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

[2021] SGHC 9

Suit No 50 of 2014

Between

GTMS Construction Pte Ltd

… Plaintiff

And

Ser Kim Koi

… Defendant

And

(1) Chan Sau Yan (formerly trading as Chan Sau Yan Associates)
(2) CSYA Pte Ltd

… Third Parties

And Between

Ser Kim Koi

… Plaintiff in counterclaim

And

GTMS Construction Pte Ltd

… Defendant in counterclaim

And

(1) Chan Sau Yan (formerly trading as Chan Sau Yan Associates)
(2) CSYA Pte Ltd

JUDGMENT

[Building and Construction Law] — [Architects, engineers and surveyors] — [Duties and liabilities]
[Building and Construction Law] — [Building and construction contracts] — [Lump sum contract]
[Building and Construction Law] — [Standard form contracts] — [Singapore Institute of Architects standard form contracts]
[Building and Construction Law] — [Contractors' duties] — [Completion of work]
[Building and Construction Law] — [Contractors' duties] — [Duty as to materials and workmanship]
[Building and Construction Law] — [Contractors' duties] — [Extension of time and liquidated damages]
[Building and Construction Law] — [Damages] — [Damages for defects]
[Building and Construction Law] — [Damages] — [Delay in completion]
[Building and Construction Law] — [Damages] — [Liquidated damages]
[Building and Construction Law] — [Damages] — [Prevention or prolongation]
[Tort] — [Conspiracy] — [Unlawful means conspiracy]

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v
Ser Kim Koi
(Chan Sau Yan (formerly trading as Chan Sau Yan Associates) and another, third parties)

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8, 9, 12–16, 19–23, 26–30 November 2018, 16–18, 22–25, 30, 31 January 2019, 18–21, 24–28 February, 3–6, 9–13, 16–19, 23–27, 30, 31 March, 1–3, 6 April, 2–5, 8–12, 15–19, 22–26, 30 June, 1–3 July, 27–29 October 2020

18 January 2021 Judgment reserved.

Tan Siong Thye J:

Introduction

1 This Suit arises from a long-standing and bitter dispute relating to the construction of three two-storey good class bungalows (Units 12, 12A and 12B) at 12 Leedon Park, Lot 98388L Mukim 04 (the "Project") at an agreed lump sum price of $13,130,000. The Project is owned by the defendant, Mr Ser Kim Koi. The plaintiff, GTMS Construction Pte Ltd, was the main contractor for the Project. The first third party, Chan Sau Yan Associates (a sole proprietorship wholly owned by Mr Chan Sau Yan Sonny), was the architect for the Project. The relationship between the defendant, the first third party and the plaintiff started out well. However, towards the end of the Project there was mistrust and

the relationship between the defendant and the first third party together with the plaintiff went south. The defendant's allegations of a web of conspiracy and a multitude of lies now hang over the parties' interactions. Intertwined within these allegations are complex questions of interpretation involving the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) (9th Ed, September 2010) (the "SIA Conditions") and the implications arising therefrom.

2 In this Suit, the plaintiff claims for unpaid sums from the defendant. The unpaid sums arise from two interim payment claims and the final payment claim which were certified by the first third party (the "certified payment claims"). The plaintiff claims an aggregate sum of $1,103,915.48 plus interest from the defendant. The defendant refused to pay the plaintiff the certified payment claims. He also refused to pay the first third party's unpaid fees of $60,990 plus interest.[1]

3 Instead, the defendant counterclaims against the plaintiff for the sum of $12,752,651[2] and took out a third party claim against the third parties for the sum of $10,853,718.63.[3] The defendant asserts that the plaintiff and the third parties had conspired to injure him and are liable to him under the tort of unlawful means conspiracy. As a corollary of that conspiracy, the defendant claims that the first third party had, *inter alia*, granted extensions of time improperly, works which were deficient were certified as satisfactory, defects were not rectified and the Project was certified to have been completed when it

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1 1st and 2nd Third Parties' Defence and Counterclaim (Amendment No 2) to Consolidated Defence & Counterclaim ("TPDCC") at prayers (a)–(b).

2 Defendant's Written Closing Submissions dated 17 August 2020 ("DWS") at para 37.

3 Third Parties' Reply Closing Submissions dated 24 August 2020 ("TPRS") at para 2.

was clearly not safe for occupation. The defendant further claims against the third parties for breach of their contractual and tortious duties owed to the defendant. The defendant also has a counterclaim against the plaintiff for rectification of defective works and liquidated damages for the delay in the completion of the Project. The defendant also claims an indemnity from the third parties for any liability arising on the part of the plaintiff to the defendant, and also for all the legal costs incurred by the defendant in defending the summary judgment application initiated by the plaintiff against the defendant.

The parties

4 The first third party, Chan Sau Yan Associates, was a sole proprietorship wholly owned by Mr Chan Sau Yan Sonny (TPW2, "Mr Chan"). I shall refer to both Chan Sau Yan Associates and Mr Chan, interchangeably, as the "first third party". The second third party is CSYA Pte Ltd, which is a conversion of the first third party into a private limited company in or around October 2011.[4] I note that there is some dispute between the parties as to whether the defendant has legal recourse against the second third party, as there was no contractual relationship between them. For reasons which I shall elaborate below, I find that the defendant has no legal recourse against the second third party. Hence, all subsequent references to "third party" shall refer to the first third party, unless otherwise specified.

5 By a Memorandum of Agreement dated 16 June 2009 (the "MOA"), the defendant and his wife engaged the first third party to provide professional

[4] Affidavit of evidence-in-chief ("AEIC") of Chan Sau Yan ("CSY") at para 10.

architectural services for the Project.[5] Further, the first third party was also authorised by the defendant and his wife to act as their agent in the matters set out or implied in the MOA and the contracts adopted for the Project (see cl 1.1(2) of the MOA).

6 After a full tender process that was coordinated by the defendant's quantity surveyor ("QS") Faithful+Gould Pte Ltd ("F+G"),[6] the plaintiff, a Singapore-incorporated company carrying on the business of general building and construction works, was appointed as the main contractor responsible for building the Project and carrying out works thereunder ("Works").[7] The terms of engagement between the defendant and the plaintiff were governed by the Letter of Acceptance dated 13 May 2011 ("LOA"), which incorporated the SIA Conditions.[8] I shall refer to all the documents comprising the contract between the plaintiff and the defendant as the "Contract" and this comprises the LOA, the SIA Conditions and all the documents cited in cl 7 of the LOA.[9] This also includes Volumes 1A, 1B and 2 of the formal contract documents prepared by F+G and the defendant's mechanical and engineering ("M&E") consultant, Chee Choon & Associates ("CCA").[10] Although there are some disputes regarding this last category of documents, I find that they are part of the Contract and I shall elaborate further on this issue in my judgment below.

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5 Agreed Bundle Vol 1 at page 30 (hereinafter referred to as "1AB00030" and all references to the Agreed Bundle shall be termed in the said format).

6 CSY at para 61.

7 Defendant's Consolidated Defence & Counterclaim (Amendment No 3) ("DDCC") at para 3; Plaintiff's Statement of Claim (Amendment No 2) ("PSOC") at paras 1–2; TPDCC at para 8.

8 7AB04197; Joint List of Agreed Facts at para 1.

9 7AB04199.

10 4AB01840–5AB02912.

7 The following consultants were engaged by the defendant on the recommendations of the third party for the Project. I shall refer to them collectively as the "Consultants":

(a) CCA, the M&E consultant;

(b) F+G, the QS;

(c) Web Structures Pte Ltd ("Web"), the civil and structural engineer; and

(d) Mr Leong Kien Keong (TPW4), the Resident Technical Officer ("RTO Leong").[11]

8 Apart from the Consultants, the defendant also engaged a group of his hand-picked individuals, comprising Mr Wilson Cheung ("Mr Cheung"), Mr Chow Kum Wai ("Mr Chow"), Mr Ng See Wah, and Dr Anand Jude Anthony ("Dr Anand"), to assist him in overseeing the Project.[12] I shall refer to them collectively as the defendant's "Assistants".

The parties' cases

The defendant's case

9 The defendant's case is that the plaintiff and the third party conspired to injure him. The defendant does not rely on any one particular incident to support his conspiracy claim. Instead, he relies on his opinionated allegations and

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11 AEIC of Ser Kim Koi ("SKK") at para 9.

12 Third Parties' Written Closing Submissions dated 17 August 2020 ("TPWS") at para 44.

personal inferences to establish that there was a conspiracy between the plaintiff and the third party to injure him. Further, arising out of the same facts, the defendant also alleges that the plaintiff and the third party had breached their contractual and/or tortious duties owed to him.

10 The defendant in his pleadings and affidavit of evidence-in-chief ("AEIC") did not make any allegations against the tender process. However, in the course of his testimony in court, the defendant alleged that the conspiracy to injure and defraud him by the plaintiff and the third party started from the tender process of the Project. The defendant also asserted in court that the plaintiff had bribed the third party in the course of the Project (the "Bribery Allegation"), although this particular allegation was later retracted.[13] As the allegations of conspiracy and fraud are very serious and would seriously affect many other major issues before this court, I allowed these allegations to be ventilated during the trial notwithstanding that they were not pleaded by the defendant. I shall now summarise the defendant's case with reference to the events in chronological order.

Tender process

11 The defendant alleges that the third party conspired with the plaintiff during the tender process for the tender to be awarded to the plaintiff. The tender was called on 13 October 2010 and there were initially five tenderers.[14] Thereafter, Soil-Build Pte Ltd ("Soil-Build") was invited to participate in the tender at the defendant's request.[15] The three lowest tenderers, Soil-Build, Daiya

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13 NEs, 17 January 2019 at pp 16 and 73.

14 NEs, 25 January 2019 at p 57.

15 3AB01480.

Engineering & Construction Pte Ltd ("Daiya") and the plaintiff, were subsequently shortlisted. The defendant asserts that the third party had "push[ed]" for the plaintiff to be selected over the other tenderers. Therefore, he was unable to select Soil-Build, who was his preferred contractor.[16] In addition, Soil-Build was also not treated equally during the tender process as the third party had "[made] life difficult" for them.[17]

Extensions of time

12 The defendant submits that the third party and the plaintiff conspired regarding the three requests for extension of time ("EOT"), thereby preventing the defendant from claiming liquidated damages from the plaintiff for EOT 2 and EOT 3. Furthermore, the defendant submits that the EOTs were granted by the third party in breach of the contractual and tortious duties owed by the third party to him.[18]

13 The original completion date under the LOA is 21 February 2013.[19] Pursuant to cl 23(1) of the SIA Conditions, EOTs can be granted by the third party to the plaintiff. Clause 23(1) states:[20]

> The Contract Period and the Date of Completion may be extended and re-calculated, subject to compliance by the Contractor with the requirements of the next following sub-clause, by such further periods and until such further dates as may reasonably reflect any delay in completion which, notwithstanding due diligence and the taking of all reasonable

16 NEs, 25 January 2019 at pp 181–182.

17 NEs, 30 January 2019 at p 19.

18 DWS at paras 42–43.

19 Joint List of Agreed Facts at para 7.

20 5AB02950.

> steps by the Contractor to avoid or reduce the same, has been caused by:
>
> (a) Force Majeure;
>
> …
>
> (o) the grounds for extension mentioned in Clauses 1.(8), 3.(3), 7, 14, 29.3(a)(ii) and 29.3(b)(ii) of these Conditions;
>
> …
>
> (q) any other grounds for extension of time expressly mentioned in the Contract Documents.

14 In total, there were three EOT requests made by the plaintiff:

(a) The plaintiff's first request of 60 days of EOT was made on 4 October 2012 due to, *inter alia*, delays relating to the delivery of marble to the Project ("EOT 1").[21] EOT 1 was rejected by the third party.[22]

(b) The plaintiff's second request of 45 days of EOT was made on 20 December 2012 due to, *inter alia*, SP PowerGrid Ltd's ("SPPG's") delay in connecting the main incoming power supply and SPPG's late notice of the requirement to install the overground distribution box ("OG Box") ("EOT 2").[23] The third party granted EOT 2 on 7 February 2013 for 40 days from 21 February 2013 (the original completion date) to 2 April 2013.[24]

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21 18AB11616.

22 18AB11631.

23 18AB11618–18AB11625.

24 Joint List of Agreed Facts at para 7b; 18AB11626–18AB11627.

(c) The plaintiff's third request of 40 days of EOT to complete the testing and commissioning ("T&C") for M&E works and the installation of light fittings was made on 1 April 2013 ("EOT 3"), in view of SPPG's delay.[25] The third party granted EOT 3 on 10 April 2013 for 15 days from 2 April 2013 to 17 April 2013.[26]

15 Therefore, the plaintiff was granted a total of two EOTs (*ie*, EOT 2 and EOT 3) totalling 55 days during the Project. The defendant alleges that these EOTs should not have been granted and were only granted due to the conspiracy between the plaintiff and the third party to injure him.

(1) EOT 1

16 The defendant asserts that the plaintiff and the third party conspired to injure him in relation to EOT 1, which concerned the delay in marble delivery.[27] He alleges that the third party would have proceeded to grant EOT 1 but for the intervention of Mr Cheung, one of the defendant's Assistants,[28] when he enquired during a site meeting whether the delay in marble delivery was on the critical path, *ie*, an event that may delay the completion of the Project. Since the delay in marble delivery was a non-critical activity, it did not contractually entitle the plaintiff to an EOT. Faced with Mr Cheung's objections, the third party had no choice but to reject EOT 1. Thus, the defendant submits that EOT 1 supports his allegation that the third party had conspired with the plaintiff to grant EOTs.

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25 18AB11628.

26 Joint List of Agreed Facts at para 7c; 18AB11629.

27 NEs, 30 January 2019 at p 101, lines 7–9.

28 NEs, 30 January 2019 at p 101.

(2) EOT 2

17 In relation to EOT 2, the defendant submits that the third party had no basis to grant EOT 2. Among other things, this was because the plaintiff had failed to exercise due diligence, a pre-condition required by cl 23(1) of the SIA Conditions and, thus, was not entitled to any EOT.[29] While the third party took into account SPPG's delay in electrical turn-on, it failed to consider the plaintiff's *own delay* in the electrical installation works which had to be done before SPPG could connect the incoming power supply. Pursuant to the Project's Master Programme, the plaintiff was required to complete the construction of the electrical meter compartments by or prior to 9 July 2012.[30] However, the electrical meter compartment doors for Units 12 and 12B were only installed on or around 1 December 2012.[31] Due to this delay of more than four and a half months, the defendant claims that the plaintiff should not have been given any EOT.

18 The defendant also relies on the circumstances surrounding EOT 2 which, in his view, suggested that the result of EOT 2 was pre-determined. These circumstances were as follows:

> (a) The third party had "directed" the plaintiff to include further details in its request in EOT 2 and had also given the plaintiff "further directions to regularise various errors made in its substantiation of the said EOT request".[32]

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29 DWS at para 194.

30 Defendant's Consolidated Third Party Statement of Claim (Amendment No 2) ("DTPSOC") at para 13A(c).

31 NEs, 21 November 2018 at p 115, lines 4–13; NEs, 2 June 2020 at p 117, lines 22–24.

32 DTPSOC at para 17(e).

(b) When the plaintiff's request in EOT 2 was circulated to CCA for "confirmation", a pre-drafted approval was enclosed and CCA was only given one day to respond to the plaintiff's request.[33]

(c) Prior to the third party's grant of EOT 2, F+G had recommended in its cost report an estimated $65,000 additional costs due to the plaintiff on the basis of EOT 2.[34]

19 In court, the defendant further alleged that the plaintiff, CCA and the third party had colluded or conspired to grant EOT 2. The defendant also alleged that the plaintiff had applied improper pressure on or interfered with the third party.[35]

(3) EOT 3

20 In relation to EOT 3, the defendant likewise submits that the third party had no basis to grant EOT 3. Prior to electrical turn-on, SPPG had to conduct testing and inspection on-site. The first round of testing and inspection was conducted on 14, 20 and 21 March 2013 (the "First Testing and Inspection") for Units 12B, 12 and 12A respectively.[36] The Project failed the First Testing and Inspection. The defendant's position is that the reasons for the failure were due to construction-related issues caused by the plaintiff.[37] Consequently, the plaintiff had to rectify these construction-related issues before the Project passed the second round of testing and inspection conducted on 27 March,

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33 DTPSOC at para 17(h).

34 DTPSOC at para 17(h).

35 NEs, 18 February 2020 at p 27, line 9 to p 31, line 15.

36 Joint List of Agreed Facts at paras 14–15; SKK at para 51.

37 DTPSOC at para 13A(l)(iv).

2 April and 8 April 2013 (the "Second Testing and Inspection").[38] Accordingly, the plaintiff had again failed to exercise due diligence and was not entitled to any EOT.[39]

21 As with EOT 2, the defendant also relies on the circumstances surrounding EOT 3 to claim that the result of EOT 3 was pre-determined. In court, the defendant similarly alleged that the plaintiff, CCA and the third party had colluded or conspired to grant EOT 3. The defendant further alleged that the plaintiff had also applied improper pressure on or interfered with the third party. These circumstances were as follows:

(a) The plaintiff made its request for EOT 3 on 1 April 2013 and the third party had immediately issued an "in-principle" entitlement the next day without prior consultation with CCA.[40]

(b) CCA had initially refused the plaintiff's request for EOT 3. However, the third party eventually managed to persuade CCA to change its recommendation.[41]

Completion certificate

22 The defendant submits that the third party and the plaintiff had conspired to issue the completion certificate ("CC") to the plaintiff.

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38 Joint List of Agreed Facts at paras 16–18.

39 DWS at para 499.

40 DTPSOC at para 17(k).

41 DTPSOC at para 17(l); DWS at para 542.

23 On 15 May 2013, the third party issued a CC certifying completion of the Project on 17 April 2013 pursuant to cl 24(4) of the SIA Conditions.[42] Clause 24(4) of the SIA Conditions states that the CC "shall be issued by the [third party] when the Works appear to be complete and to comply with the Contract in all respects".[43] Further, cl 24(4) must also be read with the all-important Item 72 of the "Preliminaries". The relevant portion of Item 72 of the Preliminaries states as follows:[44]

> Pursuant to the provisions of the Agreement and Conditions of Contract, a Completion Certificate will not be issued until:
>
> (a) All parts of the Works are in the Architect's opinion ready for occupation and for use.
>
> (b) All services are tested, commissioned and operating satisfactorily as specified in the Contract or the relevant Sub-Contract including handing over all test certificates, operating instructions and warranties.
>
> (c) All works included in the Contract are performed including such rectification as may be required to bring the work to the completion and standards acceptable to the Architect.

24 The defendant submits that all three preconditions in Item 72 of the Preliminaries were not satisfied when the third party issued the CC. The CC was issued prematurely and without basis. Accordingly, this gives rise to an inference that the CC was issued by the third party pursuant to a conspiracy between the third party and the plaintiff.[45]

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42 Joint List of Agreed Facts at para 8.

43 5AB02953.

44 5AB02574.

45 DTPSOC at para 21.

25 In relation to Item 72(a) of the Preliminaries, the defendant argues that the Project was not "ready for occupation and for use" as the temporary occupation permit ("TOP") for the Project had not been obtained. According to the defendant, it is an implied term of the Contract that the TOP must be obtained before the third party can issue the CC.[46]

26 Furthermore, the Project failed the TOP inspection conducted by the Building and Construction Authority ("BCA") on 30 April 2013 ("TOP Inspection 1").[47] This was prior to the date the CC was issued on 15 May 2013. The Project had also failed the BCA's second TOP inspection on 18 June 2013 ("TOP Inspection 2").[48] Although the TOP for the Project was eventually obtained on 16 September 2013 by way of photographic submissions,[49] the defendant alleges that this was the result of the plaintiff's and the third party's fraud and/or misrepresentation.[50] In particular, the steps and risers in the Project remain non-compliant with statutory requirements and the Project is therefore still not "ready for occupation and for use" as of today.

27 As for Item 72(b) of the Preliminaries, the defendant submits that this was not satisfied as the operating instructions and warranties were only handed over by the plaintiff to the defendant on 22 June 2014, while the test certificates

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46 DTPSOC at para 22.

47 Joint List of Agreed Facts at para 12.

48 Joint List of Agreed Facts at para 13.

49 DTPSOC at para 23(a).

50 DWS at para 13.

have not been handed over at all.[51] In addition, the T&C for gas,[52] electricity,[53] air conditioning and mechanical ventilation ("ACMV")[54] and swimming pool services[55] had not been carried out as of the date when the Project was certified to be complete.

28 Finally, with regard to Item 72(c) of the Preliminaries, the defendant asserts that there were many outstanding defects as of the date the Project was certified to be complete. These defects were identified and described in the reports prepared by Building Appraisals Pte Ltd ("BAPL"), whom the defendant engaged sometime in October 2013. These defects were as follows:

(a) The gas pipe along the driveway at the front gate of Unit 12A of the Project was punctured.[56]

(b) There were numerous cracks, scratches, and other forms of damage to the Volakas marble flooring in the Project.[57]

(c) There were numerous cracks and splinters in the ironwood used for the installation of the timber decking in the Project.[58]

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51 DWS at para 156.

52 DWS at paras 144–146.

53 DWS at paras 141–143.

54 DWS at paras 147–152.

55 DWS at paras 153–155.

56 DWS at paras 273–287.

57 DWS at paras 332–370.

58 DWS at paras 371–390.

(d) There were dents and tonality differences in the Indian rosewood timber floor finish.[59]

(e) The aluminium cappings on the rooftops of all three units of the Project were dented, scratched and finished with patchy and splotchy paintwork.[60]

(f) The steps and risers of the Project were non-compliant with the statutory and contractual requirements.[61]

(g) The swimming pools in the Project were leaking.[62]

(h) There were only seven trellis beams constructed at Unit 12B of the Project, instead of eight as required by the Contract.[63]

(i) The coating of the intumescent paint on the steelworks at the Project did not have a fire resistance of two hours, as required by the Contract. Furthermore, the trellis beams had only been coated on three sides, instead of on all four sides.[64]

(j) The external boundary wall was finished in plaster and paint, instead of an "off-form" finish, as required by the Contract.[65]

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59 DWS at paras 391–401.

60 DWS at paras 309–317.

61 DWS at paras 288–308.

62 DWS at paras 453–475.

63 DWS at paras 325–331.

64 DWS at paras 402–410.

65 DWS at paras 318–324.

(k) The grouting at the swimming pools disintegrated easily.[66]

(l) Loamy soil was not used for the Project as required by the Contract.[67]

(m) The foldable glass doors did not slide smoothly and could not be properly locked.[68]

Maintenance certificate

29 The maintenance period of the Project commenced on 18 April 2013 (*ie*, the day after completion) and ended on 17 April 2014. Clause 27(5) of the SIA Conditions states, *inter alia*, that the third party shall within 14 days issue a maintenance certificate ("MC") when all defects notified by the third party to the plaintiff have been made good by the plaintiff in compliance with the third party's directions or instructions.[69]

30 The MC was issued by the third party on 7 July 2014 when the third party was satisfied that all the defects at the Project were rectified by the plaintiff,[70] and the premises were handed over to the defendant on 21 and 23 July 2014.[71] However, the defendant contends that as of 7 July 2014, there were still many defects which had yet to be rectified (see [28] above). The defendant,

66 DWS at paras 444–452.

67 DWS at paras 411–427.

68 DWS at paras 428–443.

69 5AB02956.

70 TPWS at para 190.

71 AEIC of Dennis Tan Chong Keat ("DT") at para 104.

therefore, alleges that the MC was also issued pursuant to the conspiracy between the plaintiff and the third party.

31 Furthermore, the defendant argues that the circumstances surrounding the issuance of the MC also indicate that it was issued pursuant to the conspiracy. In support of this argument, the defendant points to the following:

(a) Firstly, the defendant was allegedly only given three days by the third party to prepare his list of outstanding defects.[72]

(b) Secondly, the third party also failed to issue the "Schedule of Defects" within 14 days of the expiry of the maintenance period, in accordance with cl 27(2) of the SIA Conditions.[73]

(c) Thirdly, although the defendant submitted photographs of the defects to the third party on or around April 2014 and 27 July 2014, the plaintiff allegedly wrote to the third party to urge them not to accept these photographs.[74]

(d) Finally, the third party issued the MC without having regard to BAPL's report.[75]

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72 DTPSOC at para 35(a).

73 DTPSOC at para 35(a).

74 DDCC at para 48b.

75 DDCC at para 48c.

Payment certificates

32 The defendant also alleges that the three payment certificates were issued by the third party pursuant to the conspiracy between the plaintiff and the third party. These three certificates were issued after the issuance of the CC:

(a) Interim Certificate No 25 dated 3 September 2013 ("IC25") was issued pursuant to the plaintiff's Payment Claim No 25, certifying a sum of $390,951.96 (excluding goods and services tax ("GST")).[76]

(b) Interim Certificate No 26 dated 6 November 2013 ("IC26") was issued pursuant to the plaintiff's Payment Claim No 26, certifying a sum of $189,250.21 (excluding GST).[77]

(c) Final Certificate dated 22 June 2015 ("FC") was issued pursuant to the plaintiff's final payment claim of $451,494.54 (excluding GST).[78] This sum is the balance between the final measurement and valuation of the Works in accordance with the Statement of Final Account and the sums that were previously certified by the third party.

33 The defendant alleges that the third party failed to independently verify that the Works claimed by the plaintiff had been executed in accordance with the Project's contractual requirements. In particular, the third party failed to withhold the costs of outstanding works stated in the schedule of the CC until such time as the outstanding works were completed (see cl 24(5) of the SIA

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76 24AB15391; Joint List of Agreed Facts at para 4.

77 27AB16885; Joint List of Agreed Facts at para 6.

78 39AB24980.

Conditions).[79] The third party also ought to have certified liquidated damages in either IC25 or IC26 given the outstanding works and unrectified defects.[80] The third party also should have taken into account in the FC the sums that the defendant was entitled to deduct from the moneys due to the plaintiff because of the outstanding works and unrectified defects.[81]

34 The defendant also asserts that the release of the first half of the retention moneys in IC25 was certified by the third party without basis, given that the plaintiff had not satisfied the requirements in cl 24(4) of the SIA Conditions and Item 72 of the Preliminaries for the issuance of the CC.[82]

35 Finally, the defendant argues that the third party failed to properly account for the Prime Cost Sums (the "PC Sums") and Prime Cost Rate items (the "PC Rate items") claimed by the plaintiff under the Project. Under Section No 2 of Section F – Schedule of Prices and Section F1 of the Preamble of the Contract, the actual quantum of PC Sums due should be valued and approved via the issuance of the architect's instructions, which cannot be issued without proper documentation. The defendant avers that to date, he had made payment of $787,742.09 for the PC Sums to the plaintiff, which was the alleged amount of PC Sums due under Architect's Instructions No 2-R1, No 6, No 17, No 24-R1 and No 26. As for the PC Rate items, the defendant had made payment of $1,757,835 for the PC Rate items to the plaintiff being the alleged total amount for PC Rate items due for works pertaining to "marble", "granite",

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79 DTPSOC at para 37(a).

80 DTPSOC at para 37(b).

81 DTPSOC at para 38(b).

82 DTPSOC at para 37(c); DWS at para 163.

"homogenous tiles", "glazed mosaic", "slate", "cobblestone", "Indian Rosewood" and "engineering wood".[83] However, to date, the defendant avers that he has not received any supporting documents (including but not limited to the M&E contract, quotations, purchase orders, delivery orders and invoices) for the PC Sums and PC Rate items.[84]

The defendant's counterclaim

36 In totality, the defendant makes the following counterclaim against the plaintiff:[85]

(a) liquidated damages of $3,600 per calendar day from 21 February 2013 (the original completion date) to the present day;[86]

(b) as an alternative claim to liquidated damages, loss of rental income due to the delay by the plaintiff in the completion of the Project (although the defendant subsequently indicated he was no longer pursuing this head of claim);[87]

(c) costs of rectifying all defective works, quantified at $1,632,415.20;[88]

(d) an account of moneys for the $787,742.09 paid to the plaintiff for the PC Sums;

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83 DDCC at paras 51c(ii)–51c(iii).

84 DDCC at paras 51c, 67–68.

85 DDCC at paras 58B–83.

86 DWS at para 214.

87 DWS at para 214.

88 DWS at para 35.

(e) an account of moneys for the $1,757,835 paid to the plaintiff for the PC Rate items;

(f) the utilities fees paid by the defendant before the Project was handed over to him on 23 July 2014, quantified at $27,916.82; and

(g) interest and costs.

37 The defendant also submits that by reason of the unlawful conspiracy, the third party should be made jointly liable with the plaintiff for the abovementioned losses suffered by the defendant.[89] The third party is also liable for the breaches of its contractual and tortious duties,[90] and the legal expenses incurred by the defendant in the summary judgment application, the details of which are set out at [718]–[724] below. Finally, the defendant avers that the third party is liable to indemnify the defendant from and against the claim brought by the plaintiff against the defendant.[91]

The plaintiff's and the third party's cases

38 The plaintiff and the third party adopt mutually aligned positions *vis-à-vis* the defendant's case. The plaintiff and the third party strongly deny that there was a conspiracy between them to injure the defendant. The plaintiff and the third party also argue that there was no breach of their respective contractual and tortious duties owed to the defendant.

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89 DWS at para 626.

90 DWS at para 625.

91 DTPSOC at para 4.

39 The third party avers that the tender was conducted fairly and the EOTs, CC, MC and payment certificates were issued properly, honestly and in good faith based on its independent and professional judgment.[92]

40 The plaintiff submits that there were valid grounds for the third party to grant the EOT requests and to issue the CC as there were only minor outstanding works. Furthermore, all the defects were eventually rectified by the plaintiff to the satisfaction of the third party.

Tender process

41 The third party denies the defendant's allegation that it had "pushed" for the plaintiff to be awarded the tender over the other tenderers. The third party maintains that it was simply performing its professional duties to the defendant by recommending the most suitable contractor for the Project. Furthermore, there were valid grounds for the third party's recommendation. For example, CCA had also recommended that the plaintiff be appointed, as it had the most competitive bid for the M&E installations.[93] The third party stresses that ultimately, the defendant alone was responsible for making the decision on which contractor to appoint.[94]

Extensions of time

42 The plaintiff and the third party contend that there was no conspiracy for the third party to grant EOTs to the plaintiff. The plaintiff also did not apply improper pressure on or influence the third party to secure the EOTs. The third

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92 Third Party's Opening Statement at para 7.

93 6AB03879.

94 AEIC of Phillip Yong ("PY") at para 43.

party issued the EOTs strictly in accordance with cl 23(1) of the SIA Conditions and the EOTs were reasonable, made properly, honestly and in good faith.[95]

(1) EOT 1

43 At the trial, the third party's counsel, Mr Thio Shen Yi SC, pointed out to the defendant that his characterisation of the events surrounding EOT 1 is flawed.[96] The contemporaneous documents, particularly the minutes of the site meetings, do not support the defendant's assertion that it was Mr Cheung who had raised the issue of the critical path, thereby preventing EOT 1 from being granted. Instead, it was the *third party* who first raised the issue of the critical path, within a week of the plaintiff's request.[97] This request was made repeatedly at the following site meetings, as reflected in the minutes. Accordingly, far from supporting the defendant's conspiracy allegation, the third party's evaluation process in EOT 1 illustrates its professional and independent assessment of the plaintiff's EOT requests.

44 Further, the plaintiff contends that there were indeed genuine and legitimate reasons for its application for EOT 1 on account of the delay by the defendant in marble selection and confirmation, thereby affecting marble delivery. According to the plaintiff, the screeding work progress includes various areas for laying marble, ceramic tile and timber parquet and the sequence of work started from the laying of the marble. At the material time when the plaintiff applied for EOT 1, it had yet to receive 70% of the marble

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95 Third Parties' Consolidated Defence and Counterclaim (Amendment No 2) to the Consolidated Third Party Statement of Claim (Amendment No 2) ("TPDCC to DTPSOC") at para 12A.

96 NEs, 30 January 2019 at p 150.

97 18AB11880.

required to complete the Project.[98] Furthermore, the arrival of the marble slabs in the warehouse of the supplier did not automatically mean that it was ready for delivery because the marble slabs needed to be processed for the Project before they were ready to be sent to the work site. This included quality checks, defect rectification such as pin-hole patching, fissure or open vein patching, polishing, cutting to size as per shop drawing, colour tone matching, and finally the packing of the marble pieces for delivery to the worksite.[99]

(2) EOT 2 and EOT 3

45 The plaintiff and the third party deny the defendant's allegation that the third party had no basis to grant EOT 2 and EOT 3. The plaintiff and the third party submit that the delays for which EOT 2 and EOT 3 were granted were *solely* caused by SPPG and not the plaintiff. There was an inordinate delay by SPPG in arranging for the power connection. Furthermore, SPPG had by way of a letter dated 21 November 2012 introduced a new and unexpected requirement for an OG Box at a very late stage in the Project.[100] Since the plaintiff had acted with due diligence at all times, it was entitled to EOTs for the delay in electrical turn-on by SPPG, which would in turn cause delay to the T&C of the M&E works at the Project.

46 In so far as EOT 2 is concerned, the plaintiff argues that the electrical meter compartments were ready as of 8 October 2012.[101] The third party

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98 18AB11616.

99 DT at pp 30–31.

100 TPDCC to DTPSOC at paras 12A(i)–(k).

101 18AB11883; Plaintiff's Written Closing Submissions dated 17 August 2020 ("PWS") at para 35.

similarly accepts that the electrical meter compartment, including the doors, were only made ready by the plaintiff in or around October 2012.[102] Accordingly, the plaintiff was in delay pursuant to the Master Programme. But the timelines in the Master Programme were not peremptory, instead they were flexible with built-in buffer time. The third party had assessed that but for the delay events by SPPG, the Project could still be completed on schedule, notwithstanding the plaintiff's delay in installing the electrical meter compartment doors.[103] The plaintiff's delay in installing the electrical meter compartment doors and SPPG's delay in electrical turn-on were entirely independent of one another. Thus, it could not be said that the plaintiff's failure to exercise due diligence, if any, contributed to SPPG's delay in electrical turn-on.

47 The plaintiff and the third party disagree with the defendant that the plaintiff had failed to exercise due diligence in relation to the delay in installing the electrical meter compartment doors. They contend that the purpose of the Master Programme is primarily to monitor the reasonable progress of the Works. The Master Programme does not stipulate contractual deadlines for the plaintiff to strictly adhere to, failing which it would have failed to act with due diligence.[104]

48 The plaintiff and the third party also deny that the circumstances surrounding EOT 2 suggest that the result was pre-determined. The third party denies that it "directed" the plaintiff to submit further details for EOT 2. The

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102 TPDCC to DTPSOC at para 16(c); NEs, 31 January 2019 at pp 76–77.

103 Third Parties' Opening Statement at paras 27(d) and 28(b).

104 TPDCC to DTPSOC at para 12A(d).

third party merely sought further substantiation in order to determine fairly and impartially whether the plaintiff was entitled to an EOT.[105] CCA was also given sufficient time to provide its views on EOT 2. Finally, although F+G had recommended additional costs in respect of EOT 2 before it was granted, this figure was expressly stated in the remarks column to be "pending justification and Architect's assessment", and was subsequently removed in a later cost report.[106]

49 For EOT 3, the plaintiff and the third party deny that the failure of the First Testing and Inspection is evidence of the plaintiff's lack of due diligence. Although the Project failed SPPG's First Testing and Inspection because certain mechanical and electrical items did not comply with SPPG's safety and connection requirements, these were not construction faults.[107] The plaintiff had constructed the electrical installation works fully in accordance with the M&E construction drawings for the Project.[108] The comments arising from SPPG's First Testing and Inspection required the plaintiff to make some amendments on the single line diagram. There were also comments for the plaintiff to rectify some signage, earthing and minor statutory non-compliance issues. Accordingly, the plaintiff could not be said to have acted without due diligence.

50 In addition, the plaintiff and the third party deny that the circumstances surrounding EOT 3 suggest that the result of EOT 3 was pre-determined. Although CCA had initially refused to support the plaintiff's request for EOT 3,

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105 TPDCC to DTPSOC at para 16(f).

106 18AB11666.

107 Plaintiff's Consolidated Reply and Defence to Counterclaim (Amendment No 2) ("PRDCC") at para 25i; TPWS at para 111.

108 TPDCC to DTPSOC at para 12A(r)(iii).

CCA acknowledged that their initial refusal was "too hasty".[109] In any event, it was the third party who had to make the ultimate decision of whether or not to grant EOT 3. The third party honestly believed that the plaintiff was entitled to EOT 3 as the request for EOT 3 arose from the same set of issues in EOT 2.

Completion certificate

51 The third party asserts that the CC was issued properly, honestly and in good faith based on its independent and professional judgment.[110] The plaintiff agrees that the third party was entitled to certify completion on 17 April 2013.[111]

52 Firstly, the third party was of the honest opinion that the Project was "ready for occupation and for use". Therefore, Item 72(a) of the Preliminaries was satisfied. In this regard, both the plaintiff and the third party are of the opinion that it is not a condition precedent for the TOP to be awarded by the BCA before the CC can be issued. The Project "was for all practical intents and purposes, physically ready for occupation and use". [112] The third party was of the opinion that any further work on the Project, including the rectification of the steps and risers, were "minor outstanding works".[113]

53 Secondly, the plaintiff and the third party also submit that Item 72(b) of the Preliminaries was satisfied as, save for the gas supply, all the services at the Project were tested, commissioned and operating satisfactorily at the time the

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109 TPWS at para 110.

110 Third Party's Opening Statement at para 35.

111 PWS at para 35.

112 TPDCC to DTPSOC at para 21(c).

113 TPDCC to DTPSOC at para 22(d).

CC was issued. The gas supply was not tested and commissioned prior to the issuance of the CC due to safety concerns raised by CCA and the defendant consented to this.[114]

54 As for the requirement for all test certificates, operating instructions and warranties to be handed over to the defendant before the issuance of the CC, the third party took a "practical approach" and decided that these documents could be prepared during the maintenance period. The focus was to deliver on the "key deliverable", which was the construction of the Project.[115] The plaintiff also states that the defendant refused to take over the Project after the CC and the TOP were issued. This further resulted in the late handing over of the test certificates, operating instructions, and warranties.[116]

55 Thirdly, Item 72(c) of the Preliminaries was also satisfied as all the alleged defects identified by the defendant had been properly rectified by the plaintiff during the maintenance period. Furthermore, some of the alleged defects were due to the natural characteristics of the materials chosen by the defendant, while others were due to a lack of maintenance or wear and tear. The third party also asserts that the plaintiff and the third party cannot be liable for the full costs of rectifying the defects due to the defendant's complete failure to mitigate his alleged losses, for example, by leaving the premises unattended since July 2014 when the Project was handed over to him.

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114 TPDCC to DTPSOC at para 30(a); TPWS at para 137 .

115 PY at paras 172–173.

116 PRDCC at para 39n.

Maintenance certificate

56 The third party submits that it issued the MC on 7 July 2014 as it was satisfied that all the defects, including those validly raised by the defendant through BAPL, had been rectified.[117] Furthermore, the third party avers that there was sufficient time given to the defendant and BAPL to prepare their list of defects. In addition, there was no need to issue a Schedule of Defects as the MC was only issued when the third party was satisfied that all the valid defects had been rectified by the plaintiff. The plaintiff agrees with the third party. Furthermore, the plaintiff adds that even as late as 30 April 2014, the list of defects highlighted by BAPL continued to expand and most of the items identified were repetitive and some were merely photographs without any proper indication of the exact locations of the defects.[118] The plaintiff also denies that it requested the third party not to accept the list or photographs of the alleged defects.

Payment certificates

57 The plaintiff and the third party argue that IC25, IC26 and the FC were issued by the third party properly, honestly and in good faith based on the third party's independent and professional judgment. The third party had exercised reasonable skill and care in issuing the three payment certificates.[119]

58 With regard to the retention sum, the third party withheld it until such time as the outstanding works stated in the schedule of the CC were completed.

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117 TPDCC to DTPSOC at para 37(e); TPWS at para 190.

118 PRDCC at para 47b.

119 TPDCC to DTPSOC at paras 40–41; PRDCC at paras 49–50.

After the issuance of the CC, the plaintiff made a claim for the release of the first half of the retention sum. The third party only certified the release of half of the retention sum in IC25 when it was satisfied that the corresponding amount of works was completed. The other half of the retention sum was withheld and certified for release only in the FC.[120]

59 The third party also avers that it exercised its professional judgment in coming to the conclusion that there was no delay to the Project. Accordingly, there was no basis to issue a delay certificate for liquidated damages payable by the plaintiff to the defendant.[121]

60 Finally, the third party argues that it properly accounted for the PC Sums and the PC Rate items claimed by the plaintiff. The third party was provided with all the necessary supporting documents to verify and approve the amounts claimed. Copies of these supporting documents were provided by F+G to the defendant's solicitors on 23 June 2014. The supporting documents were again given to the defendant on 28 October 2014. In any event, the third party submits that the Contract does not mandate the provision of supporting documentation by the plaintiff to the third party before an architect's instruction can be issued.[122]

61 The plaintiff also points out that with regard to the PC Sum and the PC Rate items, these sums were quoted by the Nominated Subcontractors ("NSC") or Nominated Suppliers ("NS") who were selected and approved by the defendant and with whom the plaintiff was directed by the defendant to

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120 TPDCC to DTPSOC at para 40(a).

121 TPDCC to DTPSOC at para 40(b).

122 TPDCC to DTPSOC at para 41(c).

contract with and/or were assigned to the plaintiff by the defendant. The defendant, therefore, approved the NSCs and the NSs and so must have known and approved their costs.[123] Hence, the plaintiff was not responsible to submit any supporting documents to the defendant.[124]

Architect's fee

62 Under the MOA, the defendant was to pay the third party for the provision of professional services for the Project. Clause 2 of the MOA states:[125]

> In consideration of the Architect providing the professional services required[,] the Client hereby agrees to pay the Architect the fees, disbursements and other expenses stipulated in the Schedule hereto.

63 The amount of fees payable to the third party ("Architect's Fee") is set out in the Schedule of Architect's Fee in the MOA.[126] The relevant clauses are cll 2.2(m) and 2.2(n) read with cl 2.1(5)(b) of the MOA, which stipulate how and when the portions of the Architect's Fee become progressively payable. Under cl 2.2(m), 3% of the Architect's Fee became payable when the Project obtained a TOP while under cl 2.2(n), 2% of the Architect's Fee became payable when the Project obtained a Certificate of Statutory Completion ("CSC").

64 The TOP for the Project was obtained on 16 September 2013 and the CSC for the Project was obtained on 12 May 2014.[127] Thus, the third party is

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123 PRDCC at para 50c.

124 PRDCC at paras 69–75.

125 1AB00031.

126 1AB00031.

127 25AB16021; 32AB20485.

now claiming from the defendant 5% of their Architect's Fee, which is in the sum of $60,990 with interest.

The summary judgment application

65 Having provided the relevant background to this dispute, it is now necessary to highlight that the plaintiff had filed an application to enter summary judgment against the defendant for the non-payment of IC25 and IC26 under O 14 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court"). The plaintiff argued that cl 31 of the SIA Conditions entitled it to full payment of the claimed sums. The relevant portions of cl 31 state as follows:[128]

> 31.(1) The Contractor shall be entitled to interim payments for the Works carried out or supplied under this Contract by way of:
>
> …
>
> (b) periodic valuation of the Works or part thereof carried out by the Contractor.
>
> …
>
> 31.(13) No certificate of the Architect under this Contract shall be final and binding in any dispute between the Employer and the Contractor, whether before an arbitrator or in the Courts, save only that, *in the absence of fraud or improper pressure or interference by either party, full effect by way of Summary Judgment or Interim Award or otherwise shall, in the absence of express provision, be given to all decisions and certificates of the Architect …, whether for payment or otherwise,* until final judgment or award, as the case may be, and until such final judgment or award such decision or certificates shall … be binding on the Employer and the Contractor in relation to any matter which, under the terms of the Contract, the Architect has a fact taken into account or allowed or disallowed, or any disputed matter upon which under the terms of the Contract he has as a fact ruled, in his certificates or otherwise. *The Architect shall in all matters certify strictly in accordance with the terms of the Contract.* In any case of doubt the Architect

128 5AB02960–5AB02961.

> shall, at the request of either party, state in writing within 28 days whether he has as a fact taken account of or allowed or disallowed or ruled upon any matter in his certificates, if so identifying any certificate and indicating the amount (if any) taken into account or allowed or disallowed, or the nature of any ruling made by him, as the case may be.
>
> [emphasis added]

66 Clause 31(13) of the SIA Conditions sets out the conditions in order for the third party's certificates to be granted "temporary finality" (see *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] 3 SLR 124 ("*Chin Ivan*") at [18]–[21]). The defendant argued, *inter alia*, that IC25 and IC26 were tainted by fraud, which included recklessness in certification.

67 The assistant registrar granted the plaintiff's application for summary judgment. On appeal, I upheld the assistant registrar's decision on the basis that the certificates were not tainted by fraud, improper pressure or interference. However, on further appeal by the defendant, the Court of Appeal ("CA") in *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 ("*Ser Kim Koi* (*Court of Appeal*)") found that on the facts of the case and *the evidence before the court at the enforcement stage*, the third party issued the CC, IC25 and IC26 at least without belief in their truth and/or recklessly without caring whether they were true or false. Further, the CA was of the view that the CC, IC25 and IC26 were not issued properly under the terms and conditions of the Contract (at [67] and [98]). Accordingly, the CA allowed the defendant's appeal.

68 It must be emphasised that the CA expressly acknowledged at [105] that its "findings at [the] enforcement stage … will necessarily be *prima facie* and non-conclusive at the substantive and final determination of the disputes

between the parties".[129] This general principle in summary judgment applications must apply with greater force when one considers the following facts. The third party was not a party to the summary judgment application and did not make submissions in *Ser Kim Koi (Court of Appeal*). It had only filed a brief affidavit in support of the plaintiff's application. This was also acknowledged by the CA, who stated at [77] that the third party ought to have provided more detailed explanations about the certificates in question. In addition, given that the summary judgment application was not concerned with the merits of the certificates, but only with enforcement, the relevant and complete documents were not produced before the CA. Furthermore, the parties were not cross-examined. I shall elaborate on the CA's judgment in greater detail below.

My decision

69 The main protagonist in this case is the defendant. He refuses to pay the plaintiff for the sums arising from the certified payment claims and the balance of the Architect's Fee. The defendant's primary grievances are that the plaintiff and the third party conspired to injure him and that the third party breached its contractual and/or tortious duties owed to him. As the conspiracy to injure the defendant is the central feature of the defendant's claim that purportedly tainted all the transactions in the Project, I shall first address the defendant's claim of unlawful means conspiracy.

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129 TPWS at para 41.

The defendant's claim in unlawful means conspiracy

The relevant legal principles

70 The CA in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [112] sets out the following requirements to establish the tort of unlawful means conspiracy:[130]

(a) there must be a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the claimant by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) the claimant suffered loss as a result of the conspiracy.

71 Therefore, in order to establish the tort of unlawful means conspiracy, the burden is on the defendant to prove the following:

(a) the plaintiff and the third party agreed or combined to do certain acts. This may be inferred from the circumstances and the acts of the alleged conspirators, but such inference can only be drawn from overt acts (see *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 ("*Turf Club*") at [347]);

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130 TPWS at para 51; DWS at para 555.

(b) the plaintiff and the third party had the intention to cause damage or injury to the defendant by those acts. This involves an examination of their *subjective* knowledge and intention at the relevant time (see *Turf Club* at [354]). Reasonable foreseeability that the defendant would or might suffer damage is not sufficient (see *EFT Holdings* at [99]);

(c) the acts were unlawful. A breach of contract can constitute an unlawful act (see *Turf Club* at [356]);

(d) the acts of the plaintiff and the third party were performed in furtherance of the agreement; and

(e) the defendant suffered loss as a result of the conspiracy.

72 The defendant's claim of unlawful means conspiracy is an enormously serious allegation, especially when it is made against professionals who rely on their reputation for their livelihoods. This claim is premised on the plaintiff and the third party committing fraud on the defendant. In this regard, the elements of fraud were set out by Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337 at 374, cited also in *Ser Kim Koi* (*Court of Appeal*) ([67] *supra*) at [38]:

> [F]raud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) *recklessly, careless whether it be true or false*. … [emphasis in original]

73 Further, the nature of the evidence required to establish fraud is well established. As stated by the CA in *Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 at [18]:

> … It is trite that a finding of fraud is a serious matter and although the civil standard of balance of probabilities applies, *the evidence must be strong and cogent before such a finding is justified* … [emphasis added]

74 This principle was explained by the CA in *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 at [14] as follows:

> … [B]ecause of the severity and potentially serious implications attaching to a fraud, even in a civil trial, judges are not normally satisfied by that little bit more evidence such as to tilt the 'balance'. They normally require more. … Therefore, we would reiterate that the standard of proof in a civil case, including cases where fraud is alleged, is that based on a balance of probabilities; *but the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case*. [emphasis added]

75 The defendant was the only factual witness who testified in support of his claim in unlawful means conspiracy. Although he had engaged Assistants who were his personal private advisers to closely monitor the progress of the construction of the Project, he did not call them as his witnesses. In his pleadings he alleged that the plaintiff and the third party had conspired to:[131]

(a) cause EOT 2 and EOT 3 to be issued to the plaintiff;

(b) cause the CC to be improperly and prematurely issued;

(c) cause the MC to be improperly and prematurely issued;

(d) cause IC25, IC26 and the FC to be improperly and inaccurately issued; and

(e) prevent the defendant from claiming liquidated damages.

76 In order for the defendant to succeed in his conspiracy claim, he had to prove firstly, that there was an agreement expressly or impliedly between the plaintiff and the third party to do the acts as stated above at [71(a)]. Secondly,

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131 DDCC at paras 57–58; DCTPSOC at paras 48–52.

that there was an intention to cause injury to the defendant.

77 I accept that an agreement between conspirators is often tacit and conceived in private (see *SH Cogent Logistics Pte Ltd and another v Singapore Agro Acricultural Pte Ltd and others* [2014] 4 SLR 1208 at [51]). Thus, I appreciate that it might be difficult to provide direct evidence of a concrete or tangible agreement being reached by all the conspirators (see *Syed Ahmad Jamal Alsagoff (administrator of the estates of Shaikah Fitom bte Ghalib bin Omar Al-Bakri and others) and others v Harun bin Syed Hussain Aljunied and others and other suits* [2017] 3 SLR 386 at [60]). However, it must be emphasised that a "mere unsubstantiated assertion is clearly insufficient. And even something that goes a little more beyond mere assertion is still insufficient" (see *Wu Yang Construction Group Ltd v Zhejiang Jingyi Group Co, Ltd and others* [2006] 4 SLR(R) 451 at [93]).

78 In the present case, the evidence of conspiracy and fraud adduced by the defendant was wholly speculative and spurious. Having regard to the lack of veracity and credibility of his evidence, I find that the defendant has failed to discharge his burden to prove, on a balance of probabilities, that there was an agreement, whether expressly or impliedly, between the plaintiff and the third party to defraud or injure the defendant. Neither did the defendant establish on a balance of probabilities any of the other requirements of a claim in unlawful means conspiracy. The strength and cogency of the evidence that was furnished by the defendant to support his allegations of conspiracy and/or fraud are far from adequate. I should add that even if the nature of evidence required were similar to that in a normal civil action, the defendant would still have failed to establish that the plaintiff and the third party were in a conspiracy to defraud him. I shall now explain my decision.

My general findings in relation to the conspiracy claim

79 Even before turning to the numerous specific allegations raised by the defendant, set out at [383]–[576] below, I set out my general findings with regard to the overarching conspiracy claim that allegedly tainted the entire Project from the very beginning (*ie*, the tender process) to the end (*ie*, the issuance of the CC, the MC, and the FC by the third party). Firstly, I find that the defendant had a propensity to rely on speculations and suspicions that were not supported by any reliable evidence. Secondly, the defendant's narrative, particularly regarding his allegations of conspiracy, was very incredible. Lastly, the defendant also refused to call any of his Assistants, whom he had engaged to safeguard his interests in this Project, to testify on his behalf. This is highly suspicious as these Assistants would be the very individuals who would be able to support any claims he had in relation to his allegation of conspiracy. I shall elaborate on each of these general findings in greater detail in the following sections.

The defendant had a proclivity for speculations and suspicions

80 The defendant had a propensity to make reckless and speculative allegations, despite knowing that these allegations and suspicions were tenuous and unsupported by evidence. To use the defendant's own expression, these allegations were based on his mere "feelings".[132] There was no direct or even circumstantial evidence to support these allegations. In most instances, these allegations were not even pleaded or included in the defendant's AEIC.

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132 NEs, 25 January 2019 at p 145, line 12.

81 For instance, when he was cross-examined by the plaintiff's counsel, Mr Thulasidas s/o Rengasamy Suppramaniam, the defendant made the Bribery Allegation and alleged unequivocally that the plaintiff had bribed the third party in order to be awarded the tender.[133] Notably, this was the first instance in which the court was apprised of this enormously serious allegation. The Bribery Allegation was not pleaded or included in the defendant's AEIC.

82 The Bribery Allegation was later retracted by the defendant on the same day after he conceded that he did not have any evidence that the plaintiff had bribed the third party.[134] However, this retraction was equivocal, in so far as the defendant later re-surfaced the allegations of bribery and corruption in cross-examination. The defendant expressly acknowledged that these allegations were only speculative:[135]

> Q: … What do you say is the motivation for the architect to conspire to injure you? The motivation.
>
> A: The motivation can be many things.
>
> Q: What do you say the motivation is?
>
> A: The motivation can be money, which I am not aware of. The motivation can be to *get their house repaired by this GTMS*. …
>
> Q: Mr Ser, are you speculating or do you know any of this for a fact?
>
> …
>
> Court: Do you know what the meaning of the word 'speculate' is? …
>
> A: *Do not talk anything that I don't have evidence.*
>
> Court: Yes.

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133 NEs, 17 January 2019 at p 16, lines 5–8.

134 NEs, 17 January 2019 at p 73, line 12.

135 NEs, 22 January 2019 at p 136, line 10 to p 137, line 23.

A: *Yes. At this moment – sorry, I don't have.*

[emphasis added]

83 The defendant also alleged that the Consultants, apart from Web, were parties to the conspiracy to injure him. When asked by the third party's counsel what motivation or reason the Consultants had to injure him, the defendant again raised allegations of bribery and corruption. The premise of the defendant's allegations was his observation that the Consultants had changed to "bigger and better car[s]":[136]

A: … From what I see, all the consultants change to bigger and better car. From Mitsubishi they change to Mercedes. From Honda Fit, they change to a Volkswagen Scirocco. *So it is very suspicious.*

Q: What is your suspicion, Mr Ser? What is your suspicion?

A: As I say, I don't know but from the way the behaviour go and the thing change [*sic*], *there must be something.*

Q: No. So what is something that you are saying?

A: *I don't have evidence at this time.*

Q: Actually, you are just stating a fact. Because the fact that somebody changes their car and buys a nicer car doesn't mean that there's anything wrong; you agree? Do you agree?

A: I agree. But where they get the money to change all this expensive car [*sic*]?

[emphasis added]

84 The allegations of bribery and corruption did not advance the defendant's case at all. In fact, these allegations revealed that the defendant is, at his core, someone who is deeply distrustful of others who did not decide in his favour regardless of the merits. The defendant would make certain

136 NEs, 23 January 2019 at p 16, line 15 to p 17, line 8.

observations (*eg*, that some Consultants had changed their cars, or that the plaintiff had repaired RTO Leong's house) and thereafter draw the wholly unmeritorious conclusion that the plaintiff, the third party and the Consultants had been conspiring to injure him at the material time.

85 Furthermore, I note that there were numerous other allegations made by the defendant that were based on his speculations and suspicions. These allegations were not borne out by the contemporaneous correspondence and documents. A non-exhaustive list of these allegations include:

(a) The defendant's allegation that RTO Leong, the plaintiff and the third party had deliberately sabotaged the hard drive of RTO Leong's laptop in order to prevent the defendant from retrieving relevant information.[137] However, the defendant later conceded that just because RTO Leong's hard drive was damaged did not mean that it was sabotaged.[138]

(b) The defendant's allegation that there were tenders which were submitted late, possibly including the plaintiff's tender. This was based on what he apparently heard from a lady at the third party's office, which was in any event hearsay.[139]

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137 NEs, 24 January 2019 at p 130.

138 NEs, 24 January 2019 at pp 137–138.

139 NEs, 25 January 2019 at p 64.

(c) The defendant's allegation that Soil-Build was discriminated in the way the tender process was implemented. This was based on what Soil-Build purportedly told him, which was also hearsay.[140]

(d) The defendant's allegation that CCA's statement in its final tender report that "[t]he [plaintiff's] tender submission is generally complete and in compliance with the tender specifications" was incorrect.[141] However, the defendant could not explain why he disagreed with CCA's statement.[142]

(e) The defendant's allegation that Daiya had submitted the schedule for deviations, contrary to what CCA had stated. The defendant's allegation was based on what Daiya's boss had apparently told Ms Linda Chua Hwee Hwee (TPW7, "Ms Chua") of CCA, which was in any event hearsay.[143]

(f) The defendant's allegation that Soil-Build must have complied with the tender given that it is a listed company.[144]

86 When questioned on the numerous inconsistencies in his evidence, the defendant also sought to shy away from responsibility. On occasion, when he was caught or cornered with inconsistent statements in cross-examination, he went as far as to state:[145]

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140 NEs, 25 January 2019 at p 91.

141 4AB01762; NEs, 25 January 2019 at p 112.

142 NEs, 25 January 2019 at p 126.

143 NEs, 25 January 2019 at pp 135–136.

144 NEs, 25 January 2019 at p 170.

145 NEs, 19 February 2020 at p 34, lines 14–23.

> Q: Then why did you say in your affidavit:
>
> > '… the non-compliances in BCA's report of the inspection on 30 April 2013 were rectified and the TOP issued eventually on 16 September'.
>
> Those are your words; your sworn statement.
>
> A: Well, if you ask me on this paragraph, it don't reflect what is actually happening.
>
> Q: So you lied in 2014?
>
> A: It's not that I lie. It's the lawyer who draft it.

87 It is difficult to accept the evidence of the defendant who has a penchant for suspicions and who would take the slightest opportunity to impugn those around him who are not on his side.

The defendant's version of events was incredible

88 In his testimony in court, the defendant claimed to have knowledge of the conspiracy as early as between March and May 2011, when the tender was awarded to the plaintiff.[146] Yet, the defendant refused to take any action after he supposedly was convinced that there was a conspiracy by the plaintiff and the third party to plot against him. This can only be described as bizarre if he had, indeed, known that he was a victim of a conspiracy to defraud him at the nascent stage of the Project. This aspect of the allegations he made in court is not in the defendant's pleadings or in his AEIC. It is unbelievable that the defendant, an experienced, shrewd and very wealthy businessman, would sit idly by and allow the plaintiff and other professionals to conspire to defraud him of millions of dollars.

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146 NEs, 31 January 2019 at p 119, line 20.

89 The defendant also claims that he is a man of principle. He explained that he does not intend to seek alternative settlement of this case as he wishes to contest this case as a matter of principle.[147] Yet when he purportedly discovered the conspiracy against him by the third party, the plaintiff, and the Consultants at the early stage of the Project, he claimed that he did not do anything as he just wanted the Project to be completed.[148] This is deeply inconsistent with the behaviour one would expect from a man of principle. This suggests that there is no truth in the defendant's allegations that he knew there was a conspiracy to injure or defraud him.

90 I also find that the defendant's allegations of conspiracy on the part of the third party, the plaintiff and the Consultants are incredible. In his pleadings and AEIC, the defendant alleges that the conspiracy involved only the plaintiff and the third party. However, during his cross-examination by the third party's counsel, the defendant essentially alleged that the entire team of professionals involved in the Project, apart from his Assistants and Web, was conspiring to injure him.

91 It is clear that to the defendant's mind, the entire Project team slowly devolved into a cesspit of lies and conspiracy. However, this conspiracy theory simply is not borne out on the facts. I highlight two general difficulties that present themselves in relation to his claim of conspiracy.

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147 NEs, 22 January 2019 at p 129, line 24 to p 130, line 7.

148 NEs, 31 January 2019 at p 125, lines 6–7.

(1) The defendant's assertion that CCA, F+G and RTO Leong were conspiring against him

92 From the defendant's pleadings and AEIC, it is clear that the parties to the alleged conspiracy to injure him were only the plaintiff and the third party. This was also the position taken in the defendant's opening statement. There was not the slightest hint that the Consultants, excluding Web, were co-conspirators as well. However, when cross-examined by the third party's counsel, the defendant then expanded the number of conspirators to almost every professional involved in the Project. The only individuals who were spared were Jessie Tan (TPW8, "Ms Tan") from Web, the defendant's wife and his Assistants. The defendant took the position that eight other professionals involved in the Project were all lying and he was the only factual witness that was telling the truth.[149] The list of conspirators is as follows:

(a) in relation to the tender process, Mr Dennis Tan (PW1, "Mr Tan") and Mr Angamuthu Manoosegaran (PW2, "Mr Manoosegaran") (from the plaintiff), Mr Phillip Yong (TPW1, "Mr Yong"), Ms Pakawadee Chiyachan (TPW3, "Ms Chiyachan") and Mr Chan (TPW2) (from the third party), and Ms Chua (TPW7) (from CCA);[150]

(b) in relation to EOT 1, Mr Tan and Mr Manoosegaran (from the plaintiff), Mr Yong, Ms Chiyachan and Mr Chan (from the third party), and Mr Daniel Ng Pak Khuen (TPW6, "Mr Ng") from F+G;[151]

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149 NEs, 22 January 2019 at p 128.

150 NEs, 25 January 2019 at p 179.

151 NEs, 22 January 2019 at p 105.

(c) in relation to EOT 2 and EOT 3, Mr Tan and Mr Manoosegaran (from the plaintiff), Mr Yong, Ms Chiyachan and Mr Chan (from the third party), Ms Chua (from CCA) and Mr Ng (from F+G);[152]

(d) in relation to the CC and the MC, Mr Tan and Mr Manoosegaran (from the plaintiff), Mr Yong, Ms Chiyachan and Mr Chan (from the third party), Ms Chua (from CCA), Mr Ng (from F+G) and RTO Leong;[153] and

(e) in relation to IC25, IC26 and the FC, Mr Tan, Mr Manoosegaran and the plaintiff's QS (from the plaintiff), Mr Yong, Ms Chiyachan and Mr Chan (from the third party), Ms Chua (from CCA), Mr Ng (from F+G) and RTO Leong.[154]

93 Although CCA, F+G and RTO Leong were not joined as third parties to the Suit, the defendant ought to have pleaded that they were co-conspirators and mentioned their involvement in the alleged conspiracy in his AEIC. But this is not the case. This glaring omission in identifying the parties to the conspiracy weakened the defendant's conspiracy claim significantly.

94 This allegation of conspiracy was vehemently objected to by Mr Ng, on behalf of F+G, as follows:[155]

> Q: Yes. Mr Ng, this is the evidence of Mr Ser, when he was cross-examined by the architect's solicitor, TSMP, and he says here:

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152 NEs, 22 January 2019 at p 89.

153 NEs, 22 January 2019 at pp 90–91.

154 NEs, 22 January 2019 at p 91.

155 NEs, 23 June 2020 at p 109, line 8 to p 111, line 3.

> 'Question: Okay. Who in F+G is a party in this conspiracy to injure you?
>
> Answer: The person who always attend the site meeting is Daniel Ng.'

And then he clarifies that you are the person that wants to injure him in this conspiracy.

A: Me?

Q: Is this the first time you have ever heard of this allegation?

A: Yes. This 'Daniel Ng' is me?

Q: Yes, there's only one Daniel Ng in this matter.

…

Q: So has Mr Ser sued you, personally, for being in a conspiracy with GTMS as well?

A: Not that I'm aware of, and I hope no.

Q: Do you know if Mr Ser has sued F+G for being in a conspiracy with GTMS to cause loss to him?

A: Also not that I'm aware of, and I also hope no.

Q: Has Mr Ser threatened to sue you or F+G for being in a conspiracy with GTMS and CSYA?

A: Not that I'm aware of.

Q: Mr Ng, do you agree that you are not in a conspiracy with GTMS?

A: Of course, no. Absolutely, 100 per cent, no.

…

Q: Mr Ng, do you agree that you are not in a conspiracy with GTMS to cause loss to Mr Ser Kim Koi?

A: Yes, agree.

Court: Sorry. 'Agree' means you agree you are in a conspiracy?

A: No. 'Do you agree that you are not in conspiracy with GTMS?' So my answer is, yes, I agree that I am not in conspiracy with GTMS to cause loss to Mr Ser Kim Koi.

95 It was apparent that this was the first time Mr Ng had heard about the defendant's allegation of conspiracy on the part of F+G, and that it was so incredible to him that he had to clarify whether he was the individual identified. That much speaks about the credibility of the defendant's claim.

96 Furthermore, if F+G was one of the conspirators with the plaintiff and the third party, why did the defendant through Mr Cheung, on 31 December 2013, engage F+G to "prepare a valuation of the defective works found in the Units"?[156] Going by the defendant's allegations, in December 2013 the relationship between the defendant, the plaintiff and the third party was not working out well and the defendant was already highly suspicious of the plaintiff and the third party. If F+G truly was a party to the conspiracy, the defendant would not have trusted F+G to conduct a valuation of the defective works.

97 The defendant's allegations of conspiracy on the part of RTO Leong are equally incredible. His speculations of such conspiracy are captured in the following exchange in court between the defendant and the third party's counsel:[157]

> Q: – what is the RTO or what do you say is RTO's motivation for conspiring with GTMS to injure you, and, again, don't speculate.
>
> …
>
> A: As I had said earlier, Mr Leong had called the contractor to repair his house leak.
>
> Q: Which contractor? GTMS or Daiya?
>
> A: GTMS contractor.

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156 AEIC of Remus Goh ("RG") at para 19.

157 NEs, 22 January 2019 at p 139, line 7 to p 141, line 20.

…

Q: How do you know this?

A: There is one day we are having tea break, I think. I happen to buy them tea –

Q: Who is this?

A: Sorry, Chow and Leong. Chow – what's his name, Chow Kim Fat or Chow Kam Fat. Leong is [RTO] Leong which you [have] been mentioning, so we were having breakfast and he say he call the contractor to go to his house to repair the house leak.

Q: And what are you trying to say, Mr Ser? Are you trying to imply from this that [RTO] Leong was somehow corrupt and he was deliberately not doing his job or he was deliberately trying to injure you, is that your case?

…

A: Just now you asked me what is their benefit to do that, is it correct or not? So I'm telling you the benefit by calling these people to repair their house.

…

Q: … Are you trying to imply from this that [RTO] Leong was somehow corrupt and he was deliberately not doing his job or was deliberately trying to injure you? It is a 'Yes' or 'No'.

A: Yes.

98 When RTO Leong was questioned about this in court, he testified as follows:[158]

Q: … Mr Leong, did you inform Mr Ser, during a tea break with Mr Chow, that you have asked the contractor to repair a leak in your house?

A: Can I explain?

Q: Yes, please do.

A: Mr Ser told me that there was some minor leaks in his house, and he asked me to tell the GTMS workers to go

158 NEs, 18 June 2020 at p 33, line 11 to p 35, line 3.

> to his house to repair the leak. It is not that I told Mr Ser and then went to ask GTMS workers to repair the leak. I don't even know that his house was damaged or there was a leak.
>
> …
>
> Q: … Mr Leong, is this the first time that you were informed that Mr Ser is accusing you of conspiracy because you told GTMS to repair your house leak?
>
> A: Yes.

99 I note at this point that RTO Leong's evidence must be treated with caution. There was one instance in which he revealed candidly that he signed that he had witnessed the testing and commissioning of the swimming pools for the Project on 15 July 2013 when he did not do so. He said he was asked to do so by Mr Sankar (one of the plaintiff's staff), who informed him that Ms Chua had asked him to sign. As Ms Chua was the M&E engineer and his superior in the Project, RTO Leong felt pressured to comply.[159] However, this was contradicted by Ms Chua on the stand who denied making such a request to RTO Leong through Mr Sankar.[160]

100 Notwithstanding this, the very veracity of the defendant's claim is dubious. The defendant alleges that RTO Leong sought the plaintiff's assistance to repair the leaks in RTO Leong's house. When RTO Leong was asked in court about this matter, he said that the plaintiff was called to repair leaks in the defendant's house. Thus, it is unclear whether it was the defendant's house that was leaking or RTO Leong's. There was no contemporaneous evidence of the defendant's claim in this regard beyond his own assertion, which is, at its very best, questionable. Even if the defendant were to be believed, it is incredible

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159 NEs, 17 June 2020 at p 109, lines 14–22; p 111, lines 11–25; p 115, lines 6–7.

160 NEs, 26 June 2020 at p 155, line 20 to p 156, line 3.

that he was able to infer that there was a conspiracy simply because the plaintiff had separately assisted RTO Leong to repair the leak in the latter's house.

101 Similar to what the defendant had done with F+G, he had in fact employed RTO Leong *directly* to work for him, *after* RTO Leong was released from the Project on 1 July 2013. He wanted RTO Leong to identify more defects and to monitor the defect rectification *on his behalf* because of RTO Leong's familiarity with the Project. This was reflective of the defendant's relationship with RTO Leong at the time of the Project, as RTO Leong testified:[161]

> Q: Mr Leong, were you ever in a conspiracy with GTMS to harm Mr Ser?
>
> A: I was actually closer to Mr Ser at that time than to GTMS.
>
> Q: So I need an answer to the question.
>
> A: Which means to say that I was never in a conspiracy with GTMS.
>
> Q: Mr Leong, were you ever dishonest to Mr Ser?
>
> A: No.
>
> …
>
> Court: Now, you told us that sometime in July, I believe, July 2013, you worked for Mr Ser for about a year?
>
> A: Yes.
>
> Court: Do you know why Mr Ser asked you to work for him?
>
> A: The most important factor was that when the contractors had finished their work, there would be a maintenance period. During this period of time, Mr Ser would try to ask the contractors to rectify all the defects. I had been at the site for over three years, and I'm very familiar with the three houses, so he asked me to stay on.
>
> Court: What did you do over the period of one year?

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161 NEs, 18 June 2020 at p 100, lines 6–14; p 102, line 9 to p 103, line 1.

> A: During this one year, if the owner had any defects, he would inform me. Sometimes the owner and I would walk around the three houses and pick up any other defects that need rectification, then tell the contractor's workers to rectify them.

102 If RTO Leong truly was a party to the conspiracy, the defendant would not have trusted him to identify defects and oversee the rectification of the defective works. Despite their previously close relationship, the defendant now has no qualms about tarnishing RTO Leong's reputation and branding him as a co-conspirator.

103 This lends weight to the conclusion that the entire conspiracy claim is untrue and a mere afterthought. It is a figment of the defendant's biased imagination that he conjured when he was in the witness stand to amplify his conspiracy defence to defeat the plaintiff's and the third party's claims.

(2) The conspiracy claim is inconsistent with the contemporaneous evidence

104 The defendant claims that he was aware of the purported conspiracy between the plaintiff and the third party from as early as March to May 2011, which was when the tender for the main contractor of the Project was processed.[162] This was at the start of the Project. However, in spite of this knowledge, the defendant did not protest or even entertain the idea of replacing the plaintiff and the third party. The defendant claimed that he still wanted to "trust" the plaintiff and the third party, even though he knew that they were defrauding him of millions of dollars.[163] The defendant's explanation is

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162 NEs, 31 January 2019 at p 116, lines 3–23.

163 NEs, 31 January 2019 at p 126.

unconvincing and unbelievable. Any reasonable individual, let alone an experienced and principled businessman, as the defendant claimed he was, would have dismissed the plaintiff and the third party if he knew that he was indeed a victim of fraud.

105 Further, the defendant did not even tell anyone, including his wife and his trusted Assistants, about his knowledge of the alleged conspiracy.[164] It is strange that he did not even alert his hand-picked Assistants who he personally employed to safeguard his interests in the Project about the alleged conspiracy. The defendant has also, to date, not made a police report in relation to the conspiracy, nor has he made complaints about the conspiracy to injure him against the professionals involved in this Project to the respective professional bodies.[165] The defendant, by his own account, essentially did *nothing* when he purportedly suspected the alleged conspiracy. There are also no records in the contemporaneous correspondence and documents, including the minutes of the site meetings, to suggest even the slightest hint of any conspiracy between the plaintiff and the third party.

106 Accordingly, the defendant's own conduct and the contemporaneous evidence do not support the defendant's contention that there was a conspiracy from as early as March to May 2011. In all probability, the defendant pieced together the conspiracy claim after the plaintiff tried to enforce its certified payment claims in an attempt to avoid his contractual liability.

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164 NEs, 31 January 2019 at pp 133 and 142.

165 NEs, 31 January 2019 at p 147.

The defendant refused to call any of his Assistants to testify

107 For the purpose of his case, the defendant relied on nine experts in order to defend and counterclaim against the plaintiff and the third party. However, he did not call any of his Assistants to testify as to the presence of the conspiracy that has tainted most of his defence and the basis of his counterclaim.[166] I have earlier at [8] made reference to the defendant's Assistants, who were a group of individuals whom the defendant had hand-picked and paid to assist him in monitoring the Project. However, when the defendant was cross-examined on their exact role in the Project, the defendant sought to significantly downplay their roles. The inference is clear. Should he call these Assistants to testify, his case, particularly the serious allegations of conspiracy and fraud on the part of the plaintiff and the third party, would be severely undermined. The Assistants were the very individuals best placed to establish the presence of a conspiracy, as they would have been well-apprised of the development of the Project and could bear witness to everything alongside the defendant.

108 I begin with Mr Chow, who attended most of the site meetings. According to the defendant, Mr Chow's "main job" was to "make sure that the waterproofing when they are putting up the membrane, he take a look and make sure that it is fully covered [*sic*]".[167] In fact, he had been brought in by the defendant as an additional check on the progress of the plaintiff and the Consultants:[168]

> Q: The waterproofing would either come under Web Structures or under CCA. You already have a consultant. Why do you need Mr Chow Kum Wai?

166 TPWS at paras 44–45.

167 NEs, 30 November 2018 at p 23, lines 8–11.

168 NEs, 30 November 2018 at p 23, line 24 to p 25, line 6.

> A: That's the problem. The 12A swimming pool, I think it is the 12A, the design short of a few metre of waterproofing. And if the waterproofing is short, it is as good as the whole pool is useless with the waterproofing.
>
> …
>
> Q: I put it to you, Mr Ser, that you appointed Mr Chow because you did not trust your own consultants.
>
> A: I had already explained to you, Mr Das. Like the consultant make a mistake on 12A swimming pool, shortage of few metre of waterproof membrane, and Chow is the one who noticed it before they cast, Chow told me, I said, 'Let's pay for the extra if they need to'. And whenever RTO Leong want to do some casting that require waterproof membrane, he will tell Chow, can you help to give an opinion.

109 Mr Chow was, thus, heavily involved in the Project, at least in relation to the construction of the swimming pools. Based on the defendant's evidence, he was allegedly the one who had first noticed that there were issues with the waterproofing.

110 Similarly, in the case of Dr Anand, although he was involved in the Project for a short duration, he attended the site meetings fortnightly during the period of his involvement. According to the defendant, Dr Anand's role was as follows:[169]

> Q: Dr Anand. You have Mr Chow, you said, for waterproofing. Now, what was Mr Anand Jude Anthony for?
>
> A: Whenever we have site meeting, he will join us. Why he's being engaged, and we pay him about $5,000 a month, just to attend meeting and be like a post man doing recording of the meeting, because before that, when there is meeting, I asked the architect to record, and they choose not to record what we say, and they record those thing that is spoken by, like GTMS or other

[169] NEs, 30 November 2018 at p 25, lines 11–25.

> consultant, they will record. But for me, they never want to record.
>
> Q: Mr Ser, I do not see Dr Anand's attendance at the site meetings.
>
> A: He did.

111 Dr Anand's role was, thus, to meticulously place on record every occurrence and discussion at the site meetings. He had been brought in to do this and was remunerated well, because the defendant was of the opinion that the plaintiff and the third party had refused to keep proper records. In fact, it appears that Dr Anand attended the site meeting on behalf of the defendant when the defendant was on holiday.[170] Both Mr Chow and Dr Anand were well positioned to provide evidence as to the existence of any conspiracy, given their heavy involvement in the Project. This fact raises the irresistible and obvious question of why the defendant refused to call them as his witnesses.

112 Mr Cheung was the general manager and director of BKAsiaPacific (Singapore) Pte Ltd, a claims consultancy which specialises in infrastructure and construction claims. According to his *curriculum vitae*, which was tendered by the third party,[171] Mr Cheung regularly provides expert reports and advice in relation to construction and infrastructure projects. Mr Cheung also has vast experience in giving evidence in court as an expert witness.

113 Notwithstanding Mr Cheung's significant expertise and experience, the defendant claimed that he paid Mr Cheung a $5,000 "token sum" monthly to perform "only administrative" work.[172] Specifically, the defendant alleged that

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170 NEs, 20 February 2020 at pp 108–109.

171 Exhibit TP-7.

172 NEs, 24 January 2019 at p 91, line 22.

Mr Cheung was apparently engaged only to send and receive e-mails on behalf of the defendant and to record minutes of the site meetings.[173] The defendant strongly disagreed with the third party's counsel that Mr Cheung was his "adviser", "main agent", or that he was heavily involved in the Project.

114 However, nothing could be further from the truth. Unbeknownst to the defendant, the third party's counsel was in fact simply using the defendant's own description of Mr Cheung's role in the Project from the defendant's earlier affidavits dated 20 March 2017[174] and 20 April 2017[175] as his adviser and main agent for the Project. The defendant was unable to explain the clear and obvious contradictions in his evidence, as revealed in the following excerpt:[176]

> Q: … Would you agree that [Mr Cheung] has acted as your adviser for the project since … September 2012?
>
> A: I wouldn't say adviser. …
>
> …
>
> Q: Let me put it to you, Mr Ser, I assume you want to downplay his role, I put it to you that he was your adviser for this project. Do you agree or disagree?
>
> A: I disagree.
>
> Q: It is fair to say that he was the main agent through which you communicated with the parties in either CSYA or GTMS; correct?
>
> A: No, I don't agree 'main agent'.

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173 NEs, 24 January 2019 at p 93, line 6 to p 94, line 9; 25 January 2019 at p 5, lines 21–22.

174 Exhibit TP-5.

175 Exhibit TP-6.

176 NEs, 24 January 2019 at p 59, line 11 to p 64, line 25; p 70, line 5 to p 71, line 2; p 81, lines 16–23.

Q: Okay. Do you agree that he was the main agent who communicated with all the consultants in the course of the project?

A: No, I don't agree.

Q: I am going to put it to you –

A: Yes.

Q: – that he was the main agent through which you communicated with the parties, either with GTMS and/or the consultants. Do you agree or disagree?

A: I disagree.

…

Q: Would you agree with me [that] Mr Cheung has very specialised knowledge and is experienced in construction? Do you agree with me?

A: I don't know.

Q: You don't know. I see. And would you agree that [Mr Cheung] was very involved in the project?

A: I don't agree.

Q: You don't agree. I see. I put it to you that he was very involved in the project; agree or disagree?

A: I don't agree.

…

Q: I am going to have to tender a document, your Honour. This is a 7th affidavit of Mr Ser Kim Koi dated 20 March 2017. …

…

Q: Mr Ser, do you recall filing this affidavit or swearing this affidavit in 2017? Can you look at page 10 because you might see your signature there.

A: Yes, I saw my signature.

Q: So you recall affirming this affidavit?

A: Should be.

Q: And you recall you would have to tell the truth in this affidavit; right?

A: Yes.

Q: Please go to page 8, paragraph 19. Can you please read this paragraph out for the court. …

A: 'Furthermore, Mr Cheung has acted as adviser for the Project since September 2012. He attended with me and recorded notes of site meetings … since his appointment as *adviser* and acted as the *main agent* through which I communicated with the parties in this suit as well as other consultants during the course of the Project. As I do not know how to effectively use electronic mail … I had requested that all email correspondence from the parties as well as other consultants be copied … to Mr Cheung's email address. Mr Cheung would also send emails to the parties and other consultants on my instructions on my behalf. Thus, *given the huge extent of Mr Cheung's involvement in the Project, paired with his specialised knowledge and experience in construction*, Mr Cheung's attendance would be required for me to conduct a meaningful inspection of the documents in the Third Parties' SLOD.'

Q: Mr Ser, do you realise that many of your answers to me in the last 10 minutes are contradicted by paragraph 19 of TP-5?

A: No, I don't agree.

Q: … Were you lying to the court today in response to my questions, or were you lying to the court in the affidavit at TP-5?

A: I'm not lying.

…

Q: … You see, I am going to actually tender the next affidavit you filed in reply because, you see, you keep lying and I'm going to show that you are a liar.

…

Q: Go to paragraph 17 of your affidavit. You see, again, Mr Ser, you're trying to squirm out of a very obvious contradiction. Can you read out paragraph 17 aloud to this court?

A: 'With regard to paragraph 39 of the 5th Affidavit of CSY, I aver that the Third Parties had been informed and/or was aware that Mr Cheung is my *adviser* and *agent* through which I communicated with the consultants in the Project including the Third Parties. The minutes of the site meetings since August 2012 which was

> prepared by the Third Parties clearly acknowledge Mr Cheung as my adviser.'
>
> …
>
> Q: I am just going to put it to you: you will say whatever you think suits your case at that point of time; you agree or disagree?
>
> A: I disagree.
>
> Q: You are prepared to lie to the court and make evidence up on the spot if you think that will help you case. Do you agree or disagree?
>
> A: I disagree.
>
> [emphasis added]

115 It is clear from the defendant's affidavits dated 20 March 2017 and 20 April 2017 that the defendant directly contradicted his own evidence concerning Mr Cheung's role in the Project. Firstly, from these affidavits, Mr Cheung was his adviser and did not merely have administrative or secretarial duties. Secondly, Mr Cheung was for all intents and purposes the defendant's right-hand man. Mr Cheung was the defendant's "main agent" whom he relied on to communicate with the plaintiff, the third party and the Consultants. Thirdly, Mr Cheung has specialised knowledge and experience in construction matters. Finally, Mr Cheung was heavily involved in the Project and was clearly an integral part of the defendant's team helping the defendant to closely monitor the progress of the Project. The numerous contemporaneous e-mails that were sent during the construction of the Project by Mr Cheung to the plaintiff, the third party and others involved in the Project clearly show that he played an important and active role on behalf of the defendant.

116 In his affidavits dated 20 March 2017 and 20 April 2017, the defendant was trying to convince the court that Mr Cheung had played an integral role in the Project. This was to persuade the court that Mr Cheung should be allowed

to accompany the defendant to inspect the third party's documents. Thus, it is clear that the defendant was content to tailor his evidence at different stages of the case to suit his needs. When his contradictions were exposed and made obvious to any reasonable person, the defendant audaciously denied the contradictions. The defendant's contradictions were clear as day and he failed to provide satisfactory explanations. In addition to bringing into question his entire claim of conspiracy, his credibility and reliability as a witness were significantly undermined by his evasiveness and vacillating testimony during the trial.

117 In response to my question, the defendant again maintained his incredible story that his Assistants (including Mr Cheung) merely played minor roles, and that he (*ie*, the defendant) was the only one who knew about the conspiracy against him:[177]

> Court: You see, you make a very serious allegation of fraud –
>
> A: Yes.
>
> Court: – and conspiracy. Did any of your advisers expressed the same view or opinion as you?
>
> A: No. They are engaged by me just to write letter and send letter to the consultant and when he got reply, he give it to me.
>
> Court: But did –
>
> A: That's their role only.
>
> Court: But they followed the project. Did you share with them that you suspect that there was fraud and conspiracy against you? Did you tell any of your advisers, personal advisers?
>
> A: I don't think I tell. But each time when – after meeting, Wilson just shake his leg – head and I shake mine and we just smile and we disperse.

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177 NEs, 21 February 2020 at p 46, lines 4–25.

> Court: Isn't it important for you to share your suspicion with your advisers? Your advisers are supposed to look after your interest.
>
> A: No, his role is not to advise me on all this. His role is not advising.

118 Even taking his evidence at its highest, the defendant alleged that the body language of Mr Cheung showed that he shared the defendant's sentiments or interpretation, or at the very least was unhappy about the way in which the plaintiff and the third party were operating the Project. If that were true, it demonstrates that there was a general dissatisfaction towards the plaintiff and the third party. This would only serve to bolster the defendant's claim of a conspiracy and would have been best illustrated by calling his Assistants as witnesses. The fact that he refused to call any of his Assistants as witnesses only goes towards showing that the allegations of conspiracy never existed during the Project. Such allegations only arose after the plaintiff requested for payment pursuant to the last three payment certificates.

119 Having made these general observations regarding the defendant's allegations of conspiracy, I shall now make some general observations of the defendant's case as a whole, before turning to examine the relationship between the defendant and the third party.

My general observations of the defendant's case

120 Notwithstanding that the third party was engaged by the defendant, the trust between them slowly eroded towards the end of the Project. When the defendant made excessive demands and unreasonably rejected the rectification works of the plaintiff, he expected the third party to be on his side. However, the third party exercised its professional and independent judgment and found that the rectifications were satisfactory. This infuriated the defendant who

became extremely upset and made outrageous and baseless allegations that the defendant and the third party were in a conspiracy to defraud and collude against him, and that the third party was not impartial. I find that most of the defendant's allegations are unfounded. There is no iota of evidence, not even circumstantial evidence, to support the hugely serious allegations of conspiracy to defraud, corruption and collusion between the plaintiff and the third party. It seems that the defendant has no qualms about carrying out these shenanigans against the plaintiff and the third party even when he knows that he has no evidence to substantiate them. When the other Consultants came forward as witnesses to support the plaintiff's and the third party's version of events, the defendant decided to tar everyone with the same brush, asserting without any shred of evidence that they were all parties to an alleged conspiracy to harm him.

121 It is very difficult to believe the defendant's allegations of conspiracy. The cogent evidence suggests to me that this conspiracy never existed in reality as it is a figment of the defendant's imagination arising from his suspicions of the plaintiff, the third party and the Consultants as they resisted his unreasonable conduct. When the plaintiff sought from the defendant payment for the last few certified payment claims, the defendant decided to use the conspiracy claim as a shield for him to avoid any liability.

122 On the contrary, the evidence shows that the plaintiff and the third party as well as the Consultants were dealing with each other at arm's length and they behaved professionally throughout the Project. The third party may have been negligent in certain aspects of his duties in this Project, for instance, the failure to know the existence of Item 72 of the Preliminaries in the Contract. However, these lapses certainly were not deliberately or intentionally done to cause harm to the defendant, who was his principal and with whom he had a contractual relationship. There was no contractual nexus between the plaintiff and the third

party. There was no reason for the third party to favour the plaintiff unless the allegations by the defendant have some truth, which is not the case here.

123 I shall begin with my assessment of the defendant's credibility and veracity as a witness. The defendant was extensively and thoroughly cross-examined by the plaintiff's and the third party's respective counsel over 13 days. I had ample opportunities to evaluate the defendant's credibility and reliability. However, I did not find the defendant to be a credible or reliable witness. The defendant's testimony was riddled with internal inconsistencies as there were numerous contradictions for which he could not provide a reasonable or satisfactory explanation. This diminished his credibility as a witness. When confronted with his own shifting evidence and the objective correspondence and documents during cross-examination, the defendant was often evasive. In fact, I note that this is not the first time such observations have been made of the defendant's credibility. In *Holland Leedon Pte Ltd (in liquidation) v C & P Transport Pte Ltd* [2013] SGHC 281, in which the defendant had testified as a witness, Lionel Yee JC observed at [152] that the defendant "seemed to be unable to recall many things and often appeared to be *asserting what he thought ought to be the case rather than what he could specifically remember the facts to be*" [emphasis added].

124 To further his campaign against the plaintiff and the third party, the defendant sought the help of Mr Chin Cheong (DW7, "Mr Chin"), the managing director of BAPL and the defendant's expert witness, to identify as many defects as possible in the Project. In December 2013, Mr Chin was engaged by the defendant to identify all defects and suggest methods of rectification. Subsequently, Mr Chin compiled his first findings in Building Appraisal Pte Ltd

Report December 2013 (the "2013 BAPL Report").[178]

125 Based on, *inter alia*, the findings in the 2013 BAPL Report, the plaintiff carried out rectification works seeking to appease the defendant. This proved to be of no avail as the defendant repeatedly directed Mr Chin to carry out further investigations on the properties. These further investigations occurred in the following months:[179]

(a) April 2014;

(b) June to November 2014, resulting in the Building Appraisal Pte Ltd Report November 2014 (the "2014 BAPL Report");[180]

(c) April 2016;

(d) June 2016;

(e) June to July 2017;

(f) May 2018;

(g) August 2018; and

(h) September 2018.

126 These investigations resulted in the Report on the Schedule of Building Defects at Nos 12, 12A, 12B Leedon Park Singapore (16 October 2018) (the "2018 BAPL Report"). The investigations entailed multiple site visits and

178 Exhibit D10.

179 NEs, 18 March 2020 at p 117, line 19 to p 125, line 10.

180 Exhibits D7, D8 and D9.

resulted in extensive reports compiled by Mr Chin. In each subsequent report, Mr Chin's findings became more detailed, zooming into even the minutest of details, as he was enormously pedantic. It was a massive hunt for the slightest defects that included the use of precision equipment such as a digital Vernier caliper for the steps and risers, which is not used in the construction industry for the measurement of steps and risers. It was an all-out war with no holds barred declared by the defendant against the plaintiff and the third party.

127 These actions by the defendant demonstrate his unreasonableness and underscore that he is on a campaign against the plaintiff and the third party, determined to find as many flaws as he can in the Project. Perhaps, this may be one of the reasons why he refused to allow the plaintiff and the third party to enter the units after the handover of the Project for the plaintiff to rectify the alleged defects. The defendant also refused to activate the various warranties from the different NSCs to rectify the purportedly defective works. He allowed the units to deteriorate and attempts to pin the blame on the plaintiff. In the same vein, Mr Chin's willingness to go along with the defendant's demands brings into question Mr Chin's impartiality and reliability, on which I shall now elaborate.

128 Mr Chin agreed that he was the defendant's representative,[181] but in response to cross-examination, Mr Chin vehemently insisted that he was "independent and impartial" and that he had "no interest in … any of the parties in this dispute".[182] He again reiterated this point as follows:[183]

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181 NEs, 12 March 2020 at p 34, lines 21–24.

182 NEs, 11 March 2020 at p 57, lines 21–22.

183 NEs, 12 March 2020 at p 8, line 13 to p 9, line 7.

> Q: So if Mr Ser did not give his approval for the draft reports, would you have finalised them? 'Yes' or 'no'?
>
> A: I will finalise them if Mr Ser did not give me approval, because my professional opinion still remain, I'm neutral, I'm objective, and my duty is to assist the court. I have no interest in any of the parties in this dispute, or any claim whatsoever arising from this.
>
> Q: Yes, Mr Chin. If you were to have finalised it without Mr Ser's approval, then do you agree with me that there was no need for you to send the draft reports to Mr Ser in these two emails?
>
> A: I disagree. It all depends, just before I engross the report, as a point of clarity, if his feedback/comments are then – differed from my opinion, I will not include in it, because this is the professional report prepared by me and it's my professional opinion.
>
> It is not to the satisfaction of the client or whoever it may be. My duties is to assist the court. That is the primary function of my duty. It overrides everything, whichever parties pays me.

129 Mr Chin alleged that his duties were to the court when he prepared his first report, *ie*, the 2013 BAPL Report. At that time, however, the present Suit had not yet commenced. It was only on 13 January 2014 that a writ of summons was filed by the plaintiff. Mr Chin was told in cross-examination that he could not have been an expert to assist the court as this Suit had not started when he was first engaged by the defendant. In response, he steadfastly stuck to his story that he had prepared his 2013 BAPL Report as an independent expert to the court.[184]

130 It is clear from the evidence that Mr Chin intended to further the defendant's interest. Mr Chin sought to comment on every disputed defect regardless of its severity. He also overreached and provided his opinion on

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184 NEs, 12 March 2020 at p 16, line 7 to p 19, line 21.

defects that he later conceded he had no experience in (*eg*, the gas pipe, the alleged leakages in the swimming pools, Volakas marble, iron wood, *etc*). In his reports, he gave the impression that he had the prerequisite knowledge and expertise in all matters that he commented on. It was only in court that he disclosed that he was a charlatan as he did not have the expertise in those areas:[185]

> Court: There is a series of general questions. One of which is: do you have experience in gas pipe?
>
> A: No, I don't.
>
> …
>
> Court: Before 2013, have you been engaged to look at leakage of swimming pools?
>
> A: No.
>
> Court: So before 2013, since you have not been engaged, do you have experience in looking for leakage of swimming pools before 2013?
>
> A: No, no.
>
> Court: So did Mr Ser ask you to look at the leakages of swimming pools in 2013?
>
> A: Yes.
>
> Court: Did you tell him you have no experience?
>
> A: Yes, I told him that I have no experience in this.
>
> Court: But I notice you also put in your report.
>
> A: I've only mentioned about the grouting work and suspected it could be a leakage problem.
>
> Court: But you didn't put a caveat that you have no experience in that area.
>
> A: No, your Honour.
>
> Court: Why not?

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185 NEs, 18 March 2020 at p 113, lines 2–4; p 113, line 22 to p 114, line 18; p 115, lines 7–21; p 125, line 19 to p 126, line 2.

Mr Chin?

A: I presumed that I have got sufficient knowledge for it, but anyway, I apologise if I've not put a caveat there.

…

Court: Do you have experience before 2013 in relation to Volakas marble?

A: Yes.

Court: How many inspections did you do before 2013?

A: I've inspected marbles, in fact –

Court: Volakas marble. Please take note, my question is in relation to Volakas marble, not marble in general.

A: No, not specifically for Volakas marbles.

Court: What about Indian rosewood, before 2013?

A: No.

Court: Sorry, 'no' means?

A: I haven't inspected any Indian rosewood before 2013.

Court: What about the ironwood of timber decking before 2013, did you have any experience?

A: Not spec – no.

…

Court: Sorry, Mr Chin, one other general question. The general question is in relation to before 2013. Before 2013, have you been engaged to inspect step and risers?

A: No.

Court: When you were involved in the other project, you told us you were a project manager of some other – were you involved in the application for TOP?

A: No.

131 Mr Chin also vacillated in his evidence. These are some examples of his contradictory evidence in relation to his testimony on the swimming pool:[186]

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186 NEs, 12 March 2020 at p 23, line 2 to p 24, line 9.

Q: Mr Chin, do you recall that you confirmed, during your cross-examination by my learned friend Mr Yap, that you had not observed the drop in the water level in the swimming pool?

A: Yes.

Q: So do you agree with me that that piece of information should not be inside any of your reports, since you didn't personally observe it or check it?

A: I disagree. There was a slight drop in the water pool, which I've also gave evidence, it was actually to the underside of the coping, that there could be a loss of some water in the swimming pool.

Q: Mr Chin, you seem to be contradicting your evidence that you had given during Mr Yap's cross-examination. I'll find the reference and show you what you said, but I'll just move on with my questioning first.

Did you personally observe any leakages in the swimming pool?

A: Your Honour, I told the court that I have not physically observed any drop in the swimming pool. I went down to site on many occasions. It was reported by the client that there was a loss of water in the swimming pool, and it was requested, in fact –

Q: Mr Chin, Mr Chin. You are a very experienced expert, done this for a long time. It's a 'yes' or 'no' question, and I know that you know this. My question is: did you personally observe any leakages in the swimming pool? 'Yes' or 'no'?

A: No, your Honour.

Q: You also confirm that you didn't conduct any test to determine whether or not there were any leakages in the swimming pool. Correct?

A: Yes, your Honour.

132 He also gave contradictory evidence on the Volakas marble flooring. Initially, he testified as follows:[187]

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187 NEs, 12 March 2020 at p 68, lines 11–18.

> Q: My next question, also in relation to the defects to the Volakas marble in units 12, 12A and 12B, if the cause of the defect is the usage of poor-quality materials, do you agree that if the Volakas marble was selected by Mr Ser, then GTMS and CSYA cannot be blamed for any defects that are because of usage of poor-quality materials? 'Yes' or 'no'?
>
> A: Yes.

133 Later when he was asked again, he retracted from his earlier answer:[188]

> Q: My next set of questions has to do with what you have identified to be defects because of inherent – what you've identified as marble impurities. Yesterday I believe Mr Yap asked you some questions about this, but just to confirm, do you agree with me that the marble impurities that you've identified are natural and inherent in the Volakas marble that were selected by Mr Ser?
>
> A: Yes.
>
> Q: Therefore, since Mr Ser is the one that selected this Volakas marble that have these natural characteristics, which you have identified as being a defect, do you agree it is unreasonable to blame GTMS and CSYA for those defects?
>
> A: I disagree.

134 Furthermore, Mr Chin's recommendations for rectification works were generally highly excessive and unreasonable. For instance, in relation to the Volakas marble flooring, he stated in his AEIC that the marble had to be completely replaced as laying new tiles alongside old tiles would only create a "'chessboard' effect".[189] In his 2014 BAPL Report, Mr Chin also provided a mapping of the Volakas marble, identifying those with deficiencies and

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188 NEs, 12 March 2020 at p 82, line 14 to p 83, line 3.

189 AEIC of Chin Cheong ("CC"), Volume 1 at pp 270, 278.

imperfections.[190] However, his mapping listed almost the entire marble plan as being defective. I observed that this meant that effectively, the entire marble flooring had to be replaced, which Mr Chin agreed with:[191]

> Court: So looking at your mapping, it's as good as replacing the entire marble.
>
> A: Yes, for the basement informal living room.
>
> Court: Yes, and where is – any more –
>
> A: Yes –
>
> Court: – Volakas marble for 12A?
>
> A: – the following page will be the basement, the store pantry area, on page 351, and unit 12A, the basement pantry area.
>
> Court: Yes.
>
> A: The following page on 353, is the entrance area.
>
> Court: This one is as good as replacing the whole area?
>
> A: Yeah. On page 355, then the following page, on 357 will is to be the study area.
>
> Court: Yes.
>
> A: The next page on 359 is the dry kitchen area.
>
> Court: Is this Volakas marble?
>
> A: Yes, they're all Volakas marble. This is on the flooring, your Honour.
>
> Court: Yes.
>
> A: The next page is at 361, which shows there's a side entrance, the formal dining area and level 1, the staircase hall. And the last page, on 362, for unit 12A is the formal living area, which is nearer to the poolside.
>
> Court: So basically, for Volakas marble for 12A, it's a replacement of all the Volakas marble in that unit?

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190 NEs, 11 March 2020 at p 15, line 19 to p 17, line 6; 8 CC at pp 3451–3452; 3 CC at pp 1135, 1168, 1275.

191 NEs, 11 March 2020 at p 9, line 14 to p 10, line 23.

A: I've identified all these areas are deficient, and that the balance of it are actually good, sound, and there's no necessity to replace them if –

Court: But the balance are very few.

A: Yes, your Honour.

Court: That's why I say that it's virtually replacing all the Volakas marble in unit 12A.

A: Yes.

135 However, when asked again in court, he conceded that it was not necessary to replace the Volakas marble, much less *all* of the Volakas marble, as there were alternative methods of rectification:[192]

Q: Mr Chin, you have recommended rectification works for the defects that you've identified in the Volakas marbles.

A: Yes.

Q: For all three units, correct?

A: Yes.

Q: These rectification works which you have recommended is to replace the marble tile that, in your opinion, has a defect. Correct?

A: Yes.

Q: My question to you is: do you agree that it is not compulsory to carry out these rectification works?

A: Yes.

Q: Yes, you agree that it is not compulsory?

A: Yes.

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192 NEs, 12 March 2020 at p 80, line 16 to p 81, line 10.

> Q: Thank you. Do you agree also that there are also alternative methods of rectification for the defects you have identified for the Volakas marbles in all three units?
>
> A: Yes.

The defendant was highly unreasonable and excessive in his claim

136 The defendant mounts a highly hyperbolic, exaggerated and unreasonable claim in this Suit, particularly in the quantum of his claim, his refusal to mitigate his losses, as well as his expectation of the rectification works that should have been carried out. He maintains this position steadfastly and stubbornly.

(1) The quantum of the defendant's claim

137 The Project's original contract lump sum value was $13,130,000. As I have mentioned earlier, the defendant counterclaims against the plaintiff for the sum of $12,752,651[193] and has taken out a third party claim against the third parties for the sum of $10,853,718.63.[194] The defendant's claims against the plaintiff and the third party are excessive. If the defendant's claims were allowed, he would essentially be getting three two-storey good class bungalows for almost free or at a very small fraction of their original contract price.[195] It is clear that the equity of the case is not with the defendant's claims against the plaintiff and the third party.

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193 DWS at para 37.

194 TPRS at para 2.

195 TPRS at para 2.

(2) The defendant's refusal to mitigate his losses

138 It is oft-said that the requirement to mitigate is strictly speaking not a positive legal duty but an expression of the principle that an aggrieved party cannot recover damages in respect of losses it could have reasonably avoided (see *The Enterprise Fund II Ltd v Jong Hee Sen* [2020] 3 SLR 419 at [86]; *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] 2 AC 353 at [10]). In *The Asia Star* [2010] 2 SLR 1154 ("*The Asia Star*"), the CA set out the rules relating to the principle of mitigation. The CA observed at [24], [30] and [32] that:

> 24 The basic rules relating to mitigation are well settled. First, the aggrieved party must take all reasonable steps to mitigate the loss consequent on the defaulting party's breach, and cannot recover damages for any loss which it could have avoided but failed to avoid due to its own unreasonable action or inaction …
>
> …
>
> 30 … [T]he singular practical focus of the central inquiry which lies at the heart of this principle … [is] ***whether or not the aggrieved party acted reasonably to mitigate its loss*** … Reasonableness forms the one identifiable foundation on which this inquiry – and, in turn, the principle of mitigation – rests. The central question which underpins the reasonableness inquiry is what a reasonable and prudent man in the trade would have done in the ordinary course of his business if he had been in the aggrieved party's shoes …
>
> …
>
> 32 … [T]he inquiry amounts to nothing more than the common law's attempt to reflect *commercial and fact-sensitive fairness* at the remedial stage of a legal inquiry into the extent of liability on the defaulting party's part. The concept of reasonableness in the context of mitigation is a flexible one. In essence, it ***bars an aggrieved party from profiting or behaving unreasonably at the expense of the defaulting party***, and encapsulates complex interplaying notions of responsibility and fairness. As with any principle of law that encapsulates notions of fairness, the principle of mitigation confers on the courts considerable discretion in evaluating the

> facts of the case at hand in order to arrive at a commercial just determination. …
>
> [emphasis in original in italics; emphasis added in bold italics]

139 As seen from the above, the inquiry at this stage is extremely fact-centric and focuses on the reasonableness of the aggrieved party's conduct. It is also pertinent to note the CA's further observations at [45] regarding aggrieved parties who take *no mitigating action* at all:

> … [W]hile it may be a general principle of the law on mitigation that the court will not nicely weigh on sensitive scales the measures taken by an aggrieved party to mitigate its loss, this principle will ordinarily apply more strongly in cases where the question before the court is whether the aggrieved party engaged in unreasonable *action* as opposed to unreasonable *inaction*. ***Once the defaulting party establishes that the aggrieved party had reasonable options before it, greater justification will usually be needed from the aggrieved party which, despite knowing that it must act reasonably to mitigate its loss, does nothing at all***. … [emphasis in original in italics; emphasis added in bold italics]

140 Till this date, the defendant has made no efforts to mitigate his losses by carrying out defect rectification works. He testified that he only carried out maintenance of the swimming pools and gardening works,[196] opting to leave any defects unattended to "for evidence".[197]

141 When the defendant was cross-examined by the plaintiff's counsel, the defendant stated that as of the handover date (*ie,* 23 July 2014), he had intended to rectify the defects but was unable to find a contractor to perform the rectification works.[198] This cannot be the truth, as the evidence shows that after

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196 NEs, 18 February 2020 at p 2, lines 11–21.

197 NEs, 19 February 2020 at p 83, lines 11–14; p 86, line 6; 21 February 2020 at p 10, line 22 to p 11, line 2.

198 NEs, 17 January 2019 at p 149, lines 16–17.

the defects were discovered, the defendant called for a tender to repair the defects. Three separate companies submitted tenders as they were interested to rectify the defects but the defendant failed to award the contract.[199] Furthermore, it was revealed when the defendant was cross-examined by the third party's counsel that the defendant in fact had *no intention* to rectify the premises as he wanted to "preserve evidence". This was his true intention which was formed shortly after the CC was issued and before the handover date (*ie*, 23 July 2014):[200]

> Q: … When did you come to this decision to keep things unrectified?
>
> …
>
> A: … After the completion certificate, CC.
>
> Q: So after the CC you thought to yourself, 'I better keep this place unrectified to preserve the evidence', is that what you're saying?
>
> A: Yes.
>
> Q: Okay. After the CC but before the handover; right?
>
> A: Yes, I think.
>
> Q: I am puzzled because I think that when my learned friend Mr Das cross-examined you, you said to the court that, actually, you had made many attempts to rectify the premises but for some reason people don't want to rectify; you can't get people. This seems to be contradictory to what you just told me and the court. So do you, first of all, remember saying that?
>
> A: Yes.
>
> Q: So can you explain the contradiction to his Honour?
>
> A: There is no contradiction at all.

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199 NEs, 23 January 2019 at p 134, line 4 to p 135, line 9; AEIC of See Choo Lip at para 4.3 and pp 100–102.

200 NEs, 23 January 2019 at p 84, line 19 to p 87, line 5; p 93, lines 12–21; p 99, line 15 to p 100, line 20.

…

A: Because at one point this – I think our lawyer say, 'Why don't you go get some quotation to rectify it …

Q: No. Mr Ser, you were actually giving the impression to the court that you were doing your best to rectify the property but nobody actually wanted to do the job for you. Do you remember saying that?

A: Yes.

Q: But today, in response to my [question], you are telling his Honour that, actually, after completion, it was in your mind already that you didn't want to rectify the property because you wanted to preserve evidence.

A: Yes.

Q: Those are inconsistent and they contradict each other.

A: No. The thing was stretching for too long. So there's some suggestion that, 'Why don't you get some quotation first'.

Q: No. That quotation has nothing to do with it stretching too long and I will take you to documents. You gave an answer that you tried to find your own contractors and nobody would do the job for you.

It is clear that you were giving the court the impression that you wanted to rectify the property but you couldn't. Today you are telling the court, actually, you never wanted to rectify the property because you are preserving evidence. That is a contradiction. Please explain that contradiction?

A: I think there is no contradiction. …

…

Q: You are being very evasive here because you know I have caught you out. Mr Ser, it's very clear, today you have said that from sometime after the completion cert but before the handover till today, and maybe all the way to the end of the trial, you have no intention of rectifying the premises because you want to preserve evidence. That was your evidence. That was very clear. You agree?

A: Yes.

Q: … So … how can you say on 17 January that as of 10 October, or after, we had an intention to get another

> contractor to rectify? That is contradictory. Do you agree?
>
> …
>
> A: It is a shift of thinking at that time.
>
> Q: No. That is a contradiction of evidence. Do you agree? Don't evade the question.
>
> A: Yes.
>
> …
>
> Q: … Which is true? Your evidence on 17 January or your evidence today?
>
> A: Both are true.
>
> Q: They cannot both be true, Mr Ser. That answer does not make sense. You have agreed that they are contradictory. …

142 Therefore, it is clear that it was the defendant who chose not to make an award to one of the three contractors whom he had invited to tender to rectify the defects.[201] Instead, he opted to leave the defects unrectified and chose to go about collecting evidence against the plaintiff and the third party, essentially fiddling while Rome burned. He inexplicably maintains this unreasonable position until today, despite the plaintiff indicating that it was willing to rectify certain defects even after litigation had commenced.[202]

143 The defendant has also persistently refused to rent out the Project after it was completed and obtained the TOP and the CSC, if that was his intention.[203] The defendant explained that he had not rented the houses out because they were

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201 NEs, 19 February 2020 at p 81, line 20 to p 83, line 14; TPWS at para 311.

202 36AB22807; 36AB23118; 36AB23141; 37AB23851.

203 TPWS at para 338.

not in "rentable condition".[204] He further opined that the houses are, in his view, unsafe for rental as, among other things, the steps and risers are unsafe.[205] However, based on the evidence from his own expert witness, Mr Teo Yik Weng (DW3, "Mr Teo"), this cannot be further from the truth. The defendant engaged Mr Teo to give evidence regarding the market rental value of the three units of the Project. Mr Teo examined the three units on 27 February 2018 to assess their market rental value. Mr Teo acknowledged that there were defects in the units.[206] However, he said that these defects did not affect the rental prospects of the units.[207] In fact, he candidly acknowledged that the units were "fit for occupation" and that he would be able to rent them out.[208]

144 At the trial, the defendant consistently maintained that the units of the Project were unsafe for tenants because of the unevenness in the height of the steps and risers. When the defendant was questioned on why he thought the units were not in rentable condition, the defendant replied, "The step and riser is one of them. If people get injured, we will be in big trouble. …"[209] However, the defendant's assertion that the units are unsafe clearly holds no water, given that the units had been awarded the TOP as early as 16 September 2013. In fact, one of the non-compliances required by the BCA to be rectified before TOP could be issued was precisely the uneven steps and risers. The fact that the BCA subsequently issued the TOP, after the steps and risers were rectified,

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204 NEs, 20 February 2020 at p 165, lines 8–14.

205 NEs, 20 February 2020 at p 165, line 15 to p 166, line 17.

206 AEIC of Teo Yik Weng at para 12.

207 NEs, 25 February 2020 at p 95, lines 18–22.

208 NEs, 25 February 2020 at p 93, lines 5–13; p 99, lines 8–15.

209 NEs, 20 February 2020 at p 165, lines 17–18.

demonstrates that the BCA found them to be compliant and, therefore, safe. Furthermore, the defendant's claim was clearly rebutted by his own witness, Mr Teo, who testified that he was able to climb the stairs of the three units safely to inspect the unit, despite his age:[210]

> Q: How did you move from the basement to the first storey to the second storey?
>
> A: How did I go?
>
> Q: Yes.
>
> A: I have to walk up.
>
> Q: So you walked up?
>
> A: On the staircase.
>
> Q: Staircase?
>
> A: Yes.
>
> Q; Did you trip or fall down the staircase?
>
> A: Did I fall down?
>
> Q: Yes.
>
> A: No, I did not.
>
> …
>
> Q: Let me give you an example. I think Ms Cheong asked you some questions in relation to the staircase. Let us assume that if the staircase was unsafe – okay – according to the BCA, let's assume that, would you say the house was in a rentable state?
>
> A: I – frankly, I will not know whether – you know what I mean, the house was unsafe or not, you see? But – but, you know, when I walk up a staircase, you know, at my age I'm very careful, I'll hold on to something. If there's no railing, I put my hand against the wall. I walk very slowly.
>
> Because you asked me – you know what I mean, if the staircase is not safe, you know what I mean, would this still be rent out? I don't know – I don't know if the

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210 NEs, 25 February 2020 at p 87, lines 2–14; p 100, line 15 to p 101, line 12.

> tenant would know whether the staircase was safe or not safe, I do not know, you see, I have no idea, just I think it's quite safe, otherwise they won't ask me to go and inspect the property, ask me to walk up. Hey, if they ask me to walk up, if it's not safe, that's terrible, do you know what I mean?

145 This shows the unreasonableness of the defendant's assertion and his economy of the truth that he could not rent out the units due to safety concerns. Even if he held the view that the defects substantially reduced the rental value of the units, this did not mean that he could simply refuse to mitigate his losses by not renting out the units. The units could still fetch a high rent, as Mr Teo testified:[211]

> Court: And I'm asking you very generally what is your impression of these three houses? Are they nice houses or are they so rundown or are they so dilapidated that they are very unsightly?
>
> A: Okay. They're okay. They're not rundown. The only thing is that [the] house is very big. Of course, I – you know what I mean, if you ever see this house, you know what I mean, unless you own many cars and all, you know when you walk in, everything is very big, very huge, you see, and it's not rundown. It's quite okay. You can occupy the – you know, you can – it's fit for occupation and because there's no furnishings of course. It don't look that good but you know most houses when they rent out, they are fully furnished. When it is fully furnished, even if, you know – just now … you asked me, you don't worry about even those marbles is broken, or whether this is not done, you know, things like that, you know. There they still will take it.
>
> The problem is this house is vacant and the – vacant, you have to do up the thing. Even a very ugly house, once you furnish a thing, it's going to be very beautiful. So if this house is furnished, I think you can rent out quite a lot. Even like, you know, when look at the URA rentals, usually it's above 30,000, 30 to 50,000 per rent. So this is unfurnished rental, it's vacant, it is

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211 NEs, 25 February 2020 at p 102, line 7 to p 103, line 12.

> unfurnished. This is what the assessor does and when it is vacant, of course the values are much lower. Much lower.

146 It is not in dispute that the units have been left vacant by the defendant since July 2014 when the Project was handed over to him.[212] However, I emphasise that the crucial time of assessment of damages remains in the year 2014. This was the year in which the Project was handed over to the defendant. It would be grossly unfair if the plaintiff and the third party were found liable for any defects not arising from the plaintiff's construction error which may have occurred since that date, especially the purported defects reported in 2018, when the defendant deliberately allowed the units in the Project to deteriorate. The defendant attempted to introduce certain defects discovered at various points in time from 2014 to date. This attempt by the defendant is not equitable as the defects could have been the result of the defendant's deliberate refusal to maintain the Project, rather than due to the plaintiff's construction errors. Therefore, the defendant's reliance on expert reports and photographs of alleged defects *after* 2014 must be treated with extreme caution.

(3) The defendant's insistence on absolute rectification

147 The defendant also unreasonably insists on total and absolute rectification of all the defects alleged by him. For example, the defendant claims that the plaintiff should compensate him for the defects in the Volakas marble on the basis of a full replacement of the Volakas marble in the Project, which costs $528,578.20.[213] Similarly, the defendant claims that he should be awarded the costs of replacing all the foldable glass doors in the Project, which would

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212 NEs, 18 February 2020 at p 2, line 22 to p 3, line 2.

213 DWS at paras 368–369.

amount to $246,160.[214] The defendant also claims that the aluminium cappings at the rooftop of the Project should be completely replaced with powder coated aluminium cappings, the cost of which is $142,175.[215] If one were to adhere to the defendant's expert's opinion in respect of the ironwood timber decking, that would also entail essentially a complete replacement of the decking.[216]

148 In his insistence on total and absolute rectification, the defendant has failed to consider and implement more cost-effective and value-added options to remedy the alleged defects. First, despite having been provided various warranties in respect of the Project (*eg*, waterproofing systems/additives, aluminium and glazing works, external spray coatings/silicate painting, tiling, ironwood, rosewood), the defendant has not called upon any of them to remedy the alleged defects.[217] Calling upon these warranties would not cost the defendant very much. In fact, the very purpose of such warranties is to allow the defendant to obtain rectification of defects that may arise after the completion and handover of the Project. Secondly, the defendant persistently refused the plaintiff's offers to rectify the alleged defects at no cost to the defendant.[218] As such, the defendant is clearly being unreasonable in his insistence on total and absolute rectification despite having the options of calling on the relevant warranties to rectify the alleged defects and/or allowing the plaintiff to carry out rectification works.

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214 DWS at paras 442–443.

215 DWS at paras 315–316.

216 NEs, 11 March 2020 at p 13, lines 19–25.

217 TPWS at para 308; 34AB21946–34AB21987.

218 TPWS at para 309; 35AB22562; 36AB23118, 36AB23141, 36AB22807.

The relationship between the defendant and the third parties

Contractual relationship

149 Before examining the defendant's allegations more closely, I first consider the preliminary issue of whether the defendant has legal recourse against the second third party in respect of any claim arising out of the MOA. The second third party was incorporated in or around October 2011, as stated at [4] above. This was after 16 June 2009, the date on which the MOA between the defendant and his wife and the first third party was concluded. Since the first third party and the second third party are separate legal entities,[219] there was no privity of contract between the defendant and the second third party in relation to the MOA. As such, the second third party would not owe any obligations to the defendant under the MOA unless there had been a novation of such obligations.

150 In *Schindler Lifts (Singapore) Pte Ltd v Paya Ubi Industrial Park Pte Ltd and Another* [2004] SGHC 34 ("*Schindler Lifts*"), Judith Prakash J (as she then was) held at [14] that:

> … The novation of a contract is a matter that has to be established by clear evidence of consent and agreement to the changes in the obligations and rights of various parties *inter se*. Such consent is usually evidenced by a written novation agreement especially in a case like the present where the contract to be novated is complex. Whilst a novation agreement can be concluded orally, clear evidence is needed to establish this fact.

151 The brief facts in *Schindler Lifts* are as follows. A subcontractor sought to claim payment from the developer, notwithstanding that the subcontract had

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219 Defendant's Consolidated Reply (Amendment No 1) to the Consolidated Defence of the 1st and 2nd Third Parties (Amendment No 1) at para 3(a).

been concluded between the subcontractor and the main contractor. The subcontractor claimed that there had been an implied novation of the subcontract. Prakash J rejected this, noting at [15]–[16] that negotiations to reach an express novation agreement had been unsuccessful and both parties recognised that no express novation had occurred. Furthermore, Prakash J found that the subcontractor's taking of instructions from the developer, and the developer's giving of instructions to the subcontractor, did not amount to an implied novation.

152 In this case, a deed of novation was forwarded to the defendant on 20 December 2011. This deed of novation would have contractually transferred to the second third party all of the first third party's rights, duties and obligations *vis-à-vis* the defendant arising from the MOA . However, the defendant failed to sign and return the deed of novation. This was done at his own choice, as he explained in court:[220]

> Court: Mr Ser, can you recall your architect, CSYA –
>
> A: Yes.
>
> Court: – they subsequently converted into, I think, a private limited company?
>
> A: Yes, they wrote to us.
>
> Court: Why did you not sign the novation contract?
>
> A: Because the first agreement with CSYA Chan Sau Yan and the company, so subsequently they convert it to private limited, I prefer to stay with the old company name.

153 As in *Schindler Lifts*, it is notable that an express deed of novation was proposed in this case but ultimately unsuccessful. Given that the defendant

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220 NEs, 21 February 2020 at p 56, line 23 to p 57, line 7.

himself had rejected the deed of novation, it is now disingenuous for him to turn around and seek to bind the second third party to the first third party's obligations under the MOA. Furthermore, there is no evidence to show that there was an oral or implied novation. In this respect, the defendant contends that the representatives of the second third party continued to deal with the defendant in relation to the Project under the second third party's electronic signature and the defendant made payment for services rendered for the Project directly to the second third party.[221] This is clearly insufficient to amount to an implied novation. In *Schindler Lifts*, the subcontractor also continued to deal with the owner, and retention moneys were released to the subcontractor. Yet, Prakash J held that there was no implied novation. The position here is no different.

154 Therefore, by virtue of the defendant's failure to sign this deed of novation, as well as the lack of evidence otherwise showing a novation of the MOA, the rights, duties and obligations arising from the MOA remained with the first third party.[222] The defendant himself admits that the MOA was not novated from the first third party to the second third party because the defendant did not agree to the novation.[223]

155 In reply submissions, the defendant clarified that he was not asserting that the second third party had a contractual relationship with him. Rather, his claim against the second third party was based on the second third party's role

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221 Defendant's Consolidated Reply (Amendment No 1) to the Consolidated Defence of the 1st and 2nd Third Parties (Amendment No 1) at para 3(d).

222 TPWS at paras 22 and 48.

223 DWS at para 8.

as an agent of the first third party.[224] The third parties agree that the second third party acted as the first third party's agent.[225] However, it is trite that a principal is liable for its agent's acts when such acts are within its agent's actual or apparent authority. There is no claim to be brought against the agent unless it can be shown that the agent entered into the contractual relationship (which, as I have concluded above, the second third party did not), or the claim is based on a breach of warranty of authority (see *eg*, *Fong Maun Yee and another v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751), which is not the case here. Therefore, the first third party, as the principal, bears the liability (if any) for the second third party's dealings with the defendant.[226] Thus, the defendant has no legal recourse against the second third party in respect of any claims arising out of the MOA. Hence, the defendant's claim against the second third party cannot succeed and must be dismissed.

Principal and agent

156 As between the defendant and the first third party, there is also a principal-agent relationship, with the defendant being the principal and the third party being the agent. This is evident from cll 1–8 of the SIA Conditions, as well as cl 1.1(2) of the MOA. None of the parties seriously disputes this.[227]

157 One implication of this is that as between the defendant and the plaintiff, the defendant is bound by the third party's actions for which the third party had actual or apparent authority. The concept of apparent authority is described in

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224 Defendant's Reply Closing Submissions dated 24 August 2020 ("DRS") at para 5.

225 TPWS at para 49.

226 TPWS at para 49.

227 TPWS at para 9; DWS at para 476.

Halsbury's Laws of Singapore vol 15 (Lexis Nexis, Singapore) at para 180.182, as follows:

> Agency by estoppel arises where one person has so acted as to lead another to believe that he has authorised a third person to act on his behalf, and that other in such belief enters into transactions with the third person within the scope of such ostensible authority. In this case, the first-mentioned person is estopped from denying the fact of the third person's agency under the general law of estoppel, and it is immaterial whether the ostensible agent had no authority whatever in fact, or merely acted in excess of his actual authority. …

158 As the CA in *Banque Nationale de Paris v Tan Nancy and another* [2001] 3 SLR(R) 726 explained at [67]–[68]:[228]

> 67 … In other words, *vis-à-vis* BNP, Gary had the apparent authority. *Bowstead & Reynolds on Agency* (Sweet & Maxwell, 16th Ed, 1996) in Art 74 states as follows at p 366:
>
> > Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though [he] had no such actual authority.
>
> 68 The relevant case in point is *Freeman & Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 … In the course of his judgment, Diplock LJ said …:
>
> > An 'apparent' or 'ostensible' authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation

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228 Plaintiff's Reply Submissions ("PRS") at para 6.

> but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

The CA then concluded that there were two requirements for the doctrine of apparent authority to apply: (a) there must have been a representation made by the principal that the agent had the authority to enter into the relevant transactions on its behalf; and (b) the contractor must have relied on this representation.

159 The doctrine of apparent authority is significant because as regards some of the defendant's allegations against the plaintiff, the plaintiff had acted on the third party's instructions. I find that by appointing the third party as his architect, the defendant represented to the plaintiff that the third party had the authority to give such instructions. This is also reflected in several parts of the Contract. In particular, cl 1(1) of the SIA Conditions states as follows:

> **Written and Verbal Directions and Instructions.** The Contractor shall at all times carry out, bring to completion, and maintain the Works in accordance with all the requirements of the Contract and must … *comply with all written directions and instructions given in relation thereto by the Architect.* … [emphasis added]

By complying with the architect's instructions, the plaintiff relied on the defendant's representation. As such, as between the defendant and the plaintiff, the defendant is bound by the instructions given by the third party to the plaintiff. However, the defendant may still seek recourse against the third party if the third party was negligent or in breach of contract by issuing such instructions, or if the defendant's claim of unlawful means conspiracy is made out. I shall elaborate on this below in relation to the specific issues and claims.

Tender process

160 I shall now examine closely the other allegations made by the defendant to support his conspiracy claim, beginning from the tender process. The defendant alleges that the conspiracy between the plaintiff and the third party started from the tender process. Here, the defendant alleges that the plaintiff, the third party and Ms Chua from CCA conspired to award the tender to the plaintiff. The defendant drew these conclusions on the basis that the tender was conducted improperly.

161 Having examined the contemporaneous correspondence and documents, I reject the defendant's allegation of a conspiracy at the tender stage. There was nothing improper about the tender process. In fact, the entire tender process supports the plaintiff's and the third party's case that there was no conspiracy to injure the defendant.

162 The defendant alleges that the third party had "pushed" for the plaintiff to be appointed, instead of Soil-Build or Daiya. Specifically, the defendant relies on the following statements made by the third party in the e-mails dated 4 May 2011 and 9 May 2011:[229]

(a) Firstly, the third party had stated that it had "no doubt that [the plaintiff is able] to deliver the product".

(b) Secondly, the third party also stated that the plaintiff "should be able to [perform] based on our experience with them at another job site".

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229 6AB03772 and 6AB04084.

163 By asserting that the third party was "pushing" for the plaintiff to be appointed, the defendant is implying that the tender process was not fairly conducted. However, I find this contention completely unmeritorious.

164 The third party was simply performing its duties to the defendant by recommending which contractor to appoint for the Project. There is not an iota of evidence to suggest that the third party did not perform its duty honestly and independently in the exercise of its professional judgment. The third party informed the defendant that the plaintiff had submitted the lowest tender. The third party also took into account CCA's final tender report for M&E installations. CCA made an independent assessment that the plaintiff had the most competitive bid for M&E installations and that its tender submission was "generally complete and in compliance with the tender specifications".[230] In contrast, Soil-Build's tender submission was incomplete in so far as M&E installations were concerned, while Daiya had deviated on the air-con equipment and monthly air-con maintenance.

165 Additionally, as Mr Yong testified, there was no preferential treatment given to the plaintiff. In fact, on the contrary, preferential treatment appears to have been granted to Soil-Build, to accommodate the defendant's various requests:[231]

> Q: Mr Yong, do you agree that GTMS was made to go through the same tender exercise for the Leedon Park project as the rest of the other tenderers in the project?
>
> A: Yes
>
> Q: Do you agree that the only tenderer which was not required to go through the pre-qualification exercise was

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230 6AB03879.

231 NEs, 6 April 2020 at p 63, line 15 to p 64, line 20; TPWS at para 65.

> the tenderer which Mr and Mrs Ser wanted to include in the tender process, even though the tender had already closed, which is Soilbuild?
>
> A: They actually – they came in after the tender closed. In fact it was about a few months after tender closed.
>
> Court: 'They' refers to whom?
>
> A: Soilbuild. And under the instruction of Mr Ser, we issued a same set of tender documents to Soilbuild and we also put Soilbuild's credential to F+G to do the same qualification exercise in terms of data collections for the company.
>
> Q: Mr Yong, do you agree that the late inclusion of Soilbuild in a tender process may in fact be unfair to the rest of the tenderers because Soilbuild did not participate in the pre-qualification exercise like the rest of the tenderers?
>
> A: Yes, we did raise to Mr Ser during that point of time.

166 Furthermore, the third party had a prior positive working experience with the plaintiff. The plaintiff was also the contractor with the lowest and most compliant tender, as reflected in the Tender Summary Report No 3 dated 29 April 2011 prepared by F+G.[232]

167 The third party expressly stated in its e-mail dated 9 May 2011 that the "final decision" on which contractor to appoint was for the defendant to decide.[233] The third party did not state that the plaintiff must be appointed. It was always open for the defendant, the owner of the Project, to reject the third party's recommendation and proceed to appoint Soil-Build. The evidence further shows that the defendant applied his mind to the selection of the plaintiff and participated in the tender interview. He also requested the financial information of the plaintiff as part of this process. At any point in time, the

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232 TPWS at para 65; 6AB03779, 6AB03879.

233 TPWS at para 66; 6AB03772, 6AB04084.

defendant was free to ask for further documents had he not been satisfied with the selection of the plaintiff.[234] Ultimately, the selection of the plaintiff had really been done at the defendant's own behest. The defendant himself acknowledged this:[235]

> Court: You can direct the architect to say that, 'I don't want GTMS. I want Soilbuild.' Tell me, can you or can you not do that?
>
> A: Yes. I didn't do that.

168 Mr Yong similarly testified that it was the defendant who had selected the plaintiff:[236]

> Q: Mr Yong, you agree that the project was awarded to GTMS on Mr Ser's instructions; right?
>
> A: Yes.
>
> Q: Mr Ser had eventually preferred GTMS over Soilbuild; is that right?
>
> A: I wouldn't know whether he preferred, but he selected GTMS over Soilbuild.
>
> Q: Do you agree that if Mr Ser had decided to award the tender to Soilbuild, CSYA would have awarded the tender to Soilbuild?
>
> A: Yes.

169 The defendant also asserts that the tender process was improper because the third party had asked Soil-Build to "stay away".[237] I observe that this was not pleaded and neither was it in the defendant's AEIC. The defendant also did not subpoena someone from Soil-Build as a witness to establish his allegation.

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234 NEs, 6 April 2020 at p 66, line 23 to p 67, line 16.

235 TPWS at para 66; NEs, 21 February 2020 at p 48, lines 4–7.

236 NEs, 6 April 2020 at p 68, lines 13–23.

237 NEs, 25 January 2019 at p 100, line 5.

Be that as it may, this is contradicted by the contemporaneous documents which show that Soil-Build was invited to tender, as per the defendant's instructions, and Soil-Build did submit a tender based on the same tender documentation as all other tenderers.[238] Soil-Build also attended a tender interview held on 19 April 2011.[239]

170 The defendant also alleges that the third party had made "life difficult" for Soil-Build. When pressed by the third party's counsel during cross-examination, the defendant elaborated that this referred to the third party telling Soil-Build that items not included in the quote would be treated as part of the lump sum.[240] This was speculative and hearsay as Soil-Build did not testify in court. In any event, there is no evidence to show that this was not told to *all* the tenderers. The defendant also admitted that he had no evidence to show that Soil-Build was deliberately disadvantaged in the tender process.[241]

171 In contradistinction, I accept Mr Yong's evidence that no such actions were taken against Soil-Build:[242]

> Q: … Do you have a response to this allegation, Mr Yong?
>
> Court: What allegation?
>
> Q: That CSYA had conducted the tender process with fraud, based on the reason that they were making life difficult for Soilbuild and making them run to and fro.
>
> A: Disagree.

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238 4AB01780; NEs, 30 January 2019 at p 6, line 24 to p 7, line 8; 6 April at p 64, lines 5–9.

239 6AB03778.

240 NEs, 30 January 2019 at p 59, lines 16–21; p 67, lines 1–5.

241 NEs, 30 January 2019 at p 79, lines 6–9.

242 NEs, 6 April 2020 at p 71, line 12 to p 72, line 2.

> Q: Your Honour, I believe he has given us his response to that allegation.
>
> Court: Sorry, Mr Yong?
>
> A: We disagree with the allegation.
>
> Q: How about the fourth reason, Mr Yong, that for Leedon Park, CSYA unjustly knocked out Daiya and Soilbuild from the tender process?
>
> A: We totally disagree.

172 In fact, the defendant's entire song and dance regarding Soil-Build appears to be something he came up with belatedly in order to support his claim of conspiracy. I refer to the evidence of Mr See Choo Lip (DW9, "Mr See"). Mr See was the quantity surveyor appointed by the defendant to quantify the value of the rectification works for the defects arising from the Project.

173 Mr See also prepared tender documents for the rectification works. Three contractors showed interest and submitted their tenders for the rectification works, namely, Maple Builders Pte Ltd, Forum Construction Pte Ltd and Bethnal Construction Pte Ltd. The defendant suggested to Mr See to invite Bethnal Construction Pte Ltd to tender for the rectification works.[243] The defendant had not suggested Soil-Build. This was despite him purportedly wanting Soil-Build to undertake the Project. If it were true that he had confidence in having Soil-Build to do the Project, I would expect the defendant to have invited Soil-Build to tender for the rectification works. But this was not done.

174 The defendant also alleges that CCA conspired with the third party to grant the plaintiff the tender award. However, this was again entirely speculative

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243 NEs, 19 February 2020 at p 80, line 24 to p 81, line 4.

and baseless. This is encapsulated by the following exchange between the third party's counsel and the defendant during cross-examination:[244]

> Q: What is your basis for saying that [the third party] and CCA conspired to recommend [the plaintiff]? …
>
> A: They conspire to give [the plaintiff] the project.
>
> Q: Well, what is your basis of saying that they conspired to give [the plaintiff] the project? Do you have evidence?
>
> A: No.

175 At the material time, the defendant was also concurrently the owner of a construction project at Coronation Road West (the "Coronation Project"). The Coronation Project was eventually awarded to Daiya. Although the Coronation Project is not directly relevant to this Suit, the defendant similarly alleges that there was a conspiracy between the third party and Daiya to wrongfully favour Daiya. The purported "basis" for this allegation was that Daiya had built Mr Yong's house, but this was again entirely speculative:[245]

> Q: Are you saying that there was any fraud involved in the conduct of the tender for Coronation Road West?
>
> A: I don't know but I know … that this Daiya built CSYA Philip Yong house.
>
> …
>
> Q: Are you saying that there was fraud in the conduct of the Coronation Road West tender? 'Yes' or 'No'?
>
> A: Yes.

176 Contrary to the defendant's speculations concerning the tender process, the contemporaneous correspondence and documents show that the tender process was conducted transparently, fairly and thoroughly. There is no iota of

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244 NEs, 25 January 2019 at p 146, lines 4–12.

245 NEs, 30 January 2019 at p 32, line 24 to p 33, line 23.

evidence to indicate partiality or bigotry in the tender process. It is not necessary for me to set out the complete tender process. However, I shall just refer to three examples.

177 Firstly, all interested contractors were made to go through the same pre-qualification exercise, of which the defendant was kept informed via e-mail.[246] F+G, who coordinated the tender process and conducted the pre-qualification exercise, disclosed the shortcomings of the plaintiff as early as in the pre-qualification report. It was expressly stated that the plaintiff had no experience in building bungalows that were similar to the Project. It was also disclosed in F+G's pre-qualification report that the plaintiff had been involved in litigation or arbitration.[247]

178 Secondly, CCA also raised issues found in the plaintiff's tender, such as the price for installation of the filtration system.[248]

179 Thirdly, the third party also asked the defendant for permission to extend the tender date, in order to obtain more competitive quotations. I note that the plaintiff's initial quotation of $15.2m was eventually reduced by approximately $2m in the final contract sum.[249] For these reasons, I find that there is no evidence to suggest that there was a conspiracy to award the Project to the plaintiff.

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246 TPWS at para 64; 2AB00699–2AB00707, 2AB00878–2AB00889.

247 2AB00786.

248 3AB01164.

249 3AB01148.

The EOTs

180 The defendant alleges that there was a conspiracy amongst the plaintiff, the third party, Ms Chua from CCA and Mr Ng from F+G to grant EOT 2 and EOT 3 to the plaintiff and that they had the intention to cause injury to the defendant and to defraud him. The defendant bases this conclusion on the claim that EOT 2 and EOT 3 were granted improperly as, among other things, the plaintiff had failed to exercise due diligence and was already in delay, and so was not entitled to any EOT. Further, the defendant also alleges that the circumstances surrounding the EOTs were highly suspicious.

181 Under cl 23 of the SIA Conditions, which forms part of the Contract, the power to grant EOTs to the plaintiff is vested in the third party.[250] The facts surrounding the grants of the EOTs have also been summarised at [12]–[21] above.

182 During cross-examination the defendant alleged that EOT 1 supported his conspiracy claim although he did not mention this in his pleadings and AEIC.[251] Accordingly, it is necessary for me to address the plaintiff's request and the third party's evaluation process in EOT 1.

EOT 1

183 EOT 1 concerned the delay in the delivery of marble by the defendant's supplier, in relation to which the plaintiff made a request on 4 October 2012 for an extension of 60 days. This was eventually rejected by the third party on the

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250 5AB02950.

251 NEs, 30 January 2019 at p 125, lines 2–16.

basis that the delay in marble delivery was a "non-critical" activity.[252]

184 The defendant claims that the third party had already agreed with the plaintiff to grant EOT 1 and that this request would have been approved but for the intervention of Mr Cheung. According to the defendant, it was Mr Cheung who questioned the basis for the request for EOT 1 during a meeting, given that the delay in marble delivery was a "non-critical" activity which did not contractually entitle the plaintiff to an EOT.[253]

185 I note that this version of Mr Cheung's role in the Project is inconsistent with the defendant's earlier characterisation of Mr Cheung at the trial as an individual who only had administrative duties, including the forwarding and receiving of e-mails (see [113] above).[254] For the purpose of establishing that there was a conspiracy to injure him, the defendant conveniently enhanced the role of Mr Cheung for this Project, in relation to EOT 1.

186 Be that as it may, the events surrounding the grant of EOT 1 do not support the defendant's allegation that the plaintiff and the third party conspired to grant the plaintiff EOT 1. On the contrary, the evaluation process for EOT 1 is evidence of the third party's professional and independent assessment of EOT requests. In the minutes of Site Meeting No 34 dated 8 October 2012, it is recorded that the plaintiff raised the issue of the delay in the marble delivery and said that they would submit an EOT request. The plaintiff then sent the request for EOT 1 on the same day (*ie*, 8 October 2012). Between 8 October

252 18AB11626.

253 NEs, 30 January 2019 at p 102, lines 2–10.

254 NEs, 24 January 2019 at p 91, line 22; 19 February 2020 at p 95, lines 3–5; p 95, lines 13–17.

2012 and 16 October 2012 (when the minutes for Site Meeting No 34 were circulated), the third party requested the plaintiff to submit the critical path schedule for the third party's assessment.[255] The third party's request was repeated in Site Meeting No 35 dated 22 October 2012, Site Meeting No 36 dated 5 November 2012 and Site Meeting No 37 dated 19 November 2012.[256]

187 Two things become clear from the minutes of these meetings, as well as the minutes that Mr Cheung had himself recorded separately. Firstly, it was the third party who first raised the topic of the critical path. Secondly, there is no indication that Mr Cheung objected to EOT 1 on the basis that it was a non-critical activity. The contemporaneous evidence simply does not support the defendant's assertion that it was Mr Cheung who had intervened to stop the third party from granting EOT 1 to the plaintiff. Even if Mr Cheung had raised the objection, it is entirely speculative to assert that EOT 1 would have been granted but for his objection. The defendant's allegations are further weakened by the absence of Mr Cheung's testimony such that the purported objection from Mr Cheung is hearsay.

EOT 2 and EOT 3

188 EOT 2 and EOT 3 were granted on the premise that SPPG had delayed the power connection, which therefore caused delay in the T&C of M&E works. It is helpful to first set out the steps required to achieve electricity turn-on which are relevant for this issue. This procedure was explained in the expert report of Mr Lee Keh Sai (DW2, "Mr Lee"), who was instructed by the defendant:[257]

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255 18AB11880.

256 19AB11963, 19AB12026, 19AB12242.

257 AEIC of Lee Keh Sai at pp 8–11.

20. The necessary electrical installation works refer to works required to be completed by both the main building contractor and the electrical contractor before SPPG can begin the cable connection works. This includes the installation of the electrical meter compartments including meter board and doors as well as cable entry pipe. …

…

22. As part of the electrical installation works, SPPG technicians will lay the physical cables from SPPG to each unit for it to receive electrical supply. … I have been shown a letter from [SP Services] dated 22 August 2011 … which states as follows:

> '… *Depending on the length of the cable to be installed, supply will normally be available 4 to 6 weeks from the date customer switchboard/meterboard and cable entry pipes of your premises is ready to receive the service cable.*'

…

25. Around the time when the service cables are installed and the houses are ready for installation of electrical meters, an application is made to [SP Services] for opening of the utility account. …

26. Upon receiving the application, normally, SPPG's Electrical Meters Section will arrange to install the kilowatt hour ('KWH') energy meter at the housing unit one day before the turning on of the electrical supply. …

…

28. Upon completion of the electrical installation and receipt of notification from SPPG on readiness of the service connection, the [Licensed Electrical Worker] books an appointment with [SP Services] for inspection and to issue the 'SP Services Electrical Installation Report'.

29. The electrical installation must pass the testing and inspection conducted by SPPG/[SP Services] and the [Licensed Electrical Worker] to permit the electrical supply to the housing unit to be turned on.

…

33. [After testing and inspection,] the [Licensed Electrical Worker] applies to [SP Services] installation branch for meter fixing and turn-on …

…

> 35. A 'pass' inspection report will be issued by [SP Services] on-site upon successful turn-on of the installation.
>
> 36. At the time the supply line is energised the person responsible for turning on the switchgear which controls the supply of electricity to the electrical installation shall issue a Statement of Turn-on of Electricity Supply. …
>
> [emphasis added in italics and bold italics]

189 In deciding whether the plaintiff was entitled to an EOT, the third party had to satisfy itself that the relevant pre-conditions in cl 23 of the SIA Conditions were complied with. The substantive pre-conditions are:[258]

(a) the event which is alleged to have caused the delay in completion must be one of the delay events stated in cl 23(1);

(b) the event caused a delay in completion; and

(c) the plaintiff must have acted with due diligence and taken all reasonable steps to avoid or reduce the delay in completion.

190 The defendant's case is that SPPG's delay did not constitute one of the delay events stated in cl 23(1). Further, the delays for which EOT 2 and EOT 3 were granted were caused by the plaintiff's own failure to exercise due diligence and/or take all reasonable steps to avoid or reduce the same. This is derived from cl 23(1) of the SIA Conditions, which states as follows:[259]

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258 DWS at para 166; PWS at para 41; TPWS at paras 71–72.

259 4AB02130.

> The Contract Period and the Date of Completion may be extended and re-calculated, subject to compliance by the Contractor with the requirements of the next following sub-clause, by such further periods and until such further dates as may reasonably reflect any *delay in completion* which, *notwithstanding due diligence and the taking of all reasonable steps by the Contractor to avoid or reduce the same*, has been caused by:
>
> …
>
> [emphasis added]

191 Accordingly, the defendant alleges that the plaintiff was not entitled to any EOT. The defendant contends that the fact that EOT 2 and EOT 3 were issued by the third party without basis suggests that the plaintiff and the third party had an agreement or there was collusion to grant EOTs with the intention to injure the defendant.

Whether SPPG's delay constitutes a delay event

192 The first issue in relation to both EOT 2 and EOT 3 is whether SPPG's requirement of an OG Box (the "OG Box requirement") and its delay in power connection works constituted one of the delay events under cll 23(1)(a) to 23(1)(q). The plaintiff and the third party submit that cl 23(1)(a) applies in this case. The third party further submits that cl 23(1)(o) also applies.[260] Clause 23(1)(a) stipulates that delay caused by *force majeure* is a delay event, whereas cl 23(1)(o) read with cl 7(1) pertains to where the alleged delay event resulted in a "variation of the works". In response, the defendant submits that both cl 23(1)(a) and 23(1)(o) are inapplicable. I shall deal with each of these clauses in turn.

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260 PWS at para 46; TPWS at para 98.

(1) Clause 23(1)(a)

193 The plaintiff and the third party submit that SPPG's delay in carrying out power connection works and the OG Box requirement amounted to a *force majeure* event because it was unforeseeable and/or out of the control of all parties.[261] In response, the defendant submits that cl 23(1)(a) is "meaningless, unenforceable and cannot be relied on" because the Contract does not contain a definition of what constitutes *force majeure*. The defendant further submits that even if cl 23(1)(a) were operative, SPPG's delay in carrying out power connection works did not amount to a *force majeure* event as they were foreseeable.[262] Having considered the parties' submissions, I find that cl 23(1)(a) is operative and applies in this case.

194 I turn first to the issue of whether cl 23(1)(a) is operative and enforceable. In my view, the defendant's argument that cl 23(1)(a) is rendered unenforceable for lack of definition does not hold water. The meaning of the term *force majeure* is generally understood. In Chow Kok Fong, *Construction Contracts Dictionary* (Sweet & Maxwell, 2nd Ed, 2014) ("*Construction Contracts Dictionary*") at p 198, the term *force majeure* is explained in the following terms:

> … An event beyond the control of either of the parties to the contract, the effect of which is to release the parties from performing their remaining obligations under the contract. …

195 Similarly, *Halsbury's Laws of Singapore* vol 2 (Lexis Nexis, Singapore) ("*Halsbury's Laws of Singapore*") at para 30.112 states that:

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261 PWS at paras 46–47; TPWS at para 98(b).

262 DWS at paras 173–174.

> Force majeure has been described as 'a reference to all circumstances independent of the will of man'. Whether a particular event constitutes force majeure under any given contract turns on the construction of the force majeure clause in the context of the other terms of the contract as well as the relationship of the parties. …
>
> … A force majeure clause therefore affords 'a more nuanced response' to events which were completely unexpected and beyond the control of either party. Thus a standard form of construction contract may provide for the completion date to be extended on account of force majeure and this preserves the operation of the other terms of the contract.

In relation to this "standard form of construction contract", the learned author of *Halsbury's Laws of Singapore* referred to cl 14.2 of the Public Sector Standard Conditions of Contract (7th Ed, 2014). Similar to cl 23(1)(a) of the SIA Conditions, cl 14.2(a) simply refers to "[f]orce majeure" without any accompanying definition.

196 The concept of *force majeure* was explained in some detail by the CA in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 ("*RDC Concrete*") at [54] and [57]:[263]

> 54 The most important principle with respect to *force majeure* clauses entails, simultaneously, a rather specific factual inquiry: the *precise construction* of the clause is paramount as it would define the *precise scope and ambit* of the clause itself. The court is, in accordance with the principle of freedom of contract, to give full effect to the intention of the parties in so far as such a clause is concerned.
>
> …
>
> 57 … In this regard, it is important to note that, by their *very nature and function*, *force majeure* clauses would – in the ordinary course of events – be triggered only where there was a ***radical external event that supervened and that was not due to the fault of either of the contracting parties***. … As S Rajendran J observed in the Singapore High Court decision

263 TPWS at para 79.

> of *Magenta Resources (S) Pte Ltd v China Resources (S) Pte Ltd* [1996] 2 SLR(R) 316 … :
>
> > What is referred to as *force majeure* in our law … is really no more than a convenient way of referring to contractual terms that the parties have agreed upon to deal with situations that might arise, ***over which the parties have little or no control, that might impede or obstruct the performance of the contract***. There can therefore be no general rule as to what constitutes a situation of *force majeure*. Whether such a (*force majeure*) situation arises, and, where it does arise, the rights and obligations that follow, would all depend on what the parties, in their contract, have provided for. …
>
> [CA's emphasis in *RDC Concrete* in italics; emphasis added in bold italics]

197 Thus, a *force majeure* event generally refers to an event that impedes or obstructs the performance of the contract, which was out of the parties' control and occurred without the fault of either party. Whether a *force majeure* event arises is ultimately a matter of construction based on the facts of each case, with a view to giving effect to the parties' intentions. Furthermore, the element of unforeseeability is not strictly necessary. As the CA in *RDC Concrete* observed at [56], a *force majeure* clause is "an agreement as to how outstanding obligations should be resolved upon the onset of a *foreseeable* event" [emphasis in original].[264] In this regard, the CA distinguished the concept of *force majeure* from the related doctrine of frustration, in which the element of unforeseeability is critical. However, a *force majeure* event is typically "radical" (see *RDC Concrete* at [57]). Borrowing from the doctrine of frustration, this refers to where "the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract" (see *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at

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264 PRS at para 26.

729, cited by the CA in *Glahe International Expo AG v ACS Computer Pte Ltd and another appeal* [1999] 1 SLR(R) 945 at [27]).

198 The court should be slow to find the *force majeure* clause unenforceable on the basis that it is not defined in the Contract. In the absence of any contractual definition, I find it appropriate to construe the clause based on its general and established meaning as set out at [197] above – an event that was radical and out of the parties' control, which occurred without either party's fault.

199 The scope and coverage of the term *force majeure* in cl 23(1)(a) has to be considered in the context of the entirety of cl 23(1) which deals with EOT in the SIA Conditions. Clause 23(1) lists out various instances in which EOT may be granted. It is also important to note that cl 23(1) is derived from the standard SIA Conditions which are often incorporated into construction contracts. In other words, cl 23(1) is not a bespoke contractual term specially contemplated by the plaintiff and the defendant. Clause 23(1) lists a number of delay events from cll 23(1)(a)–(q) in which EOT may be granted. One such delay event is *force majeure* which is in cl 23(1)(a). There are a few instances in cl 23(1) that can easily come within *force majeure* but these are stipulated as delay events under other specific sub-clauses. I shall list out the following instances. Clause 23(1)(b) allows an EOT if there are "exceptionally adverse weather conditions". Clause 23(1)(c) allows an EOT if there is a "fire, storm, lightning, high winds, earthquake or aircraft or aerial objects …". Clause 23(1)(d) allows an EOT if there is a "war, hostilities, insurgency, terrorism, civil commotion, or riots". Hence, cl 23(1)(b)–(d) are instances of *force majeure*, but under the SIA Conditions they are deliberately separated from cl 23(1)(a), the *force majeure* clause. This suggests that the scope of *force majeure* in cl 23(1)(a) has a wider and more general application extending beyond these common instances of

force majeure. Furthermore, if cll 23(1)(a)–(q) are considered closely the common thread underlying all the delay events set out therein is that when the delaying events are not attributable to the contractor, it can apply for an EOT. This is a fair and equitable approach to the issue of EOT.

200 Having found cl 23(1)(a) operative and enforceable, I turn now to ascertain whether the OG Box requirement cum installation and the delay in SPPG's power connection works is a *force majeure* event falling within the ambit of cl 23(1)(a). It is useful to set out the relevant facts, as follows:

(a) CCA made the request to SPPG for SPPG to lay the cable to the electrical meter compartments between 8 October 2012 (when the plaintiff informed that the electrical meter compartments were ready) and 22 October 2012 (when CCA informed that it had made the relevant arrangements with SPPG).[265]

(b) By way of a letter dated 21 November 2012, SPPG informed the defendant that it was necessary to install an OG Box for the Project.[266] This letter was forwarded by CCA to the plaintiff and the third party on 26 November 2012.[267] This was the first time the OG Box requirement was raised by SPPG. The OG Box requirement was neither mentioned nor included in SPPG's initial quotation dated 22 November 2010 which was two years ago.[268]

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265 NEs, 16 November 2018 at p 128, lines 8–19; NEs, 18 February 2020 at p 19, line 21 to p 20, line 12; 19AB11966; NEs, 1 July 2020 at p 6, lines 13-19; p 18, lines 5-12.

266 19AB12186.

267 19AB12301; NEs, 26 June 2020 at p 99, line 18 to p 100, line 7.

268 AEIC of Chua Hwee Hwee ("CHH") at para 44; NEs, 2 July 2020 at p 106, lines 13–17.

(c) Consequently, between 3 December 2012 and 17 December 2012, CCA had to work with Web to ensure that the National Parks Board ("NParks") had no issues with the proposed location of the OG Box.[269] This entailed making amendments to plans and drawings for the Project. CCA also had to rely on the third party to expedite the defendant's approval for the location of the OG Box.[270]

(d) Despite the fact that the issue of the proposed location of the OG Box had been resolved at the very latest by 17 December 2012,[271] SPPG only started its works for incoming power supply on or around 25 February 2013.[272] There were many e-mails and telephone calls from CCA and the plaintiff to SPPG pleading with it to start its works expediently. However, SPPG gave various reasons for its delays, such as adverse weather conditions and low morale on the part of the subcontractors due to fatalities at other sites.[273] On one occasion, SPPG's workers simply failed to turn up despite prior arrangements made with CCA.[274]

(e) SPPG eventually completed its works on 7 March 2013.[275]

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269 19AB12300.

270 CHH at para 44.

271 AEIC of Tan Bee Keow.

272 Agreed Statement of Facts at p 4 para 25.

273 PY at para 71.

274 21AB13468.

275 NEs, 28 February 2020 at p 122, lines 9–15.

201 There were, thus, two aspects of the delay: (a) the delay occasioned by the need to determine a location for the OG Box; and (b) the delay occasioned by the time taken by SPPG to install the OG Box and complete its power connection works. Both the installation of the OG Box and the laying of the cables constituted part of SPPG's power connection works. Mr Lee, the defendant's expert, explained as follows:[276]

> Q: Mr Lee, at paragraph 22, you say:
>
> > 'As part of the electrical installation works, SPPG technicians will lay the physical cables from SPPG to each unit for it to receive electricity supply.'
>
> Correct?
>
> A: Correct.
>
> Q: Would the construction of the OG box be done at the same time as the works you have described at paragraph 22?
>
> A: It could. Could be done.

202 In my view, the delay occasioned by SPPG was out of the parties' control and occurred without either party's fault. The last-minute requirement to install an OG Box was not mentioned in SPPG's initial quotation two years ago. Furthermore, the construction of the OG Box did not fall within the scope of responsibility of either the plaintiff or the defendant. This is evident from Ms Tan's testimony, as follows:[277]

> Court: Now, whose responsibility is it to construct the OG box? Is it SPPG, or is it you [*ie*, Web], or GTMS?
>
> A: I think it's the authority.
>
> Court: So you all have got nothing –

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276 NEs, 25 February 2020 at p 47, lines 15–25.

277 NEs, 2 July 2020 at p 123, lines 5–11.

A: No.

Court: – to do with the erection of the OG box; right?

A: Yes, we don't have anything to do with it.

203 Similarly, Mr Lee, the defendant's expert, explained as follows:[278]

Q: Okay. But do you agree that the construction of the OG Box will be done by SPPG, right?

A: Yes, because it is the property of SPPG.

Q: So it is not within the control of the architects; correct?

A: Correct.

Q: It is not within the control of the main contractor; correct?

A: Correct.

Q: It is not within the control of the owner; correct?

A: Correct.

Q: And it is solely dependent on when SPPG wants to carry out the construction of the OG box; correct?

A: Yes.

204 Therefore, not only was the OG Box requirement entirely unexpected, the delay thereby caused by the OG Box requirement occurred without the fault of either party and was out of their control.[279]

205 Similarly, the time taken by SPPG in carrying out power connection works was also out of the control of both parties and occurred without either party's fault. This can be seen from the reasons given by SPPG for its delay, for instance, adverse weather conditions and low morale. These reasons were not

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278 NEs, 25 February 2020 at p 48, lines 1–16.

279 TPWS at para 98(a).

attributable to either the plaintiff or the defendant.[280] Mr Lee acknowledged that the time taken by SPPG to complete its power connection works was outside of the plaintiff's and the defendant's control, as follows:[281]

> Q: Let me clarify. At paragraph 22, you say:
>
> > 'As part of the electrical installation works, SPPG technicians will lay the physical cables from SPPG to each unit for it to receive electricity supply.'
>
> Correct?
>
> A: Correct, correct.
>
> Q: Those are the works that I am now talking about.
>
> A: Oh, those have to be done by SPPG.
>
> Q: So only SPPG can carry out these works; correct?
>
> A: Yes. Yes.
>
> Q: And how long they take to carry out these works is solely [dependent] on SPPG; correct?
>
> A: Correct.
>
> Q: It is outside the control of the owner; correct?
>
> A: Correct.
>
> Q: It is outside the control of the main contractor; correct?
>
> A: Correct.
>
> Q: It is outside the control of the architects; correct?
>
> A: Correct.
>
> Q: So if SPPG takes longer than this four to six weeks that they have stated in their letter, there is only SPPG to blame; correct?
>
> A: Correct.

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280 TPWS at para 98(b).

281 NEs, 25 February 2020 at p 50, line 9 to p 51, line 9.

206 In fact, even though the power connection works were outside the scope of responsibility of the plaintiff and the defendant, the plaintiff and CCA nevertheless tried to persuade SPPG to commence works expediently. I shall elaborate more on the issue of fault below, as it is also relevant to whether the plaintiff's failure to exercise due diligence contributed to the delay event and whether the plaintiff took reasonable steps to mitigate the delay arising from the delay event.

207 The defendant submits that the delay on SPPG's part was foreseeable and, therefore, cannot constitute a *force majeure* event.[282] This is based on the fact that, according to the Master Programme, the plaintiff had planned for SPPG to begin its incoming power supply connection on 9 July 2012, about six months before TOP. Ms Chua explained that this "allowance of six months" had been specifically planned to "cater for delays" by the plaintiff and/or SPPG. Indeed, Ms Chua acknowledged that "delays by SPPG in general was fore[seen] by CCA".[283]

208 In my view, this does not take SPPG's delay out of the scope of cl 23(1)(a). SPPG's role in bringing incoming power supply to the Project was a critical and planned event in the Master Programme. This activity, therefore, was foreseeable. However, it was not foreseen that the OG Box requirement would be part of SPPG's conditions for bringing incoming power supply. Similarly, while the bringing of incoming power supply was an expected activity, the unforeseeable aspect of this activity in this case was SPPG's

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282 DWS at paras 173–174.

283 NEs, 26 June 2020 at p 48, lines 11–15; p 51, line 4 to p 53, line 3.

prolonged and protracted delay despite numerous reminders by the plaintiff and CCA.

209 In any case, as I have observed above, the element of foreseeability is not critical to the concept of *force majeure*. Instead, the true question is whether the event was such that it rendered performance of the contract "radically different" from what was originally undertaken. In my view, it was. SPPG had initially estimated that it would take about four to six weeks to complete its power connection works.[284] According to Ms Chua from CCA, SPPG would typically take a much shorter time of about two weeks.[285] However, the actual time between when SPPG was first notified (between 8 October 2012 and 22 October 2012) and when power connection works were eventually completed (7 March 2013) was around *19 to 21 weeks*.[286] While parties did anticipate some delay to be possible, this was significantly longer than what all parties had expected.[287] Although the plaintiff and CCA had catered for a buffer period of six months, this included time required by the plaintiff to carry out other works that it needed to do after power connection, such as T&C of the M&E works.[288] In other words, SPPG had not been expected to take up the entirety of the six months buffer period. To put the extent of delay into perspective, the Project had been expected to take less than two years to complete (from the time of the signing of the LOA on 13 May 2011 to the original completion date of 21 February 2013). Thus, the four to five months

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284 20AB12711.

285 21AB13393; CHH at para 37.

286 PWS at paras 31 and 42.

287 TPWS at para 98(b).

288 NEs, 26 June 2020 at p 52, lines 12–22.

taken by SPPG would constitute almost a quarter of the original estimated time required to complete the Project. Therefore, although some delays were expected from SPPG, the *extent* of the delay in this case was so protracted that it rendered the performance of the Contract radically different from what had initially been undertaken. The same can be said for the last-minute introduction of the OG Box requirement.

210 For the above reasons, in the context of cl 23(1) and the facts of this case, the OG Box requirement and the prolonged delay by SPPG amount to *force majeure* under cl 23(1)(a) of the SIA Conditions. In this case, it cannot be gainsaid that the OG Box requirement and the protracted delay by SPPG for the incoming power supply were beyond the control of the parties and this could not be attributable to the plaintiff. The delaying event in this case could easily justify the grant of an EOT to the plaintiff according to the spirit and intent of cl 23(1), provided that there was no lapse of due diligence on the part of the plaintiff. This explains why the defendant and his Assistants, especially Mr Cheung, did not object at the relevant time when the third party was considering the plaintiff's applications for EOT 2 and EOT 3. The defendant and Mr Cheung also did not register their objections in any way when the third party granted EOT 2 and EOT 3. The defendant only took objection to the third party's grant of EOT 2 and EOT 3 when the plaintiff instituted this Suit.

211 For these reasons, I find that cl 23(1)(a) is operative and SPPG's OG Box requirement and delay in carrying out power connection works amounted to a *force majeure* event falling within the ambit of cl 23(1)(a), and also led to a delay in completion.

(2) Clause 23(1)(o)

212 I turn now to cl 23(1)(o). The third party submits that SPPG's delay in carrying out power connection works also falls within the ambit of cl 23(1)(o).[289] Given my finding that cl 23(1)(a) applies to the OG Box requirement and SPPG's delay in commencing power connection works, there is strictly speaking no need for me to determine this point.

213 However, for completeness, I would not have accepted the third party's submission in this regard. It was not pleaded by the third party, although it was raised in the middle of the trial.[290] Furthermore, it was not borne out by the evidence. The third party's letter granting EOT 2 did not contain any mention of cl 23(1)(o).[291] More importantly, there is no "variation" to speak of in this case. Given that the OG Box fell within SPPG's purview, the plaintiff was not contractually obligated to construct the OG Box and it was instead constructed by SPPG. Thus, the OG Box requirement could not have amounted to a "variation" of the plaintiff's contractual Works within the meaning of cl 7(1) of the SIA Conditions. There is also no evidence of any architect's instructions, or verbal instructions even, for the plaintiff to carry out variation works as a result of SPPG's delays.[292]

214 When asked regarding this point, the third party's counsel encouraged the court to adopt a broad interpretation of the word "variation". While he accepted that there was no variation in the *Works* themselves, he sought to

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289 TPWS at para 98.

290 NEs, 9 June 2020 at p 2, lines 5–9.

291 21AB13224–21AB13225.

292 DRS at para 39.

suggest that the "variation" in this case was a variation in the *schedule* for the Works.[293] I do not accept this. There is nothing in the Contract to support such a broad interpretation of the word "variation". To the contrary, the non-exhaustive definition of "variation" in cl 12(2) of the SIA Conditions suggests otherwise, because the activities set out therein relate to variations in the Works themselves.[294] Therefore, cl 23(1)(o) is not applicable in this case.

Whether the requirements for EOT 2 are established

215 Having found that SPPG's delay constituted a delay event under cl 23(1)(a), I turn next to the other requirements for the granting of an EOT. I shall first deal with EOT 2.

216 Based on cl 23(1) of the SIA Conditions set out above at [190], there are two critical questions that have to be answered. Firstly, whether the plaintiff's failure to exercise due diligence contributed to the delay event. Secondly, whether the plaintiff took reasonable steps to mitigate the delay arising from the delay event.

217 Additionally, given that the defendant's claim here is one of unlawful means conspiracy, the further question to be answered is whether the third party's decision to grant EOT 2 was proper. I shall deal with these questions sequentially.

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293 NEs, 27 October 2020 at p 124, line 18 to p 125, line 10.

294 4AB02122; NEs, 27 October 2020 at p 125, line 21 to p 126, line 5.

(1) The plaintiff exercised due diligence and was not responsible for the delay

218 As I have explained above, SPPG's original estimation of the time needed for electrical turn-on (*ie*, four to six weeks) was not realised in this case, resulting in a long delay in completion. This was through *no fault* of any of the parties in this dispute. Rather, it was due to matters wholly beyond the plaintiff's control (or that of any other party in the Project). This is apparent from the sequence of events set out at [200] above.

219 The defendant raises two main arguments to support his submission that the plaintiff failed to exercise due diligence. First, the defendant alleges that because the electrical meter compartment doors for Unit 12 and Unit 12B were only installed on or around 1 December 2012, this meant that the electrical meter compartments were not ready to receive the incoming power supply. Hence, with reference to the timelines in the Project's Master Programme, the plaintiff was already in delay of more than four and a half months.[295] According to the Master Programme, the time allocated for SPPG to establish power connection was between 9 July 2012 and 11 August 2012. Therefore, the defendant alleges that the plaintiff should have completed construction of the electrical meter compartments by 9 July 2012. Its failure to do so meant that, notwithstanding SPPG's delay in achieving incoming power supply and subsequent electrical turn-on, the plaintiff itself had failed to exercise due diligence. The defendant also contends that the Project was not ready for SPPG to commence its cable-laying works until 10 January 2013, due to certain ongoing works which would have obstructed the cable-laying works.[296] In

295 DWS at paras 186 and 195.

296 DWS at paras 189–192.

support of his submission, the defendant relies on the evidence of Mr Foo Charn Lim (DW6, "Mr Foo"), who conducted a delay analysis on the events leading up to EOT 2. I shall deal with each of these points in turn.

(A) THE ELECTRICAL METER COMPARTMENT DOORS

220 On the facts, the plaintiff's delay in the installation of the electrical meter compartments would not have delayed the completion of the Project. The delay in the completion of the Project was entirely due to SPPG's OG Box requirement and delay in carrying out power connection works. At the very latest, the electrical meter compartments (except the doors) were ready in or around early October 2012.[297] It was at this point that the electrical meter compartments were ready for survey by SPPG.[298] Although the electrical meter compartment doors were only ready in November 2012 and installed on or around 1 December 2012 at the latest,[299] there was simply no requirement that the electrical meter compartment doors must have been installed *before* SPPG would be willing to commence work. In SPPG's letters dated 22 November 2010,[300] there were no requirement for the electrical meter compartment doors to be completed. The only conditions were as follows:

> **Please note the conditions of electricity connection stated overleaf and the following:**
>
> Applicant to provide cable termination materials at his switchboard.

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297 18AB11883; NEs, 2 June 2020 at p 80, lines 10–16.

298 NEs, 26 June 2020 at p 95, line 19 to p 96, line 1.

299 CHH at para 35; 19AB12356; NEs, 26 June 2020 at p 67, line 24 to p 69, line 22; p 85, lines 1–5.

300 3AB01215, 3AB01217, 3AB01219.

> The type of metering scheme indicated in the application by LEW is Normal metering
>
> Applicant to provide 150mm dia UPVC cable entry pipe from intake point to undercross roadside drain along Leedon Pk. To be carried out in conjunction with Application:12100069.
>
> [emphasis in original]

221 The various letters dated 25 August 2011 from SPPG also did not indicate that the electrical meter compartment doors must be ready for incoming power supply. However, SPPG indicated that the following matters should be ready:[301]

> I am pleased to advise that I am the officer responsible for implementing the above project.
>
> 2 Your client's *switchboard/meter board and the cable entry pipe shall be ready before the service cable can be installed*. You are required to obtain approval from our Meter Section regarding the meterboard requirement at the gatepost as specified in PowerGrid's handbook on 'How to apply for electricity connection'.
>
> 3 Please also advise us the estimated date *when these items will be ready* so that we can proceed to seek approval of the relevant authorities for the cable work. …
>
> [emphasis added]

222 Therefore, SPPG only required the switchboard/meter board and cable entry pipe to be ready before SPPG would install the service cables for incoming power supply. SPPG did not require the electrical meter compartment doors to be ready for incoming power supply.

223 Further, I find that the presence or absence of the electrical meter compartment doors simply had no bearing on whether SPPG could carry out the installation works, as the electrical meter compartment doors were not essential

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301 18AB11481, 18AB11482, 18AB11483.

for the installation of cables to facilitate incoming power supply. This was conceded by the defendant's own witness, Mr Lee, in cross-examination as follows:[302]

> A: I have no solid evidence to say that SPPG will only install the service cable to the consumer switchboard when the doors for the meter compartment is provided. …

224 He made similar concessions in response to my questions:[303]

> Court: If I ask you for the purpose of connection –
>
> A: Mm.
>
> Court: – what will be your most important requirement, because without those requirements, you cannot connect, okay?
>
> A: Correct.
>
> Court: What would be your answer?
>
> A: My answer would be the switchboard has got to be furnished and installed in the correct location by the contractor.
>
> Court: Yes.
>
> A: And, most importantly, underground pipe leading from the external surface into the meter compartment must be completed to enable, or to facilitate PowerGrid to lay and pull in the cable for termination, without which no connection can be made.
>
> Court: So these are your essentials?
>
> A: Essential.
>
> Court: Before which you cannot?
>
> A: Yeah.
>
> Court: I am not talking about for completeness. For completeness, of course your meter compartment must have a door.

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302 NEs, 24 February 2020 at p 165, lines 7–10.

303 NEs, 25 February 2020 at p 69, line 21 to p 73, line 6.

A: Yeah.

Court: My focus is not on the completeness of the compartment.

A: Yeah.

Court: My question is one on the essence of connection.

A: Yes.

Court: Okay? The door, of course – obviously, the door is for safety reasons. You cannot have a meter compartment without the door.

A: Yeah.

Court: My point here is can the connection be done, because you mentioned that the door can be detached; right? Of course, for the purpose of connection, it will be easier if the door is –

A: Provided.

Court: No, if the doors are detached and then, after the connection, you can reattach the doors. Of course that would be the ideal situation –

A: Yes.

Court: – so that the door will not cause an obstacle to your work. Would I be right to describe it in that way?

A: Yes, correct.

Court: So you can actually install without the door at that point of installation?

A: Correct.

Court: But you must have the door eventually to ensure safety?

A: Yes.

Court: Have I summarised your position correctly?

A: Yes.

Court: Is that the reason why, in those letters that you were referred to this morning, SP did not specifically identify that the door must be there, but they identified that it must have a switchboard, is that the reason?

A: Could be, or they may have missed out the important thing on door requirements, which is not stipulated in the letter. And remember also this letter is issued by SP

> Services, not by PowerGrid. Normally, it is the – the door requirement is the technical requirement of SPPG, PowerGrid.
>
> Court: No. As I say, I understand that the door requirement is for safety reasons, but short of trying to repeat myself, I am now focusing more on the installation, not on the door.
>
> A: Yes, yes, I understand.
>
> Court: Because, as I say, the door and the compartment comes together. Without the door, your meter compartment is incomplete.
>
> A: Correct.
>
> Court: But my focus is not on completeness of the meter compartment.
>
> A: Yes.
>
> Court: My focus is on the installation to energise the whole system.
>
> A: Yes.
>
> Court: You can energise the system without the door, that's my point.
>
> A: Yes, you can.

225 In fact, based on the answers from Mr Lee, it appears that the electrical meter compartment doors would *get in the way* of SPPG's installation works. This was also confirmed by Mr Tan[304] and RTO Leong[305] who both agreed that it was good practice *not* to install the doors before SPPG commenced its works. The pertinent evidence of RTO Leong, in particular, was as follows:[306]

> A: The entire process should go like this: we would build the meter compartment, and then SPPG will come in to pull the cables. But sometimes the bending of the pipes could be very difficult because some of these incoming

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304 NEs, 8 November 2018 at p 143, lines 2–23.

305 NEs, 18 June 2020 at p 63, line 11 to p 65, line 14.

306 NEs, 18 June 2020 at p 67, lines 23 to p 68, line 23.

> cables are very thick, so *sometimes the contractors are reluctant to install doors at this stage because there could be accidents that would damage the door during the pulling in of the cables. Once the cables have been put in, then we have to prepare the meter board, and the door must then be installed at this stage*, because it is the government's regulation that the door must be installed in order to protect the meters, otherwise, it could be troublesome if the meters were stolen. Once the door had been prepared and installed, then the meters would be installed. Then there's the opening of the account, and electricity can pass through.
>
> Q: So, Mr Leong, to clarify again, it is only right before the meter installation that the contractor may actually just install the door?
>
> A: (In English) Correct.
>
> Q: So this could take place on the same day that the meter is actually installed?
>
> A: Sometimes they might install the door one day earlier before the installation of the meter.
>
> [emphasis added]

226 There is, therefore, no reason for SPPG to have required the electrical meter compartment doors to be installed before commencing any works. Although Ms Chua initially testified that SPPG required doors to be installed to prevent the tampering of any cables that were installed,[307] she subsequently clarified that what was required by SPPG prior to its installation works was a "temporary structure" to secure the electrical meter compartments. It was only after SPPG completed its installation works and electrical testing was conducted that the actual electrical meter compartment doors needed to be installed:[308]

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307 NEs, 26 June 2020 at p 62, lines 18–25.

308 NEs, 26 June 2020 at p 86, line 3 to p 87, line 18; 30 June 2020 at p 157, line 1 to p 160, line 16.

A: Okay. There's two scope of the work. First scope is we need to arrange PowerGrid to do cable connection into our meter compartment.

…

A: And they will start there. The next stage is we have to ensure that the project is complete, internal testing – internal work are complete to at least 90 per cent, and with the meter compartment – the original meter compartment is fixed with a glass meter and louvre, then we can arrange for electrical testing.

Court: You mentioned something about a door to secure something.

A: First stage, where we request for service connection, the door has to be a secured door, but it doesn't need to be the completed – the original – the door that has to be completed for electrical testing arrangement. Okay, because when we do electrical testing arrangement … you have to make sure that the glass – the meter compartment door comply with PowerGrid requirement. So they have louvres and they have a glass panel with a lock that is SPPG lock.

…

Court: And the first stage, you mentioned something about a door to be secured?

A: It just has to be a secure door that is lockable.

Court: And what do you mean by that?

A: So that when they – we can have a lock to lock it so nobody can tamper the cable that's in – connecting into the meter compartment.

227 Ms Chua's evidence leads to two points. Firstly, the actual electrical meter compartment doors were only required to be installed *after* SPPG had completed its first stage of installation works. There was no need for the actual doors to be in place before SPPG could come in. It was, hence, not strictly a prerequisite before SPPG could begin works. Secondly, to the extent that SPPG wanted to prevent the tampering of the cables, this could be done by putting a temporary structure in place to ensure that the electrical meter compartment was

secure.

228 My findings above were also confirmed by Mr Yong in his evidence, which is useful to reproduce extensively:[309]

> Q: Now can you go to page 6175 of volume 10 of the agreed bundle. Mr Yong, as you can see from this letter, at paragraph 2, the last sentence, it says:
>
> > 'Depending on the length of cable … supply will normally be available 4 to 6 weeks from the date customer switchboard … and cable entry pipes of your premises is ready to receive the service cable.'
>
> A: Yes.
>
> Q: Mr Yong, do you agree that the requirement of the [meter] compartment doors is not stipulated in SPPG's letter?
>
> A: Yes, it's not stated in this letter.
>
> Q: Mr Yong, when you were cross-examined by the defendant's counsel to answer if you agree whether the meter compartment door must be ready before SPPG will come in, at first you tried to explain that the door might pose a problem if SPPG comes in and the door is installed, and yet you later answered that the door should be there when the cable is being brought in?
>
> A: Yes, I did answer that, because subsequently if the cable comes in, the door should be there. But in the process of pulling the cable, actually the door is a hindrance. But of course, I mean, I'm not in the process of inspecting the chamber together with SPPG, so I think electrical is the best guy to tell us whether the door should be there or not there. All I understand is that this letter stated that you need the RC work, which is the compartment; you need the switchboard, which is the timber board; you need the incoming trunking; it didn't mention the door. However, in all correspondence with CCA, sometimes they do mention doors. But we all know that in the process of pulling this cable, which is actually the size of 150 diameter, it's this size (witness

[309] NEs, 2 June 2020 at p 88, line 11 to p 92, line 10.

indicates), the size of our neck, the door basically is there to obstruct you from pulling. So in the process of pulling, I'm not sure whether they dismantle or they – they put it elsewhere, but we know that by the end of pulling the cable into this compartment, the door has to be there to close up. That is the whole completion job.

Court: So, in other words, without the RC compartment block, you cannot have incoming cable; right?

A: Yes.

Court: Without the electrical board in the RC compartment block, you cannot have incoming cable?

A: Yes.

Court: Without the incoming pipe to allow the cable to enter into the –

A: The site.

Court: – electrical compartment box, you cannot have incoming power?

A: Yes.

Court: These are critical compartments for incoming power?

A: Yes.

Court: The door, as you said, it is not vital, in other words, you don't need a door?

A: Yes, the door is basically to close up to say that the work is complete.

Court: When you finish, when the incoming comes, you close it up?

A: Yes.

…

Q: If you take a look at the letter that should still be in front of you at page 06175, they mention the requirement of the cable entry pipes?

A: Yes.

Q: But they did not mention that there was a requirement of the meter compartment doors; is that right?

A: Yes.

> Court: Mr Yong, I do not need to be an LEW, common sense tells me that if I am SPPG, if you don't have a RC box, I can't help you.
>
> A: Right.
>
> Court: However, if you don't have the aluminium door, I can still bring in your power; correct?
>
> A: Yes, because even the cable, when it comes up, is not energised yet. Actually, it doesn't pose any danger. It's only theft, if there is anything. So the door is really just there for protection in that sense.

229 I note that in any case, the plaintiff may appear to have been behind schedule for the installation of the electrical meter compartments *vis-à-vis the Master Programme*. The electrical meter compartments (except the doors) were ready in or around early October 2012, when the Master Programme provided that they should have been ready by 9 July 2012. However, this in itself cannot mean that the plaintiff was in delay as the Master Programme incorporates the concept of a "float" to allow the plaintiff to catch-up and meet the completion date of 21 February 2013.[310] This refers to the period of time in which the execution of an activity which is not on a critical path may be prolonged without affecting subsequent activities or the completion time for the project as a whole (see *Construction Contracts Dictionary* at p 197).[311] The float is calculated by subtracting the time actually required to perform an activity from all the time that is available to perform it. In the construction industry, the float is useful in allocating resources, in that those activities which have no or less float allocated can be given higher priority.

230 Therefore, the Master Programme has to be analysed in conjunction with

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310 NEs, 30 June 2020 at p 146, lines 15-18.

311 TPWS at para 77.

the concept of a float. The purpose of the Master Programme is to provide a general guide to monitor the progress of the work and is not intended to impose strict contractual deadlines for each activity. This is evident from cl 4(2) of the SIA Conditions, which states:[312]

> Approval of the programme by the Architect shall signify his agreement with the proposed order or sequence of working in the programme, and may be taken into account in any dispute for determining a reasonable order or sequence for supplying any outstanding information or details to the Contractor … but shall not otherwise change the contractual obligations of either party in relation to the Contract Date for Completion, or as to a reasonable time for giving or receiving further information … In particular an optimistic programme showing completion before the Contract Date for Completion shall not without express agreement to that effect with the Employer alter or advance the aforesaid obligations of the Architect and Employer, nor shall it advance the Contract Date for Completion.

231 This is further explained in Chow Kok Fong, *The Singapore SIA Form of Building Contract: A Commentary on the 9th Edition of the Singapore Institute of Architects Standard Form of Building Contract* (Sweet & Maxwell, 2013) ("*Commentary on SIA Standard Form*") at para 6.10, as follows:[313]

> It follows that the particulars of the activities shown in the programme furnished under Clause 4(1) have a very circumscribed contractual significance, consistent with the original drafting intent recorded in the Guidance Notes. It is suggested that the only material significance of this schedule is that it may be of evidentiary value in determining whether the Contractor is proceeding with 'diligence and due expedition' under Clause 32(3)(d) … This view is reinforced by the provisions in Clause 4(2). This sub-clause deliberately downplays the significance of the programme, confining its relevance to operate only as a broad sequence of activities for two purposes:

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312 5AB02938.

313 TPWS at para 75; DRS at para 42.

> (a) the Architect's issue of any outstanding information and details to the Contractor; and
>
> (b) affording the Contractor Site possession.

This is the position taken by the plaintiff, the third party and CCA.[314] Indeed, if the defendant genuinely believed that the Master Programme stipulated strict contractual deadlines for each activity, then the onus would be on him and his Assistants to voice their disapproval during the course of the Project if the timelines for the various activities failed to comply with the Master Programme. His Assistants, particularly Mr Cheung, who has vast experience in the construction industry, knew that the plaintiff could not be held strictly to the Master Programme. By choosing to remain silent at the relevant times and site meetings, I can only surmise that the defendant understood that the Master Programme was not a rigid schedule of activities. The defendant's counsel accepts that the Master Programme is merely a benchmark for judging the progress of the works and the dates provided for in the Master Programme are not peremptory, because the plaintiff is ultimately held to the completion date.[315] In the circumstances, the defendant cannot argue that the plaintiff was in delay merely by the fact that it failed to have the electrical meter compartments, including the doors, ready on 9 July 2012 for SPPG to do the incoming power supply connection. This is given that there was an in-built float in the Master Programme to allow flexibility to the plaintiff in relation to the construction of the electrical meter compartments, including the doors.

232 Since the timelines in the Master Programme are not peremptory, the true question is whether the plaintiff was acting with due diligence. Although

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314 NEs, 30 June 2020 at p 140, line 24 to p 141, line 3; PWS at paras 66–69.

315 NEs, 5 June 2020 at p 79, line 20 to p 80, line 7.

the plaintiff did not adhere to the timelines in the Master Programme for the installation of the electrical meter compartments, I find that it was still acting with due diligence. In assessing whether the contractor is acting with due diligence, the Master Programme is of *evidential* value (as observed in *Commentary on SIA Standard Form* cited at [231] above). However, it is not conclusive. As Simon Brown LJ observed in *West Faulkner Associates v London Borough of Newham* [1995] 71 BLR 1 at 12 (cited in *Compact Metal Industries Ltd v Enersave Power Builders Pte Ltd and Others* [2008] SGHC 201 at [82]):[316]

> [F]ailure to comply with an agreed programme may be some, but certainly is not conclusive, evidence of failure to proceed regularly and diligently. Thus the failure to comply with the programme may be due to the contractor's default, or a cause of delay (warranting an extension), or it may be that the contractor is proceeding at a rate and in a manner which satisfies his obligation to proceed regularly and diligently even though it differs from the programme.

233 The defendant cites *Jurong Engineering Ltd v Paccan Building Technology Pte Ltd* [1999] 2 SLR(R) 849 ("*Jurong Engineering*") in support of his case that the plaintiff's delay in installing the electrical meter compartment doors meant that it was not proceeding with due diligence.[317] Although the CA observed at [39] that due diligence "can only be determined by pacing the progress of [the subcontractor's] work against the subcontract programme", this must be seen in the context of the CA's entire decision. In particular, the CA observed at [44] that:

> If the progress of the subcontract works *consistently* lagged behind and did not keep pace with the subcontract programme, then the respondents were not proceeding with reasonable

316 TPWS at para 85; DRS at para 42.

317 DWS at para 198.

> diligence. *This is not saying that the dates in the subcontract programme were peremptory*. [emphasis added]

234 The CA, therefore, was not saying that the subcontractor had to follow strictly the dates set out in the subcontract programme. Rather, the CA was focused on whether the progress of the subcontract works evinced a *consistent* lag compared to the subcontract programme. This is evident from how the CA at [51] subsequently cited a passage which referred to a situation "where a contractor *persists* in a rate of progress bearing no relation either to a contractually promised or reasonable date of completion" [emphasis added]. This is also evident from the CA's actual decision, where it held that there were "extensive delays" in respect of at least six categories of works (see *Jurong Engineering* at [47], [49] and [50]). Furthermore, it is not apparent whether the subcontract in *Jurong Engineering* contained a clause similar to cl 4(2) of the SIA Conditions, which deliberately downplays the importance of the Master Programme. As such, *Jurong Engineering* merely reinforces the position that adherence to the Master Programme is of *evidential* value in assessing whether the contractor was proceeding with due diligence.

235 Thus, the critical question is whether the rate at which the plaintiff was proceeding was in accordance with his obligation to act with due diligence. In this regard, *Construction Contracts Dictionary* at p 153 observes that "any obligation for due diligence has to be interpreted with reference to the completion date stated in the contract".[318] Thus, in assessing whether a contractor has acted with due diligence, the contractor's ability to meet the stipulated completion date is an important consideration.

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318 TPWS at para 84.

236 In this case, I emphasise that even though the electrical meter compartment doors were installed on or around 1 December 2012, the plaintiff, the third party and crucially the M&E consultant, CCA, were still confident that the Project could be completed on schedule, provided SPPG completed its cable-laying works and supplied the requisite electrical turn-on within four to six weeks, following which the T&C of M&E works could be carried out.[319] In this regard, Ms Chua testified as follows:[320]

> Q: Ms Chua, is it true that even if SPPG only came in to do their incoming power connection works in November 2012, GTMS would still be in a position to meet the original contractual completion date of 21 February 2013?
>
> A: Yes.

237 Accordingly, I find that the plaintiff's delay in the installation of the electrical meter compartments and the electrical meter compartment doors would not have caused any delay in the completion of the Project, but for SPPG's OG Box requirement and its delay in the installation of the incoming power supply connection to the three units of the Project. The plaintiff's delay in the installation of the electrical meter compartments and the electrical meter compartment doors had no nexus to SPPG's delay. The latter was wholly beyond the plaintiff's control.

(B) MR FOO'S DELAY ANALYSIS

238 The defendant relies on the evidence of Mr Foo to argue that the plaintiff

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319 TPWS at para 99; CHH at para 37; NEs, 8 November 2018 at p 164, line 21 to p 166, line 6.

320 NEs, 1 July 2020 at p 7, line 21 to p 8, line 1.

was in fact the cause of the delay.[321] Mr Foo is a civil engineer whose work experience is primarily in the areas of programme planning, delay analysis and extension of time claims in various types of construction projects. Mr Foo was instructed by the defendant to provide an expert opinion on the progress, delay and completion of the Project. In his opinion, although the *grant* of EOT 2 and EOT 3 due to SPPG's delay and the OG Box requirement was reasonable, the plaintiff was not entitled to the *quantum* of EOT 2.[322] Thus, the third party had incorrectly granted the EOT in so far as it was wrong in its computation of the number of days of extension to which the plaintiff had been entitled. In coming to his findings, Mr Foo relied on the Master Programme, performing a delay analysis progressively upon the achievement of certain milestones in the Project. Based on this, he concluded that the Project's expected completion date was 4 June 2013, which was in delay of 103 days from the original contractual completion date of 21 February 2013.

239 Although I agree with Mr Foo's methodology in his analysis, I am unable to agree with his assumptions, which have a material outcome on his findings. He has three assumptions that are fundamentally incorrect and which, ultimately, substantially and significantly undermined his findings.

240 Firstly, Mr Foo began the calculation of his delay analysis from 17 November 2012 as he assumed that the application to SPPG for power connection was made on that date.[323] In his view, this was the appropriate date and he based this on a letter that the defendant had received from SP Services

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321 DWS at paras 205–207.

322 NEs, 5 March 2020 at p 63, lines 2–5; p 77, lines 6–14; p 95, lines 12–17; TPWS at para 101.

323 AEIC of Foo Charn Lim ("FCL") at p 15, para 27.

on 17 November 2012.[324] Given that the Master Programme had planned for "incoming power supply" to be connected between 9 July 2012 and 11 August 2012, Mr Foo opined that the plaintiff was already in delay as at 17 November 2012.[325]

241 However, it is incorrect for Mr Foo to use 17 November 2012 as the date on which the application to SPPG for incoming power connection was done. As stated above at [200(a)], the request to SPPG for electrical incoming power supply turn-on was done in or around October 2012. The minutes of Site Meeting No 34 dated 8 October 2012 state that as of that date, "GTMS informed that all meter compartments are ready. CCA to follow up for inspection."[326] Ms Chua testified that once the plaintiff informed CCA that the electrical meter compartments were ready on 8 October 2012, she "would have called [SPPG] immediately", and probably on 8 October 2012 itself.[327] This request to SPPG was reflected in the minutes of Site Meeting No 35 dated 22 October 2012, which state that as of this date, "GTMS informed that all meter compartments are ready. *CCA informed that CCA has already arranged with officers. GTMS to follow up*." [emphasis added][328] As explained by Mr Tan, this meant that CCA had already contacted SPPG to connect the incoming power supply and this also involved the licensed electrical worker.[329] As confirmed by Mr Yong:[330]

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324 FCL at p 96.

325 FCL at p 15, para 28.

326 18AB11883.

327 NEs, 1 July 2020 at p 106, lines 11–17; PWS at para 35.

328 19AB11966.

329 NEs, 16 November 2018 at p 128, line 23 to p 129, line 1.

330 NEs, 2 June 2020 at p 96, lines 18–22.

> Q: … Mr Yong, do you agree that CCA, according to these site meeting minutes, had already contacted SPPG as at [22] October 2012 regardless of meter compartment doors point?
>
> A: Yes, they have started to contact SPPG.

242 Again, the minutes of the subsequent site meeting dated 5 November 2012 state that as of this date, "[c]urrently, GTMS is arranging with power grid officer for testing date and will submit the schedule of testing for information."[331] Logically, it would not have been possible for the plaintiff to arrange for a testing date without a prior application having already been made to SPPG. In contrast, as seen from its opening paragraph, the letter that Mr Foo relies on is merely in reference to a "request for the opening of utility account".[332] This letter from SP Services dated 17 November 2012 does not make any mention of the earlier initial application date to SPPG and as confirmed by Ms Chua, was not the application to SPPG for power connection.[333] Ms Chua further clarified that:[334]

> A: This [letter dated 17 November 2012] … is to open account, for water account, gas account and electrical account.
>
> Q: Yes, and this is a different application from the earlier application I showed you in August 2011; right?
>
> A: Yes, it's different.
>
> …
>
> Court: Hold on. You would like to tell me what is the difference?

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331 19AB12029.

332 FCL at p 96.

333 NEs, 1 July 2020 at p 9, lines 10-21; PWS at para 38.

334 NEs, 26 June 2020 at p 129, line 22 to p 130, line 16.

> A: This is for account opening. That means you have to apply for the meter, you need to have an account number.
>
> Court: So what about the other –
>
> A: That one is for service connection, incoming cable.
>
> Court: Oh, that's for incoming cable?
>
> A: Yeah. It's to apply the load – electrical load to the unit, to the house … This [letter dated 17 November 2012] is not, this is to open an electrical water and gas account.

243 Therefore, it would be more accurate to take the actual date of CCA's submission of its request to SPPG as the starting point of the calculation in Mr Foo's delay analysis. The earliest possible date when this request was submitted was 8 October 2012, according to Ms Chua's testimony. As regards the latest possible date, the minutes of Site Meeting No 35 show that the application to SPPG was made by 22 October 2012, which would still have been ahead of the date Mr Foo used (*ie*, 17 November 2012). In fact, the difference between 22 October 2012 and 17 November 2012 is 26 days and that would have been omitted from the delay calculation. Secondly, Mr Foo also noted in his calculations that SPPG was unable to commence its power connection works on 17 December 2012, because: (a) the doors to the electrical meter compartment were only installed "on or around 1 December 2012";[335] and (b) the location of the OG box was only confirmed on 17 December 2012. This assumption of 17 December 2012 is again incorrect as both of the premises upon which it is founded are misguided for the following reasons:

(a) Mr Foo's opinion that SPPG would commence its works only after the electrical meter compartment doors were ready was based on the evidence of Mr Lee. However, as shown above at [220]–[228], that

335 FCL at para 40.

was never a requirement mandated by SPPG. Mr Lee accepted that incoming power could be installed without the electrical meter compartment doors.

(b) Similarly, the confirmation of the location of the OG Box was also not a requirement originally mandated by SPPG. The only requirements, as stated above at [222], were for the switchboard/meter board and cable entry pipe to be ready. Hence, the plaintiff cannot be faulted for not determining the location of an OG Box. Furthermore, the plaintiff was not responsible for determining the location of the OG Box as this was a matter to be resolved between CCA, Web, NParks, the defendant and the third party. Thus, it follows that the plaintiff cannot be said to have lacked due diligence in respect of determining the location of the OG Box. For the purposes of considering whether the plaintiff was the cause of the delay or contributed to the delay, therefore, it should be assumed that SPPG could have commenced work without the need to confirm the location of an OG Box.

244 SPPG thus could have commenced its work way ahead of 17 December 2012, bringing into question Mr Foo's calculations.

245 Thirdly, Mr Foo opined that the site was not ready for SPPG to lay the subterranean cable as there were ongoing excavation works as of 2 January 2013. In his view, this presented site constraints, preventing SPPG from commencing work any earlier than 2 January 2013.[336] I am, however, unable to agree with Mr Foo's interpretation in this regard. Mr Foo's assumption that

336 FCL at para 42.

there were ongoing excavation works was based solely on a single photograph which he alleged showed some excavation work outside the parameter wall between Units 12 and 12A.[337] He had never physically been to the site himself. This means that Mr Foo's interpretation of this photograph and the implication that it hindered SPPG's works was entirely speculative, as he acknowledged:[338]

> Court: You see, the photograph at page 572 is a snapshot of a particular spot.
>
> A: Yes.
>
> Court: Agree?
>
> A: Agree.
>
> Court: So, Mr Foo, you wouldn't know what is on both sides of the photograph. When I said 'both sides of the photograph' means you wouldn't know whether there are earthwork or only this part that has got earthwork, the other part could have been completed, or could not have been completed. It's all guesswork.
>
> A: Yes correct.
>
> Court: Unless you are there at the site then you can tell, 'Yeah, this shows that the other site has earthwork carrying on.'
>
> A: Yes.
>
> …
>
> Court: Yes, but isn't it possible that –
>
> A: Others are done.
>
> Court: – and then they wanted to dig this place because this place gave them some problem. I don't know.
>
> A: Yes, yes, so –
>
> Court: I'm only speculating, like you I'm speculating, I have not been to the site. I'm just trying to interpret strictly from the photograph.

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337 FCL at para 42; NEs, 30 March 2020 at p 129, line 23 to p 130, line 1; TPWS at para 103.

338 NEs, 6 March 2020 at p 140, line 15 to p 142, line 11.

A: Yes, I understand.

Court: So what happened on both sides of this photograph we do not know. It could be completed, it could not have been completed.

A: Yes.

Court: It's all speculative.

A: Correct.

246 Even if there were ongoing excavation works, in my view, it is entirely possible that the excavation works could be carried out concurrently with SPPG's laying of the cables. This was a possibility that Mr Foo also subsequently acknowledged:[339]

Court: Can't you do concurrent work? So that when you bury the drain you bury it together with the pipe, the cable. I thought that would be the most efficient rather than having the drain, and then you finish the drain I come in, I dig up the drain again to lay my cable.

A: That's also possible.

Court: I'm sorry, what is also possible?

A: I mean like you say no need to dig and just lay the duct, pull the cable and concurrently do with the drain works.

Court: That is the ideal situation, right? So that there will be no – it's the most productive way to go about it.

A: Possible.

339 NEs, 6 March 2020 at p 159, lines 5–18.

247 The excavation works were, therefore, no impediment to SPPG commencing works. In fact, this was confirmed by Mr Yong's own view of the entire process. Mr Yong explained that the excavator and the earthwork in the photograph mentioned by Mr Foo were within the compound of the Project and would not hinder SPPG's cable-laying from the OG Box to the three units:[340]

> Q: Is it your position that SPPG will come and lay cables when there are still workers doing construction works where SPPG need to lay the cables?
>
> A: I think that depends on SPPG. But our stand is, looking at this photograph, there is no obstruction for SPPG to come in.
>
> Q: But it depends on SPPG and you don't know SPPG's position.
>
> A: Yes.
>
> Q: Would that be correct?
>
> A: Yup, we would not be able to anticipate SPPG.
>
> Q: Let's go to the other photo now, page 12692, the first one I referred you to. I am going to suggest to you again that the works around that area, which is indicated in the photo number 6 dated 2 January 2013, will prevent SPPG from laying their cables on site. Will you agree or disagree?
>
> …
>
> A: The excavator is within the site. The box drain basically forms that line where SPPG will pull the cable along. So, technically, this bulldozer is actually within the site. It will not affect any works that is outside. The position that this bulldozer is occupying is within the site and the cable is supposed to pull from outside, so it doesn't obstruct any work. It will not obstruct any work by SPPG.
>
> …
>
> Q: … During Mr Foo Charn Lim's cross-examination, he

340 NEs, 30 March 2020 at p 146, line 9 to p 147, line 14; 2 June 2020 at p 100, lines 10–23.

> had given evidence that although he's not an electrical expert, he was of the view that there were excavation works dated 2 January 2013 which would have hindered SPPG's incoming power supply works, and he referred to D13 and 14 to say that?
>
> A: Yes, and a photograph, I think.
>
> Q: Mr Yong, do you agree that the excavation works on 2 January 2013 would not have hindered SPPG's incoming power supply works?
>
> A: It would not have hindered SPPG incoming supply work because the work is actually within the site, while SPPG work is actually outside the boundary line. So there's two different area altogether.

248 For the above reasons, the *actual* timeline had SPPG not been in delay would have been as follows:

(a) Taking the latest date possible, the application for power connection to SPPG would have been done on 22 October 2012 (see [200(a)] above).

(b) SPPG would have required 11 days to make preparation to commence work, based on Mr Foo's own calculation,[341] bringing the relevant date to 2 November 2012.

(c) SPPG then would have required 11 days to complete the works, based on the time they had actually taken (*ie*, 25 February 2013 to 7 March 2013) (see [200(d)]–[200(e)] above). This would have brought the relevant date to 13 November 2012.

(d) An additional 40 days would then be required for electrical T&C and M&E works. This was the estimated duration arrived at by the third

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341 NEs, 28 February 2020 at p 92, lines 11–21.

party, nearer to the date of the planned works. Although Mr Foo initially insisted on using the original estimate of 90 days based on the Master Programme, he eventually conceded in cross-examination that the estimate of 40 days would be more accurate.[342] This would have brought the relevant date to 23 December 2012.

249 This would mean that the Project would be ready for completion by 23 December 2012, 60 days *ahead* of the original completion date of 21 February 2013.

250 Even taking Mr Foo's starting date of 17 November 2012, the plaintiff would still have been able to complete the Project on time if SPPG had not been in delay. According to Ms Chua, the timeline would have been as follows:[343]

(a) Taking Mr Foo's starting date, the application for power connection to SPPG would have been made on 17 November 2012.

(b) According to Mr Foo's estimate, SPPG would have taken 34 days to complete their incoming power supply connection works. As confirmed by Ms Chua, this amount of time was "very typical".[344] This would bring the relevant date to 21 December 2012.

(c) The additional 40 days needed for T&C and M&E works, starting from 22 December 2012, would then bring the relevant date to 31 January 2013.

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342 NEs, 28 February 2020 at p 51, lines 13–16.

343 NEs, 2 July 2020 at p 3, line 21 to p 4, line 3.

344 NEs, 1 July 2020 at p 112, lines 5–9.

251 I note that this timeline does not include the time taken for SPPG to respond and prepare for the cable-laying works. According to Mr Foo, this would have taken another 11 days. Factoring these 11 days into account, the Project would still have been completed by 11 February 2013, ten days *ahead* of the original completion date of 21 February 2013. The plaintiff, thus, cannot be held liable for the delay that resulted from SPPG's conduct.

(2) The plaintiff took reasonable mitigation efforts

252 The next question is whether the plaintiff, upon the knowledge of SPPG's delay, took reasonable mitigation efforts to reduce the delay. It is pertinent to note that it was not within the plaintiff's scope of works to arrange for incoming power supply. That was the responsibility of CCA, the M&E consultant who had been engaged directly by the defendant. The defendant himself was of the view that it was CCA's responsibility to arrange for electrical turn-on with SPPG. For example, on 21 February 2013, Mr Cheung sent the following e-mail to Ms Chua and Mr Ng Chee Choon of CCA on behalf of the defendant (the "21 February 2013 E-mail"):[345]

> … The Employer has raised serious concern about the late installation of the OG Box and has been chasing your input to ensure no further delay to the completion of the Works. *Such delay gives ground for the Main Contractor to claim EOT* which has caused loss to the Employer for late completion. As a consultant, we would expect your proactive follow up actions to prevent further damages to the Employer. You are requested to update us the current status and forward to us a copy of all relevant correspondence exchanged between you and [SPPG] for the OG Box matter. … [emphasis added]

253 Two points ought to be highlighted from the 21 February 2013 E-mail. Firstly, the defendant, through Mr Cheung, a person experienced in the

345 CHH at p 125.

construction industry, accepted that it was CCA's responsibility to arrange for incoming power supply. Accordingly, short of completing all the necessary installation works, there was nothing further for the plaintiff to do to mitigate SPPG's delay. Nevertheless, it should be noted that the plaintiff also followed up with SPPG, in conjunction with the efforts of CCA, to persuade SPPG to carry out its power connection works more expediently.[346] In this respect, Mr Manoosegaran testified as follows:[347]

> Q: Do you recall throughout December, January and February, Linda kept chasing and chasing SPPG. Correct?
>
> A: Yes, that's correct.
>
> Q: Were you aware of that correspondence during that time?
>
> A: Yes, I was aware.
>
> Q: Did you also personally chase SPPG or is that something for the M&E consultant to do?
>
> A: If I recall, I would have spoken to the officer at least once.
>
> Q: So, certainly, the M&E consultants are the ones that have to chase SPPG, but you were also doing it?
>
> A: Yes.
>
> Q: How about Mr Sankar? Did you instruct him or any of the other –
>
> A: Yes, certainly.
>
> Q: But did you also instruct your guys to say, 'Hey, can you chase the SPPG guys?'
>
> A: Yes, I did.

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346 TPWS at para 100; PY at p 746.

347 NEs, 22 November 2018 at p 147, line 23 to p 148, line 17.

254 This was supported by documentary evidence and further confirmed by Ms Chua in the course of the trial:[348]

> Q: … Can I ask you if GTMS was also liaising with Singapore Power to try to get them to come on site to do the connection?
>
> A: Yes.
>
> Q: And who from GTMS would have been doing that?
>
> A: We have instructed Sankar to coordinate.
>
> Q: So both of you were doing it concurrently; right?
>
> A: Yes.

255 Secondly, it is clear from the 21 February 2013 E-mail that Mr Cheung and the defendant recognised that the plaintiff was entitled to claim EOT on the basis of SPPG's delay. Crucially, at no point of time during the course of the Project did the defendant or any of his Assistants ever object to the issuance of EOT 2 and EOT 3.[349]

(3) The third party's decision to grant EOT 2 was proper

256 Thus, the plaintiff was entitled to an extension of time in so far as EOT 2 was concerned. The next question is whether the third party's decision to grant 40 days' extension for EOT 2 was improper. I note that CCA had only recommended 15 days' extension to be granted.[350]

257 However, the court will not lightly disturb the third party's assessment, as long as it is made fairly and rationally. As stated by Warren Khoo J in *Lian*

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348 19AB12488; 20AB12719–20AB12720, 20AB12940, 20AB12997, 20AB13031; NEs, 26 June 2020 at p 111, lines 17–24.

349 NEs, 18 February 2020 at p 36, lines 3–5.

350 21AB13216.

Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd [1999] 3 SLR(R) 518 at [29]:[351]

> … What is involved in a time extension exercise is, basically, to assess how much more time the contractor should fairly and reasonably be entitled to have beyond the time initially allowed by the contract to complete the works as a result of the delay events which have occurred. The architect is required to make a fair estimate and assessment, and not to give a precise arithmetic calculation. Note the use of the word 'estimate' in cl 23(3). …

258 This was further explained in *Liew Ter Kwang v Hurry General Contractor Pte Ltd* [2004] 3 SLR(R) 59 ("*Liew Ter Kwang*") at [17], where Prakash J explained that "whilst the assessment of a fair and reasonable extension involves an exercise of judgment, that judgment must be fairly and rationally based". This means that the third party must:

(a) carry out a logical analysis in a methodical way of the impact that the relevant matters the plaintiff put forward had on the delay to the Project;

(b) make a calculated assessment of time which it thought was reasonable for the various items individually and overall, rather than an impressionistic assessment;

(c) apply the provisions of the Contract correctly; and

(d) in allowing time based on the grounds listed in the provisions of the Contract, ensure that the allowance made bears a logical and reasonable relation to the delay caused.

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351 TPWS at para 73.

259 I am satisfied that the third party had made a fair and rational assessment with regard to the plaintiff's request in EOT 2. As Mr Foo himself observed, in the context of extension of time analyses, different people can reasonably and honestly hold different perspectives. As such, despite the difference of opinion between himself and the third party, he believed that the third party "acted reasonably" in granting the EOT.[352] Moreover, in coming to its decision, the third party sought and reviewed a critical path analysis of SPPG's delay, sought the views of CCA, and requested the relevant information from the plaintiff.[353] Furthermore, it is crystal clear that when EOT 2 was granted on 7 February 2013, SPPG had not even started works.[354] SPPG also failed to provide an indication of when it would commence works, save that it would be after Chinese New Year, and therefore 18 February 2013 at the earliest.[355] Given that such power connection works would ordinarily take at least two weeks to complete according to Ms Chua's estimate, four to six weeks by SPPG's estimate or 34 days according to Mr Foo's estimate, it would not have been possible to meet the original completion date of 21 February 2013. In fact, SPPG only began its power connection works on or about 25 February 2013 which was after the original completion date.[356]

260 For EOT 2, the third party's decision to grant 40 days' extension was based on a breakdown of the various works that the plaintiff was required to undertake after the incoming supply of electricity. Mr Yong explained that he

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352 NEs, 3 March 2020 at p 108, line 22 to p 109, line 7; 5 March 2020 at p 63, lines 2–5; TPWS at para 101.

353 TPWS at para 97; 20AB13011.

354 21AB13224; NEs, 18 February 2020 at p 32, lines 7–11.

355 NEs, 18 February 2020 at p 32, line 23 to p 33, line 10. 18AB11627.

356 Agreed Statement of Facts at p 4 para 25.

estimated 40 days in total as the plaintiff required 15 days for M&E works, ten days for ACMV works and 15 days for lighting installation.[357] The third party also decided that T&C of M&E works for all three units could be conducted concurrently and this would require the plaintiff to increase its manpower in order to meet the extended time limits.[358] Indeed, this was the third party's justification for granting EOT 2 at the material time.[359]

261 The defendant argues that the ACMV and lighting works could be conducted concurrently, thus, only 15 days should have been given for both these works. According to the defendant, the third party had given the plaintiff an additional ten days' EOT to the plaintiff, even though this was not necessary.[360] Mr Yong explained that the reason why he had assessed each of these works separately was because he had followed the scopes of work set out in the Master Programme:[361]

> Q: You accept the scope for ACMV and light fitting installation overlap; right?
>
> A: Yes.
>
> Q: If they are done at exactly the same time, the contractor only needs 15 days to do these two items, right, Mr Yong?
>
> A: Correct. But it is all the while in the master programme and also in their final request for EOT that it's three different scopes.

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357 NEs, 2 June 2020 at p 105, lines 20–24; PWS at para 55.

358 NEs, 5 June 2020 at p 139, lines 18–21; p 163, lines 17–23.

359 18AB11627.

360 Defendant's Closing Submissions ("DCS"), at para 535.

361 NEs, 31 March 2020 at p 12, lines 17–25.

262 The defendant also argues that as at 7 February 2013, the third party was not entitled to grant EOT 2 to the plaintiff as the delay event had not completed. This is based on the defendant's interpretation of cl 23(3) of the SIA Conditions, which provides:[362]

> *After any delaying factor in respect of which an extension of time is permitted by the Contract has ceased to operate* and it is possible to decide the length of the period of extension beyond the Contract Completion Date (or any previous extension thereof) in respect of such matter, the Architect shall determine such period of extension and shall at any time up to and including the issue of the Final Certificate notify the Contractor in writing of his decision and estimate of the same. [emphasis added]

263 According to the defendant, the portion of cl 23(3) italicised above means that the third party was not entitled to grant an EOT until the delay event had "ceased to operate". The number of days given for extension should then be calibrated against the actual number of days of delay. Further, extensions of time can only be granted if there is an impact on completion. Thus, the defendant argues that the grant of EOT 2 was premature, given that the delay event had not yet ceased at the time of the grant.[363] At the time when EOT 2 was granted the third party could not have known whether the delay event would have any impact on eventual completion. Furthermore, the plaintiff actually completed the T&C of M&E works in ten days. Hence, the 40 days' extension granted under EOT 2 unfairly benefitted the plaintiff.

264 I do not accept this argument. Clause 23(3) of the SIA Conditions places an obligation on the third party to determine the plaintiff's application for an EOT and to notify the plaintiff of its decision. This clause states that when the

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362 4AB02132.

363 DWS at para 502.

third party considers the plaintiff's EOT application, it can wait till after the cessation of the delay event to decide the length of extension beyond the contract completion date, provided that the third party notifies the plaintiff of its decision and estimate by the time of the issuance of the final certificate. This merely provides the latest date by which the third party must notify the plaintiff of its decision. Clause 23(3) does not state that the third party cannot grant the EOT earlier if it is able to evaluate the EOT application before the cessation of the delay event. This interpretation of cl 23(3) is supported by the following observations in Eugenie Lip & Choy Chee Yean, *Contract Administration Guide to the SIA Conditions of Building Contract* (Lexis Nexis, 2nd Ed, 2009) at para 2.131:

> … [T]he approach of **Clause 23.(2)** … recognises the need for the Contractor to have an expeditious decision on whether an extension of time would be granted. As most if not all of the benefits of an expeditious decision on whether an extension of time would be granted would be lost if the Contractor is not also given an expeditious decision on the number of days of extension of time that would be granted, it does not seem logical to oblige the Architect to give a decision on the Contractor's entitlement to an extension of time within one month but allow the Architect the luxury of months or even years to decide on the actual number of days of extension. The Contractor will need both sets of information in order to properly plan for his works.
>
> …
>
> The Architect therefore should decide on the extension of time within a reasonable time and unless there is a legitimate reason not to do so, this decision should also be notified to the Contractor once it has been made.
>
> [emphasis in original]

265 In this case, Mr Yong explained that the EOT application was submitted on 20 December 2012, which was close to the contract completion date, *ie*, 21 February 2013. The third party knew that the delay event was SPPG's delay in carrying out power connection works and that the delay would impact the

contract completion date. Instead of delaying its decision on the EOT application till the issuance of the final certificate, the third party processed the EOT application with inputs from CCA as it was certain that the delay caused by SPPG would push back the actual completion date beyond the contractual completion date of 21 February 2013.[364] This expeditious processing of the EOT application under these circumstances cannot be faulted.

Whether the requirements for EOT 3 are established

266 I shall now turn to EOT 3. EOT 3 was granted by the third party due to SPPG's protracted delay in carrying out its incoming cable-laying works. This was anticipated even at the time of the granting of EOT 2, when the third party stated that it was granting an extension of 40 days and keeping another 15 days in reserve depending on whether there was "further delay due to [SPPG's] part". Since SPPG took longer than the parties expected, the third party granted EOT 3, again on the basis of SPPG's delay.[365] I have already concluded at [211] above that SPPG's delay constituted a *force majeure* event within the ambit of cl 23(1)(a) of the SIA Conditions.

267 The defendant asserts that the third party should not have granted EOT 3 because the plaintiff was responsible for the failure of SPPG's First Testing and Inspection on 14, 20 and 21 March 2013 for Units 12B, 12 and 12A respectively (*ie*, the reasons for the failure were due to construction-related issues). Accordingly, the plaintiff did not exercise due diligence.

268 At this juncture, it should be recalled that SPPG's testing and inspection

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364 TPWS at para 96.

365 PWS at para 54; 21AB13224–21AB13225; TPWS at paras 106 and 111.

took place after the completion of all electrical installation and the receipt of notification from SPPG on the readiness of the service connection.

269 I am satisfied that the plaintiff acted with due diligence in relation to EOT 3. CCA, the M&E consultant, confirmed that the plaintiff had constructed the M&E works fully in accordance with the M&E construction drawings.[366] Although the Project failed SPPG's First Testing and Inspection because certain mechanical and electrical items did not comply with SPPG's safety and connection requirements, the issues that were highlighted by SPPG in the First Testing and Inspection were not construction faults.[367] The comments arising from SPPG's First Testing and Inspection required the plaintiff to amend the single line diagram, and to rectify some signage, earthing and minor statutory non-compliance issues. Moreover, the failure of SPPG's First Testing and Inspection was expected due to the extremely detailed nature of the inspection. Mr Chan explained as follows:[368]

> A: I think you're a lawyer, so of course you follow whatever is written to the letter, but as consultants, especially in the building industry, we know that when you're dealing with authorities, there's a certain unpredictability about it when they come and inspect. So to fail the inspection is quite common for the – on the first time?

270 This was confirmed by Ms Chua, when she testified:[369]

> Q: … Ms Chua, is the first round of failure of the SPPG electrical turn-on tests for unit 12B the fault of GTMS?
>
> A: Not really, because it's expected to have a retest for a big house like that, yeah.

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366 TPDCC to DTPSOC at para 12A(r)(iii).

367 PRDCC at para 25i.

368 NEs, 8 June 2020 at p 69, lines 11–17; PRS at para 31.

369 TPWS at para 111; NEs, 2 July 2020 at p 23, line 15 to p 24, line 14.

> Q: Can you please help us understand your answer a bit more?
>
> A: Okay … usually for houses like that – or, rather, for SPPG, right, for residential projects, they will check to the little minor item because for them it's the safety of the user, so they will check everything to a knock-out box – to whether the knock-out box has earthing, to that detail. So it can be anything that causes the failure, yeah. So, yeah, because they are very thorough with the check. So once – when they are so thorough and they pick out all the defects that they feel that they should fail the test, our works contractor should pick it up and make sure that it doesn't reoccur in other units. So that's why, in my opinion, the first test is not at the fault of GTMS, yeah.
>
> Just to add on: all my projects, right, never have first time – it hardly first-time pass for a house like that, that scale. Never, yeah.

Accordingly, the plaintiff could not be said to have acted without due diligence.

271 The defendant also took issue with the fact that although CCA had recommended that EOT 3 be granted for 15 days with effect from 28 March 2013, the third party granted the extension with effect from 2 April 2013. CCA had recommended 28 March 2013 as it was the first re-test and electrical turn-on date conducted for the three units, specifically Unit 12B. Further, CCA was of the opinion that the test dates for Units 12 and 12A, on 2 April 2013 and 8 April 2013 respectively, were not appropriate as the testing defects were similar to that of Unit 12B but had been left unrectified by the plaintiff.[370] However, the third party explained that since EOT 2 was granted until 2 April 2013, EOT 3 should therefore begin from 2 April 2013.[371] Further, from the viewpoint of the third party, the 15 days in EOT 3 related to the same issues as

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370 22AB13961.

371 NEs, 31 March 2020 at p 93, lines 7–19.

in EOT 2, and was distinct from this issue of re-test and electrical turn-on. This is elaborated on below at [290]–[292]. In any case, as stated above at [257], the court will not lightly disturb the third party's assessment so long as it is one that is made fairly and rationally. The mere fact that the third party decided to have EOT 3 start on 2 April 2013 instead of 28 March 2013 does not suggest that the assessment was made unfairly or irrationally. It should also be emphasised that the plaintiff had requested 40 days' EOT in EOT 3, but the third party decided to only grant 15 days based on its independent assessment.

272 In the circumstances, for both EOT 2 and EOT 3, I find that there was no failure on the part of the plaintiff to exercise due diligence or take reasonable mitigation steps. The third party's issuance of EOT 2 and EOT 3, which was based on its professional and independent assessment, cannot be impugned.

Circumstances surrounding EOT 2 and EOT 3

273 The defendant further alleges that the results of EOT 2 and EOT 3 were pre-determined, based on certain observations he himself had made. On that basis, the defendant claims that there were *both* a conspiracy amongst the parties and improper pressure or interference exerted by the plaintiff on the third party and CCA.[372]

274 I note first that the defendant's two claims are fundamentally inconsistent. If the plaintiff were conspiring with CCA and the third party to injure the defendant, it naturally follows that they would be working *in tandem* with one another. In other words, there would simply be no need for the plaintiff to exert improper pressure or to interfere with the other parties to get them to

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372 NEs, 18 February 2020 at p 48, line 4 to p 50, line 11; p 71, line 13 to p 72, line 24.

comply with its demands. Regardless, in my view, both of the allegations made by the defendant are completely speculative and baseless.

275 Additionally, the defendant's own expert witness, Mr Foo, contradicted the defendant's allegations of conspiracy and/or collusion. Even though he strongly disagreed with the third party's granting of the EOTs, Mr Foo acknowledged in response to my questions that "when you say are they colluding, I don't see the evidence".[373]

276 I shall first address EOT 2. The defendant alleges that the third party was coaching or advising the plaintiff to advance the latter's claim.[374] The defendant highlighted that on 28 January 2013, the third party had requested the plaintiff to include SPPG's delay in electrical turn-on in its request (the "28 January 2013 E-mail").[375] The 28 January 2013 E-mail from Ms Chiyachan addressed to Mr Manoosegaran and Mr Kumar of the plaintiff stated as follows:

> … We understand that the power grid turn on will affect schedule of T&C of M&E, hence please include in the critical path schedule for our reference for our fully [*sic*] view of assessment. …

277 In addition, on 1 February 2013, the third party directed the plaintiff to regularise various errors made in its substantiation of its request (the "1 February 2013 E-mail").[376] The 1 February 2013 E-mail from Ms Chiyachan to Mr Kumar stated as follows:

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373 NEs, 6 March 2020 at p 161, line 22 to p 162, line 10.

374 SKK at para 38.

375 20AB12999; DDCC at para 25f.

376 20AB13071; DDCC at para 25f.

> … Can you also correct the attached table; task ID, completion date, etc. And resubmit to us by today. …

278 I find that there is no merit to the defendant's allegation whatsoever. Clause 23(4) of the SIA Conditions expressly permits the third party to request for further information from the plaintiff to enable it to estimate the period of extension of time to be granted, if any.[377] There is nothing insidious about such a request. In certifying EOT claims, the role of the third party is to evaluate the merits of the EOT application rationally and fairly. It has to exercise its independent and professional judgment and not take sides with either the plaintiff or the defendant. It is, thus, necessary for all relevant information to be placed before the third party so that it can properly exercise its judgment. The information must be *complete* (which was the third party's intention in sending the 28 January 2013 E-mail) and must also be *accurate* (which was the third party's intention in sending the 1 February 2013 E-mail). Further, the third party's practice of seeking further substantiation was not a one-off incident. For EOT 1, which was ultimately rejected, the third party had similarly requested the plaintiff to provide further substantiation on four occasions.[378]

279 The defendant also alleges that the plaintiff's amended request for EOT 2 was sent by the third party to CCA for "confirmation" on 5 February 2013 (the "5 February 2013 E-mail") and a pre-drafted approval from the third party was enclosed. Further, CCA was only given one day to respond.[379] Thus, the defendant suggests that the third party had already pre-determined EOT 2.

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377 TPWS at para 92.

378 TPDCC at para 20(a).

379 DDCC at para 25i; CHH at pp 142178–142179.

280 I find that there is no evidence of a conspiracy involving CCA. There is no obligation on the part of the third party to seek any "confirmation" from CCA, or any party for that matter.[380] The third party explained that it had sought CCA's views on EOT 2 given that EOT 2 related to M&E works.[381] Ultimately, it was the third party alone who was responsible for EOT certification. As Ms Chua herself agreed, the third party was in a better position than CCA to assess whether the plaintiff had carried out its works diligently such that an EOT should be granted.[382] If the result of EOT 2 was indeed pre-determined, then there was no reason for the third party to seek CCA's input. Further, while the 5 February 2013 E-mail did indeed seek CCA's response by the next day, CCA was aware of EOT 2 from as early as 20 December 2012 and had commenced its review of EOT 2 on 28 December 2012.[383] Accordingly, it is clear that the 5 February 2013 E-mail was sent by the third party to seek CCA's *final* input on EOT 2.[384]

281 There is similarly no evidence of improper pressure being exerted on CCA by the plaintiff. It should be noted that CCA had itself *recommended* granting EOT 2, albeit for only 15 days.[385] CCA's reply stated that: "For PG [Power Grid] parts … you are granting 15 days [*sic*] and we are fine with it".[386]

282 The defendant also contends that the outcome of EOT 2 was pre-

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380 NEs, 18 February 2020 at p 44, lines 19–25; PWS at paras 71–72.

381 AEIC of Pakawadee Chiyachan at para 46.

382 NEs, 30 June 2020 at p 150, lines 18-22.

383 CHH at para 32– 33; NEs, 26 June 2020 at p 42, lines 8 to 11.

384 CHH at paras 48–50.

385 21AB13216.

386 CHH at p 180.

determined. This was based on the fact that prior to the issuance of EOT 2, F+G had recommended in Cost Report No 6 an *estimated* $65,000 additional costs in respect of "Additional compensation to the Contractor due to extension of time".[387] It is clear that there is no basis for the defendant to cast aspersions on EOT 2 based on Cost Report No 6. The figure of $65,000 was expressly stated in the remarks column to be "pending justification and Architect's assessment".[388] Such estimations by F+G as to *potential* claims by the plaintiff were wholly logical. As explained by Mr Ng in his AEIC:[389]

> 92. Additionally, I wish to add that if estimated costs in relation to GTMS were included in the cost reports for the Project, this was simply F+G's estimation of a potential amount which GTMS **might** claim in a future payment claim and **might** be entitled to. Including an estimated cost in relation to GTMS in a cost report for the Project does **not** mean that these estimated costs will be incurred by GTMS and/or eventually be certified as due and owing to GTMS. Such estimated costs were included so that Ser was aware of the additional financial commitments.
>
> …
>
> 99. F+G was aware that GTMS had submitted a claim for an extension of time on or around 20 December 2012 …
>
> …
>
> 101. As any cost implications arising from a grant of the 20 December 2012 Request for EOT may be an additional cost which Ser may need to pay to GTMS, F+G included an estimation of the same in Cost Report No. 06 in the sum of S$65,000. These were not costs that were already certified as due to GTMS. … one of the purposes of a cost report was to keep CSYA, Ser and the consultants for the Project aware of any projected additional costs …
>
> 102. It must be emphasised Cost Report No. 06 does not state that estimated costs of S$65,000 are due to GTMS. Cost Report

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387 DDCC at para 25j.

388 AEIC of Ng Pak Khuen ("NPK") at p 1406.

389 NPK at paras 92, 99, 101–102.

> No. 06 states that estimated costs of S$65,000 are anticipated (as this is set out in the 'Anticipated Variations' for 'Architectural and Structural Works' column), and that these are '*Estimated; pending justification and Architect's assessment*'. If GTMS is unable to justify the 20 December 2012 Request for EOT and/or the cost implication for this, the sum of S$65,000 will not be recommended by F+G as being due to GTMS in the relevant F+G valuation. …
>
> [emphasis in original in italics and bold underline; emphasis added in underline]

283 This was also corroborated by Mr Yong who stated that the figures were "only an anticipated increase".[390] The defendant's assertion that F+G was a party to the conspiracy simply because of this cost report is wholly unmeritorious.

284 I shall now deal with EOT 3, where the plaintiff was granted 15 days' extension on 10 April 2013 from 2 April 2013 to 17 April 2013. The defendant likewise claims that the result of EOT 3 was pre-determined and was pursuant to a conspiracy between the plaintiff and the third party, or as a result of improper pressure exerted by the plaintiff. If EOT 3 had not been granted, the contractual completion date would have been 2 April 2013, such that the plaintiff would have been liable to pay liquidated damages from that date onwards until the actual completion date of the Project.

285 The defendant relies on the fact that the third party issued an "in-principle" entitlement to EOT to the plaintiff on 2 April 2013. This was only one day after the plaintiff's request for EOT 3 was made.[391] The in-principle entitlement was issued by the third party without consulting CCA. Further, it transpired that CCA had initially refused to support the plaintiff's request in

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390 NEs, 4 June 2020 at p 64, lines 18–19.

391 DDCC at para 25m.

EOT 3. According to the defendant, CCA was "persuaded" by the third party to change their recommendation.[392]

286 Additionally, the defendant asserts that the plaintiff and the third party had a pre-planned agreement to grant an EOT of 15 days. This agreement entailed the plaintiff pretending to ask the third party for 40 days' EOT, following which the third party would pretend to consider the proposition. The third party would then reject the request for 40 days' EOT and gave 15 days' EOT.[393]

287 I must say that the defendant's arguments are illogical and baseless. The defendant alleges that Ms Chua from CCA was a party to the conspiracy in relation to EOT 2 and EOT 3. However, if CCA was indeed a party to the conspiracy, then there was no reason for it to have initially objected to granting EOT 3.

288 Be that as it may, I shall consider whether the events set out in [266]–[271] and [285] above support the defendant's contention that the plaintiff and the third party conspired in relation to EOT 3. It is not disputed that CCA had initially refused the plaintiff's request for EOT 3. However, CCA itself acknowledged that its initial refusal was "too hasty".[394] As Ms Chua explained:[395]

> A: … I think, if I recall, there are some mistake that is not supposed to happen, although there are other more, so at that point I just say 'no', because during the test there

392 SKK at para 56(c).

393 NEs, 18 February 2020 at p 42, lines 8–14.

394 CHH at para 56; TPWS at para 110.

395 NEs, 2 July 2020 at p 45, line 20 to p 46, line 8.

> are many defects, so some are uncalled for, but then some are – you know, is expected. So at that point I say 'no', yeah. But after thinking through, I think it's not fair because some of the defects are – or rather, some of the item that SPPG picked up are not – are too small for them to – I mean, nobody is 100 per cent perfect. So if they [the plaintiff] have find out [the defects in] the first house, then they shouldn't repeat the same thing the rest, so I think I should give them this time.

289 Further, it must again be emphasised that ultimately, even if CCA had persisted in its refusal to support the grant of EOT 3, the third party is still the one who has to make the final judgment call on whether or not to grant EOT 3.[396] As long as the third party exercises its judgment fairly and rationally, it is completely entitled to disagree with CCA and arrive at a different conclusion.

290 Additionally, the circumstances of the third party granting an in-principle entitlement to the plaintiff are not suspicious if one considers that the third party honestly believed that EOT 3 arose from the same set of issues in EOT 2. As stated by Mr Yong in his e-mail to Ms Chua on 2 April 2013 (the "2 April 2013 E-mail"):[397]

> … [W]e view that since we had given previously due to late turn on date and Power grid late connection, the contractor should entitled the same ground for claim on time if it is deem not their fault [*sic*]. …

291 It becomes more improbable that EOT 3 arose out of a conspiracy given that the possibility of granting EOT 3 had previously already been discussed during EOT 2. This heads-up is found in the letter granting EOT 2:[398]

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396 TPWS at para 110.

397 22AB13939.

398 21AB13224–21AB13225.

> … As result above, we agree based on the above basis to grant M/s GTMS's 40 days of EOT for the T&C of M&E Services works and Light Fitting installation. We will review on the 15 days given for the electrical turn-on should there be further delay due to PowerGrid part. …

292 This was again confirmed by Mr Yong on the witness stand:[399]

> A: … So CCA is of the opinion that for this second test for energisation, there should not be any time given, because even if anything, it should be for the first house. But our argument to CCA is that actually we are not looking at this at all; we are actually looking at the first 15 days that was written in the first grant, because there is in fact a delay from whichever February date that SPPG has agreed and subsequently only came at end of February. So that 15 days was there.

293 Accordingly, the circumstances surrounding the issuance of EOT 2 and EOT 3 do not support the inference of any conspiracy between the plaintiff and the third party to grant EOT 2 and EOT 3. Neither is there any evidence that the plaintiff and the third party had an intention to injure the defendant by allowing EOT 2 and EOT 3 to be granted. There is also absolutely no evidence of interference or pressure being exerted by the plaintiff on the third party or CCA.

294 What is most revealing and pertinent is that these allegations to injure or defraud the defendant were never raised or suggested by the defendant and his Assistants when the EOTs were considered. If these allegations were indeed true, one would have expected the defendant and his Assistants to have protested or expressed some dissatisfaction over the granting of EOT 2 and EOT 3. However, there were no signs or any indications of unhappiness over the granting of EOT 2 and EOT 3 until the plaintiff commenced this Suit. Neither the defendant nor his Assistants raised any discernible objection to the EOTs at

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399 NEs, 2 June 2020 at p 107, lines 15–24.

the material time, even though they were copied in the letters and had the opportunity to do so.[400] In fact, the defendant could not even remember when he first raised his objections, or whether he had even expressed any objections in the first place. This can be seen from my exchange with him:[401]

> Court: … When did you first object to the 40 days extension?
>
> A: I can't remember, but I don't think I objected in writing.
>
> Court: When did you first express your objection? People cannot read your mind, Mr Ser. Do you understand what I mean?
>
> A: Yeah.
>
> …
>
> Court: When the trial started, I know you objected. But I am asking, before that, when did you object?
>
> A: In writing, I don't think so. But I did express to the site meeting – at the site meeting, that the electricity is not available yet in September 2012. I had been chasing them, 'When can the electricity be made available?' This is what I expressed.
>
> Court: Yes. If you don't clearly express, who can read your mind? Unless you say, 'No, this is not fair, how can we allow the extension', then people can understand that you are objecting. Do you understand what I mean? People cannot read your mind.
>
> …
>
> A: I think the first one should be January 2013 or February 2013.
>
> Court: How did you register your objections in January?
>
> A: I don't remember I write at all. I didn't write and I didn't tell Wilson Cheung to write.
>
> Court: So nobody –
>
> A: Did I? I don't know, I forgot.

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400 22AB13989; NEs, 18 February 2020 at p 45, lines 2–18.

401 NEs, 21 February 2020 at pp 53–56.

> Court: In other words, your objection is stored in your brain, you didn't express it out?
>
> A: It's in my brain for quite sometime but I –
>
> Court: But you didn't express it out?
>
> A: I don't know I express it to tell Wilson or not, I forgot.
>
> Court: Can I assume that the same thing happened in the application for the second EOT, that you accepted it, but subsequently you objected it?
>
> A: Second TOP is quite distinct, but I don't think I write a letter also. I got to check. But I feel very funny how come the contractor failed the safety test, and CSYA later on back him up by saying this is common.

295 Hence, I find that the defendant's allegations of conspiracy in relation to the EOTs are completely spurious as the allegations are unsupported by any evidence. To the contrary, the evidence clearly shows that the plaintiff and the professionals involved in the processing of EOT 2 and EOT 3 acted professionally and independently.

Summary on the EOTs

296 In summary, the defendant has not proven his case on a balance of probabilities in relation to a conspiracy between the plaintiff and the third party regarding the grant of the EOTs:

(a) The circumstances surrounding the evaluation of EOT 1, if anything, evidenced the third party's professionalism and independence when assessing the EOT requests, for it was the third party who had continually pushed back and required substantiation from the plaintiff when evaluating EOT 1.

(b) EOT 2 was granted fairly and independently as SPPG's delay in carrying out power connection works constituted a *force majeure* event

falling within cl 23(1)(a) of the SIA Conditions. Furthermore, the plaintiff was not responsible for any delay that occurred and in fact, took reasonable efforts to mitigate any delays that arose. Although EOT 2 was granted for a period of 40 days, instead of CCA's recommendation of 15 days, I find that the third party acted rationally and its decision was based on a breakdown of the Works that the plaintiff was required to undertake.

(c) In EOT 3, the third party granted the plaintiff a period of 15 days of EOT. This was also justifiably granted as it was similarly due to SPPG's delay in carrying out power connection works, which constituted a *force majeure* event. EOT 3 was linked to EOT 2 in so far as the third party, in granting 40 days for EOT 2, had indicated to the plaintiff that it was keeping another 15 days in reserve depending on whether there was "further delay due to [SPPG's] part". SPPG did cause further delay after EOT 2. Moreover, the plaintiff acted with due diligence in seeking to comply with the First Testing and Inspection. The third party's decision was, therefore, made professionally and independently.

297 My findings above are also buttressed by the fact that there was no shred of evidence of any broader conspiracy surrounding the EOTs. The allegations of fraud raised by the defendant in this regard were often fundamentally inconsistent or soundly rebutted by the evidence available. I, therefore, reject the defendant's allegations in this regard.

Completion certificate

298 The defendant asserts that the CC was issued prematurely and without basis. The defendant avers that the conditions in Item 72 of the Preliminaries

regarding the issuance of the CC were not satisfied. On that basis, the defendant alleges that the circumstances give rise to an inference that there was a conspiracy between the plaintiff and the third party for the third party to issue the CC to the plaintiff with the intention of thereby causing injury to the defendant.

299 To recapitulate, Item 72 of the Preliminaries comprises three conditions as follows:

> Pursuant to the provisions of the Agreement and Conditions of Contract, a Completion Certificate will not be issued until:
>
> > (a) All parts of the Works are in the Architect's opinion ready for occupation and for use.
> >
> > (b) All services are tested, commissioned and operating satisfactorily as specified in the Contract or the relevant Sub-Contract including handing over all test certificates, operating instructions and warranties.
> >
> > (c) All works included in the Contract are performed including such rectification as may be required to bring the work to the completion and standards acceptable to the Architect.

300 In determining whether the CC can be issued, Item 72 of the Preliminaries must be read together with cl 24(4) of the SIA Conditions which provides:[402]

> Subject to the provisions of Sub-Clause (3) hereof as to the effect of Termination of Delay Certificates, the liability of the Contractor to pay further liquidated damages under Sub-Clause (3) hereof shall cease, and the Contract be deemed to be completed for this purpose, upon the issue by the Architect of his certificate under this Sub-Clause that the Works have been completed. Such certificate is referred to in this Contract as a 'Completion Certificate', and shall be issued by the Architect when the Works *appear to be complete and to comply with the Contract in all respects*. [emphasis added]

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402 4AB02133.

301 Clause 24(4) of the SIA Conditions requires the third party to refer to the Contract between the plaintiff and the defendant, which includes Item 72 of the Preliminaries.

Whether Item 72 of the Preliminaries is applicable

302 The plaintiff and the third party contend that Item 72 of the Preliminaries does not apply in determining when the CC should be issued. They raise various arguments in this respect, which I shall address in turn.

(1) The third party's submission that Item 72 does not form part of the Contract as the defendant did not sign Volumes 1A, 1B and 2 of the formal contract documents

303 The third party submits that Item 72 of the Preliminaries does not form part of the Contract. This submission is based on the fact that the defendant did not sign Volumes 1A, 1B and 2 of the formal contract documents, which contained Item 72 of the Preliminaries. According to the third party, this "evince[d] an intention not to be bound by Volumes 1A, 1B and 2".[403] Furthermore, cl 7 of the LOA states, among other things, that:[404]

> Until the formal contract documents are prepared and executed, this Letter of Acceptance together with the documents listed as Contract Documents, shall constitute a binding agreement between you and the Employer.

According to the third party, since Item 72 of the Preliminaries is not found in any of the documents referred to in cl 7 of the LOA, Item 72 of the Preliminaries

403 TPWS at para 117.

404 4AB02166.

does not form part of the Contract. Instead, the relevant clauses are contained in the SIA Conditions, which forms part of the Contract via cl 7(a) of the LOA.[405]

304 I disagree with the third party. As V K Rajah JC (as he then was) observed in *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [48]–[50] and [52] (cited by the CA in *Toptip Holding Pte Ltd v Mercuria Energy Trading Pte Ltd and another appeal* [2018] 1 SLR 50 at [51]):

> 48 Acceptance in a contractual setting must be ascertained objectively. Acceptance can be signified orally, in writing or by conduct. When there is a history of negotiations and discussions, ***the court will look at the whole continuum of facts*** in concluding whether a contract exists. …
>
> 49 ***A contract may be concluded on the terms of even a draft agreement, if the parties are perceived by their conduct to have acted on it***. *Brogden v Metropolitan Railway Company* (1877) 2 App Cas 666 provides a germane illustration. A draft agreement for the supply of coal was submitted by a railway company to a merchant. The merchant made a number of alterations to the draft, marked it 'approved' and then returned it. The railway company never expressly agreed to the amendments but nonetheless accepted deliveries. It was held that a contract on the terms of the draft agreement had been reached upon the acceptance of these deliveries.
>
> 50 It is also hornbook law that silence *per se* is equivocal and does not amount to a clear representation. …
>
> … Silence is a midwife that may ultimately deliver a contractual offspring that is stillborn or live. Silence and implicit acceptance are not invariably antagonistic concepts. Silence can signify affirmation at one end of the spectrum, disinterestedness or abandonment at the other end of the spectrum. It is a chameleon utterly coloured by its contextual environment. Silence will usually be equivocal in unilateral contracts or arrangements; in bilateral arrangements or negotiations on the other hand, there will usually never be *true* or *perfect* silence. ***In many such cases, while there may not be actual communication of acceptance, the parties' positive,***

405 TPWS at para 117.

> ***negative or even neutral conduct can evince rejection, acceptance or even variation of an existing offer***.
>
> …
>
> 52 … In the final analysis, ***the touchstone is whether, in the established matrix of circumstances, the conduct of the parties, objectively ascertained, supports the existence of a contract***. Reduced to its rudiments, it can be said that this is essentially an exercise in intuition. Legal intentions, whether articulated or unarticulated, should not be viewed in isolation but should be filtered through their factual prism. …
>
> [emphasis in original in italics, emphasis added in bold italics]

305 Looking at the matrix of circumstances in this case, the conduct of both the plaintiff and the defendant evinces an agreement that Volumes 1A, 1B and 2 formed part of the Contract. The formal contract documents had been prepared by F+G and CCA, both of whom were consultants engaged by the defendant. From 29 February 2012 to 15 April 2013, the defendant was repeatedly reminded at site meetings to sign the formal contract documents. However, the defendant testified that he "just put the contract aside".[406] Throughout this time, the plaintiff and the third party continued to work on the Project. On their end, Mr Tan agreed in cross-examination that Volumes 1A, 1B and 2 formed part of the Contract, and that he had signed on various pages of Volume 1B.[407] Mr Chan similarly agreed that the Contract included Volumes 1A, 1B and 2, as well as Item 72 in particular.[408]

306 In the light of all these circumstances, the defendant's conduct taken objectively signified his acceptance rather than his rejection of the formal contract documents. Having been reminded to sign the formal contract

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406 NEs, 23 January 2019 at p 181, line 13 to p 185, line 10.

407 NEs, 8 November 2018 at p 109, line 10 to p 111, line 1; DRS at para 2.

408 NEs, 4 June 2020 at p 174, line 11 to p 176, line 24; DRS at para 2.

documents at site meetings, he must have known that the plaintiff and the third party were operating on the basis that the formal contract documents applied. His inaction despite such knowledge evinced to the plaintiff his acquiescence to the formal contract documents being part of the Contract. Therefore, I find that although the formal contract documents were not signed by the defendant, the plaintiff and the defendant agreed by their conduct that the formal contract documents formed part of the Contract. As such, Item 72 of the Preliminaries, which can be found in Volume 1B of the formal contract documents, is also part of the Contract.

(2) The plaintiff's submission that Item 72 relates to the issuance of the MC and not the CC

307 The plaintiff takes a slightly different position from the third party. While the plaintiff accepts that Item 72 of the Preliminaries forms part of the Contract, the plaintiff submits that Item 72 relates to the issuance of the MC, rather than the CC.[409] According to the plaintiff, the Preliminaries were drafted with the Public Sector Standard Conditions of Contract for Construction Works (the "PSS Conditions") in mind, such that the reference to the "Completion Certificate" should be construed as a reference to the "Maintenance Certificate".[410] In support of this, the plaintiff points to Items 17, 45 and 60 of the Preliminaries, in which there are several apparent discrepancies between the terminologies used in the Preliminaries and the SIA Conditions.[411] Thus, the plaintiff submits that Item 72 pertains to the issuance of the MC and is irrelevant to the determination of whether and when the CC should have been issued.

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409 PWS at para 24.

410 PWS at para 16.

411 PWS at paras 17–23.

308 I do not accept the plaintiff's submission. First, this was raised for the very first time in the plaintiff's written closing submissions after the trial had ended. The plaintiff did not mention this point in its pleadings. It did not adduce any evidence of the PSS Conditions and its relevant terms, neither did it put this aspect of its case to any of the witnesses at trial.[412] The last point is especially significant as it was F+G and CCA who had prepared the formal contract documents, including the Preliminaries. Therefore, the witnesses from F+G and/or CCA could have provided useful evidence as to how the Preliminaries came about and whether they were originally drafted for the PSS Conditions. However, the plaintiff failed to raise this point entirely. In these circumstances, it would not be fair to the other parties, the defendant especially, to permit the plaintiff to raise this new argument at the last minute at the conclusion of the trial after all the witnesses had testified.

309 Secondly, it is not apparent from the evidence before me that the Preliminaries were intended to be used with the PSS Conditions. There are no express references in the Preliminaries to the PSS Conditions.[413] The phrase "Completion Certificate" does not even appear in the PSS Conditions, which use the term "Final Completion Certificate".[414] In contrast, the SIA Conditions use the exact term "Completion Certificate".

310 Thirdly, even if the Preliminaries were originally drafted to be used with the PSS Conditions, that does not mean that they cannot be used with the SIA Conditions. Furthermore, when used with the SIA Conditions, the

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412 DRS at para 17.

413 DRS at para 18.

414 Plaintiff's Bundle of Authorities, dated 17 August 2020, Tab 2, at p 69.

Preliminaries may not necessarily take on the same meanings as when they were used with the PSS Conditions. While there may be some discrepancies in the terminologies used (*eg*, Item 60 of the Preliminaries refers to a "Certificate of Substantial Completion" although the SIA Conditions do not refer to a "Certificate of Substantial Completion"), the meaning as intended by the parties is ultimately a matter of construction based on the circumstances as a whole. In construing the meaning of "Completion Certificate", it is pertinent that Item 72 of the Preliminaries clearly states that:

> Pursuant to the provisions of the Agreement and *Conditions of Contract*, a Completion Certificate will not be issued until … [emphasis added]

311 In turn, the phrase "Conditions of Contract" is expressly defined at Item 3 of the Preliminaries to be the SIA Conditions together with the Supplementary Conditions. Read in this context, the phrase "Completion Certificate" in Item 72 must have the same meaning as the phrase "Completion Certificate" in cl 24(4) of the SIA Conditions although the scope and requirements in the two provisions are ostensibly different. It is also important to note that none of the witnesses, including those from F+G and CCA, testified that Item 72 of the Preliminaries was applicable to the Maintenance Certificate rather than the Completion Certificate. If Item 72 indeed relates to the Maintenance Certificate, one would expect the witnesses and the parties to raise it right from the start.

312 For the above reasons, I do not accept the plaintiff's submission that the term "Completion Certificate" in Item 72 of the Preliminaries should be construed as "Maintenance Certificate".

(3) The plaintiff's and the third party's submission that Item 72 should be disregarded as it contradicts cl 24(4)

313 Finally, the plaintiff and the third party both submit that even if Item 72 forms part of the Contract, cl 24(4) of the SIA Conditions supersedes Item 72 of the Preliminaries, such that the latter should be *disregarded* when determining whether the CC can be issued.[415] This argument is based on cl 11 of the Supplementary Conditions to the Conditions of Contract, which provides as follows:[416]

> **Order Of Priority Of Information**
>
> In the event of conflicts and discrepancies between different parts of the Contract Documents, the information shall be taken in the following order of priority:
>
> - Articles and Conditions of Contract
> - Scope of Works
> - Preliminaries
> - Drawings
> - Particular/Technical Specifications
> - General/Standard Specifications
> - Schedule of Prices [excluding Preliminaries]

314 The plaintiff and the third party contend that as cl 24(4) contradicts Item 72 of the Preliminaries, the effect of cl 11 is that cl 24(4) of the SIA Conditions "prevail[s]" over Item 72 of the Preliminaries.[417] In support of this, the third party raises several instances of apparent contradictions between

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415 PWS at para 7; TPWS at para 118.

416 5AB02496.

417 TPWS at para 120.

cl 24(4) and Item 72. The eventual result is that, in determining when the CC can be issued, the third party only has to refer to cl 24(4) of the SIA Conditions.

315 I disagree with the plaintiff and the third party. Clause 11 states the order of priority "*[i]n the event of conflicts and discrepancies*". In this instance, however, cl 24(4) of the SIA Conditions and Item 72 of the Preliminaries are neither in conflict nor inconsistent. There are no discrepancies in these two provisions. In fact, Item 72 of the Preliminaries is *complementary or supplementary to* cl 24(4) of the SIA Conditions.[418] Clause 24(4) *broadly* sets out the circumstances under which the third party can exercise its discretion to issue the CC, as seen above at [300]. Item 72 of the Preliminaries provides further guidelines to the third party on its exercise of the discretion in cl 24(4) of the SIA Conditions. Both provisions have a common purpose, that is, to ensure that the Project is complete, in compliance with the contractual requirements and that the defendant can move in to occupy and use the three units in the Project. In this regard, it is notable that cl 24(4) makes reference to compliance with "the Contract in all respects". This reference to the Contract means that in determining whether the requirements in cl 24(4) are satisfied, the third party should have regard to the entire Contract, including Item 72 of the Preliminaries.

316 In this respect, the CA in *Ser Kim Koi (Court of Appeal)* ([67] *supra*) at [66] similarly observed:[419]

> In any event, ***there is no discrepancy between cl 24(4) and Item 72 in the present case***. Indeed cl 24(4) requires the Architect to issue the Completion Certificate when the works appear to be complete 'and *to comply* with the Contract *in all*

418 DWS at para 61.

419 DWS at para 61; DRS at para 14.

> *respects*' … It cannot be argued that Item 72 is not part of the contract or that its requirements do not have to be met. In fact the parties do not dispute that Item 72 is contained within Section 1 of the preliminaries and the preliminaries in turn form an important part of the contract containing the bills or bills of quantities or schedules of rates or prices or the specifications of works which set out, *inter alia*, details of the works, the contractor's obligations, what equipment will be provided and what will not, requirements for the execution of the works, *etc*, all of which will enable the contractor to more accurately price his works and prolongation expenses. ***Item 72 can be seen to complement and describe in more detail what the contractor's obligations are***, including those in relation to completion. [emphasis in original in italics, emphasis added in bold italics]

317 Thus, Item 72 of the Preliminaries has to be satisfied before the CC can be issued. I turn now to deal with each of the conditions under Item 72 of the Preliminaries and the specific allegations in relation to each condition.

Whether Item 72(a) of the Preliminaries has been fulfilled

318 Item 72(a) of the Preliminaries states that the CC shall not be issued until "[a]ll parts of the Works are in the Architect's opinion ready for occupation and for use".[420] To recapitulate, the CC was issued by the third party on 15 May 2013, certifying completion on 17 April 2013. The TOP was only issued by the BCA on 16 September 2013. As at 15 May 2013, the Project had already failed TOP Inspection 1, which was held on 30 April 2013.

319 The plaintiff distinguishes between the Project being "physically ready for occupation" and the employer being able to "legally occupy the Project" after the TOP is obtained. The plaintiff submits that the phrase "ready for occupation and for use" in Item 72(a) refers to physical readiness for

420 5AB02574.

occupation, not legal readiness. Otherwise, the phrase "Architect's opinion" would be rendered otiose. The plaintiff also notes that when making a request for the issuance of the TOP, the third party is required to submit a declaration that the "works have been completed in accordance with the provisions of the Building Control Act, the regulations made thereunder and the conditions under which the plans were approved".[421] According to the plaintiff, this means that the third party must be satisfied that the Project is "ready for occupation" before applying for the TOP.[422]

320 Similarly, the third party submits that the issuance of the TOP is not a pre-condition for the third party's issuance of the CC. The third party notes that pursuant to s 12(4) of the Building Control Act (Cap 29, 1999 Rev Ed) ("Building Control Act"), the TOP is only *prima facie* evidence that a building is suitable for occupation. Moreover, there is no express reference to obtaining the TOP in Item 72(a) or any other part of the Contract. Thus, Item 72(a) should be read practically from the perspective of the third party who is not legally-trained.[423]

321 The defendant takes a different position. Since it is an offence pursuant to s 12 of the Building Control Act to occupy a building before the TOP or CSC has been issued, the defendant claims that the third party should not have issued the CC for the Project certifying that it was ready for occupation and use.[424] The

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421 23AB14325.

422 PWS at paras 85–86.

423 TPWS at paras 123–125; 131–133.

424 DWS at paras 68–69.

defendant also relies on the following passages from *Ser Kim Koi (Court of Appeal)* ([67] *supra*) at [44]–[45]:[425]

> 44 The meaning of the phrase in Item 72 para (a), 'All parts of the Works ***are*** … ***ready*** for ***occupation and for use*** …' … is clear. It means, in no uncertain terms, that the employer can go into occupation of and use the premises. It is difficult to understand how the Architect could have issued the Completion Certificate on 15 May 2013, certifying contract completion on 17 April 2013, when just two weeks prior to his issue of that Completion Certificate, the Buildings had *failed* the first TOP inspection on 30 April 2013.
>
> 45 Mr Pillay [*ie*, the defendant's counsel for the summary judgment application] rightly points out that anyone in the building and construction industry knows that entering into occupation of and using a building which has not obtained TOP or its certificate of statutory completion is an offence under s 12 of the Act …
>
> [emphasis in original]

322 I generally agree with the above-cited passages in principle, on the premise that the reasons for the failure of the TOP inspections can be attributed to matters that fall within the scope of the plaintiff's Works. However, the passages cited above cannot be taken to stand for the *absolute* proposition that a CC can *never* be issued if the TOP is not obtained. An example of when the CC was issued *prior* to the obtaining of the TOP is *Schindler's Lifts* ([150] *supra*). In that case, the completion certificate was issued on 1 September 2000 whereas the TOP was obtained in two phrases on 23 September 2000 and 1 February 2001 (see *Schindler's Lifts* at [4]). In this case, it is clear and undisputed that Item 72(a) of the Preliminaries and cl 24(4) of the SIA Conditions do not state that the TOP must be secured before the architect can issue the CC. In a situation where the third party issues the CC notwithstanding

425 DWS at paras 64–66.

that the TOP inspections have failed, a more nuanced inquiry is needed, on which I shall now elaborate.

323 In construing Item 72(a) of the Preliminaries, the court has to first determine the scope of the plaintiff's Works under the Contract. In this case, the definition of the term "Works" is set out in cl 1 of the Articles of Contract, under the heading "Contractor's Obligations": [426]

> The Contractor hereby agrees with the Employer to carry out, bring to completion, and maintain for the Employer the building and other works comprising Proposed Erection of 3 Units of 2-Storey Detached Dwelling House with A Basement and A Swimming Pool at Lot 98388L Mukim 04 at Leedon Park (Bukit Timah Planning Area) (which, together with such variations as may be required by the Architect and all temporary works needed satisfactorily to construct the permanent works, are hereinafter called 'the Works') …

324 Next, the court has to identify the reasons for the failure of the TOP inspections. Were any of these reasons due to construction-related issues that were within the scope of the plaintiff's Works? If the failure of the TOP inspections was due to defects that were wholly beyond the plaintiff's control and not within its contractual responsibility, it would be difficult for the third party not to issue the CC since the plaintiff can be considered to have completed its contractual obligations. In these circumstances, it would be justifiable for the third party to issue the CC notwithstanding that the TOP has not been obtained. This is especially so having regard to the purpose of the CC which, *inter alia*, is to determine the plaintiff's liability for delay and determine the commencement of the maintenance period (see *Ser Kim Koi (Court of Appeal)* at [69]).

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426 5AB02929.

325 In relation to TOP Inspection 1, some of the reasons why it failed clearly fell within the scope of the plaintiff's Works *eg,* the unequal steps and risers. This shortcoming was already known to the third party before TOP Inspection 1 as it had qualified it in the CC.[427] Both the plaintiff and the third party have stated that they considered some of the non-compliances identified in the TOP inspections as minor works which could be completed post-completion. For example, in relation to the unequal steps and risers, Mr Yong stated as follows:[428]

> In order to achieve levelled steps and equal risers, and considering the small deviation from the requirements, the timber planks could simply be sanded down until the correct height for each step and riser was achieved. Such sanding down work is minor work which we were of the view could be easily done. This was precisely the method which GTMS undertook to rectify the riser issue.

326 However, it does not matter whether or not the unequal steps and risers are "minor" works by industry standard or that they could easily be rectified. The fact is that the Project could not have been "ready for occupation" under Item 72(a) of the Preliminaries in the light of the safety issues presented by the unequal steps and risers. Thus, these minor works would have posed a danger to the occupiers of the Project. That was why the TOP was not granted after TOP Inspection 1. As stated by the CA in *Ser Kim Koi (Court of Appeal)* ([67] *supra*) at [53]–[55]:

> 53 … Staircases are potentially dangerous structures because tripping and falling on staircases can have very dire consequences including serious physical injury or even death. …

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427 23AB14585.

428 PY at para 134.

> 54 … Persons involved in the building and construction industry are aware of a known human behavioural trait. Most people only look at a staircase when they negotiate the first few steps. Thereafter their gaze goes elsewhere because they assume the steps are equal in rise or drop. Any non-uniform change in the rise or drop could potentially result in that person tripping or losing his balance and falling.
>
> 55 When the Architect issued the Completion Certificate, he already knew from the TOP inspection that there was an important defect in unlevelled steps and unequal risers in all staircases. As noted above, the Architect acknowledged the existence of these defects in his attachment to the Completion Certificate as requiring rectification … These staircases were thus clearly not safe for use by occupants of the Buildings when the Architect issued his Completion Certificate. …

327 The third party claims that it acted in good faith based on its experience, commercial understanding and practical reality. But none of these reasons can override the clear and express language of Item 72(a) of the Preliminaries. Further, Mr Yong testified that when he issued the CC on 15 May 2013, he was unaware of Item 72 of the Preliminaries. Instead, he relied on cl 24(4) of the SIA Conditions.[429] As stated above at [300], however, cl 24(4) of the SIA Conditions expressly states that the Works must "comply with the Contract in all respects". Therefore, this provision requires the third party to refer to the Contract documents between the plaintiff and the defendant, which includes Item 72 of the Preliminaries.

328 It is, therefore, clear that as of TOP Inspection 1 on 30 April 2013, Item 72(a) of the Preliminaries had not been fully complied with by the plaintiff. In fact, the plaintiff itself admits that "there [were] construction errors in the steps that caused [TOP Inspection 1] to fail".[430] TOP Inspection 1 was before

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429 NEs, 31 March 2020 at p 171, lines 1–15; 2 June 2020 at p 3, lines 14–21.

430 PWS at para 143; DWS at para 81.

15 May 2013, when the CC was issued to take effect from 17 April 2013. The third party knew on 15 May 2013 that TOP Inspection 1 failed for several reasons, including the non-compliant steps and risers which was a construction matter within the plaintiff's scope of responsibility. In fact, the evidence shows that the third party knew that the steps and risers were non-compliant even before the application for TOP Inspection 1. Hence, the third party should not have issued the CC on 15 May 2013 certifying that the Project was completed on 17 April 2013.

329 TOP Inspection 2 was on 18 June 2013. After TOP Inspection 2, the BCA did not comment on the steps and risers inside the three units, including those that they had earlier identified as non-compliant. Thus, those steps and risers were deemed acceptable by the BCA. However, the Project again failed TOP Inspection 2. This second failure to obtain the TOP was due to three issues – the steps at the RC flat roof for all units, the last step at the landscape area of Unit 12A that failed to comply with the requirements for steps and risers, and the height of the barrier at the pavilion in Unit 12A.[431] I shall deal with each of these in turn.

330 I start with the steps at the RC flat roof. The steps at the RC flat roof were not part of the contract drawings and had only been added subsequently to ensure easy access at the flat roof, as instructed by the third party pursuant to Architect's Instruction Number 15.[432] Hence, this is additional work directed by the third party. As Mr Tan explained, these steps were "non-standard and not

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431 25AB15830.

432 PWS at para 131; TPWS at para 281; 17AB10930.

typical in design".[433] The reason for not allowing the steps pertained to *design*, rather than as a result of a *construction fault* on the plaintiff's part. The plaintiff had merely followed the design of the RC flat roof step area provided by the third party.[434] Therefore, this was not a construction error by the plaintiff. I also do not consider this to be a matter of negligent design on the part of the third party. The third party had considered that the steps at the RC flat roof fell within certain exceptions to the BCA's Approved Document – Acceptable Solutions (July 2011) (the "BCA Regulations"), whereas the BCA officer took a different view. This was a matter of a difference in opinion, rather than the third party being negligent in its design.[435]

331 I turn now to the last step at the landscape area of Unit 12A. While this was within the contract drawings and clearly fell within the scope of the plaintiff's Works, the cause of the defect was not a construction error. Rather, the defect arose due to the settlement of the landscaped soil, which resulted in the height of the last step being higher than permitted under the BCA Regulations.[436] As this was a natural phenomenon, it cannot be attributed to the plaintiff or the third party, nor can it be regarded as a construction error.

332 Finally, I turn to the issue of the height of the barrier at the pavilion in Unit 12A. The TOP was only obtained on 16 September 2013 due to this issue, which eventually necessitated the installation of a glass barrier. According to the BCA Regulations, where a design had a fall of more than one metre in

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433 DT at para 54(b).

434 PWS at para 132.

435 TPWS at paras 282, 283 and 285; Exhibit D27; NEs, 1 April 2020 at p 19, line 14 to p 20, line 15.

436 PWS at paras 129–130; TPWS at paras 286–287; PY at para 193.

height, a barrier should be constructed for safety purposes. Furthermore, the BCA Regulations state that the "height of a barrier is measured vertically from the finished floor level to the top of the barrier".[437] In this instance, there was a wall at the pavilion of Unit 12A which was a metre high if measured from the pavilion floor. However, there was a bench built into the wall. During TOP Inspection 1, the BCA officer measured the height of the wall from the top of the bench instead of from the floor of the pavilion. Thus, the height of the wall became less than a metre and the BCA officer was of the view that this posed a safety issue as people could climb onto the bench and potentially topple over the wall onto the level below which would be more than a metre fall. The third party was of the opinion that it was not a safety issue as the wall was a metre tall when measured from the floor of the pavilion. On this view, the term "finished floor level" in the BCA Regulations referred to the floor of the pavilion, rather than the top of the bench. However, the BCA disagreed as the BCA officer measured the height of the wall from the top of the bench to the top of the wall.[438]

333 It was this difference in opinion that resulted in the BCA refusing to grant the TOP at TOP Inspection 2.[439] The BCA Regulations did not state where the measurements should begin, *ie*, from the top of the wall or the top of the bench. It was, thus, a matter of a difference in opinion. The third party could not have foreseen this with certainty before the BCA's inspections. In fact, prior to the construction of the Project, the third party had obtained approvals for the building plans from the BCA. The building plans included the height of the wall

437 Exhibit D27.

438 TPWS at paras 275–276.

439 PWS at para 134; TPWS at paras 276 and 280.

with the built-in bench at the pavilion at Unit 12A being stated as 1000mm from the "finished floor level".[440] Since the BCA had approved the building plans, the BCA should not have faulted this aspect of the design at TOP Inspection 1. Nevertheless, the BCA did. The third party then attempted to resolve the issue by implementing an invisible grille which was, however, rejected by the BCA. Eventually, a glass barrier was used with the approval of the BCA. It would, therefore, not be correct to say that the third party had been negligent in designing the pavilion and the invisible grille. It would also not be correct to say that the issue with the height of the barrier at the pavilion in Unit 12A was a construction error.

334 Thus, while the failure of TOP Inspection 1 was due to construction faults on the plaintiff's part, the failure of TOP Inspection 2 was not. Rather, it was caused by natural phenomenon and design issues falling within the third party's purview. Therefore, since the failure of TOP Inspection 2 was not due to defects within the plaintiff's contractual responsibility, the third party could have issued the CC once the defects highlighted in TOP Inspection 1 were rectified. I accept Mr Yong's evidence that such rectification works were completed by 28 May 2013, within 28 days from the date of TOP Inspection 1.[441] The rectification works started on 17 May 2013 and it took 11 days to complete it. I note that there is some dispute amongst the parties in relation to whether the rectification works for the steps and risers had in fact been carried out satisfactorily, which I shall deal with further below. Thus, I find that Item 72(a) of the Preliminaries was satisfied by 28 May 2013.

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440 NEs, 4 June 2020 at p 10, line 18 to p 13, line 8; TPRS at para 39.

441 PWS at paras 161–162; PRS at para 9; PY at para 135.

335 For completeness, I should add that the plaintiff pleaded for the court to grant an extension of time from 17 April 2013 to 16 September 2013, or in the alternative, for a declaration that time had been set at large for the completion of the Contract. This was on the basis that any delay in obtaining the TOP was due to the third party's failure to produce a design for the pavilion at Unit 12A that was acceptable to the BCA.[442] Given my finding that the CC should have been issued on 28 May 2013 (*before* the issue relating to the pavilion at Unit 12A was resolved), there is no need for the court to consider the issue of any delay occasioned by the invisible grille. Furthermore, for reasons which I shall explain at [661]–[665] below, the relevant act of prevention was not the third party's design of the invisible grille, but its instructions to the plaintiff to delay rectification of the steps and risers until after TOP Inspection 1. In the circumstances, it was understandable why the plaintiff did not apply for an EOT after the issues relating to the invisible grille arose. At that point in time, the CC had already been issued. There would have been no need for the plaintiff to apply for any EOT and it would not have occurred to the plaintiff to do so.

Whether Item 72(b) of the Preliminaries has been fulfilled

336 The defendant alleges that as at 17 April 2013, various services, including gas and electricity, had not undergone T&C. According to the defendant, the T&C for electricity was never carried out as he had not received any report on the same. In addition, the defendant claims that T&C for ACMV works was only done on 8 July 2013.

442 PSOC at para 19; prayer b(ii).

337 I shall deal first with the T&C for gas services before turning to the T&C for the other services, and finally, the handing over of the relevant documentation.

(1) Testing and commissioning of gas services

338 Item 72(b) of the Preliminaries states that before the third party issues the CC, "[a]ll services [must be] tested, commissioned and operating satisfactorily as specified in the Contract". The defendant contends that this includes the gas services for the Project, and that T&C of the gas services was not conducted after power turn-on.[443] It is not in dispute that as at 17 April 2013, T&C for the gas services was not completed. The third party submits that the defendant is estopped from strict reliance on Item 72(b) in this respect because it was represented to all parties that, for safety reasons, the T&C for the gas services would be done after the Project was completed and all parties consented to this.[444]

339 The requirements of promissory estoppel are well-settled, as explained by the CA in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [57], [58] and [61]:[445]

> 57 … [T]he doctrine of equitable (or promissory) estoppel … requires an *unequivocal representation by one party that he will not insist upon his legal rights against the other party, and such reliance by the representee as will render it inequitable for the representor to go back upon his representation* …
>
> 58 Next, it is well established that mere silence or inaction will not normally amount to an unequivocal representation … However … '*in certain circumstances, particularly where there is*

443 DWS at para 144.

444 TPWS at para 137.

445 TPWS at paras 135–136.

> *a duty to speak, mere silence may amount to [such] a representation*'. …
>
> …
>
> 61 … [W]hether there is a duty to speak is a question which must be decided having regard to the facts of the case at hand and the legal context in which the case arises. … The expression 'duty to speak' does not refer to a legal duty as such, but to *circumstances in which a failure to speak would lead a reasonable party to think that the other party has elected between two inconsistent rights or will forbear to enforce a particular right in the future*, as the case may be. We emphasise that this is not the subjective assessment of the other party but an objective assessment made by reference to how a reasonable person apprised of the relevant facts would view the silence in the circumstances, though unsurprisingly, *the parties' relationship … will be a critical focus of the court's assessment of whether those circumstances exist*.
>
> [emphasis added]

340 I agree that gas services fall within the scope of Item 72(b) of the Preliminaries. However, I accept the third party's submission that the defendant is estopped from insisting that T&C of the gas services be done prior to the issuance of the CC. CCA was of the opinion that gas turn-on for the Project should only be completed *after* the TOP was obtained, as it had concerns about the safety of switching on the gas supply for the Project that would be vacant for an extended period of time.[446] This was communicated by CCA to the defendant, Mr Cheung, Mr Chow, the third party and the other Consultants on 21 January 2013 during Site Meeting No 41.[447] Item 7.4 of the minutes of Site Meeting No 41 states:

> Regarding to [*sic*] gas turn-on, GTMS informed that gas stoves have already been installed. However, Gas turn-on will be done after TOP.

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446 CHH at para 73; NEs, 18 February 2020 at p 139, lines 10 –22.

447 PWS at para 104; 20AB13014.

341 The defendant, Mr Cheung and Mr Chow did not have any objections to this proposal at the meeting. A copy of the minutes was circulated to all parties present at Site Meeting No 41 by the third party via an e-mail dated 30 January 2013.[448] There is also no other evidence to suggest that the defendant or his Assistants had any objections to the proposal at Site Meeting No 42,[449] or at any other point of time during the course of the Project.[450] This was confirmed by Ms Chua at trial:[451]

> Q: … Do you agree that this arrangement to have a gas turn-on after TOP is nothing special?
>
> A: Yes.
>
> Q: Do you agree that you actually agreed with CSYA regarding this arrangement of having gas turn-on after TOP?
>
> A: Yes.
>
> Q: Do you agree that this arrangement of having gas turn-on after TOP was actually agreed to by Mr Ser and his advisors, such as Mr Wilson Cheung?
>
> A: During this discussion, client and Wilson Cheung is present. I believe it's – it should be – it should be in one – in one of the meeting minutes. They attended the meeting.
>
> …
>
> Q: So, at this meeting, if Mr Ser was to say, 'I want my gas to be available by the completion date', would GTMS be able to do it?
>
> A: Yes.
>
> Q: And you would give the instruction for GTMS to do it if Mr Ser asked for it; is that right?

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448 PWS at para 105; 20AB12946, 20AB13009.

449 PWS at para 107; 21AB13239.

450 TPWS at para 137.

451 NEs, 1 July 2020 at p 65, line 24 to p 67, line 7.

A: Yes.

342 As evident from the above, the defendant was informed of CCA's proposal to conduct T&C of the gas services after the TOP. The defendant was the employer in the Project. If no objections were made by him after he was informed of the proposal, a reasonable person in the position of the plaintiff and the third party would think that he had agreed to CCA's proposal. In other words, he had a duty to speak. Therefore, his failure to voice any objections amounts to a representation that he agreed to the T&C of the gas services being conducted after the TOP. The plaintiff relied on this representation when it did not carry out the T&C of the gas services until after the TOP and the issuance of the CC. Accordingly, it would be inequitable for the defendant to now raise the argument that there was no T&C of the gas services prior to the issuance of the CC, when it appears that all parties had jointly agreed to CCA's proposal in Meeting Site Number 41.

343 Moreover, T&C was eventually conducted by City Gas as well as by the plaintiff and its subcontractors, both prior to, at the time of, and after gas turn-on. This is confirmed by the documents[452] as well as the testimonies of the various witnesses. Mr Chew Beng Wah (PW6, "Mr Chew") testified that although CCA was of the view that further T&C for the gas services was not required following turn-on, the subcontractors nevertheless carried out further T&C at the Project after gas turn-on.[453] Similarly, Ms Chua testified as follows:[454]

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452 24AB15255; 24AB15350–24AB15351; 45AB29166; Third Parties' Counsel Note ("TPCN") at para 39(c).

453 NEs, 29 November 2018 at p 75, lines 2–14; TPCN at para 39(d).

454 NEs, 1 July 2020 at p 68, line 14 to p 69, line 13; p 71, lines 8–18.

Q: So before gas turn-on, there would be the official and formal T&C by City Gas; is that right?

A: Concurrent, yes.

Q: So after the gas turn-on, do you agree that City Gas would actually test the gas again?

A: Yes, they'll make sure that the stove are [sic] working.

Q: So after these tests that were done after gas turn-on by City Gas, do you agree that internal testing was also subsequently carried out by the subcontractors, Artisan?

A: Yes.

Q: Do you agree that these internal testing after gas turn-on are carried out internally between GTMS and its subcontractor?

A: Yes.

Q: Unlike the tests carried out by City Gas, the internal tests conducted by GTMS and its subcontractors do not come with a formal certificate of testing and commissioning; do you agree?

A: Yes, the industrial practice is such, they don't usually keep documentary proof that it's done.

Q: Do you agree that GTMS has satisfied the contract requirements for T&C of gas supply after gas turn-on?

A: Yes.

…

Q: And when you say here there was no need for any further T&C for the gas services to be carried out, do you refer to further T&C as the tests by City Gas?

A: The tests by City Gas is considered testing and commissioning already, yeah. There's no need for additional test.

Q: But do you agree that, nevertheless, even though there's no need to, Artisan did conduct further gas testing after gas turn-on?

A: Yes, they did.

(2) Testing and commissioning of other services

344 I note that in *Ser Kim Koi (Court of Appeal)* ([67] *supra*), the CA also observed at [47] that the documents in the CC suggested that some basic works and services had yet to be tested, commissioned, or checked if they were operating satisfactorily. In particular, the CA referred to the schedule of minor outstanding works attached to the CC, which states:[455]

> Mechanical & Electrical
>
> 1. To conduct floor by floor testing and commissioning for the A/C equipment.
>
> 2. To flush the water pipes.
>
> 3. To conduct commission for the hot water.

345 Thus, there were possibly four services for which T&C had not been carried out, namely, the electrical services, the ACMV works, the water pipes, and the hot water supply. I shall address each of these in turn.

346 Firstly, regarding the electrical services, the contemporaneous documents demonstrate that the electrical services of the Project had undergone T&C before 17 April 2013. These are as follows:

> (a) In relation to the T&C of the lighting points and lighting arrester, the Certificate of Supervision of Lighting Protection System dated 7 February 2013 is evidence that T&C of the lighting points and lighting arrestor was completed prior to 17 April 2013.[456]

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455 DWS at para 136.

456 PY at p 2618.

(b) In relation to the T&C of the lighting points and built-in equipment, the Certificate of Fitness of Residential Unit dated 7 March 2013 for Unit 12, Unit 12A and Unit 12B show that T&C of the lighting points and built-in equipment was completed prior to 17 April 2013.[457]

(c) The licensed electrical worker signed the Electrical Installation Inspection Report for Unit 12, Unit 12A and Unit 12B on 5 April 2013, 1 April 2013 and 26 March 2013 respectively, showing that the electrical installation complied with the requirements in accordance with "the Singapore Standard CP5 and the relevant regulations" prior to 17 April 2013.[458]

(d) SPPG's officer signed the Statement of Turn-on of Electricity for Unit 12, Unit 12A and Unit 12B on 8 April 2013, 2 April 2013 and 27 March 2013 respectively, showing that the electrical installation was "suitable for connection to the electrical system" prior to 17 April 2013.[459]

Mr Lee, the defendant's expert electrical witness, affirmed that once the Certificate of Fitness of Residential Unit, Electrical Installation Inspection Report and Statement of Turn-on of Electricity were duly endorsed, no further T&C was required for the Project.[460]

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457 CHH at para 72; PWS at para 90; 21AB13533–21AB13535.

458 PWS at para 89; 22AB13971, 22AB13893 and 22AB13867.

459 PWS at para 91; 22AB13973, 22AB13952 and 22AB13883.

460 PWS at paras 95, 96 and 363; NEs, 24 February 2020 at pp 186–187.

347 That addresses T&C *prior* to electrical turn-on. However, the defendant's contention is that T&C must have been conducted before and *after* turn-on.[461] I turn now to T&C conducted after turn-on. Mr Yong explained that when it came to T&C of certain services conducted by the plaintiff after turn-on and prior to handing over, these might not necessarily be accompanied by formal documentation. Mr Yong explained as follows:[462]

> Court: I know for the incoming power, there's a testing and commissioning by SPPG. Otherwise, you wouldn't have incoming power.
>
> A: Yes.
>
> Court: But I'm not referring to that sort of testing and commissioning. I'm referring about the ultimate testing and commissioning for handing over.
>
> A: That one there is – that's why I'm trying to say that air-con I can see there's documents, but for the rest, there may not be clear a document. Like, for example, electrical on lighting, all you can do is you turn on and off, the lights are there. You can't be putting a piece of paper saying that living room 24 bulbs are working. There is no such document.
>
> Court: So there's no such documentation for that sort of testing and commissioning prior to handing over?
>
> A: Correct …

348 Given the absence of formal documentation, the most useful evidence to determine whether T&C had in fact been conducted is the evidence of the people who were present at the Project at the relevant time and who had witnessed such T&C taking place. In that regard, Mr Yong confirmed in his evidence that T&C of the electrical services had been carried out:[463]

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461 DWS at para 141.

462 NEs, 4 June 2020 at p 59, line 20 to p 60, line 12.

463 NEs, 2 June 2020 at p 18, line 14 to p 19, line 11.

Q: Now for electrical testing, after electrical supply was turn-on, do you agree that internal testing was carried out for the electrical items, such as the pump and motors, the switches of the houses, the power points? Please answer 'yes'?

A: Yes.

Q: The isolator?

A: Yes.

Q: The fan?

A: Yes.

Q: Water heater?

A: Yes.

Q: Auto gate?

A: Yes.

Q: Garden light and timer?

A: Yes.

Q: So basically all electrical appliances, they were all tested; is that right?

A: Yes.

Q: So after electrical was turn-on, there were still tests that were done to ensure that the electricals were working?

A: Yes.

349 Ms Chua similarly confirmed that the requisite T&C had been carried out by the plaintiff:[464]

Q: … Ms Chua, do you agree that before 17 April 2013, you were satisfied that GTMS had complied with the contractual requirements regarding the testing of the electrical equipment?

Court: And commissioning.

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464 NEs, 1 July 2020 at p 58, lines 5–24; 2 July 2020 at p 15, line 25 to p 16, line 3; PWS at paras 92 and 365.

> Q: Yes, your Honour.
>
> A: Yes.
>
> …
>
> Q: … Ms Chua, as the M&E engineer of the project, you would ensure that the electrical equipment was tested after electrical turn-on; is that right?
>
> A: Yes.

350 I note that in the course of cross-examination, Mr Tan testified that the T&C for the electrical services had not in fact been conducted after power turn-on:[465]

> Q: So GTMS is obliged to test and commission the electrical services after power connection. Right, Mr Tan?
>
> A: According to this, yes.
>
> Q: Is it your evidence that GTMS did not conduct any testing and commissioning for electrical services after power connection?
>
> A: Yes.

351 The defendant seeks to rely on this portion of Mr Tan's evidence to show that the T&C of the electrical services was not conducted after power turn-on.[466] However, it must be borne in mind that Mr Tan is the plaintiff's director and was not directly managing the Project.[467] When giving evidence on the stand in relation to the T&C of the relevant services, he stated that he would "leave the technical aspect to [his] project manager to explain".[468] In contrast, Mr Yong and Ms Chua were both more closely involved in the running of the Project than

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465 NEs, 12 November 2018 at p 26, lines 5–12.

466 DWS at para 142.

467 NEs, 28 October 2020 at p 189, lines 8–14.

468 NEs, 12 November 2018 at p 14, lines 13–14.

Mr Tan. In fact, Ms Chua was the M&E engineer for the Project, therefore, she would have been directly involved in overseeing the plaintiff's progress in relation to the electrical services. In these circumstances, when it comes to the issue of whether the T&C of the electrical services was in fact carried out after power turn-on, I am more inclined to prefer the evidence of Mr Yong and Ms Chua over that of Mr Tan.

352 Secondly, the T&C of the ACMV works had already been completed on or around 1 and 2 April 2013 (before electrical turn-on), as well as from 10 to 12 April 2013 (after electrical turn-on). This is supported by the contemporaneous documents, and confirmed by Ms Chua at trial.[469] In particular, the T&C of the ACMV works was completed and signed off by the plaintiff and its subcontractor for Unit 12, Unit 12A and Unit 12B on 10 April 2013, 11 April 2013 and 12 April 2013 respectively.[470] Ms Chua testified that she had personally conducted the T&C of the ACMV works:[471]

> A: I can tell you this because I went down personally to check. It is my duty to check, because I will not do any – I mean, I have been in this line for so long, I'm very diligent with my job, so I will make sure I personally check everything. I clearly remember I did all the check. In fact, I went room by room, floor by floor, bungalow by bungalow. Every floor, I will check. That – that's my job. …

469 PY at p 1438–1448; 23AB14323; 22AB13997; 22AB14003; 2 DT at p 1197-1200; NEs, 1 July 2020 at p 60, line 20 to p 64, line 4; 2 July 2020 at p 16, lines 4–7.

470 PWS at paras 100–102; 22AB13997–22AB14000, 22AB14003–22AB14005; 2 DT at p 1198.

471 NEs, 2 July 2020 at p 31, lines 18–25.

353 Ms Chua further explained that CCA had to conduct the T&C before it could release the Certificate of Supervision required for the TOP application:[472]

> A: I actually attended that test, myself, before I released this cert. It's just that I don't sign any test report.
>
> …
>
> A: … [W]e have attended the testing ourselves to make sure everything are completed before we release this cert … I check everything before I release the cert.
>
> …
>
> A: I'm not sure whether it is also 1 April, but I have done my check and test to ensure it's all completed before we release this certificate. …

354 In relation to the T&C of the A/C equipment referred to in the schedule of minor works attached to the CC (which was eventually carried out on 8 July 2013), this was an *additional* T&C carried out at the defendant's request, as he wanted the ACMV works to be tested on both sunny and rainy days.[473] Mr Yong testified to this effect:[474]

> Q: So, Mr Yong, do you therefore agree that Mr Ser's demand to conduct ACMV tests on both hot and cold days is unreasonable?
>
> A: I mean I wouldn't say it's unreasonable, but it's a – it's a request from him.
>
> Q: Mr Yong, in the end, the tests on both hot and cold days of the ACMV system was done; is that right?
>
> A: I think they tried on a dry day and a rainy day, something to that effect.

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472 NEs, 30 June 2020 at p 95, lines 19–21; p 96, lines 17–20; p 98, lines 10-12; 22AB14048.

473 PWS at para 103.

474 NEs, 2 June 2020 at p 35, lines 17–25.

355 Ms Chiyachan had corroborated this by explaining that it had been an additional request by the defendant:[475]

> Court: Why did you ask GTMS to conduct floor-to-floor testing and commissioning for the A/C equipment when this was already done?
>
> …
>
> A: (interpreted) This was advised by CCA. Actually, this is an extra T&C for the air-conditioning equipment because Mr Ser insists that he wants to have the T&C conduct for the floor by floor. That means on this floor, of the next floor, and every floor, conducting T&C on every floor. So this is different from the first T&C that we did for the air-conditioning system.
>
> Court: So this is something extra requested by Mr Ser, is it?
>
> A: Yes. That's what I understand from CCA.

356 This was, again, confirmed by Ms Chua during cross-examination:[476]

> Q: So, in other words, GTMS did all the testing and commissioning for all three units on 8 July 2013; right?
>
> A: There are more than – more than one day test. Owner wanted us to test during hot weather, during rainy weather, in the afternoon and in the morning.

357 As Ms Chua explained, this additional T&C pertained to ascertaining whether CCA's *design* for the ACMV works was performing according to purpose, and not whether the ACMV works were constructed by the plaintiff in accordance with CCA's design:[477]

> A: Testing were done, and it was working. However, to work in accordance to our design, I have not checked. That one is thereafter, because we need to confirm whether during hot weather the temperature within the room is

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475 NEs, 16 June 2020 at p 104, lines 5–20.

476 NEs, 26 June 2020 at p 149, line 24 to p 150, line 4.

477 NEs, 30 June 2020 at p 100, line 13 to p 105, line 12.

> still set as 23 degree, during cold weather is the internal room temperature as 23 degree. This is what I am checking in order to hand over to client. That's our design specification. But, however, it is working in order before we release this cert.
>
> …
>
> Q: … So essentially what you did before 19 April was you checked whether the air-conditioning units were all working; right?
>
> A: Yes.
>
> Q: And this check as to whether it performs according to your design … was done after 19 April 2013; right?
>
> A: Yes.
>
> …
>
> A: We designed the system. We just need to make sure that it is completed according to our design. But it's not their duty to ensure that they get the temperature, because we design for it. But they have to conduct a test to prove that our design are correct.

When questioned by the court, Ms Chua maintained this position:[478]

> Court: Now, you have told us that before 17 April, the air-con system, the ACMV, had already been tested in preparation of the final inspection on the 17th?
>
> A: Yes.
>
> Court: That's what you told us; right?
>
> A: Yeah.
>
> Court: Now, if that is the case, then, in other words, you'd already done the testing and commissioning of air-con, but why you ask GTMS to do it again?
>
> A: No, because we need to test one day. You know, you remember we had to do a thermo-hydrograph?
>
> Court: Yes.

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478 NEs, 2 July 2020 at p 30, lines 5–22.

> A: They had limitations on the number of thermo-hydrographs, so they have to slowly take time to do the test again to have the result that we wanted, or, rather, the specific – we just want to make sure that our design is constructed accordingly.

358 In relation to the T&C for the water pipes and hot water, I find that as at 17 April 2013, these services must necessarily have been already working. This is seen from the evidence of Ms Chiyachan:[479]

> Court: The water used by the contractor for the project, is it the same as the water for the houses?
>
> A: Yes, correct.
>
> Court: So was there any feedback on 17 April that there was no water in the houses?
>
> A: No.

359 This was also corroborated by the evidence of Mr Yong, who testified that similar to the T&C of the electrical services, the plaintiff's internal T&C of the water pipes and hot water was not necessarily accompanied by formal documentation. Mr Yong explained as follows:[480]

> Q: So my question is: unlike the tests before turn-on of electrical and gas, the internal tests conducted by GTMS and its subcontractors, these internal tests do not come with formal certificates of testing and commissioning. Do you agree?
>
> A: Yes. Just to give an example, for example, a tap, you don't give a yes it passed or it failed, basically, you turn on the tap, and the water comes out. And then because Leedon Park is a Green Mark building, we actually had measurements of the amount of water that comes out from the tap to confirm that it actually confines to a low water usage, so those are the tests which doesn't really have a report, but there was a BCA guy who came in

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479 NEs, 16 June 2020 at p 96, lines 18–23.

480 NEs, 2 June 2020 at p 21, line 5 to p 22, line 21; 4 June 2020 at p 60, lines 10–16.

> and test the amount of water in order to certify the building.
>
> Court: If I hear you correctly, what you're trying to tell me, that there was a testing and commissioning?
>
> A: Yes, in a way it's called commissioning, because now that the – all the electrical wire, the water pipes are all the connected to the equipment itself, so the equipment must work. So that was the second stage of the testing and commissioning after the turn-on.
>
> Court: So what you're saying is that there was testing and commissioning of the electrical, water –
>
> A: Electrical, water, gas; as in the burner is actually burning when you turn it on, it achieve a certain degree after a certain while; then all the WCs, for example, they are all working. So these are – like what Mr Yap is trying to raise to me is that there is no formal application form that it is – it is tested and it is signed off.
>
> Q: And for the electrical tests that were carried out after electrical turn-on, these tests were all carried out within the EOT grant of 15 days; is that right, Mr Yong?
>
> A: What I'm sure is on 17 April, which is the final inspection, all these thinqs are actually working. When you turn on the switch, the lights turn on, the fans turn on. That's where we actually start to inspect and say whether which are good enough, which ones needs to be rectified.

360 Ms Chua similarly confirmed that the requisite T&C for all the relevant works had been carried out before 17 April 2013, save for the T&C of the gas services:[481]

> Q: So is it your evidence that the electrical services for the project were tested and commissioned in accordance with the contract before 17 April 2013?
>
> A: Yes.
>
> Q: Were the ACMV services for the project tested and commissioned in accordance with the contract before 17 April 2013?

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481 NEs, 2 July 2020 at p 15, line 25 to p 16, line 23.

A: Yes.

Q: Were the plumbing services for the project tested and commissioned in accordance with the contract before 17 April 2013?

A: Yes.

Q: Were the sanitary services for the project tested and commissioned in accordance with the contract before 17 April 2013?

A: Yes.

Q: Were the filtration systems for the project tested and commissioned in accordance with the contract prior to 17 April 2013?

A: Yes.

361 I turn now to the defendant's submission regarding the T&C of the swimming pool. The defendant submits that the T&C of the swimming pool installations was conducted after the certified completion date of 17 April 2013, and that RTO Leong (who signed as a witness to these reports) had not actually been present during the T&C of the swimming pool installations.[482]

362 However, this allegation was not pleaded by the defendant.[483] This was pointed out to the defendant's counsel during the trial. Nevertheless, he maintained that there was no need for the defendant to amend his pleadings as the T&C of the swimming pool fell within his "pleaded case [that] item 72(b) of the [P]reliminaries have not been satisfied".[484] With respect, I find this explanation highly unsatisfactory. As the defendant's counsel himself pointed out during Mr Ng's cross-examination, the services falling within Item 72(b) were M&E installations, electrical installations, ACMV works, plumbing,

482 DWS at paras 153–155.

483 PRS at para 24.

484 NEs, 18 June 2020 at p 93, lines 17–20.

sanitary, gas and filtration.[485] However, it was not apparent from the defendant's pleadings that his case regarding Item 72(b) related to *all* of the services covered by Item 72(b). The defendant's case as reflected in his pleadings is that "there was no basis for issuing the CC stating that the Project was complete on 17 April 2013, when *gas, electrical services, and ACMV* for the Project had yet to be fully tested and commissioned" [emphasis added].[486] There is no mention of the T&C for the swimming pool. The fact that the defendant specifically referred to "gas, electrical services and ACMV" reinforces the understanding that the defendant was only contesting T&C in relation to these particular services. In fact, the defendant's counsel acknowledged in his oral submissions that the defendant did not "plead the swimming pool". The defendant's counsel submitted that nevertheless, the court should consider the issue as it "came out in evidence".[487] This too is not a satisfactory explanation.

363 It is trite that parties must plead all the material facts of their case and the court is precluded from deciding on a matter that the parties have decided not to put in issue. The exception to this is where no prejudice would be caused to the other parties in the trial or it would be clearly unjust for the court to disregard the issue (see *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [35], [38] and [40]). The rationale for this is procedural fairness (see *RDC Concrete* ([196] *supra*) at [52]), including the need to ensure that a party has notice of his opponent's case so that he can adequately prepare for it.

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485 4AB01840; NEs, 19 June 2020 at p 72, lines 2–24.

486 DDCC at para 38.

487 NEs, 27 October 2020 at p 89, lines 18–20.

364 In this case, I find that the defendant's pleadings were insufficient to bring to the parties' and the court's attention that he was also contesting the T&C of the swimming pool. The main focus throughout the trial was on the alleged leakage of the swimming pool. There was no mention of whether the T&C for the swimming pool was conducted in the pleadings. That was raised as an issue only in the last tranche of the trial, when the *court* sought certain clarifications from the parties on the evidence.[488] As such, to consider the issue now would be prejudicial to the plaintiff and the third party, who did not have the opportunity to prepare for this point and adduce from their witnesses the relevant evidence to address this point. In particular, the defendant relies on a document titled "Checklist for Testing & Commissioning of Swimming Pool" dated 16 May 2013, after the certified completion date.[489] While this document was referred to by the parties in the course of the trial, it was not for the purpose of asking the witnesses whether and when the T&C of the swimming pool was conducted. Therefore, I disregard the defendant's submissions on this point as it was not pleaded, and it would be prejudicial to the plaintiff and the third party to consider it now.

365 In any case, even if the issue were considered, I would not have accepted the defendant's claim that the T&C of the swimming pool was not conducted before the issuance of the CC. To the contrary, the evidence shows that the T&C of the swimming pool was in fact conducted before the issuance of the CC. Specifically, Ms Chua testified that all of the relevant T&C had been conducted (see [360] above). This is supported by the minutes of Site Meeting No 47 dated

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488 NEs, 18 June 2020 at p 91, line 1 to p 93, line 20.

489 DWS at para 153.

15 April 2013, which state that the T&C of the swimming pool was completed as at that date.[490]

(3) Handover of test certificates, operating instructions and warranties

366 A final issue arises in relation to Item 72(b) of the Preliminaries. This condition stipulates that test certificates, operating instructions and warranties (the "Documents") have to be handed over by the plaintiff to the defendant before the third party can issue the CC. It is not disputed that the operating instructions and warranties were only handed over to the defendant on or about 22 June 2014. The defendant further submits that the test certificates have not been handed over to the defendant even up till today.[491] However, the Documents were in fact ready earlier than 22 June 2014 as the plaintiff and the third party wanted to hand over the Project to the defendant soon after the TOP was obtained, specifically, on or around 25 September 2013, but the defendant refused to take over the Project.[492]

367 The third party explained that the Documents were not handed over because it took a "practical approach" and was of the opinion that the Documents could be prepared during the maintenance period. The third party considered the handing over of the Documents a *de minimis* issue which had no impact on the practicality of completion.[493] Accordingly, the third party was of the opinion that Item 72(b) of the Preliminaries did not require the Documents

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490 23AB14323.

491 PY at para 175; DWS at para 156.

492 NEs, 12 November 2018 at p 33, lines 15–24.

493 PY at paras 173–174.

to be handed over prior to the issuance of the CC. This position was reiterated by Mr Yong in cross-examination:[494]

> Q: … Mr Yong, besides T&C, prelim 72(b) also deals with test certificates, operating instructions and warranties; right?
>
> A: Yes.
>
> Q: Basically it's also a requirement under prelim 72 that the test certificates, operating instructions and warranties are handed over to the owner; right?
>
> A: Yes, but usually, in practice, the warranties will come very much later.
>
> Q: Mr Yong, let's leave aside practice.
>
> Contractually, it is a requirement under prelim 72(b), right, Mr Yong?
>
> A: Yes, and we took a very practical view towards this, that this could be actually issued during the handover.

368 When pressed further in cross-examination, his explanation was as follows:[495]

> Q: Mr Yong, these operating instructions are expressly required in item 72(b), right? It is a contractual requirement to be handed over; right?
>
> A: It's written there, yes.
>
> Q: Test certificates and warranties as well. And 72(b) is very clear: until these things are satisfied, the architect is not allowed to issue a completion certificate; right?
>
> A: But in the standard world, this – all these certificates and warranties usually come quite late. It needs to be verified by QS, which is then the contract so-called adviser, and all this will take beyond the actual date of completion.

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494 NEs, 2 April 2020 at p 19, line 17 to p 20, line 7.

495 NEs, 2 April 2020 at p 63, line 11 to p 64, line 11.

> Q: By actual date of completion, you mean completion of the works, right?
>
> A: Yes.
>
> Q: Right?
>
> A: Contract completion.
>
> Q: Yes, contract completion. But, Mr Yong, can I suggest to you that if you take that interpretation or that position, then you are ignoring what item 72(b) of the preliminaries expressly require the architect to consider. Do you agree, Mr Yong?
>
> A: As I mentioned, on 17 April – I mean, prelim 72 really did not occur to us.

369 I accept the third party's position that the handing over of the Documents under the second part of Item 72(b) of the Preliminaries is *de minimis*. It is trite that the Singapore courts adopt a contextual approach to interpretation. This was set out by the CA in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [130]:

> … [T]he court will *first* take into account the plain language of the contract together with relevant extrinsic material which is evidence of its context. *Then, if, in the light of this context,* the plain language of the contract becomes ambiguous (*ie*, it takes on another plausible meaning) or absurd, the court will be entitled to put on the contractual term in question an interpretation which is different from that demanded by its plain language. … [emphasis in original]

370 The CA further cited Gerald McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2007) and endorsed several canons of interpretation at [131]. The ones that are significant in this case are the following:

> (a) The aim of construction: the aim of the exercise of construction of a contract is to ascertain the meaning which it would convey to a reasonable business person.

(b) The holistic or "whole contract" approach: the exercise of construction is based on the whole contract or a holistic approach. Courts are not excessively focused upon a particular word, phrase, sentence or clause, rather, the emphasis is on the document as a whole.

(c) The contextual dimension: the exercise in construction is informed by the surrounding circumstances or external context. Modern judges are prepared to look beyond the four corners of a document, or the bare words of an utterance. It is permissible to have regard to the legal, regulatory, and factual matrix which constitutes the background in which the document was drafted or the utterance was made.

(d) Business purpose: due consideration is given to the commercial purpose of the transaction or provision. The courts have regard to the overall purpose of the parties with respect to a particular transaction, or more narrowly the reason why a particular obligation was undertaken.

(e) Avoiding unreasonable results: a construction which leads to very unreasonable results is to be avoided unless it is required by clear words and there is no other tenable construction.

371 Applying these principles, I turn first to the plain language of Item 72(b) of the Preliminaries. In full, Item 72(b) reads:

> Pursuant to the provisions of the Agreement and Conditions of Contract, a Completion Certificate will not be issued until:
>
> …
>
> b) All services are tested, commissioned and operating satisfactorily as specified in the Contract or the relevant Sub-Contract including handing over all test certificates, operating instructions and warranties.

372 Item 72(b) essentially comprises two parts. Firstly, the requirement to ensure that all services are tested, commissioned and operating satisfactorily (the "T&C requirement"). Secondly, the requirement to hand over the Documents (the "handover requirement"). The defendant contends that the court should adopt the literal meaning of Item 72(b), which is that it is mandatory for the handover requirement to be fulfilled in order for Item 72(b) to be satisfied. In my view, however, the word "including" which connects the T&C requirement and the handover requirement shows that the handover requirement is a *subset* of the T&C requirement. The plain language of Item 72(b) thus suggests that the handover requirement is *subsidiary* to the primary focus of the sub-clause, which is the T&C requirement. In determining whether Item 72(b) has been satisfied, therefore, the critical issue is whether the T&C requirement has been fulfilled.

373 This alternative meaning is plausible in the light of the context of the clause and the Contract as a whole, as well as its commercial background and business purpose. I turn first to the contractual context. Item 72(b) forms part of various other requirements that must be satisfied before the third party can issue the CC. These are Items 72(a) and 72(c), as well as cl 24(4) of the SIA Conditions. Items 72(a) and 72(c) provide that:

> Pursuant to the provisions of the Agreement and Conditions of Contract, a Completion Certificate will not be issued until:
>
> > a) All parts of the Works are *in the Architect's opinion* ready for occupation and for use.
> >
> > …
> >
> > c) All works included in the Contract are performed including such rectification as may be required to bring the work to the completion and standards *acceptable to the Architect.*
>
> [emphasis added]

374 Clause 24(4) of the SIA Conditions provides that:

> ... Such certificate is referred to in this Contract as a 'Completion Certificate', and shall be issued by the Architect when the Works *appear to be complete and to comply with the Contract in all respects*. [emphasis added]

375 As seen from the italicised portions of the provisions above, these provisions confer onto the third party a significant amount of leeway to apply its judgment to determine whether such conditions have been satisfied. This makes sense given that it is precisely the architect's expertise that is sought after when an owner engages an architect to oversee a project. The T&C requirement in Item 72(b) contains a phrasing similar to the above provisions in so far as it uses the word "satisfactorily", which must refer to the satisfaction of the architect. The spirit of these provisions, therefore, is that the CC should be issued when the architect, applying his professional judgment and expertise, is satisfied that the works have been completed. Allowing the architect to retain this broad, general discretion to determine whether the T&C requirements have been satisfied, rather than restricting him to the timing of the handover of the Documents, would be more in line with the spirit of Item 72.

376 This interpretation is fortified by the commercial background and business purpose of Item 72. The literal interpretation of Item 72(b) would not cohere with the business purpose of the CC. As mentioned at [324] above, the purpose of the CC is, *inter alia*, to determine the plaintiff's liability for delay and determine the commencement of the maintenance period. Therefore, in construing Item 72(b), as with Item 72(a), the court must have reference to the scope of the plaintiff's responsibilities. As Mr Yong testified, the Documents must first be verified by the quality surveyor before they can be handed over the

defendant.[496] Similarly, Ms Chua testified that after compiling the Documents, the plaintiff had to submit them to CCA for vetting and approval before the Documents could be handed over to the defendant.[497] If Item 72(b) were construed literally such that the CC could only be issued after the handover requirement was satisfied, the plaintiff would be exposed to the risk of delay on the part of other parties over whom it had no control.

377 Similarly, to interpret Item 72(b) literally so as to require the Documents to be handed over before the issuance of the CC would have been impracticable, unworkable even, for all parties. As Mr Yong explained:[498]

> Court: Okay. Now, if, at that time, you were aware of prelim 72, would you have issued the completion certificate?
>
> A: I think I would still have issued it, because prelim 72 involved a lot of paperworks [*sic*] which I mentioned earlier that it's impossible to get it on time if you want to take that completion date as the thing. Like warranties, all this … the supplier will only issue you the warranties when you actually issue the completion cert, so it's a back-to-back story, you see. So same thing, I think a lot of these documents, like operational manual and then the warranties and then the working drawings, it doesn't really affects [*sic*] the usage of the place, so we will still issue the completion. Those can be actually follow up during the maintenance period, which is that one whole year.
>
> …
>
> A: … at the same time we also know that contractor has already start doing all this thing, and this, in usual practice, will always come later.
>
> Court: What will always come later?

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496 NEs, 2 April 2020 at p 63, line 12 to p 64, line 12.

497 NEs, 1 July 2020 at p 85, lines 10–17.

498 NEs, 4 June 2020 at p 75, line 15 to p 76, line 15.

> A: The paperworks [*sic*], the drawing, the OMM, the warranties.

378 Such an impracticable outcome could not have been the parties' intentions, neither would a reasonable business person have understood Item 72(b) in this manner. Although the court must not rewrite the parties' contract (see Goh Yihan, *The Interpretation of Contracts in Singapore* (Sweet & Maxwell, 2018) at para 10.005), the unreasonableness of a particular interpretation may suggest that it was *not the parties' intentions* for such an interpretation to be adopted.

379 Furthermore, I note that Item 72 was included in the Contract by CCA, rather than having been specifically negotiated by the plaintiff and the defendant. Therefore, it is not the case that the parties specially took pains to include this clause in the Contract. This supports the interpretation that the handover requirement is *de minimis*.

380 Finally, I note that cl 31(13) of the SIA Conditions states that "[t]he Architect shall in all matters certify strictly in accordance with the terms of the Contract". This is not a bar to the abovementioned purposive construction of Item 72(b). Clause 31(13) merely states that the Architect must adhere strictly to the *terms of the Contract*; it does not require that the Architect adhere strictly to the *literal meaning* of the Contract. Rather, the terms of the Contract are determined by the court through the process of construction. In other words, cl 31(13) does not mandate a literal interpretation of the Contract, only that the Architect must certify strictly in accordance with the terms of the Contract as construed by the court. Therefore, it does not impede the purposive interpretation that the handover of the Documents in Item 72 is *de minimis*.

381 For the above reasons, I find that Item 72(b) is fulfilled as long as the services are tested, commissioned and operating to the third party's satisfaction as specified in the Contract and subcontracts. In assessing whether these requirements have been satisfied, the third party may have regard to whether the Documents have been handed over to the defendant. Given that the T&C had been carried out for all services except for gas services by 17 April 2013, and the third party was of the view that, from a practical perspective, the handover of the Documents could be done on another day, Item 72(b) was satisfied by 17 April 2013.

382 Thus, my finding remains that the CC should only have been issued as of 28 May 2013, which is the date that Item 72(a) was complied with (*ie*, the date of completion of rectification works in relation to the defects raised after TOP Inspection 1).

Whether Item 72(c) of the Preliminaries has been fulfilled

383 The defendant submits that the third party should not have issued the CC certifying completion on 17 April 2013, as there were "many outstanding unrectified construction defects at the Project".[499] Item 72(c) of the Preliminaries provides that the third party shall not issue the CC unless "[a]ll works included in the Contract are performed *including such rectification as may be required to bring the work to the completion and standards acceptable to the [third party]*" [emphasis added]. Therefore, the defendant asserts that the fact that the CC was issued, notwithstanding the numerous defects, gives rise to the inference that the plaintiff and the third party had conspired in relation to the

499 DDCC at para 40.

issuance of the CC. I should also add that the defendant challenges the issuance of the MC on the same basis.

384 The plaintiff disputes this and contends that the remaining outstanding works after the CC was issued were "minor" works.[500] Similarly, the third party points to cll 24(4) and 24(5) of the SIA Conditions, which provide that the Works should "appear to be complete and to comply with the Contract in all respects", and that the third party can list outstanding "minor works" in a schedule to the CC to be rectified thereafter.

385 Preliminarily, I note that the presence of minor defects does not prohibit the third party from issuing the CC. This was explained by Prakash J in *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd and another* [2009] 1 SLR(R) 385 ("*Yap Boon Keng Sonny*") at [134], as follows:[501]

> … In the construction industry, it is accepted that there are likely to be minor defects found in a newly completed building and that is why construction contracts generally provide for a defects maintenance period during which the contractor can touch up the works. …

386 The following passage from *Commentary on SIA Standard Form* at para 24.14 is pertinent in explaining the standards expected of a contractor at the point of completion:[502]

> … On the terms of the sub-clause, the state of the Works only has to appear to be complete. This impression is reinforced by the provision in the next sub-clause – Clause 24(5) – which anticipates that there may be minor outstanding works and of course by the provision in Clause 27 for making good defects. Consequently it is highly arguable that the term 'completion' for

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500 PWS at para 150.

501 TPWS at para 140.

502 TPWS at para 121.

> the purpose of the SIA Contract corresponds in essence with the expression 'practical completion' which has been used in the JCT forms for many years. …

This term "practical completion" has been understood as referring to "the completion of all the construction work that has to be done … notwithstanding the existence of latent defects" and "a state of affairs in which the works had been completed free from patent defects other than ones to be ignored as trifling" (see Chow Kok Fong, *Law and Practice of Construction Contracts* (5th Ed, Sweet & Maxwell Asia, 2018) ("*Law and Practice of Construction Contracts*") at para 23.414).[503]

387 I turn now to the alleged defects. The matters raised by the defendant can be classified into three categories:

(a) defects due to the plaintiff's failure to exercise proper care and skill in constructing the Project (see Stephen Furst and Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 10th Ed, 2016) at para 3-071);

(b) defects due to the defendant's lack of maintenance of the Project and/or wear and tear; and

(c) issues arising due to the natural characteristics of the materials chosen by the defendant.

388 From the outset, I must emphasise that the plaintiff and the third party can only be liable for defects that are due to the plaintiff's failure to exercise proper care and skill (*ie*, the first category stated above). The burden is on the

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503 TPWS at para 122.

defendant to prove, on a balance of probabilities, that each alleged defect is attributable to the plaintiff.

389 Further, I note that Item 72(c) of the Preliminaries states that the Works and any rectifications must be carried out "to the completion and standards *acceptable to the Architect*" [emphasis added]. It is, therefore, clear that the decision to issue the CC under Item 72(c) of the Preliminaries lies in the discretion of the third party.

390 In so far as the defendant sought to rely on expert reports and photographs of alleged defects after 2014, this had to be treated with extreme caution given that these defects could have been the result of the defendant's deliberate refusal to maintain the Project, as mentioned above at [140]–[142].

Clause 11 of the SIA Conditions

391 Before turning to deal with each of the specific defects, I would like to refer to Mr Chin's opinion on cl 11(1) of the SIA Conditions, which he claims required the plaintiff to supply materials of "… the best of their described kinds…" for the Project. He relied on this clause to support his finding of defects in relation to the Volakas marble, the ironwood for the timber decking and the variance in tonality of the Indian rosewood. With respect, Mr Chin must read that provision in the context of the entirety of clause 11(1). It is wrong for him to focus only on that portion of the clause to the exclusion of other parts to support his opinion that the plaintiff furnished poor quality materials in this Project. Clause 11(1) reads:[504]

504 Exhibit D10 at p 98.

> **Quality of Materials and Workmanship**
>
> Without prejudice to the Contractor's responsibilities under Clause 3 of these Conditions, all materials, goods and workmanship comprised in the Works shall, save where otherwise expressly stated or required, be the best of their described kinds and shall in all cases be in exact conformity with any contractual description or specification and of good quality. …

392 This sentence does not mean that the plaintiff must provide the best materials regardless of the materials agreed, selected and chosen by the defendant. As I elaborate below at [425]–[429], the defendant personally chose and selected the Volakas marble. Similarly, in relation to the Indian rosewood and ironwood, samples were shown to the defendant, together with the prices of those materials (see below at [447]). These materials became the PC Rate items of the defendant's NSCs and were included in the tender documents that subsequently became the contractual terms. Therefore, the plaintiff had no discretion to change these materials. Hence, it is incorrect and unfair for the defendant to now claim that the plaintiff must provide the best quality materials in respect of all the materials in the Project. Bearing the above in mind, I shall now address the alleged defects in the Project.

(1) Punctured gas pipe

393 The defendant alleges that there is a defective gas pipe laid across the driveway at the front gate of Unit 12A.[505] This defect only relates to Unit 12A. There are two parts to the defendant's pleadings regarding the alleged defective gas pipe. Firstly, the defendant argues that the gas pipe was punctured and not rectified. He pleads as follows:[506]

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505 DWS at para 273; SKK at para 151; Exhibit D10 at p 993 (Photo No A1).

506 DDCC at p 40, para 40(ii).

> The dented and/or punctured gas pipes at unit 12A of the Project had not been replaced in accordance with the engineer's directions issued on 24 March 2014. No architect's instructions and/or directions had been issued to date to authorise or regularise the same; …

394 Secondly, as part of his claim that the third party demonstrated undue partiality towards the plaintiff, the defendant argues as follows:[507]

> To date, SKK has also yet to receive any record of a qualified personnel test being conducted on the gas connections at the Project. Further, although a dented and/or punctured gas pipe was found at the Project on or around 7 March 2014, which the relevant authorities required to be replaced, and pressure-tested. GTMS has to date failed, refused and/or neglected to do so as there is no record of any replacement and pressure test carried out by GTMS of the same.

395 In essence, the defendant's pleadings raised three allegations in relation to the gas pipe. Firstly, the gas pipe sleeve had been dented. Secondly, the gas pipe had been punctured. Lastly, there had been no proper replacement and pressure testing of the gas pipe. Before I deal with these issues, I would like to address the manner in which the defendant introduced fresh evidence in relation to these issues at the last minute.

THE DEFENDANT'S BELATED INTRODUCTION OF EVIDENCE

396 During the course of trial, the defendant sought to introduce new evidence in relation to the gas pipe at the first and third tranche of the trial, *ie*, 8 November to 30 November 2018 and 18 February to 3 July 2020. On both occasions, this was done *weeks after* that particular tranche of hearings had commenced. In any case these applications to adduce fresh evidence were made *several years after* the pleadings had been exchanged and closed. These

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507 DDCC at para 52(i).

introductions of fresh evidence were also done after the summary judgment application in 2016.

397 I shall elaborate on each of these fresh applications in greater detail to illustrate the undesirable state of affairs in relation to the defendant's conduct of this case. Generally, the court should not condone such unsatisfactory conduct on the part of the defendant, as the belated introduction of fresh evidence may impinge on procedural fairness if the opposing parties are not given sufficient opportunity to respond to the fresh evidence.

398 The first application to introduce fresh evidence was made on 28 November 2018. The defendant sought to adduce into evidence a video taken on 22 November 2018. The defendant had engaged a contractor to hack the driveway of Unit 12A to expose the allegedly punctured gas pipe. According to the defendant's counsel, Mr Christopher Chong, the purpose of the video was to prove that the plaintiff did not perform the necessary rectification works on the gas pipe sleeve and that the gas pipe still remained punctured.[508]

399 It must be emphasised that this new evidence was introduced approximately three weeks *after* the trial had commenced. The video was only disclosed to the plaintiff and the third party on the evening of 26 November 2018.[509] In all fairness to the plaintiff and the third party, the hearing had to be adjourned for them to view the video evidence and to respond to the defendant's application. The plaintiff and the third party, quite understandably, vehemently

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508 NEs, 28 November 2018 at p 38, lines 10–20.

509 NEs, 28 November 2018 at p 39, lines 9–10.

objected to this last-minute introduction of new evidence as they were caught by surprise.[510]

400 The defendant's counsel explained that the video was only filmed on 22 November 2018 as Mr Tan had stated during cross-examination that the gas pipe sleeve was replaced by the plaintiff. However, the defendant's counsel candidly acknowledged that the defendant had been aware that the plaintiff's case was that the defects had been rectified.[511] If that was the case, the evidence could have and should have been obtained and introduced at an earlier stage.

401 Thus, I expressed my great dissatisfaction that evidence was being introduced so late in the trial. Despite my dissatisfaction, on 9 March 2020 at the third tranche of the trial, the defendant again sought to admit fresh evidence in relation to the issue of the gas pipe.

402 On this second occasion to adduce fresh evidence, the defendant sought to introduce the evidence of Mr Lim Teck Seng Bernard (DW8, "Mr Bernard Lim"). According to the defendant's counsel, Mr Bernard Lim's evidence would show that the gas pipe had been improperly rectified. Again, it must be emphasised that this introduction of new evidence was made two weeks *after* the *third* tranche of trial had commenced. The interval between the first tranche of trial (*ie*, November 2018) to the third tranche of trial was more than a year. Clearly, there was inordinate delay on the defendant's part.

403 Again, I reluctantly allowed the defendant to introduce the new evidence on account of its *potential* relevance to the issue of whether the gas pipe was

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510 NEs, 28 November at p 39, line 13 to p 40, line 21.

511 NEs, 28 November 2018 at p 42, line 23 to p 44, line 25.

punctured. However, as will be discussed below, a more thorough and careful analysis of the evidence and the pleadings reveal that this new evidence is *irrelevant* to the defendant's pleaded case and this introduction of fresh evidence should not have been allowed.

404 Ultimately, this entire state of affairs leaves much to be desired. The burden is on the defendant to prove his counterclaim that the gas pipe was punctured and that the plaintiff did not rectify the defect. Accordingly, the defendant ought to have acted far more expediently to obtain all relevant evidence that would go towards proving the alleged defects, and this should have been done before the trial commenced.

THE ALLEGED DEFECTS IN THE GAS PIPE

405 I shall now deal with the defendant's counterclaim regarding the alleged punctured gas pipe. In this regard, the defendant relies on an email sent by CCA on 7 March 2014 and a corresponding Engineer's Direction No 1 ("ED 01") issued by CCA on 24 March 2014 to replace the gas pipe.[512] The defendant asserts that the plaintiff has not complied with ED 01 to date.

406 However, CCA confirmed that the plaintiff complied with ED 01 by carrying out all the necessary rectification works in relation to the gas pipe as of 1 April 2014. Contrary to the defendant's allegations, it was the *gas pipe sleeve* which covers the gas pipe that was dented.[513] Furthermore, BAPL, the defendant's own expert, confirmed that as of 21 November 2013, the gas

512 SKK at para 149.

513 CHH at para 94; PWS at para 307.

pressure was fully restored and was not leaking.[514] This suggests that any issues with the gas pipe, regardless of whether they concern the gas pipe sleeve or the actual gas pipe, had been rectified by the plaintiff.

407 In any event, the defendant has failed to establish, on a balance of probabilities, that the dented/punctured gas pipe was not replaced, and pressure tested as pleaded. The defendant's allegations are rebutted by the testimony of Mr Lim Shao Lin, (PW7, "Mr Lim SL"), the managing director of GasHub Engineering Pte Ltd and the licensed gas worker for the Project. It transpired that in November 2013, there were complaints from the defendant of low gas pressure at Unit 12A of the Project.[515] Mr Lim SL suspected that the gas pipes might be waterlogged, preventing gas from flowing through. Accordingly, Mr Lim SL conducted investigations on the same gas pipe that the defendant now alleges was punctured. For the purpose of these investigations, Mr Lim SL hacked the tiles of the driveway at Unit 12A that covered the gas pipe, removed the cement, cut the iron gas pipe sleeve and removed the sleeve.[516] It was in the course of this process that the gas pipe sleeve was deliberately cut to access the gas pipe. Separately, Mr Lim SL also had to drill and tap a hole in the gas pipe to check if it was waterlogged. He found nothing wrong with the gas pipe and patched up the hole that he had drilled with a steel plug and sealant to prevent any gas leaks.[517] Thereafter, a semi-circular iron structure was used to replace the part of the iron sleeve that was removed to access the gas pipe so as to protect that portion of the gas pipe. It was subsequently revealed that the cause of the

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514 29AB18346.

515 NEs, 29 November 2018 at p 84, line 14.

516 NEs, 29 November 2018 at p 87, lines 19–21.

517 TPWS at para 237.

low gas pressure was due to gas pipes laid by external parties at the roadside outside the Project.[518]

408 The alleged puncture in the gas pipe was thus due to investigations made as a result of the *defendant's own* complaints. It, therefore, does not lie in the defendant's mouth to allege that there was defect, or a puncture, in the gas pipe.

409 However, the defendant then pointed to the fact that there was a steel plug on the gas pipe as evidence that it was and remains punctured. It was for this very purpose that he sought to introduce the video evidence. However, the video evidence does not advance the defendant's case in any way, for nothing can be made out from the video disclosed. In fact, the evidence shows that after confirming that the gas pipe was not waterlogged, Mr Lim SL had to seal the hole in the gas pipe with a steel plug.[519] Accordingly, what is clear is that not only was there no puncture in the gas pipe before Mr Lim SL drilled it to check whether it was waterlogged (and found that it was not, hence, no replacement was required), proper testing that involved drilling into the gas pipe had to be done.

410 I turn next to the evidence of Mr Bernard Lim, which is relied upon by the defendant.[520] Mr Bernard Lim is a project coordinator at City Gas Pte Ltd, which is a retail supplier of gas. He said that the laying of the gas pipe was according to the as-built plan, which had been approved. He further said that the gas pipe protected by the iron sleeve that was laid across the driveway of Unit 12A is proper and acceptable.

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518 NEs, 29 November 2018 at p 88, lines 23–25.

519 NEs, 29 November 2018 at p 89, lines 20–22.

520 DWS at para 284.

411 Mr Bernard Lim had inspected the relevant gas pipe at Unit 12A and opined that sealing the hole in the gas pipe with a steel plug was contrary to accepted practice. However, the defendant's pleadings are not that the rectification work done to the gas pipe is improper or illegal. Rather, the pleadings state that *no rectification work* was carried out on the dented or punctured gas pipe. It is, therefore, clear that Mr Bernard Lim's evidence is simply irrelevant to any of the pleaded issues as stated at [393]–[395]. Thus, Mr Bernard Lim's evidence should not, strictly speaking, have been admitted at all.

412 However, I am cognisant of the fact that his evidence related to the issue of gas safety. Thus, I shall nevertheless deal with this matter. In Mr Bernard Lim's opinion, it was a dangerous practice to drill a hole into the gas pipe and to subsequently seal the hole with a steel plug. This was because there was a possibility of gas leakage as the gas pipe in Unit 12A was made of polythylene.[521] The proper practice, in his view, was to cut away a section of the pipe and thereafter insert a T-joint between adjacent parts of the pipe. However, he opined that if the gas pipe were made of ductile iron it would be appropriate to drill a hole and thereafter plug that hole:[522]

> Court: If it had been a ductile gas pipe, iron gas pipe, do you cut or do you drill?
>
> A: Drill. There — they can tap a hole, yes.
>
> Court: You can tap a hole?
>
> A: Yes.
>
> Court: So what is the difference between the two methods?

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521 NEs, 17 March 2020 at p 10, lines 16–17; p 41, lines 11–15.

522 NEs, 17 March 2020 at p 41, line 24 to p 42, line 13.

A: One is a metal pipe, you can insert a plug upon completing the work. But for a PE pipe, there's no — it's not a proper fitting.

Court: Okay. So if it is a ductile metal gas pipe, you can actually drill a hole —

A: Yes.

Court: — and then after that, you can plug that hole, right?

A: Yes, yes.

413 I recognise that this may certainly have been one viable method of testing and rectification of the gas pipe. However, Mr Bernard Lim also acknowledged that what Mr Lim SL, the certified licensed gas worker, did was not against the Code of Practice for Manufactured Gas Pipe Installation (also referred to as "CP51") or any regulation or law:[523]

Q: Let me take your answer and try to understand it one by one. Under CP51, there is no rule which says that a contractor or licensed gas service worker cannot [put] a nut into a gas pipe to seal any hole. "Yes" or "no"?

A: No.

Q: So —

Court: No, what? No, cannot, or no, CP51 doesn't —

…

A: The CP doesn't state that.

…

Q: Mr Lim, do you agree that there is no other regulation or law which states that a contractor or licensed gas service worker cannot put a nut into a pipe to seal the pipe hole?

A: You're talking about CP?

Q: No, other laws, like Gas Act, Gas (Supply) Act, or regulations.

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523 NEs, 17 March 2020 at p 9, line 12 to p 10, line 11; Exhibit D17.

A: Not that I know of.

414 As seen from Mr Bernard Lim's response, he acknowledged that there is no relevant regulation or rule that prohibits the method of rectification used by Mr Lim SL. Furthermore, there is no evidence that the licensed gas workers who legitimately conducted on-site rectification had improperly conducted their works or were negligent in any way. In any case, given that all licensed gas service workers are licensed by the Energy Market Authority,[524] the plaintiff and the third party would have been fully entitled to rely on their method of rectification. Although Mr Bernard Lim disagreed with Mr Lim SL's method of rectification, this court cannot disregard the method used by Mr Lim SL, who was a qualified licensed gas worker and whose rectification work was accepted by CCA.

415 Similarly, the defendant's claim regarding the possibility of the gas pipe being dented was a non-starter. Contrary to what the defendant alleges, it was the *gas pipe sleeve* which covers the gas pipe that was dented. The dent in the gas pipe sleeve did not affect the gas pipe. According to Mr Chew, the purpose of the gas pipe sleeve is to protect the gas pipe from being damaged.[525] That dent in the gas pipe sleeve did not damage or affect the gas pipe itself. The rectification of the pipe sleeve and gas pipe after testing by Mr Lim SL was accepted by CCA.[526]

416 Therefore, I find that the defendant has not established his counterclaim in relation to the alleged defects in the gas pipe. In fact, the evidence shows that

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524 NEs, 17 March 2020 at p 1, lines 5–10.

525 NEs, 29 November 2018 at p 39, line 24.

526 CHH at para 94.

the defendant went out of his way to identify alleged defects, to the extent of hacking his own property, and then jumped to the conclusion that the plaintiff and the third party must have been responsible for the alleged defect. In this instance, the video evidence was, for all intents and purposes, a fishing expedition for evidence to support the defendant's case that there was a punctured gas pipe. A considerable amount of the court's time was wasted to deal with this issue as the defendant is hugely suspicious of the plaintiff and the third party. The cost of rectifying this defect (*ie*, to replace just the pipe sleeve) is only $1,149.90,[527] and the sum claimed by the defendant to replace the allegedly punctured gas pipe is $3,833.[528] These relatively trivial sums do not justify the considerable and inordinate time and resources that were devoted to try this issue.

(2) Volakas marble flooring

417 The defendant alleges that there were "numerous cracks, scratches, and other forms of damage to the marble flooring [in the Project]".[529] According to the defendant, these defects were due to the plaintiff's failure to handle, lay and protect the Volakas marble tiles with the requisite care.[530] Furthermore, the plaintiff also made use of a pallet truck on-site without ensuring that there were proper protective measures to prevent damage to the Volakas marble flooring.[531] In fact, the defendant raised his concerns about the lack of protection to the Volakas marble flooring over the course of the various site meetings from

527 Agreed Quantum of Damages, S/N 10.

528 DWS at para 286.

529 DWS at para 332; SKK at para 177.

530 SKK at para 177.

531 DWS at para 343; DDCC at para 52(b); DWS at para 343.

19 November 2012 to 4 February 2013.[532] The third party itself also issued an architect's direction ("AD 01") on 4 January 2013, noting that "[t]here [were] no proper protection of the installed works …". The defendant contends that the plaintiff failed to comply with AD 01 as the protection provided by the plaintiff remained unsatisfactory.[533] The defendant also relies on Mr Chin's evidence to argue that the Volakas marble was defective.[534] In considering Mr Chin's evidence it is important to bear in mind that he was not an expert in Volakas marble as he had no prior experience regarding Volakas marble. Although he professed to have dealt with other kinds of marble in general, such experience does not immediately translate to the kind of in-depth knowledge that he professed to have in relation to Volakas marble. Hence, he cannot be considered an expert in Volakas marble.

418 In Mr Chin's opinion, the marble in the house suffered from extensive defects, including unsightly marble impurities, hole damage, unsightly marble filler and poor patch repair on the floor tiles.[535] These are his personal observations. Further, in his 2014 BAPL Report, he also opined that the marble tiles remained "unsightly and clearly defective", and that the plaintiff's repair works utilising marble fillers and stain removers were simply inadequate. This was despite the third party having inspected the repaired works and noting that the rectification works were generally acceptable.[536] The defendant thus claims

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532 DKK at para 178.

533 DWS at paras 346–347.

534 DWS at paras 334, 336 and 339.

535 CC Vol 1 at pp 270 and 278.

536 DT Vol 1 at p 113.

a full replacement of the Volakas marble in the Project, which would cost $528,578.20.[537]

419 I find that Mr Chin's insistence on excessive rectification, as discussed above at [134], brings into question his objectivity. Mr Chin's evidence is also highly unreliable, for as stated above at [131]–[133], he vacillated on a number of key issues when providing evidence. In particular, the Volakas marble was a key issue in relation to which he originally testified that a complete replacement of all the marble slabs would be required. However, he subsequently retracted from his original position, conceding that it was possible to attempt to rectify the defects using other means besides a complete replacement. This change of approach suggests that he may have realised the extreme position that he initially took. In any case, I find Mr Chin's evidence in relation to the Volakas marble to have been given without the requisite experience and it should be treated with extreme caution.

420 It should also be noted that RTO Leong testified that he had specifically checked the marble that was delivered to the site at multiple times:[538]

> Q: Mr Leong, regarding the marble works, previously, Mr Chong, my learned friend, asked you whether you did check whether or not the marble pieces were defective when they arrived. When you did your checks, did you ensure that any piece that was damaged was actually rejected?
>
> A: Certainly. Can I elaborate further?
>
> Q: Yes, please do.
>
> A: Sometimes, while moving the material to the actual place for installation, there could be accidents that

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537 DWS at para 369.

538 NEs, 18 June 2020 at p 57, line 24 to p 58, line 24.

> happened along the way and damage [to] the tiles, so you can't say that we did not inspect at the point when we opened the box, because this accident happened subsequently.
>
> Q: Mr Leong, you stated that you have done your job properly, as a matter of professional pride and responsibility, and you would check that the contractor was using the approved material and that the works were actually constructed accordingly, and you said that you would check thoroughly before signing off. So after they were installed, did you check again?
>
> A: Of course.
>
> Q: And if it was defective due to workmanship, you will tell GTMS to replace the tile or rectify the issue?
>
> A: Of course.

421 It is clear that the defendant's allegations regarding the Volakas marble flooring are largely unmeritorious and extreme. The plaintiff did rectification works to the marble flooring following the defendant's complaints. Furthermore, the alleged cracks, tonality, stains and other forms of impurity are natural inherent characteristics of the Volakas marble.[539] The natural characteristics of Volakas marble must be the starting premise to determine whether or not there were any defects in relation to the Volakas marble flooring. Furthermore, the defendant chose the Volakas marble slabs himself[540] and decided not to dry lay the Volakas marble tiles (*ie*, laying out the marble slabs without mortar to observe the aesthetic effect). Dry laying the Volakas marble tiles beforehand would have ensured better tonality of the Volakas marble flooring. In the circumstances, it was highly improper for the defendant to turn around and claim that the plaintiff was responsible for the alleged defects arising out of the Volakas marble flooring. I shall elaborate on each of these points.

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539 PWS at para 278.

540 PWS at paras 278–280; TPWS at para 249.

422 Firstly, I accept the plaintiff's and the third party's submission that the alleged defects in the Volakas marble flooring were "natural flaws".[541] On this point, the evidence of Mr Tong Kam Fei (PW4, "Mr Tong") was highly relevant. Mr Tong is a director of Andes Consultant Pte Ltd, a firm that specialises in advising on building and construction disputes.[542] Mr Tong testified that he is experienced to deal with issues arising from marble.[543] Mr Tong inspected the Project on 20 February 2014 and made the following finding in relation to the Volakas marble flooring:[544]

> **MARBLE FLOOR**
>
> The marble flooring has its imperfections and characteristics typical of a Grade "C" marble based on the marble imperfections described in the classification table of the Marble Institute of America. Based on the classification, *it is reasonable to find natural "flaws" like veins, fissures and air voids in marble cut tiles* at the subject's property floor. Therefore, in the same context, it is not unreasonable that repair works such as waxing and sticking be carried out on site after the polishing of the marble as the *polishing process would have further exposed some of these flaws*. It is our opinion and based on "BCA Good Industry Practices for Marble and Granite Finishes" that *the installation of the marble flooring had been satisfactorily carried out*. The contractor had, out of obligation and without claiming charges repaired the marble floor and this should not be construed as an admission of liabilities of poor workmanship. In fact, the contractor had improved some of the repaired imperfections which were originally carried out by the supplier in the factory, so as to be able to satisfy the owner's complainants.
>
> [emphasis added]

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541 TPWS at para 250; AEIC of Tong Kam Fei ("TKF") at para 9.

542 TKF at para 1.

543 NEs, 27 November 2018 at p 34, lines 2–4.

544 TKF at p 3.

423 Mr Tong's assessment of the Volakas marble was consistent with that of Marble Market, a Greek supplier of Volakas marble, as well as Palazzo, who supplied the Volakas marble for the Project. Both Marble Market and Palazzo were of the opinion that the alleged defects concerning the Volakas marble flooring were natural flaws. Mr Tong agreed with their assessment. In a letter that was sent in March 2014, Mr Yiannis Chatziioannidis, the managing director of Marble Market, stated that Volakas marble "can include some natural impurities like red and yellow lines, grey crystals … hairline cracks and fissures … pinholes and holes … [and] brown pencil veins".[545] In addition, in an email dated 22 November 2013, Mr Joseph Tan from Palazzo also stated that Volakas marble is a "natural stone [that] is likely to vary in colour and veins. The yellow stains found on the surface of the marble are iron minerals".[546]

424 These statements are consistent with the existing literature on Volakas marble. In Marble Institute of America, "Marble Soundness Classification" (January 2005), which was tendered by the third party, Grade C marbles such as Volakas marble are said to:[547]

> … contain all or some of the following features: *holes, voids, lines of separation and structural flaws*. …
>
> It is standard practice to repair these variations by use of reinforcing backing, liners, sticking together, filing with resin or cement, fabricating corners or missing stone with compounds of similar nature, colour and texture. … Upon completion, most repairs can be visible and apparent given a difference in light reflection. *Quality of the repair work will vary in this group*. …
>
> [emphasis added]

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545 29AB18487.

546 27AB16989.

547 Exhibit TP2.

425 Secondly, the defendant would have been fully aware of some of these natural flaws which were exposed when he selected the Volakas marble at the Palazzo warehouse. The defendant visited the Palazzo warehouse on at least three occasions (16 July, 23 July and 30 July 2012) and personally chose the Volakas slabs.[548] These visits to the warehouse lasted for at least two hours on each occasion.[549]

426 The defendant claims that nevertheless, he did not have the opportunity to check the Volakas marble delivered by Palazzo.[550] I do not accept this claim. According to Mr Manoosegaran, the defendant personally chose the Volakas marble slabs at the Palazzo warehouse before they were cut to their required sizes.[551] This was corroborated by Ms Chiyachan, who had accompanied the defendant to the warehouses on various occasions.[552] There are also contemporaneous emails sent by Ms Chiyachan that clearly show that the defendant visited the Palazzo warehouse to select the Volakas slabs for the Project on 16 July and 23 July 2012.[553] These visits were arranged pursuant to a discussion on 5 July 2012 where the defendant agreed not to dry lay the Volakas marble, but to view the slabs before cutting instead.[554]

427 The defendant, however, disputes this by claiming that he would usually only be standing "20–30 feet away" as he was afraid of going near the marble

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548 PWS at paras 279–281.

549 NEs, 23 November 2018 at p 23.

550 DWS at para 362.

551 NEs, 23 November 2018 at p 37, line 1.

552 NEs, 15 June 2020 at pp 53–55.

553 16AB10650 (visit on 16 July 2012); 16AB10744 (visit on 23 July 2012).

554 16AB10423.

slabs.[555] Again, this was simply untrue. The plaintiff and the third party rely on photographs showing the defendant selecting the Volakas marble slabs at the Palazzo warehouse. In these pictures, the defendant is shown standing closely to a marble slab as part of his inspection.[556] Ms Chiyachan also testified that at these visits, the defendant had gone "quite close" to the marble and had been "quite close together with us, and he also see [*sic*] the marble and to carry the marble himself … we went there together to understand what his standard for the marble [was]".[557]

428 Therefore, in the light of the evidence, photographs and contemporaneous emails, I reject the defendant's bare assertion that he did not select any Volakas marble and that the photographs merely captured him "walking past" the Volakas slabs.[558] The defendant's assertion was also not corroborated by any of the other witnesses, who instead testified that the defendant had chosen the Volakas slabs himself. Thus, the defendant would have been fully aware of some of the natural flaws of the Volakas marble which were exposed and later made more apparent when polished by the plaintiff.

429 I further note that prior to the above events, the defendant and his wife had paid a visit to Mr Yong's house in order to obtain an idea of how Volakas marble would look when installed in a larger space. At that meeting, Mr Yong explained to them the issues relating to Volakas marble, including the tonality, stain, grain and veins, which was often only appreciated by marble

555 NEs, 20 February 2020 at p 145.

556 16AB10633.

557 NEs, 15 June 2020 at p 102, lines 8–23.

558 NEs, 31 January 2019 at p 20, lines 1–4.

connoisseurs. In fact, at this meeting the defendant's wife had expressed her objections to the selection of Volakas marble, which she thought to be ugly. Ironically, it was shortly after this meeting that the defendant chose Volakas marble for the Project, to the surprise of Mr Yong.[559] Given that the defendant had clearly been apprised of the issues relating to Volakas marble prior to making his own choice, he ought to lie in the bed that he had made for himself.

430 Thirdly, the defendant also agreed not to dry lay the Volakas marble. The process of dry laying involves placing the cut marble together with a display of where and how each of the tiles are to be installed, marking the specific grid lines on the floorplan how the tiles are to be laid.[560] This allows the defendant to inspect the tiles before actual permanent laying and to confirm if the tonality of the Volakas marble tiles was acceptable to him.[561] Although the plaintiff had highlighted that there was insufficient space to conduct the dry laying of the Volakas marble on-site, and that the lighting conditions were not ideal, it remained possible to conduct the dry lay at the Palazzo warehouse.[562] Furthermore, the defendant also agreed with the third party's recommendation not to fully dry lay the Volakas marble at another location due to the increased risk of the marble breaking during transportation and handling.[563] The eventual arrangement was for the parties to conduct a partial dry lay of fewer pieces of marble at Unit 12B. This is reflected in the minutes of Site Meeting No 27, which state: "As for dry lay, [the defendant] agreed not to proceed with.

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559 NEs, 3 April 2020 at p 139; TPWS at para 250.

560 NEs, 10 March 2020 at p 34, lines 1–6.

561 NEs, 13 November 2018 at p 40, lines 7–9.

562 NEs, 13 November 2018 at p 40, lines 10–21; 4 June 2020 at p 80, line 18 to p 82, line 1.

563 PY at para 296b; TPWS at para 254.

However, slab viewing will be arranged before cutting instead."[564] During this process of slab viewing, it was pointed out to the defendant that there were defects that were inherent within the marble, and which still existed even though the marble had already undergone treatment. It was only after the defendant accepted the conditions of the marble that the contractors proceeded to start laying it on-site.[565] As such, the defendant's decision not to proceed with dry laying and to accept the marble was an informed one, through which he saved costs by foregoing the opportunity to inspect the actual permanent laying of the tiles before installation.[566] In this regard, it is also notable that the defendant's own expert, Mr Chin, agreed in cross-examination as follows:[567]

> Q: I put it to you, Mr Chin, that, as Mr Ser had received a lower price for deciding not to proceed with dry lay for Volakas marble, it is not fair for him to now complain that the marble looks unsightly. Do you agree?
>
> A: I agree.

431 Finally, I note that the defendant only raised his complaints about the Volakas marble flooring in October 2013, notwithstanding that the installation of the Volakas marble tiles was completed before January 2013.[568] I accept that the defendant was entitled to raise any defects throughout the defects liability period. However, with regard to the Volakas marble flooring, the defendant would have been aware of the alleged defects since January 2013. The fact that he did not have any issues then and only complained about the alleged defects in October 2013 is evidence of how the defendant only sought to subsequently

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564 PWS at para 289; 16AB10423.

565 NEs, 4 June 2020, p 82, lines 6–17.

566 PWS at para 290.

567 NEs, 10 March 2020 at p 47, lines 20–25.

568 PY at para 301.

nit-pick and identify all possible defects in an unreasonable and pedantic manner, in order to find fault with the plaintiff and the third party once the certified payment claims became due. The defendant's issue with the Volakas marble flooring was, in all likelihood, a mere afterthought.

432 In any event, I observe that the plaintiff carried out three rounds of rectification to the Volakas marble flooring for the Project.[569] It appears that these rectifications by the plaintiff had been undertaken with great care to cater to BAPL's complaints, as Mr Yong himself testified:[570]

> Q: So after the December 2013 BAPL presented to GTMS, GTMS had engaged marble tradesmen, marble specialists, to actually repair the Volakas marble tiles, and there were rounds of inspection conducted by CSYA; is that right?
>
> A: Yes, from sample of repair to the eventual repair. So for every defects type, there was actually a sample done. For example, for pinhole, how is this being filled, whether these are generally acceptable. For stain, when it is removed, after two days, this is what it is, we are looking at it. And the cracks — and for how big the cracks is, how do you chip off the thing and how do you fill it back. Actually, there were examples of all these defects that was done on site prior to this April 2014. In fact, all the while there was. It's just that we all accept that these are acceptable and we go with this method. So that was done.
>
> But however, you know, after the repair, I mean, there were more and more sort of comments from BAPL, which seems like it's a bit antithesis, because they were the ones who also say that it's – "You should go ahead with this repair", and then they are not accepting the way that it is done.
>
> Court: Were these serious cracks?

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569 PY at para 300; PWS at para 303; TPWS at para 255.

570 NEs, 3 June 2020 at p 8, line 20 to p 10, line 4.

> A: They were not. They were really very, very fine. You can't see it from this point of view. It is only when you zoom in with a finger and you start pointing, then you perhaps can start to detect that it is a line there. Sometimes the unevenness is really the legs would not be able to feel, we were barefooted most of the time, but when you use your finger to touch it, you will roughly know that there is actually a sort [of] … indentation or a differential of levels. But those are really very little.

433 Such rectification by the plaintiff was done purely on a goodwill basis and the plaintiff did not issue an invoice or make a claim for these rectification works.[571] I have seen the photographs of the rectification works done by the plaintiff as produced by Mr Chin and the rectification works appear to be satisfactory.[572] The third party similarly approved the rectification works at the time, as Mr Yong observed:[573]

> Q: According to Mr Dennis Tan's AEIC, the plaintiff's director, he state that notwithstanding that the technical flaws are natural, these pinholes and cracks were also repaired by GTMS in their attempt to approve the aesthetic in order to satisfy the owner. Were these repair works checked and approved by CSYA?
>
> A: Yes.
>
> Q: And was CSYA satisfied?
>
> A: Yes. We have — in fact, we have rectification reports after reports saying that it has been done and we are satisfied with whatever that has been done.

434 It is, therefore, unreasonable for the defendant and Mr Chin to reject those rectification works.

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571 NEs, 20 November 2018 at p 50, lines 1–4.

572 CC at pp 317–318, 323–332; Exhibit D18.

573 NEs, 2 June 2020 at p 125, line 23 to p 126, line 10.

435 In addition, the third party also clarified that although it issued AD 01 to direct the plaintiff to ensure that there was proper protection for the installed works, this was merely to reinforce what the plaintiff was already doing on-site.[574] The third party had accepted the plaintiff's explanation that protective measures were only necessary on-site when the finishing works were complete.[575] In any case, if there were any damage to the finished works the plaintiff had to make good such damage at its own cost. Thus, there was every reason for the plaintiff not to damage the finished works.

(3) Ironwood for timber decking

436 The defendant alleges that there were numerous cracks and splinters in the ironwood used for the installation of the timber decking in the Project.[576] Furthermore, there were also differences in tonality between the ironwood used for the Project. Mr Chin agreed with the defendant's allegations regarding the cracks, splinters and differences in tonality.[577] He opined that the timber strips with such defects have to be replaced. Further, Mr Chin also noted the presence of stains on the timber decking, which he claimed have to be removed with a stain remover.[578]

437 Similar to the Volakas marble flooring, Mr Chin provided a mapping of the timber strips that, in his view, were defective.[579] However, once again, I

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574 PY at para 308; PWS at para 300.

575 PY at paras 307–308.

576 DWS at para 371; DDCC at para 52(c).

577 DWS at paras 372, 374–377.

578 CC at p 267.

579 Exhibit D7 at pp 407–436; Exhibit D8 at pp 327–331; Exhibit D9 at pp 489–493.

observed that the extent of his mapping in relation to Unit 12 was so extensive as to effectively require the complete replacement of the entire timber decking. Mr Chin agreed with my observation:[580]

> A: So apart from all those I have identified as marked here, the rest of the timber is good, that do not require replacement. So it's the strip that I'm referring to.
>
> Court: Yes, but there are not many. It's as good as removing the whole entire deck.
>
> A: Yes.

438 However, these allegations are again without merit. As with Volakas marble flooring, these alleged defects were simply natural characteristics of ironwood. In this regard, Mr Tong opined as follows:[581]

> **TIMBER DECK**
>
> Timber characteristic like *split and difference in colour tone is a natural occurrence in timber* and the installer should not be held liable. It should be noted that *these timber strips are used outdoor and subjected to the weather and elements of the natural environment.* Timber can and will change in colour and degrade over time when exposed to constant sunlight and rain, wherein its physical aspects like straightness and flatness will alter, *and split and check will develop.* The timber decking is satisfactory and complied with the quality control set up by the owner's consultant.
>
> [emphasis added]

439 While Mr Chin agreed with Mr Tong's observations, he opined that such splitting and checking could not have occurred in the early stage of life of timber

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580 NEs, 11 March 2020 at p 13, lines 19–25.

581 TKF at p 4; PWS at paras 292–293; TPWS at para 259.

that was carefully selected, as the natural decaying mechanism would take a long period of time.[582]

440 However, in my view, Mr Chin failed to take into account the fact that the timber had been left exposed outdoors for a period of time. In fact, from the time the Project was purportedly completed in April 2013 to his investigations in November 2014, which resulted in the mapping, the timber had been left exposed for a period of 19 months. That would have allowed the split and checks to develop, as per Mr Tong's opinion above at [438] unless there was proper maintenance. Further, Mr Tong's evidence is consistent with the literature that states that ironwood, which was used for the timber decking, "seasons slowly with tendency for … splitting".[583] Furthermore, ironwood also "darken[s] on exposure to a deep reddish brown, becoming very dark brown or even black with age".[584]

441 The plaintiff and the third party further argue that they had used control samples on-site during the installation of the timber decking to monitor the tonality of the ironwood. The plaintiff's representatives and RTO Leong would compare the ironwood received on-site with the control samples, ensuring that they fell within the acceptable tonality range.[585] This was the general practice for this Project as confirmed by Mr Yong:[586]

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582 NEs, 11 March 2020 at p 15, lines 1–18.

583 49AB32272.

584 49AB32272; PWS at para 294.

585 30AB18607; NEs, 20 November 2018 at p 72, lines 10–13.

586 NEs, 2 June 2020 at p 137, line 25 to p 138, line 10.

> Q: So do you confirm that both for the outdoor timber decking and the indoor timber strips, there were actually samples on site?
>
> A: Yes, there was actually samples on site on — not only just a piece, but it's a panel, so it's a few pieces.
>
> Q: And is it your evidence that the internal timber strips and the outdoor timber decking, they all satisfied the minimum standard indicated in these samples?
>
> A: Yes.

442 Accordingly, the alleged defects in relation to the ironwood at the timber decking were not construction defects. In any event, the plaintiff also carried out the necessary rectification works to the timber decking on or around 14 January 2014 and 8 April 2014, which the third party was satisfied with.[587]

443 Besides, the defendant has an existing warranty with the plaintiff and the subcontractor, Kianson Pte Ltd. Under this warranty, the defendant is indemnified in relation to the timber decking.[588] Accordingly, if the defendant maintains that the timber decking is defective, the appropriate course of action would be for him to enforce the warranty against the plaintiff or Kianson Pte Ltd. He could easily have used this warranty to get the person who issued it to rectify the allegedly defective timber decking. However, he not only refused to allow the plaintiff to rectify the works, he also did not activate the warranty. The defendant is contributorily negligent in this regard even if he were found to be entitled to compensation for these defects.

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587 PY at para 303.

588 34AB21927.

(4) Variance in tonality of timber floor finish

444 Apart from the timber decking, the defendant also alleges that there were tonality differences in the indoor timber floor finishes throughout the Project.[589] For this, the defendant claims the costs of rectifying the tonality differences in the timber floor finishes amounting to $24,667, as well as the costs of sanding and polishing the flooring amounting to $5,493.[590]

445 However, once again, these differences in tonality are inherent natural characteristics of the Indian rosewood used for the timber floor finish.[591] Mr Tong opined as follows:[592]

> Generally, the timber flooring in the subject property is satisfactory in term of their flatness and workmanship. *There are different colour tones which are inherent and natural characteristic of the material itself.* Due to the effect of sunlight when viewed from different angles the degree of surface flatness can be discerned. There are also defects associated with expansion and contraction of timber itself, which is reversible and can be rectified. This is within the range of market practice which is 5% and below. *The timber flooring is undergoing changes due to its exposure to sunlight as in this case wherein the glass walls and windows are not covered with curtain.* These changes can be remedied and are reversible once the environment is stabilised and protected. [emphasis added]

446 This is again consistent with the existing literature on Indian rosewood that states that the general characteristic of Indian rosewood is that it varies in colour from golden brown to dark purple brown with darker streaks.[593]

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589 DWS at para 391; DDCC at para 52(e).

590 DWS at paras 400–401.

591 PW, at paras 296–297; TPWS at para 265.

592 TKF at pp 3–4.

593 49AB32270.

Moreover, according to Mr Tong, this tonality difference is something that is ordinarily appreciated by purchasers of Indian rosewood.[594] As with the ironwood, the Indian rosewood used for the Project was checked against control samples before installation.[595] If the defendant did not appreciate such tonality differences, then it was incumbent on him to install curtains or other protective coverings to protect the Indian rosewood from exposure to sunlight, preventing the tonality differences from being exacerbated.

447 Further, as mentioned above at [441], there had been a concerted effort to ensure the quality of the materials that were used at the Project. Specifically in relation to the Indian rosewood, samples had been brought at an early stage of the Project to a meeting between the third party and the defendant, for the latter's approval and comments.[596] Thereafter, there was a further re-submission of Indian rosewood by the supplier that had also been placed on-site.[597]

448 Accordingly, the variance in tonality of the indoor timber floor finishes was not a construction defect and neither the plaintiff nor the third party is liable for them.

(5) Aluminium cappings at the rooftop

449 The defendant alleges that the aluminium cappings on the rooftops of all three units of the Project were dented, scratched and finished with patchy and splotchy paintwork. When the plaintiff attempted to rectify these alleged

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594 TKF at para 46.

595 30AB18608.

596 NEs, 2 June 2020 at p 133, lines 2–6.

597 NEs, 2 June 2020 at p 133, lines 14–16.

defects, the plaintiff applied polyurethane spray-paint in a patchwork manner, when the aluminium had already been powder-coated. The defendant contends that the application of these different types of paint resulted in visibly divergent finishes.[598]

450 The defendant's allegations are again unmeritorious. The defendant is essentially asserting that the plaintiff's method of rectification worsened the alleged defects. Instead, the plaintiff should have *completely* replaced the aluminium cappings with powder coated cappings.[599] However, the plaintiff's method of rectification was accepted by the third party and was confirmed to be correct by Qualicoat Pte Ltd ("Qualicoat"), the manufacturer of the aluminium.[600] Qualicoat has provided a ten-year performance warranty to the plaintiff in relation to the aluminium and stated as follows in a letter dated 1 April 2014:[601]

> … we hereby confirmed that all the Aluminium Panels with scratches would be recoated on job site touch up as follows:
>
> 1) The power coated panels will be refinished with a compatible external grade 2-coat PU paint system on site.
>
> 2) This will provided [*sic*] an additional layer of protection and will in no way compromise the performance of the initial powder coating layer.

451 In fact, Mr Chin, the defendant's own witness, also agreed with Qualicoat's method of rectification as follows:[602]

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598 DWS at paras 309–313.

599 DWS at para 315.

600 PWS at paras 351–352; TPWS at para 263; DT at p 108, Item C42–43; NEs, 4 June 2020 at p 69, line 16 to p 70, line 21.

601 31AB19723.

602 NEs, 12 March 2020 at p 97, lines 8–14.

> Q: Just to confirm, Mr Chin, are you a specialist when it comes to aluminium coating?
>
> A: No.
>
> Q: Do you agree with me that this rectification works that are set out by Qualicoat in this letter, this is an acceptable method of rectification?
>
> A: Yes.

452 Mr Chin further alleged that even after the rectification had been completed, the polyurethane spray-paint could still be easily rubbed off by simply using his fingers. I find the allegation that the spray-paint can be so easily removed difficult to accept. In fact, as Mr Yong testified, what he had rubbed off could instead have been mere dust:[603]

> Court: There was an allegation — I think it's Mr Chin — to say that when you run your fingers over the spray paint, it will come off.
>
> A: Yes.
>
> Court: Are you aware of that?
>
> A: Yes.
>
> Court: Is what he said correct?
>
> A: No. I think it's actually dust. I mean, to BAPL, it seems like this whole project has a lot of things that you run through a finger, it will collapse, including the tile joint and the paint works. Okay. We should start with the rectification of scratches on aluminium work.
>
> Okay. First of all, the aluminium work was all specified for powder coating, which means that it is actually done in factory, sprayed, and then it comes to site installed. That's about it. If there's any scratches, usually the rectification work is done on site already. You cannot just take out the aluminium work and send it to factory, because that's not possible once the aluminium is assembled. So there is a certain procedure for the paint works to be sprayed on, so that's — there's an approved method of statement for this, so we

603 PWS at para 348; NEs, 4 June 2020 at p 69, line 3 to p 70, line 21.

> accepted that, because the paint supplier are the ones who gave us the statement and they are the ones who give the warranty. So of course it's an acceptable rectification method, and it is also a market rectification method. …
>
> …
>
> Court: Listen. If the original veneer is powder-coated and you spray paint it, will the spray paint stick onto the powder coating?
>
> A: It will, yes, according to the supplier' specifications and method of statement.

453 Furthermore, I also agree with the plaintiff and the third party that any issues with the aluminium claddings and cappings are aesthetic in nature. Mr Chin agreed that overall, this would not affect the performance of the metal cappings:[604]

> Q: Do you agree with me that this defect that you have identified in December 2013 is an aesthetic issue?
>
> A: Yes, as well as performance, because the paint will break down faster than it should be.
>
> Q: Just to follow up on that, does it affect the performance of the metal capping?
>
> A: No, it does not.

454 In any event, I note that the defendant has an existing warranty wherein the plaintiff and the subcontractor, Lejen Aluminium Pte Ltd, are jointly and severally liable "in the event of any deterioration or defects" in the aluminium works and glazing (except shower screen). This warranty expires on 17 April 2023[605] and the plaintiff has indicated that it is prepared to honour this

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604 NEs, 12 March 2020 at p 91, lines 2–8.

605 34AB21937.

warranty.[606] Therefore, the appropriate course of action is for the defendant to enforce this warranty if he is of the opinion that there are indeed defects concerning the aluminium works.

(6) Steps and risers

455 I have earlier found that the third party should not have issued the CC as of 17 April 2013 due to the non-compliant steps and risers (see [382] above). However, I reject the defendant's allegation that the steps and risers remain unrectified and non-compliant with the statutory requirements and contractual requirements up till today.[607]

456 According to the BCA Regulations, the height of a riser shall not be more than 175mm (see Section E.3.4.1).[608] Note 1 of the BCA Regulations qualifies this by clearly stating that a tolerance of +/- 5mm in any flight of stairs is acceptable. The defendant relies on a later version of the BCA Regulations (*ie*, the October 2013 version) wherein Note 1 to Section E.3.4.1 states that "[a] tolerance of 5mm between *two consecutive steps* in any flights of staircase is acceptable" [emphasis added].[609] However, the October 2013 version of the BCA Regulations is irrelevant for the purposes of this dispute, given that the steps and risers were constructed before then and the TOP inspections were also conducted before October 2013.

606 NEs, 20 November 2018 at p 81, line 1.

607 DWS at paras 103 and 290.

608 PY at p 2302.

609 SKK at para 114.

457 The defendant alleges that the height of many risers exceeded 180mm even up till today.[610] In this regard, the defendant relies on the measurements of the risers by Mr Chin. He utilised precision measurement tools such as the digital Vernier caliper and a bubble leveller to carry out an interpolation and extrapolation of different points of the various steps. Undoubtedly, this allowed him to achieve a highly precise reading of the thickness and height of the various steps and risers. Based on his findings, Mr Chin opined that the riser heights were non-compliant with the BCA Regulations. Further, he opined that the difference in thickness and height of the various steps and risers was evidence of inadequate rectification done by the plaintiff. Overall, in Mr Chin's view, these defects presented a hazard to anyone walking up or down the stairs.

458 However, Mr Chin's use of such equipment to measure the height of the risers is completely inappropriate and unreasonable in the construction industry.[611] According to Mr Tan, Mr Chin's method of measurement would have added 3mm to the measurement of the riser.[612] Mr Chin's method of measurement is also at odds with the construction industry's traditional method of measuring steps and risers, namely, the use of a simple measuring tape. In the construction industry, precision instruments are not used to measure the height of the risers. Mr Chin conceded that the digital Vernier caliper is not used in the construction industry to measure steps and risers and that the usual method of measurement was by a measuring tape. He conceded this several times in court:[613]

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610 SKK at para 115.

611 PWS at paras 179–183.

612 NEs, 19 November 2018 at p 101, lines 13–15.

613 NEs, 11 March 2020 at p 49, lines 15–20; p 50, lines 8–18.

> Q: … I put it to you, Mr Chin, that a normal contractor building a staircase would not be using your method of measurement to adhere to the standard of quality control unless the contract stipulates that such level of accuracy is a requirement.
>
> A: Yes, agree.
>
> …
>
> Q: Do you see the method of measurement used for the measurement of the height of the risers used in these photos? The height of the risers are being measured by simply holding a measuring tape vertically against the riser. Do you agree?
>
> A: Yes, that's generally.
>
> Q: Would you agree that it is probable that a method of measurement adopted by BCA when checking for compliance should be similar to the method you see in these photos?
>
> …
>
> A: Generally, yes. …

459 Again, in response to my questions, he agreed that the digital Vernier caliper is not used by those in the construction industry:[614]

> Court: No, listen to my question. I'm not asking for exact, the exact measurement. Of course, if you want to be 100 per cent accurate, you use a digital [Vernier caliper], right?
>
> A: Yes.
>
> Court: But in the construction industry – do these people use this in the construction industry?
>
> A: No.

460 It is understandable why precision tools such as the digital Vernier caliper are not used to measure steps and risers. The digital Vernier caliper is a tool used in the precision manufacturing industry in which exact precision in

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614 NEs, 18 March 2020 at p 126, lines 8–15.

measurement is critical as there is little or no room for error. This is not the case for the measurement of the steps and risers as the BCA does give a range for acceptance of compliance. Mr Chin conceded that prior to this Project he had no experience in measuring steps and risers. For him to use the digital Vernier caliper, knowing that such precision equipment is not used in construction industry, suggests that he was out to prove that the steps and risers were not compliant with the BCA Regulations.

461 In my view, using the common measuring tape would have been the appropriate method of measurement, given that the BCA itself had used this method to determine if the steps and risers were compliant with statutory requirements.[615] In fact, according to Mr Yong who was present at the TOP inspections, he said that the BCA inspectors walked along the stairs and if they felt that the steps and risers were uneven or not according to the prescribed requirements, then measurements were taken. The BCA inspectors did not take measurements of every step and riser.[616] The BCA's method of measurement must be the starting premise to determine if the steps and risers were in compliance with statutory requirements. Indeed, when the third party corresponded with the BCA to rectify the non-compliances arising out of the TOP inspections, the photographs of the rectified stairs were accompanied by a tape measure.[617] The BCA was satisfied with these photographic submissions and granted the TOP for the Project on that basis.

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615 NEs, 19 November 2018 at p 102, lines 5–6.

616 TPWS at para 230.

617 25AB15838.

462 In fact, the industry practice is similar to the method used by the BCA during its TOP site inspections (*ie*, walking up and down the stairs to spot the uneven height of the risers). This is Mr Yong's explanation:[618]

> Q: But nobody from the architects actually took a measuring tape, or any other measuring device, to verify if these measurements are accurate, right, Mr Yong?
>
> A: We might not have done that, but I think when we walked through there, the contractor is with us. So if there's any problems, we usually will ask them to measure.
>
> Q: Yes, but that's from walking, right, Mr Yong?
>
> A: Yes.
>
> Q: I still find it quite difficult to understand how you detect a difference a few mm by walking up and down the steps, but maybe you might want to explain.
>
> A: Well, if you do a 24-storey building that has how many flights of steps, the best way actually is to walk up and down, and that's how TOP officer actually does it. They use their body parts as part of the measurements to know that whether the measurements are within or out. So in a very fast instance, for example, whether it's 12, 12A or 12B, so that's why they took one hour. They actually took all the way — I mean, take the staircase to go all the way up and come down to know whether it is even or not even, and when they find that there is any problem, they will actually ask for measurements and they will take photograph on the spot.
>
> Q: Mr Yong, it's not humanly possible to detect from walking —
>
> A: Yes, but that is construction —
>
> Q: Let me finish first. It is not humanly possible to detect, when walking up the steps, whether something is plus/minus 5 mm or more, right, do you agree with me?
>
> A: But when it is actually very much more than 5 mm, you can tell. Maybe you can't tell 1 or 2, but definitely, you know —

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618 NEs, 1 April 2020 at p 113, line 15 to p 115, line 2; 2 June 2020 at p 46, lines 2–9.

463 Similar evidence was provided by Ms Chiyachan in her testimony as follows:[619]

> Q: Ms Wan, can you please explain why you were comfortable with just using this method of visual inspection and going up and down to check whether the treads of the internal staircases of the project were flat?
>
> A: (Interpreted) It's quite common that I will use the way of going up and down to check whether it is flat, the surface.
>
> Q: Would this be a standard industry practice?
>
> A: From what I understand, that [is] what we [have] done for other project also.

464 This is a sensible method of testing the staircase *ie*, a general walk of the staircase, and pausing to measure only when something is obviously dangerous or incorrect. The BCA used the ergonomics of the human body to test the safety aspects of the staircases. This is logical as after all the staircases are used by people. This underscores the fact that the construction industry is far from a precision industry, which Mr Chin would have known.

465 In this regard, I accept the measurements of the steps and risers produced by the third party after the plaintiff performed the rectification works.[620] Although the defendant submits that this set of measurements are inadmissible hearsay evidence,[621] I accept the plaintiff's contention that this set of measurements is an exception to the hearsay rule pursuant to s 32(1)(*b*)(iv) of

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619 NEs, 16 June 2020 at p 72, line 16 to p 73, line 1.

620 Third Party Bundle of Documents at pp 40–50.

621 DWS at para 115.

the Evidence Act (Cap 97, 1997 Rev Ed) (the "Evidence Act").[622] Section 32(1)(*b*)(iv) provides:

> **32.—**(1) Subject to subsections (2) and (3), statements of relevant facts made by a person (whether orally, in a document or otherwise), are themselves relevant facts in the following cases:
>
> **…**
>
> **or is made in course of trade, business, profession or other occupation;**
>
> (*b*) when the statement was made by a person in the ordinary course of a trade, business, profession or other occupation and in particular when it consists of –
>
> …
>
> (iv) a document constituting, or forming part of, the records (whether past or present) of a trade, business, profession or other occupation that are recorded, owned or kept by any other person, body or organisation carrying out the trade, business, profession or other occupation,
>
> [emphasis in original]

466 In this case, the measurements were taken by the plaintiff's ex-employee, Juan Ocampo ("Mr Ocampo"). According to Mr Tan, Mr Ocampo had left the plaintiff's employ and returned to the Philippines.[623] Nevertheless, the measurements were taken by Mr Ocampo as part of the plaintiff's records, in the course of carrying out the plaintiff's business.[624] Therefore, the measurements fall within the exception to hearsay set out in s 32(1)(*b*)(iv) of the Evidence Act.

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622 PRS at paras 13–14.

623 NEs, 16 November 2020 at p 31, lines 9–11.

624 NEs, 9 November 2020 at p 110, lines 9–18.

467 I address briefly two points raised by the defendant in this regard. First, the defendant submits that the measurements should not be admitted into evidence because the plaintiff did not comply with the notice requirements in O 38 r 4 of the Rules of Court.[625] While this is true, this is a mere irregularity and is not fatal to the plaintiff's admission of such evidence. Order 2 r 1(1) of the Rules of Court states that:

> Where, … at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and *shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein*. [emphasis added]

468 Secondly, the defendant also relies on *Bumi Geo Engineering Pte Ltd v Civil Tech Pte Ltd* [2015] 5 SLR 1322 ("*Bumi Geo*") to submit that the measurements were a "once-off set of measurements", were not recorded with a disinterested motive, and it was unclear who took the measurements and whether it was taken by the person who recorded them.[626] These objections are without merit. The fact that the measurements were "once-off" is immaterial. The critical question, as set out in *Bumi Geo* at [105], is whether the measurements were made "in the way of business", which "has been defined to mean a course of transactions performed in one's habitual relations with others and as a material part of one's mode of obtaining a livelihood". In the present case, it is clear that they were – Mr Ocampo made the measurements in the course of his employment with the plaintiff for the purposes of the plaintiff's business as a contractor. Furthermore, the court's observations in *Bumi Geo* at

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625 Defendant's Skeletal Submissions dated 27 October 2020 ("DSS") at para 68.

626 DSS at para 69.

[104] regarding a "disinterested motive" were in relation to explaining the *rationale* of the hearsay exception, rather than laying down a general rule that all evidence sought to be adduced via s 32(1)(*b*)(iv) had to have been made with a disinterested motive. The identity of the person who took the measurements is also not unclear, as there is evidence before the court that they were taken by Mr Ocampo. Thus, I reject the defendant's submission that the measurements of the rectified steps and risers taken by Mr Ocampo are inadmissible hearsay evidence.

469 The defendant still asserts up till today that the defects relating to the steps and risers are unrectified. I note that the TOP has been granted for the Project and the BCA certified the staircases as having passed their inspections, *ie*, the staircase is safe for use. The CSC has also been issued in respect of the Project.[627]

470 I find that the defendant's assertions are without basis and incorrect for several reasons. Firstly, in Mr See's opinion the proper rectification work was to have:[628]

> … all the finishing to the steel stair removed, dismantle the steel stair, lower it to the floor using chain blocks, remove the existing intumescent paint, cut and adjust the risers to appropriate height and weld them back by qualified welders, grind the steel stair received intumescent paint, prepare and apply primer, apply intumescent paint, lift each flight of the stair into position and fixed them, lay screed, plywood base and rosewood finishing to the threads and risers. Thereafter, smooth sanding and apply clear finishing to the timber treads and risers.

627 TPRS at paras 56–58.

628 AEIC of See Choo Lip at para 6.9; DWS at para 302.

471 Mr See proposed a complete removal of the staircase and to re-do the steps and risers. He disagreed with Mr Chin's and Mr Yong's method of rectification by sanding down the steps. He explained:[629]

> I find no satisfactory configuration to minimise the rectification works. The findings in the BAPL Steps Report also demonstrate that it is extremely difficult to rectify the problems to bring the steps within (1) contractual compliance; and (2) statutory compliance because the amount of play is restricted by the steel structure.
>
> A major problem with the steps and risers is that many of the risers exceed the regulated 175mm height. Evidently, many of the timber treads were shaved at the edge in an attempt to bring the riser within the 175mm statutory requirement.
>
> The restriction in rectifying the timber treads that are too thin, i.e. below 10mm thickness, is that this will add to the height of the riser above. At the same time, there are many other timber treads that are too thick, i.e. more than 20mm. While I note that Mr Chin Cheong's recommendation is to sand down the timber treads that are too thick, this will create a new problem of increasing the height of the adjacent riser.
>
> A third complication lies in the requirement that two consecutive steps must not have a variance in height of more than 5mm. Given the disparity in the readings, it is not possible for a simple replacement of timber treads that are too thin and sanding down of timber treads that are too thick (the "**Proposed Rectification Method**"). The Proposed Rectification Method, while logical when viewed in isolation, is unable to bring all the steps in compliance with statutory requirements, let alone contractual requirements.
>
> Due to the size of the flights, it is almost impossible to remove the stair to the fabrication shop to rectify the steelwork, which would require certain part of the walls and doors to be dismantled for removal and installation. A heavy crane may also be required.
>
> [emphasis in original]

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629 AEIC of See Choo Lip at paras 6.4–6.8.

472 The flaw in Mr See's assessment is that he had only looked at a short flight of five steps leading up to the roof level, before concluding that sanding down was not possible. When cross-examined, Mr Yong conceded that based on these five steps alone, it would not be possible to sand them down to 175mm per step.[630] However, as Mr Yong noted, this would not be a problem if one sanded down the various flights of steps as a whole. In that way, there would be a greater range of steps to allow for any topping up or sanding down to be done. Although he had not been required to carry out the exercise, in his view, this would have rectified the defects:[631]

> Q: Have you actually done an analysis on this?
>
> A: You can actually do a mathematical count. You will see that they will get almost 175.
>
> Q: If you do an average, yes.
>
> A. No, but we start from the middle. Because what happens is I think you start from either the beginning or the end, you will not be able to compensate the difference for the whole thing. But if you start from the middle of these steps with three flights, which you need to do something to it based on Mr Chin's dimension, then you are very likely to get your 175.

473 Furthermore, in the event that there was any excess that could not be solved by sanding down the steps alone, this excess could be resolved by sanding down the various landings in the stairs, as Mr Yong explained:[632]

> A: Yes, the steel structure is technically — if we base on this height itself, it's technically 15 plus 9 metres — sorry, 15 plus 9 mm below. So if the finishing is all 15 plus 9, which is 15 of finishing timber plus 9 mm of substrate, you have actually 20 — 24 mm, thereabouts, to play with. …

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630 NEs, 1 April 2020 at p 154, line 15 to p 156, line 1.

631 NEs, 1 April 2020 at p 156, line 22 to p 157, line 8.

632 NEs, 1 April 2020 at p 158, lines 16–21.

474 It should be noted that the plaintiff had, in fact, initially proposed a method of rectification similar to what Mr See suggested, albeit one less drastic. Following the failure of TOP Inspection 1, the plaintiff wrote to the third party, suggesting a number of major rectification works, including the reduction of a riser from the flight of steps such that every single step would be 172.5mm.[633] This method would involve a substantial amount of work, which was effectively a redesign of the staircase.[634] The fact that the plaintiff voluntarily suggested, and undertook to carry out, such major work demonstrates its willingness to rectify the defects whatever may be the efforts involved. The plaintiff's proposal was not implemented because the third party opined that such drastic measures were not necessary, as Mr Yong testified:[635]

> Court: So their proposal of reducing one riser is not necessary because the difference is not significant?
>
> A: Yes.
>
> Court: And it can be done by sanding down?
>
> A: Correct, yes, your Honour.

475 Secondly, there is no evidence that any misrepresentations were made to the BCA in the final TOP inspection in order to gain approval. Although the defendant claims that a letter was drafted to inform the BCA,[636] this was not produced in evidence. In any case, this draft letter is irrelevant, for not only was it never submitted to the BCA,[637] there have been no sanctions or findings by the BCA that there were false representations made by the parties.

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633 23AB14404; NEs, 1 April 2020 at p 76, lines 11–16.

634 NEs, 1 April 2020 at p 91, line 14 to p 92, line 16.

635 NEs, 1 April 2020 at p 89, lines 11–16.

636 NEs, 19 February 2020 at p 39, lines 4–12.

637 NEs, 19 February 2020 at p 29, line 13 to p 41, line 11.

476 Lastly, the evidence shows that the defendant was at all times aware of the progress of the TOP inspections. In fact, after the unsuccessful TOP inspection held on 30 April 2013, the defendant instructed Mr Cheung to keep an eye on any works done by the third party.[638] It is unbelievable that the defendant had opted to stay silent even when he disagreed with the finishings and had every opportunity to ask for further details.

477 I shall briefly deal with Mr Chin's assertion that the steps and risers, mentioned above at [457], may be a safety issue. His assertion is not borne out on the facts. As noted above at [144], Mr Teo, who had visited the Project in order to determine its rental value, had no problem using the staircase despite his age. In fact, prior to being informed in court that there was a dispute regarding the height of the steps, Mr Teo had not even noticed any defects during his inspections.

478 In relation to Mr Chin himself, I note that it was only in 2017 that he went into the Project, armed with his precision tools, to identify the defects set out in his 2018 BAPL Report. Prior to that, he was at the site on multiple occasions in December 2013 and November 2014 during which he carried out extensive inspections for defects and flaws. In all these inspections, he had no problem when he used the staircases in the three units to access the upper floors. There was never any mention in his reports, prior to his inspection of the steps and risers, of any hazard posed by the steps and risers, or that he had tripped or fallen because of the unevenness or uneven height in the steps and risers. The first time the allegations relating to the steps and risers were brought up was in

638 25AB16020.

June 2016, in Mr Chin's penultimate BAPL Report.[639] This very point was also noted by Mr Yong in his testimony:[640]

> Q: …. So in the first five reports from December 2013 to April 2016, the riser height issue was not brought up. Do you recall that, Mr Yong?
>
> A: Yes.
>
> …
>
> Q: So it took until the second-last BAPL report, dated June 2016, for Mr Chin Cheong to put the riser height issue into his BAPL report; is that right?
>
> A: Yes, the riser height issue was never mentioned in the first few reports.

479 The methodology and results from Mr Chin's reports are further questionable. Mr Chin had inexplicably adopted a method of measurement that was simply different from the industry practice, as seen from the following exchange in court:[641]

> Court: So what you are trying to tell me is that GTMS takes the height of the riser from the bottom of the step to the height of another step? Is that what you mean?
>
> Yap: Takes the height of the riser from the bottom of the step —
>
> Court: To the height —
>
> Yap: To the top —
>
> Court: — height of the next step?
>
> Yap: — of the step.
>
> Court: Right?
>
> Yap: Yes, your Honour.

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639 PWS at paras 172 and 176.

640 NEs, 2 June 2020 at p 44, line 22 to p 45, line 7.

641 NEs, 2 June 2020 at p 49, line 24 to p 51, line 5.

> Court: And you're saying that BAPL is also taking this step, but they factor in to the level of the steps?
>
> Yap: Yes, your Honour.
>
> …
>
> Court: So, Mr Yong, basically have you understood the explanation that I summarised with Mr Yap?
>
> Yong: Yes. Yes, your Honour.
>
> Court: So, in other words, there are two methodologies.
>
> Yong: The general methodology is the blue one. … Usually you measure the full vertical portions from the bottom of it to the top of it, but you don't project it back to the horizontal surface and then take the end of that, and then you project it back again, of course there will be a lot of discrepancy. So —
>
> Court: So what is the industry –
>
> Yong: It's the blue measurement. So you actually take the vertical height from the bottom of the riser to the top of the riser.

480 The adoption of such a method resulted in substantially different measurements being taken by Mr Chin, allowing him to conclude that the stairs posed a danger. However, there was simply no reason for him to have done so, and this is reflected in the disparity between his conclusions regarding the alleged danger posed by the stairs and what has transpired in actuality:[642]

> Q: Mr Yong, do you agree that there's no safety concern about the unevenness of the riser because the slant of the tread is only very slight?
>
> A: Yes. It took Chin Cheong almost two years to realise that, or even longer.
>
> …
>
> Q: Do you agree that after BCA had passed the inner staircases during their second TOP inspection, when you walked up and down the stairs of the project, you

642 NEs, 2 June 2020 at p 46, line 7 to p 47, line 4.

> were not aware that there was an issue with the unevenness of the staircase treads or riser heights?
>
> A: Agreed. In fact, since the TOP, we never received any accident report or any report saying that people fell down from the staircase, because if you base on Chin Cheong's hazardous scales of 3 to 4 to 10 — on the scale of 1 to 10, it is 3 to 4, it also could mean that for every 10 person that walk up and down, 3 to 4 will fall down, but so far I don't think we have received any reports of that, and even the owner himself is walking up and down most of the time.

481 All of these suggest that Mr Chin was blowing things out of proportion and that there was never a genuine danger posed by the steps and risers.

482 Accordingly, I find that the steps and risers for the Project were in compliance with the statutory requirements as of 28 May 2013, which was when the plaintiff completed its rectification works in relation to the defects raised after TOP Inspection 1.

(7) Swimming pool leakage

483 In February 2014, the defendant alleged that the water level of the swimming pools at the Project dropped by inches within days after the pumps were switched off. He also received a notification from the Public Utilities Board that the water consumption at the Project was exceptionally high and he was advised to check for leakages.[643] The defendant, therefore, contends that the swimming pools at the Project are leaking and that these remain unrectified by the plaintiff. This alleged leakage has resulted in abnormal water consumption at the Project.[644]

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643 AEIC of Lee Tiong Meng at para 7b.

644 DWS at para 453; DDCC at para 40(a).

484 In this regard, the defendant called his experts Mr Ng Dick Young (DW4, "Mr Ng DY"), Mr Tang Chua Boon (DW5, "Mr Tang") and Mr Chin. Their respective roles were as follows:

(a) Mr Ng DY conducted inspections of the swimming pools in August and October 2018. He opined that the swimming pools were clearly leaking, and this was attributable to the waterproofing membrane being defective, rather than wear and tear or a lack of maintenance.[645]

(b) Mr Tang conducted CCTV inspections of the integrity of the swimming pool piping systems in September and October 2014, as well as in October 2018. He opined that a number of the pipes suffered from severe deficiencies in the pipe joints. This was attributable to a failure to ensure a proper support system or different size of pipes having been used in the construction,[646] which could result in water leakage, irregular flow and clogging, and irregular flow rate.[647]

(c) Mr Chin conducted various inspections of the units in the Project. In his 2018 BAPL Report, he observed that the swimming pool suffered from water stain marks on the wall next to the overflow drain and around the grout joints of the tiles.[648] In his opinion, these were likely due to moisture egress, which was likely because the waterproofing membrane was damaged.[649]

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645 AEIC of Ng Dick Young ("NDY") at p 26.

646 AEIC of Tang Chua Boon ("TCB") at pp 9–11.

647 TCB at pp 6, 8 and 9.

648 NEs, 9 March 2020 at p 109, lines 18–25.

649 CC at p 269.

485 Therefore, the defendant claims that these experts' findings support his initial complaint about the leakage of the swimming pool in February 2014.[650]

486 However, the plaintiff relies on a report prepared by Barry Lee Tiong Meng (PW8, "Mr Lee") from Aquatic Technology Pte Ltd, the firm that installed several aspects of the defendant's swimming pools, namely, the laying of the pipes, the filtration system, and the T&C of the swimming pool system.[651] Following the defendant's complaints about the swimming pools in February 2014, Mr Lee conducted an investigation into a possible leakage of the swimming pools in April 2014. Based on the investigation, Mr Lee concluded that the water level of the swimming pools only dropped "marginally". There were two reasons for this marginal drop in water level:

(a) firstly, there was seepage from the screed at the coping edge in the swimming pools; and

(b) secondly, evaporation of water, which averaged 5mm a day but could be as high as 9mm on a hot and dry day.[652]

487 I wish to reiterate that the defendant engaged his Assistant, Mr Chow, an expert in waterproofing of swimming pools, to closely supervise the construction of the swimming pools in the Project. If there were any issues regarding the swimming pools, Mr Chow would have raised them on the spot or soon thereafter. But Mr Chow did not complain of any leaks in the swimming pools.

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650 30AB19228.

651 NEs, 21 February 2020 at p 65, lines 1–17; PWS at paras 231–232.

652 PY at para 218.

488 Having reviewed all four reports and heard the evidence of the experts, I find that the defendant has failed, on the balance of probabilities, to prove that the swimming pools were leaking at the material time (*ie*, 2014). I shall deal with each of the expert's evidence in turn.

NG DICK YOUNG'S EVIDENCE

489 There are several reasons why I reject Mr Ng DY's evidence. Firstly, Mr Ng DY's report was based on inspections which were only conducted in August and October 2018, about five years after the TOP was obtained (*ie*, 16 September 2013). As he candidly acknowledged, his report was not relevant to the state of the swimming pools as at 2013,[653] which was the relevant time of the defendant's complaints of a leakage.[654] In contrast, Mr Lee's report was based on inspections in April 2014, and thus would have been more accurate and relevant in determining whether the swimming pools were indeed leaking at that time.[655] As a corollary, the possibility that the leakages, if any, observed by Mr Ng DY in 2018 were due to a lack of maintenance and wear and tear, as suggested by Mr Tan, could not be eliminated.

490 Secondly, Mr Ng DY's evidence was unreliable. He had only conducted a physical inspection involving hacking work at Unit 12A and not the other two units. Unit 12A was selected on the instructions of the defendant. Further, Mr Ng DY did not decide which tiles to hack. It was the defendant who discussed with Mr Ng DY's engineer on the tiles to be hacked.[656] Further, Mr Ng

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653 NEs, 26 February 2020 at p 52, lines 4 to p 53, line 14.

654 TPWS at para 209.

655 TPWS at para 210.

656 NEs, 26 February 2020 at p 112, lines 4–21; TPWS at para 209.

DY's findings from Unit 12 and Unit 12B were based on *extrapolations* from his inspection of Unit 12A.[657] In fact, he had only conducted a visual inspection of these two units. Mr Ng DY assumed that a finding of leakage in one swimming pool could similarly mean that there were leakages in the other pools, simply because the three swimming pools were constructed in the *same manner.*

491 This is not how an expert should conduct his checks. Assuming his method was correct, the proper way to find out if the other two swimming pools were leaking would be to conduct an independent and objective physical test involving hacking works, which he had not done. Such failure to do so made his report unreliable. In addition, this was the first time that Mr Ng DY had ever been asked to inspect a swimming pool for leakages and to prepare such a corresponding report.[658] He does not qualify as an expert in determining leakages in swimming pool.

492 Thirdly, Mr Ng DY's investigation may not have been able to positively determine that the swimming pool was in fact leaking. To ascertain this issue of swimming pool leak, it is necessary to first describe the structure of the swimming pool wall, which comprised several layers.

493 The outermost layer was made up of tiles, either granite tiles making up the exterior wall of the swimming pool, or mosaic tiles on the interior wall of the swimming pool. Underneath the layer of tiles was a layer of cement adhesive, which was used to adhere the tiles to the third layer of cement bedding. The fourth layer was the cementitious waterproof membrane, referred to as a

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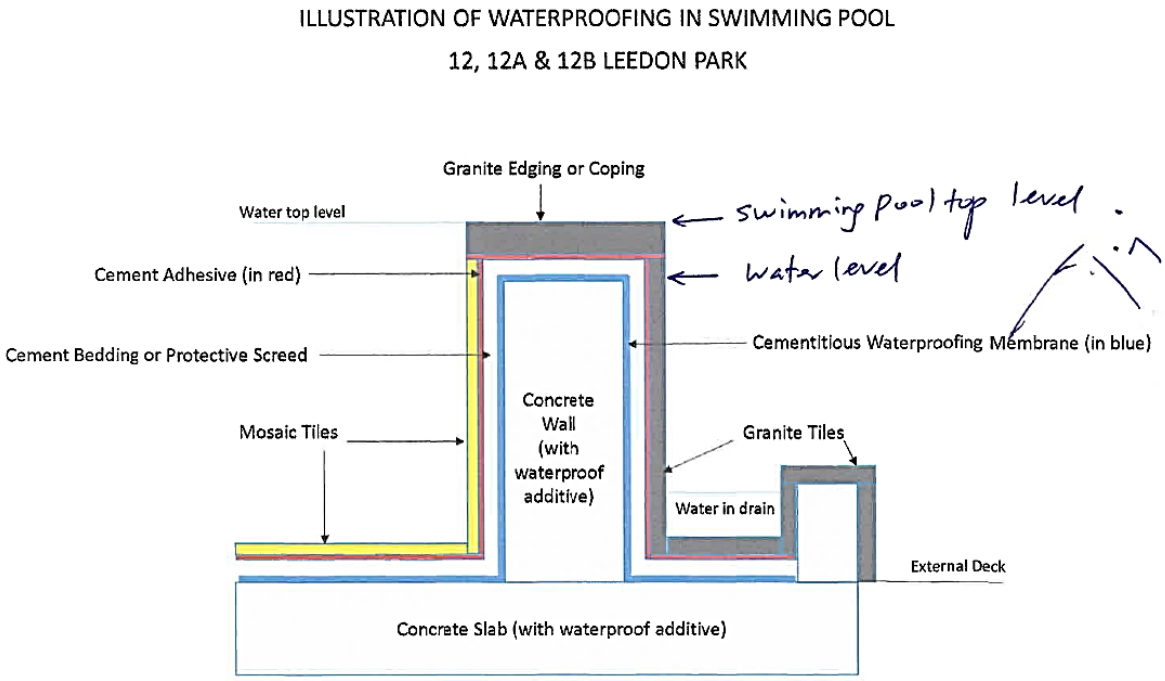
657 TPWS at para 209; NEs, 26 February 2020 at p 53, line 16 to p 54, line 25.

658 NEs, 26 February 2020 at p 110, lines 9–19.

cementitious polymer modified elastrometric membrane.[659] Mr Ng DY explained that this cementitious waterproof membrane has specified chemical with waterproofing properties that, when solidified, would look exactly like normal cement to a layperson.[660] The final layer was the reinforced concrete wall, which the plaintiff said also had a waterproof additive added to it before it was casted.

494 The diagrammatic representation of the swimming pool waterproofing is reproduced by the plaintiff:[661]



659 PWS at para 237.

660 NEs, 26 February 2020 at p 99, line 22 to p 101, line 11.

661 Exhibit P15.

Figure 1.

495 Mr Ng DY's method of testing whether the pool at Unit 12A was leaking involved mechanically hacking, with power tools, those parts of the *exterior wall* of the swimming pool which the defendant opined to be likely leak spots.[662] However, this methodology may not be correct. For a swimming pool to leak and result in substantial water loss, this would entail the water having to seep through several layers. First, the mosaic tiles and grouting must be defective. Second, there is a defective waterproof membrane of the interior wall that holds the water. Third, the water has to seep through the thick reinforced concrete wall with waterproof additive. Lastly, the water has to go through the defective *exterior* waterproof membrane, cement bedding and adhesive cement that held the granite tiles for the cascading effects. This clearly had not happened as Mr Ng DY acknowledged in cross-examination:[663]

> Q: … I put it to you that despite the hacking of the cementitious waterproofing membrane, the internal waterproofing membrane is still functioning as at page 18 of your AEIC. Both photos show that the area of the hacked-out wall remains visibly dry. Do you agree?
>
> A: Yes —

496 Further, even if the exterior wall suffered from a deficiency, it would not necessarily result in the leakage of water from the swimming pool. Although Mr Ng DY acknowledged this to be the case, he did not examine the inner wall of the swimming pool which would determine whether the swimming pool was leaking, as he acknowledged in court:[664]

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662 NEs, 26 February 2020 at p 38, lines 8–17.

663 NEs, 26 February 2020 at p 12, lines 9–15.

664 NEs, 26 February 2020 at p 119, line 22 to p 120, line 9.

> Court: So if there is any deficiency in the waterproofing membrane on the exterior side, right, will it affect leakage of water from the swimming pool?
>
> A: No.
>
> Court: I am using commonsense.
>
> A: Yes, yes.
>
> Court: But if there is a deficiency in the inner side, there is serious trouble; right?
>
> A: Yes.
>
> Court: Sorry, just a matter of record, did you examine the inner side of the swimming pool?
>
> A: No.

497 It is also important to note that Mr Ng DY was not personally present when his workers carried out the hacking works.[665] The cementitious waterproof membrane looks similar to the cement concrete wall and Mr Ng DY noted that his workers would not be able to differentiate between these two materials. Thus, it was possible that the workers could have damaged or removed the waterproof membrane themselves during the hacking process. In fact, this possibility was also corroborated by the testimony of RTO Leong in court. When referred to Mr Ng DY's AEIC and the relevant pictures, RTO Leong initially testified in cross-examination as follows:[666]

> Q: … I'm just asking you to look at this picture, right, and just confirm that it doesn't appear that there's waterproofing there. Right? Let's leave aside whether it's supposed to be there or not.
>
> A: Yes.
>
> Court: "Yes" what? Yes there's no waterproofing?
>
> A: There's no waterproofing applied.

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665 NEs, 26 February 2020 at p 44, line 4 to p 45, line 8.

666 NEs, 18 June 2020 at p 25, line 19 to p 26, line 1.

498 However, when further questioned, he clarified as follows:[667]

> Q: Mr Leong, previously my learned friend pointed you to page 18 of Mr Ng Dick Young's AEIC. ... And Mr Chong asked you if there's a dark grey or black area for the waterproofing applied. …
>
> …
>
> Q: And then after that, you answered that there's no waterproofing applied?
>
> A: He said, "No grey or black?" And since I didn't see any grey or black, so I said, "No waterproofing."
>
> Q: I believe when he directed you to answer this question, he told you that Mr Ng Dick Young actually said that there was no waterproofing applied at that area.
>
> A: Yes.
>
> Q: Mr Leong, is it possible that the waterproofing layer may have been scraped off?
>
> A: There is such a possibility.
>
> Q: Mr Leong, is it possible that the waterproofing layer actually still can be seen, but it's very hard to be seen because it's grey in colour?
>
> A: Possible, correct. Perhaps the colour had changed.

499 Finally, when Mr Ng DY was questioned on his expert opinion, he repeatedly retracted and contradicted significant portions of his report. These pertained to his observations relating to the following: (a) the damp concrete areas; (b) the signs of corrosion in the exposed concrete wall; (c) the presence of "honeycombs"; and (d) the debonding of tiles. I address each of these in turn.

500 In relation to dampness of the bare reinforced concrete, Mr Ng DY had stated in his AEIC, as follows:[668]

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667 NEs, 18 June 2020 at p 28, line 9 to p 29, line 7.

668 NDY at para 14.

> … Further, my inspection of the bare RC walls revealed multiple damp concrete areas (see photos above). As we had taken care to prevent all external sources of water from wetting the external wall of the swimming pool, the damp concrete surfaces at localised areas indicate that water had permeated the RC wall from the inside of the pool. This means that the swimming pool's water proofing layer has failed.

501 His initial evidence was that the dampness of the bare reinforced concrete walls was proof that the waterproof membrane had failed. However, when questioned in cross-examination, he quickly conceded that this was untrue:[669]

> Q: So I repeat my question: would you agree that because water is flowing through this cement bedding, it is only natural for this cement bedding to be damp after you remove the tiles on the surface?
>
> A: Yes.
>
> Q: This does not mean that the waterproofing layer has failed. Do you agree?
>
> A: I agree.
>
> Q: Can you go to paragraph 14 of your AEIC. …
>
> …
>
> I put it to you, Mr Ng, that your conclusion cannot be correct because, as you have stated previously in this cross-examination, underneath the titles is the cement bedding which should have been moist or damp because of water flowing through the grouts. Do you agree?
>
> A: Yes.

502 Similarly, in relation to signs of corrosion in the exposed concrete wall, Mr Ng DY's AEIC stated as follows:[670]

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669 NEs, 25 February 2020 at p 119, line 12 to p 113, line 10.

670 NDY at para 15.

> Further, I also note that the bare concrete wall presented many clear signs of corrosion. This is another sign that the water proofing layer has failed, and that water has permeated into the concrete from the swimming pool and caused corrosion in the rebars (reinforcing bars) in the concrete.

503 However, in cross-examination, he conceded that this was not necessarily the case with respect to the corrosion near the bottom of the bare concrete wall:[671]

> Q: Okay. Can we go back to paragraph 15 of your AEIC at page 25.
>
> …
>
> Q: … From the few photos I have shown you previously, would you say that your statement here is wrong?
>
> A: My statement here is refers to the corrosion sign on page 18 and 19.
>
> Q: I am only referring to the corrosion signs at page 14 to page 16. We will move to that later.
>
> For the corrosion signs at the bottom, at pages 14, 15 and 16 of your AEIC, do you agree that this corrosion comes from the steel grating or the supports of the steel grating?
>
> A: Yes.
>
> Q: So these pictures do not show any corrosion of the reinforcing bars of the concrete?
>
> A: That's right.

504 He similarly backtracked in his evidence regarding the other signs of corrosion, revealing that he had not in fact gone on to investigate the cause of the corrosion:[672]

> Court: If it is the case of a holding bar which is actually some kind of a rod, right —

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671 NEs, 25 February 2020 at p 122, line 19 to p 123, line 17.

672 NEs, 26 February 2020 at p 115, lines 1–13.

> A: Yes.
>
> Court: — then you should be able to see, right?
>
> A: It could be embedded inside the wall.
>
> Court: Yes.
>
> A: Yeah.
>
> Court: But even if it is [e]mbedded, there will be signs to say that it is there. So did you go and investigate further to find —
>
> A: No, I didn't investigate further. We just saw the rusty stain, then we just come to [the] conclusion, from steel.

505 Despite his initial position regarding the corrosion stains, Mr Ng DY, therefore, admitted that the corrosion was caused by the corrosion of the steel edging supports near the external bottom of the pool wall of the overflow drain. Beyond this, he did not know for sure that the water had permeated the concrete and corroded the reinforcing bars.

506 In relation to the presence of "honeycombs", Mr Yong explained how honeycombs could be formed when the concrete is poured over the reinforced iron bars contained within the wooden formwork. The concrete is then vibrated to allow it to hold on to the reinforced iron bars, and if it is not well vibrated, air bubbles could be left behind, which would look like honeycombs.[673] On this point, Mr Ng DY's AEIC stated that:[674]

> Yet another sign that the water is able to penetrate the concrete wall is the presence of 'honeycombs' on the concrete wall's external surface. A 'honeycomb' is the presence of a group of small holes within the concrete substrate. The presence of 'honeycombs' allows water to flow through the RC wall.

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673 NEs, 6 April 2020 at p 33, line 14 to p 34, line 7.

674 NDY at para 16.

507 In court, however, Mr Ng DY acknowledged that the water seepage that would result from honeycombs, was not in fact present:[675]

> Q: What I meant, your Honour, was that if the honeycomb goes through the entire concrete, water would be visible or at least the concrete outside would be visibly damp. The witness agreed that if the honeycombing actually goes all the way through the concrete substrate, then the outer layer will also be visibly damp.
>
> …
>
> Court: You say that this, following from Mr Yap's question, you say that this honeycomb is not damp right?
>
> A: That's right.
>
> Court: And there is no sign of water seepage?
>
> A: Yeah, from the photograph, no sign. …

508 In fact, according to Mr Yong's evidence, it appears that Mr Ng DY could not possibly have been looking at honeycombs as honeycombs could only form on bare reinforced concrete. Since Mr Ng DY had not removed the waterproofing layer in his investigations, he could not have seen the bare reinforced concrete.[676] This was affirmed by Ms Tan at trial, when she testified that the concrete wall did not appear to have honeycombs on it:[677]

> Court: I recall you mentioned that this photograph does not seem to look like honeycomb.
>
> A: Yes.
>
> Court: Can I assume that you know how honeycombs look like?
>
> A: Definitely.
>
> Court: Now, why do you say that these do not look like honeycomb?

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675 NEs, 25 February 2020 at p 131, lines 12–18; p 132, lines 6–11.

676 NEs, 6 April 2020 at p 34, lines 11–14.

677 NEs, 2 July 2020 at p 124, line 13 to p 126, line 15.

> A: From this photograph, right, it seems like there is a mixture of like a — you know, like a grout, because when you cast the RC wall, it is very clean. So … it seems like there's some deposit or, rather, not the original concrete on the — on this photograph. So I'm looking at this photograph, I do not know whether … it is part of the original concrete wall or it is — it could be the plaster, or it could be the … mortar … that they stick on while … they are installing the stone … finishes onto the … structure. So when you apply some finishes, right, you will have those plaster and then it will stick onto that.

509 This coheres with the evidence of RTO Leong, who stated that prior to the application of the waterproofing, he and Mr Chow had checked the surface of the structure wall of the swimming pool to ensure that there were no honeycombs. In his words, they were "very particular about this because waterproofing is very important".[678]

510 Lastly, in relation to the debonding of the tiles, Mr Ng DY had stated in his AEIC that:[679]

> I also observed that some parts of the RC wall, concrete slabs and tiles have also completely debonded. This suggests that the water proofing failure is severe.

511 This suggestion was brought into question by his own testimony during cross-examination:[680]

> Q: So I put it to you that it is possible that the debonding is due to excessive vibration during your hacking process — it is possible?
>
> A: It's one — could be one of the reasons.
>
> …

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678 PWS at paras 246–247; NEs, 18 June 2020 at p 30, lines 7–20.

679 NDY at para 17.

680 NEs, 26 February 2020 at p 38, line 24 to p 39, line 2; p 39, line 23 to p 40, line 9.

> Q: So the debonding could either be caused by the vibration during your hacking works, or could be caused by a failure of the waterproofing layer, is that your evidence? It is either/or?
>
> A: A combination of vibration and the bonding weakened by the water seepage and the water seepage — the reason of water seepage, leakage could be the failure of the waterproofing membrane.
>
> Q: But it is not definite evidence that the waterproofing layer has failed?
>
> A: It is not definite.

512 It is, thus, immediately apparent that Mr Ng DY's evidence on the stand was a clear *volte-face* from his own expert report. For these reasons, I am not satisfied with Mr Ng DY's evidence that the swimming pool was leaking due to a failure in the waterproof membrane.

TANG CHUA BOON'S EVIDENCE

513 Similarly, I find that Mr Tang's evidence does not support the defendant's case. Fundamentally, Mr Tang's evidence is *irrelevant* to *this issue* of the swimming pool leakage. He conceded that his CCTV camera was not a test for leak in the swimming pools:[681]

> Court: Okay. So when he engaged you to check the integrity of the piping system, did he specifically ask you to check whether there was any leak in the piping system.
>
> A: No. I told him that my inspection only can tell the condition of pipe. *I cannot test for leak.*
>
> Court: Your focus wasn't on the leakage.
>
> A: No. *Only on the pipe condition.*
>
> [emphasis added]

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681 NEs, 27 February 2020 at p 91, line 23 to p 92, line 5.

514 In the first place, Mr Tang did not conduct a water flood test. This involves capping the bottom end of the pipe, filling the pipe with water and monitoring the water level over 24 hours.[682] Instead, Mr Tang only did a visual, telescopic inspection of the pipes. This method of testing was used only to detect the possible presence of deformities in the pipes and is usually ordered *after* the pipes have been determined to be leaking. Mr Tang candidly acknowledged this:[683]

> Q: … Mr Tang, don't you think that a simple water flood test would be enough to ascertain the watertightness of the pipes and give you evidence whether or not the water is, in fact, leaking from the pipes?
>
> A: You are correct. The watertightness test will be conduct[ed] to check whether the pipes are watertight. We are instructed by the client to do telescopic inspection and that's our finding based on the visual inspection.
>
> …
>
> Q: So did you recommend the owner of the premises who instructed you to do these tests that a simple water flood test would be a better test to ascertain the watertightness of the pipes?
>
> A: I was tasked to do telescopic inspection. I was not asked to do watertightness and he never [sought] my advice.
>
> …
>
> Q: … Mr Ser has never sought your advice on what test should be done to ascertain the watertightness of the pipes?
>
> A: Yes.
>
> Q: And in your opinion, a simple water flood test would be a better test to test whether the pipe is watertight?
>
> A: Yes.

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682 PWS at para 265.

683 NEs, 27 February 2020 at p 12, line 14 to p 14, line 3.

> Q: Mr Tang, could you please briefly describe how such a water flood test would be conducted?
>
> A: The standard watertightness test you will have to conceal both end with a water column and you observe the drop of the water column to ascertain the tightness of the pipe.

515 In fact, he testified that not only was the water flood test a more appropriate method, he would not himself have relied on the CCTV camera inspection to test for water leakages:[684]

> Court: … If the owner had specifically asked you to ascertain whether any water leakage from the piping system, would you have used your CCTV camera inspection?
>
> A: No.
>
> Court: You would not?
>
> A: I would not.
>
> Court: Perhaps can you explain why not?
>
> A: The fundamental is to do a watertightness test to check the tightness of the pipe. There [are] cases where after the watertightness test, the owner in general, they want to know the condition of pipe; then they will engage us to do the telescopic inspection to see any defects in the deformation or damaging to the pipe surface.

516 Therefore, Mr Tang's evidence does not show the leakage of the swimming pools in the three units. This would be sufficient to dispose of Mr Tang's evidence in relation to this entire issue.

517 For completeness, however, I shall deal with why his findings did not actually show the possibility of a leakage. A key finding in Mr Tang's inspections was that there were gaps within the joints of several of the pipes that

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684 NEs, 27 February 2020 at p 99, line 23 to p 100, line 12.

he had inspected. An example of such a gap is found in the following picture that he annexed to his report:[685]

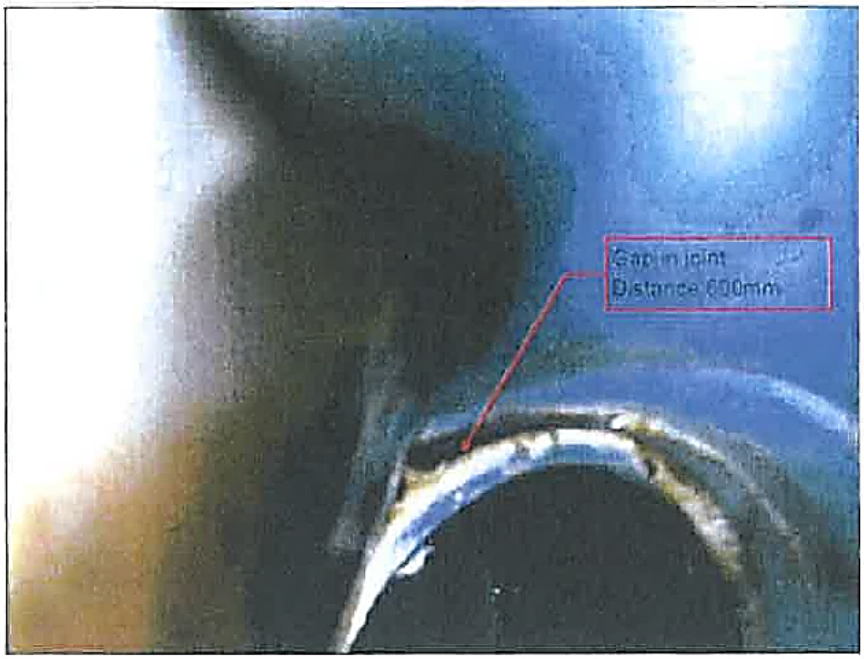

Photo: UP2 gap in joint.jpg
0m, General condition photograph, Gap in joint

Figure 2.

518 In his opinion, such gaps would not be present if proper workmanship, and hence a proper connection, had been done. These gaps would further lead to a leakage problem in the pipes.[686] However, Mr Tang acknowledged that he was unable to ascertain whether the gaps were such that they would allow water to seep through, as he was unable to view the length of the gaps. The gaps had initially been filled up using UPVC glue, in order to adhere the various pipes

685 TCB at p 28.

686 NEs, 27 February 2020 at p 71, lines 11–17.

together. Mr Tang was unable to view the gaps from end to end, thus, the possibility that the UPVC glue was preventing a leakage could not be ruled out.

519 Mr Tang also took issue with the failure to utilise a standard reducer to join two different sizes of pipes in Unit 12A. According to his evidence, a standard reducer is a common solution used when a bigger pipe is connected to a smaller pipe, without which there would be a leakage when water flowed through. The picture that he annexed to show the defect in this case was the following:[687]

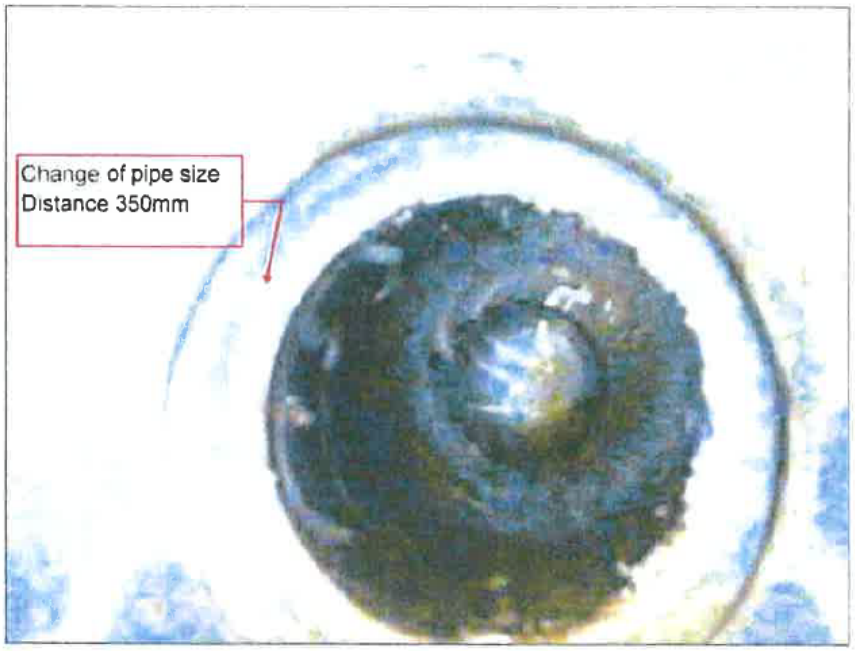

Photo: UP1 Change of pipe size.jpg
0m, General condition photograph, Change of pipe size

Figure 3.

687 TCB at p 38.

520 However, what is clear is that even if this defect existed, it made no difference in so far as the issue of leakage was concerned, as Mr Tang himself noted:[688]

> Court: So because of the difference in the size of pipe, which is slight, will it make a big difference in terms of flow.
>
> A: No.
>
> Court: It won't make a difference? Now, you have to bear in mind that you have four UP pipes.
>
> A: Yes.
>
> Court: Out of these four UP pipes, only one has a difference in size.
>
> A: Yes.
>
> Court: So will it affect the integrity of the drainage system?
>
> A: Very unlikely.

521 Therefore, I reject Mr Tang's evidence that the swimming pool was experiencing a water leakage.

CHIN CHEONG'S EVIDENCE

522 I note at the outset that this is yet another area in which Mr Chin simply had no experience prior to 2013. In any case, Mr Chin had not conducted any tests whatsoever to determine whether the swimming pool was leaking. He relied purely on speculations based on his observations of stains at the site. When asked in cross-examination, Mr Chin noted that there were two possible causes of the stains namely, that the waterproofing membrane had failed, or the

688 NEs, 27 February 2020 at p 99, lines 10–22.

grout in between the tiles was defective.[689] He was unable to point a definitive cause of the leak, or whether it was even leaking in the first place.

523 When cross-examined on this issue, Mr Chin made two key concessions, which effectively undermined his evidence:[690]

> Q: Have you actually observed, yourself, that the water level has dropped?
>
> A: No.
>
> Q: I put it to you that GTMS has conducted water level tests in the swimming pool and has proven that the water level drop is due to natural evaporation and not due to structural leakage. Do you agree?
>
> A: Yes.
>
> Q: Can you agree with me that such water-level drop tests are more definite proof of the reasons for the water level drop in the swimming pool?
>
> A: Yes, your Honour. …

524 The fact remains that Mr Chin did not personally observe the drop in water level, and that the plaintiff's tests would have been more definitive than his evidence. Further, given the speculative nature of his evidence and his lack of experience on the matter, I reject Mr Chin's evidence that the swimming pools had water leakage.

LEE TIONG MENG'S EVIDENCE

525 I turn now to Mr Lee's evidence that there was a marginal drop in the swimming pool water levels due to evaporation and possible seepage from the screed of the coping edge. Mr Lee explained that the coping edge of a swimming

689 NEs, 9 March 2020 at p 106, lines 1–5.

690 NEs, 9 March 2020 at p 115, line 8 to p 117, line 3.

pool is the cap or edging which is the granite that is placed around the top rim of a swimming pool. The screed is the adhesive that is used to hold the coping granite at the top structure of the swimming pool vertical wall. The water from the swimming pool will flow over the granite capping edge and cascade down the exterior wall to the overflow channel. The diagrammatic representation of the swimming pool water flow is reproduced by the plaintiff:[691]

691 Exhibit P1.

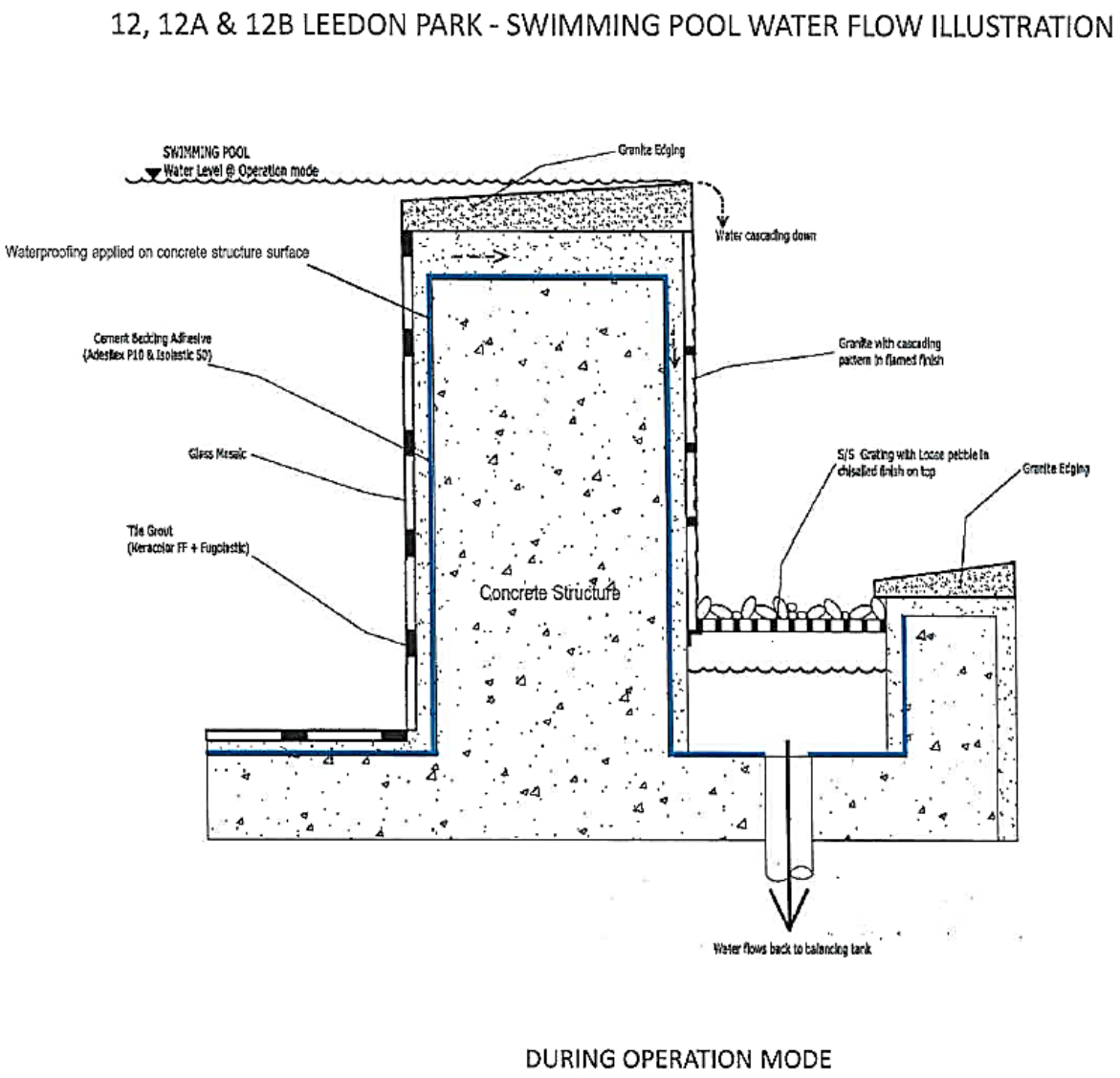

Figure 4.

526 The plaintiff's and the third party's case is that although the water could have seeped out of the screed, this was not a water loss from the swimming pool. The swimming pools here were designed to have a cascading effect, such that water would overflow the pools, across the outer wall. The water that flowed out of these pools would then be collected in an overflow channel and subsequently flow back into a balancing tank. When the pump of this swimming pool system was turned on, the water would be pumped back into the swimming pool and the water level would remain the same. In other words, there would be no nett water loss as a result of the leakage from the screed as that water will find its way down the water cascading wall to the overflow channel. This was the feature of these swimming pools.[692]

527 I note that the minutes of Site Meeting No 47 dated 15 April 2013 state that the swimming pool testing was completed.[693] Furthermore Web, one of the defendant's Consultants, was satisfied that the swimming pools were not leaking as of 29 January 2014.[694]

528 However, the defendant's case is that the water levels had dropped when the pumps were *switched off*. On Mr Lee's evidence when the pumping system was not turned on, the water could leak from the screed down the cascading wall to the overflow drain. This may, perhaps, result in a drop in the water levels. Mr Lee acknowledged that the leak from the screed was a common problem. This can be seen from his evidence, as follows:[695]

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692 PWS at paras 235 and 238; TPWS at para 211.

693 23AB14323.

694 37AB24052, NEs, 2 July 2020 at p 112, line 24 to p 113, line 13; TPWS at para 209.

695 NEs, 24 February 2020 at p 139, line 5 to p 141, line 3.

Court: Is it common for this screed to leak — for water to leak through this screed?

A: Yes, it's a common issue.

Court: It's a common issue?

A: Yes.

…

Court: By right, should the screed leak —

A: Because it's porous, yes, it will seep through.

Court: No, when I say by right, I mean if you do it properly, your screed should not leak, should not allow water to leak, isn't it?

…

Court: Do you tell the main-con to say, "Hey, this is a common problem, the screed is a common problem" —

A: Yes.

Court: — "You either have to use waterproof cement or to use some material in order to prevent the water leakage at the screed." Do you tell the contractor that?

A: I believe so. During the one — during the meetings.

Court: What is the solution then? In other words, do you leave it because it is a common problem or do you need to rectify to prevent the leakage?

A: They can put some sealant at the pointing … below the coping edge. That's what some of our other contractors did. They applied sealant over it to prevent water from seeping through.

Court: In other words, although it is a common problem, you still need to rectify it; right?

A: Yes, correct, correct.

529 From the above, it can be seen that although it is a "common problem" for the screed to leak, it is still considered a defect and has to be rectified. In fact, Mr Lee observed that a failure to rectify the screed might worsen the

porousness of the screed, possibly even to the extent of affecting the cascading effect of the swimming pool.[696]

530 Therefore, I accept that there was a defect in the screed which may cause some leakage in the swimming pools due to the porous nature of the screed. For completeness, I note that Mr Lee did not specify which swimming pool was leaking, however, he had checked *all three swimming pools* for leakage. The inference, therefore, is that his observations apply to all three swimming pools.[697] Hence the plaintiff is liable to waterproof the screed of the swimming pools of the three units in the Project.

(8) Grouting at the swimming pool

531 The defendant alleges that there are defects concerning the grouting used at the swimming pools.[698] The grouting refers to the material that is used to fill the gaps between the tiles.[699]

532 According to the defendant, the grouting disintegrates easily whenever he rubs it gently with his fingers.[700] This was also stated in the 2014 BAPL Report by Mr Chin, who opined that "with a slight abrasion, the colour of the grout begins to dissolve and disintegrate".[701] Mr Chin again reiterated in his 2018 BAPL Report that the wrong type of grouting had been used because the

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696 NEs, 24 February 2020 at p 146, lines 5–24.

697 NEs, 27 October 2020 at p 136, lines 16–21.

698 DWS at para 444; DDCC at para 40(a).

699 PY at para 221.

700 SKK at para 155.

701 31AB19646.

pointing at the tile joints could be easily rubbed off.[702] Furthermore, the defects associated with the grouting caused water to squirt in an unsightly manner from different locations of the exterior swimming pool walls.[703]

533 In his testimony, Mr Yong observed that it could not have been possible that the grouting was so easily removed:[704]

> Court: Now, if I bring this complaint to its logical conclusion, in other words, if it's really the grout that can be removed so easily by the hand, by the finger, what will be the effect of all the mosaic tiles if it is really like that?
>
> A: Prolonged, everything will pop out, because it's supposed to hold the tiles.
>
> Court: No, I'm not talking about prolonged, I'm talking about this stage. That if it is really truly at this stage that the grouting can be easily removed by running your finger over it, then what do you expect the mosaic tiles of the pool? What I meant is will the grouting still be able to hold the mosaic tile if the grout is so easily removed?
>
> A: No, the whole tiles will collapse out of the pool already if it is so easily removed, because the grouting is the one that actually holds all the tiles in position, other than the cement [base] that is at the back of it. You will start to see movement of tiles, in other words, the line — the grouting line will start to — actually start to move because these are the only thing that actually holds on the position.
>
> Court: So was there any complaint of mosaic tile popping up?
>
> A: There's no complaints of popping tiles or popping mosaic in the pool.

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702 CC at pp 272, 287 and 305.

703 SKK at para 157.

704 NEs, 3 June 2020 at p 44, line 13 to p 45, line 14.

534 Additionally, Mr Yong was of the opinion that based on the photographs, it appeared that what had been removed was not in fact any of the grouting:[705]

> Court: You have to bear in mind the timeframe here is March 2014. This is the letter from BAPL.
>
> A: Yes.
>
> Court: And they enclosed certain photographs.
>
> A: Yes.
>
> Court: And their observation is in relation to the grouting.
>
> A: Yes.
>
> …
>
> Court: Basically, what I wanted to ask you, what is this black stain? Is this the grout or is it algae? Because, you see, water had not been used for long you get algae that forms, so I want to know whether is this an algae that has formed on the grout or is this the grout itself? According to BAPL's letter, they say — what did they say?
>
> A: The grout.
>
> Court: They say it's the grout?
>
> A: Yes.
>
> …
>
> Court: Does this look like grout, or look like algae, or look like what other substance?
>
> …
>
> A: It doesn't look like a grout to me. It looks like some substance that has been in that joint area.
>
> Court: What is the colour?
>
> A: Blackish. Our grouting is lighter. It's definitely in the grey range.

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705 NEs, 3 June 2020 at p 40, line 5 to p 43, line 7.

535 The plaintiff and the third party argue that the issues with the grouting are due to the improper chemistry of the water in the swimming pools.[706] In an email dated 16 May 2014 from Ms Evelyn Tay of MAPEI Far East Pte Ltd ("MAPEI"), the manufacturer of the grouting, it was stated that MAPEI had checked the pH value of the water in the swimming pools, and the readings ranged from pH 6.8 to 7.0, which is acidic.[707] MAPEI indicated that the pH value of the water in the swimming pool should not be less than pH 7.2, otherwise the grouting would be affected.

536 It is clear from MAPEI's investigations in May 2014 that the defects relating to the grouting are due to the improper pH value of the swimming pools. This was before the Project was handed over to the defendant.[708] Hence, the plaintiff failed to maintain the pH value of the swimming pools before the Project was handed over to the defendant in July 2014.

537 Accordingly, it was incumbent on the plaintiff to maintain the swimming pools. This would include ensuring that the pH value of the swimming pools was not less than pH 7.2. When cross-examined, Mr Tan agreed that it was the obligation of the plaintiff to maintain the swimming pools as at 16 May 2014.[709] Therefore, I find that the plaintiff is liable to the defendant for the costs of rectifying the grouting which has been quantified by the parties at $1,170.00 for Unit 12, $1,957.80 for Unit 12A and $1,427.40 for Unit 12B. The total cost amounts to $4,555.20.[710]

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706 PWS at paras 243–245; TPWS at para 214.

707 32AB20489.

708 DWS at para 450.

709 NEs, 14 November 2018 at p 44, lines 20–24.

710 Exhibit D21.

(9) Trellis beams

538 For the trellis beams, the parties do not dispute that both the Contract Drawing No. WEB325/12b/S.01 and As-Built Drawing No. WEB325/12b/S.01 show that there are to be eight trellis beams constructed at the car porch of Unit 12B of the Project, but only seven were erected.[711] The defendant alleges that the plaintiff and the third party are liable for $2,400 in respect of the missing trellis beam.[712] In response, the plaintiff and the third party submit that Web regularised the discrepancy in the as-built drawings through the issuance of Engineer's Instruction No WEB365/22/EI.008 dated 30 June 2014, which was *confirmed* by the third party in Architect's Instruction No 42. The third party also submits that the seven trellis beams are sufficient to accommodate the structural needs of the Project.[713]

539 It is not disputed that the defendant did not expressly consent to reducing the number of trellis beams from eight to seven at the car porch of Unit 12B of the Project. This change in the number of trellis beams was solely due to instructions from the third party after Web decided to change the trellis beams from eight to seven. This was candidly admitted to by Mr Yong as follows:[714]

> A: In Web Structures drawings, eight beam. I think it's ask CSYA, after coordinating with the timber, we actually instruct for the seven instead of eight, because seven is enough to do the work already. It's not initiative by GTMS. It's definitely instructions given from consultants to GTMS for the reduction.

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711 SKK at para 171.

712 DWS at para 325.

713 TPWS at para 240; AEIC of Tan Bee Keow at pp 93–98; 36AB22830–36AB22833.

714 NEs, 4 June 2020 at p 72, lines 7–18.

> Court: So in this instance, did you seek the approval of Mr Ser or his representative?
>
> A: No, because these are all actually non-aesthetic issues. They are really on more coordination of work on site.

540 When cross-examined, Mr Tan conceded that the plaintiff was contractually obliged to construct eight trellis beams. Pursuant to cl 11(1) of the SIA Conditions, "all materials, goods and workmanship comprised in the [w]orks shall … *be in exact conformity with any contractual description or specification* …" [emphasis added]. In court, the plaintiff's counsel accepted that the cost of the extra trellis beam should not be billed for and should be deducted from the final accounts.[715] The third party should have certified the missing trellis beam as an omission, and reduced the certified payment claims on that basis. This was also pointed out by the defendant in his payment response to Payment Claim No 27 dated 1 July 2015, where he quantified the overpayment as $708.40.[716] Hence, the plaintiff should refund the defendant in respect of the missing trellis beam.

541 Turning to the question of quantum, I note that the defendant is now claiming the sum of $2,400 based on Mr See's report. However, the defendant has not provided any satisfactory reason why he is now claiming more than three times the sum reflected in the initial claim in his payment response. While it was suggested that the sum set out in the defendant's payment response was merely the defendant's layman opinion,[717] this is not borne out by the payment response itself. As the plaintiff's counsel, Mr Mendel Yap, pointed out, the

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715 DWS at para 330; NEs, 15 June 2020 at p 33, lines 5–14; 27 October 2020 at p 103, lines 8–18.

716 Set Down Bundle at pp 137–138; TPWS at para 241; 39AB25290.

717 NEs, 15 June 2020 at p 32, line 2.

payment response was drafted by Mr Cheung, and was precise and lengthy.[718] Further, having earlier quantified the overpayment as $708.40, the defendant should be taken to have agreed to this quantification. Accordingly, the quantum of damages for the missing trellis beam is $708.40, which the plaintiff will pay to the defendant, as the plaintiff rightfully admitted that the missing beam should not have been billed.

(10) Intumescent paint

542 The defendant alleges that the intumescent paint has not been applied satisfactorily on the steelworks at the Project.[719] This allegation has two aspects: firstly, that the intumescent paint only has a fire resistance of one hour; secondly, that the intumescent paint was only applied on three out of four surfaces of the trellis beams. For this, the defendant claims the sum of $63,144 to reapply the intumescent paint on all the trellis beams and $90,556 to reapply the intumescent paint at the steel staircases for the Project.[720]

543 I shall first address the fire resistance of the intumescent paint. It is undisputed that the intumescent paint only has a fire resistance of one hour.[721] The defendant contends that the intumescent paint should have a fire resistance of two hours. This is based on cl 3.8 of Contract Drawing No WEB325/GN.01, which expressly stipulates that "all steelworks are to be fire-proofed for *minimum two hours protection*" [emphasis added].[722]

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718 NEs, 27 October 2020 at p 104, line 17 to p 105, line 3.

719 DDDC at 40(b); DWS at para 402.

720 DWS at paras 402 and 410.

721 DWS at para 404.

722 SKK at Tab 53.

544 However, cl 3.8 appears to contradict cl 7.1 of the same Contract Drawing No WEB325/GN.01, which provides that "[a]ll structural steelwork [are] to receive adequate/appropriate fire protection in line with the prescribed fire resistance periods".[723] Although the defendant submits that this refers to the two-hour resistance period in cl 3.8,[724] I find this unsatisfactory. If that was the case, cl 7.1 would be devoid of meaning as it simply reiterates what is provided for in cl 3.8. Further, the word "prescribed" suggests a mandatory requirement, in particular, one that is imposed by the relevant authorities. Clause 3.8 also appears to contradict cl 7(1) of the SIA Conditions, which requires the plaintiff to comply with the relevant statutory requirements in force at the material time.

545 In light of these contradictions, I accept the plaintiff's and the third party's submissions that cl 7(1) of the SIA Conditions overrides cl 3.8 of Contract Drawing No WEB325/GN.01.[725] This is based on cll 11 and 14 of the SIA Conditions. Clause 11 provides that in the event of conflict, the SIA Conditions take priority over any drawings and technical specifications (see [313] above). Clause 14 provides that all discrepancies and divergences in the contract documents for the Project are to be resolved by the third party through the giving of a direction or instruction if they were brought to his attention. Thus, whether the intumescent paint should have a fire resistance of one hour or two hours is a matter that lay in the third party's discretion.

546 In this case, the third party had agreed with the plaintiff on or around 20 December 2012 that it sufficed for the intumescent paint to have a fire

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723 TPWS at para 219; 1AB00226.

724 DRS at para 98.

725 PWS at paras 216–217; TPWS at para 219.

resistance of one hour.[726] This was in line with the prescribed fire resistance period pursuant to the relevant statutory requirements at the time. Based on Table 3.3A of the Singapore Civil Defence Force Fire Code 2013 (the "SCDF Fire Code 2013"), the minimum period of fire resistance for the intumescent paint was one hour.[727] On 20 March 2013, Registered Inspector Chua Seow Ann issued a Registered Inspector's Inspection Certificate to certify that in accordance with the Fire Safety (Registered Inspector) Regulations, he had carried out an inspection of the fire safety works and confirmed that the fire safety works had been carried out in accordance with the approved plans of fire safety works.[728] Setsco Services Pte Ltd, an independent third party laboratory, also certified that the Project was compliant with the statutory requirements in relation to fire-proofing.[729] Therefore, it is acceptable for the intumescent paint to have a fire resistance of one hour.

547 I address now the second part of the defendant's allegation. In addition to the fire resistance period, the defendant also alleges that the steel beams, which form part of the trellises, were only coated with intumescent paint on three sides instead of all four sides.[730] It is not disputed that only three sides of the trellises were coated with intumescent paint and that intumescent paint had not been applied on the surface of the trellis beams facing the timber deck

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726 PY at para 232.

727 PY at para 233a; 38AB24180.

728 PY at p 1626.

729 PY at para 233c; 21AB13231; NEs, 20 November 2018 at p 90, lines 13–23.

730 SKK at p 130.

above.[731] The issue is whether painting only three sides of the trellises was in line with the Contract.

548 In my view, it was. When cross-examined, Mr Tan explained that one side of the steel beams was not coated with intumescent paint as they were covered by the timber decking.[732] The Contract does not contain any express stipulation of how many, and which sides, of the trellis beams must be coated with intumescent paint. Clause 7.1 of the same Contract Drawing No WEB325/GN.01 simply provides that "[a]ll structural steelwork [are] to receive adequate/appropriate fire protection in line with the prescribed fire resistance periods".[733] Turning to the relevant statutory requirements, therefore, Table 3.3A of the SCDF Fire Code 2013 only requires the "exposed faces" of the structural frame, beam or column to be coated with intumescent paint.[734] This is affirmed by the fact that a Registered Inspector's Inspection Certificate has been issued in respect of the Project and Setsco Services Pte Ltd had certified that the Project was compliant with the statutory requirements in relation to fire-proofing (see [546] above). This puts to rest the defendant's assertion that in order to have "effective fireproofing", the plaintiff should have fire-proofed all four sides of the steelworks.[735] The defendant did not adduce any evidence or expert testimony to support this assertion. On the contrary, as I have observed above, the Project has been certified to be compliant with the statutory requirements in relation to fire-proofing. Therefore, I find that the coating of

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731 NEs, 14 November 2018 at p 50, lines 10–13.

732 NEs, 14 November 2018 at p 55, lines 5–6.

733 TPWS at para 219; 1AB00226.

734 NEs, 19 February 2020 at p 100, line 20 to p 101, line 10; Exhibit TP-8; DT at para 99(c); TPWS at para 223; PRS at para 72.

735 NEs, 14 November 2020 at p 54, line 24 to p 57, line 13.

only three sides of the trellises with intumescent paint is compliant with the Contract and does not amount to a defect.

549 For the above reasons, I find that the plaintiff is not liable to the defendant in respect of the intumescent paint applied. The fire resistance period of one hour and the painting of the three exposed sides of the trellises are in compliance with the Contract.

550 I shall now deal with the defendant's allegation that the intumescent paint was defective and had peeled. Based on Mr Chin's BAPL reports, the defendant alleges that there were several locations at the Project where the intumescent paint had peeled.[736] However, the plaintiff admits only to the peeling of the intumescent paint as identified in the minutes of a meeting dated 11 February 2015. According to these minutes, after a joint inspection of all three units, only five points of peeling at three beams at Unit 12A were identified. Given my concerns regarding Mr Chin's evidence, as explained above, I do not think it appropriate to rely on the BAPL Reports to conclude the extent of peeling of the intumescent paint. Indeed, it was not clear from many of the photographs in Mr Chin's reports whether the intumescent paint was actually peeling. In my view, the minutes of the meeting dated 11 February 2015 are much more reliable, having been the outcome of a joint inspection. Furthermore, it took place several months after the Project was handed over to the defendant. Therefore, results of the joint inspection should be quite indicative of the condition of the Project around the time of handover. Hence, I find that the application of the intumescent paint was defective in so far as it had peeled in respect of three beams in Unit 12A.

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736 DCS at para 407.

551 I turn now to the question of quantification. The sum of $153,700 suggested by the defendant was reached on the premise that the intumescent paint for a *two-hour* fire rating would be reapplied on *all* the trellis beams at the Project, and also includes the cost of reapplying the intumescent paint at the steel staircases for the Project.[737] It would not be appropriate to use this sum as the basis of quantifying the cost of rectification of the *five* locations of peeling on three trellis beams at Unit 12A.

552 Furthermore, the damages awarded for the peeling of the intumescent paint must also take into account the defendant's failure to mitigate his loss. The court must take into account his failure to expeditiously rectify the defects relating to the peeling of the intumescent paint. Moreover, the defendant also exacerbated his loss by peeling off the top coat of the intumescent paint, which is the protective layer for the intumescent paint.[738] This was done by the defendant "for his own investigation".[739] The subcontractor for the intumescent paint works, Innovente Asia Pacific Pte Ltd, based on their site inspection on 11 February 2015, observed that the top coat of the intumescent paint was intentionally removed.[740] This is also reflected in the minutes of the joint inspection dated 11 February 2015. Mr Yong similarly observed that it appeared that some of the peeling had also been done deliberately:[741]

> A: The 24060 appears that the tearing is actually irregular. However, 24059, if you look at that flap that comes down, it measures about 900 mm width, which is, I mean, basically where I'm sitting to the edge of this. It's

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737 DCS at para 410.

738 38AB24067.

739 38AB24060.

740 38AB24176.

741 NEs, 3 June 2020 at p 57, lines 1–15.

> actually two straight line. The peel is straight, versus the page 24060, the peel is very uneven, although the picture is very small, but it looks very uneven, it doesn't look like it is two straight lines coming down from two edges. So, I mean, the reason why we specifically took this photograph where there's two straight lines is because this really is a deliberate sort of peel, but the others could be natural, I mean we can't really make much conclusion.

553 I also note that the plaintiff had offered to rectify the intumescent paint on 4 September 2014, 22 September 2014 and 3 December 2014, but the defendant refused to allow the plaintiff to do so.[742] This began in 24 July 2014, when the plaintiff submitted the repair method statement as requested by the defendant. The method statement laid out the plan to repair the works.[743] After the method statement was given to the defendant, he set out a number of conditions before he would allow the plaintiff to enter the Project. For example, the defendant wanted to know the plan to protect the surrounding area, the number of people with the trade certificate, the access plan to the work area, the manner of supervision of the workers, the quality of the work and even the safety and equipment insurance.[744] When this information was properly provided to the defendant,[745] it was only after a long delay that the defendant's lawyers sent a letter to the plaintiff's lawyers refusing the plaintiff entry to conduct the repair works.[746] Even after this, the plaintiff continued to offer to rectify the works.[747] The defendant, however, responded by incredulously

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742 PY at para 240; 35AB22608; 36AB23103.

743 35AB22391.

744 35AB22608.

745 NEs, 3 June 2020 at p 61, line 25 to p 62, line 1.

746 36AB23103.

747 36AB22817.

requiring the plaintiff to submit a plan to repair the works *without entering the units at the Project*.[748] This clearly demonstrated an attempt by the defendant to refuse or frustrate any attempt by the plaintiff to rectify the defects.

554 In the circumstances, regarding the defective intumescent paint for the trellis beams, I allow the defendant's claim in respect of those five locations of peeling on three trellis beams at Unit 12A. As the defendant has not provided any alternative quantification for these damages, I shall award nominal damages in respect of the peeling intumescent paint. However, the nominal damages will be further adjusted downwards to account for the defendant's failure to mitigate his loss. Accordingly, the defendant is awarded $500 for the peeling intumescent paint at Unit 12A.

(11) Finishing of external boundary wall

555 The defendant alleges that the external boundary wall has yet to be constructed with an "off-form" finish in accordance with the contractual requirements (see Item 3.5 of Section F – Schedule of Prices).[749] The boundary wall was finished in plaster and paint on the instruction of the third party after the latter did not like the outcome of the off-form effects.[750]

556 When cross-examined, Mr Tan conceded that the plaintiff had a contractual obligation to provide an "off-form" finish to the external boundary wall, instead of a plaster and paint finish.[751] The plaintiff's defence, however, is

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748 36AB22818.

749 DWS at para 318; DDCC at para 40(l); 5AB02659.

750 DWS at para 321.

751 NEs, 15 November 2018 at p 140, lines 16–20.

that it was instructed by the third party to use plaster and paint instead. The third party confirmed that it had issued these instructions to the plaintiff.[752] The reason for such a change was that the third party had determined that the final outcome following the plaintiff's initial works was "unsightly".[753]

557 Therefore, the plaintiff is not liable for the boundary wall finish in plaster and paint instead of an "off-form" finish. It is settled law that the third party is the defendant's agent, although it must act fairly and professionally in the exercise of his functions requiring skill and judgment, such as in assessing EOT requests and payment claims (*Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 1 SLR(R) 458 at [16]). As I have explained at [159] above, the third party had the apparent authority to instruct the plaintiff to vary the Works. When the plaintiff was informed by the third party to use plaster and paint instead, the plaintiff was fully entitled to proceed as instructed by the third party.[754] Given that the third party was the agent for the defendant, it was within the third party's authority to "provid[e] all necessary information and issu[e] instructions to [the plaintiff] to enable [the plaintiff] to proceed with the works" (see cl 2(1)(4)(a) of the MOA).

558 In the third party's view, the manner in which the plaintiff had done the off-form finish was unsightly and unsatisfactory from an aesthetic point of view.[755] The change in finishing was thus made to *improve* the finishing of the external boundary wall. Moreover, according to the defendant's own expert,

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752 PY at para 280; NEs, 2 April 2020 at p 151, lines 11–13.

753 NEs, 2 April 2020 at p 155, line 5.

754 PRS at para 59.

755 NEs, 2 April 2020 at p 155, lines 1–20.

Mr Chin, this change in finishing did not affect the performance or function of the external boundary wall or lead to any safety implications.[756] Further, it should be noted that the plaster and paint finish was one that had to be applied on top of, and in addition to, the original off-form finish. Mr See, the defendant's expert, confirmed that this required extra work.[757] This resulted in additional material and labour costs, which were paid for by the plaintiff.[758] The third party had in fact acted in the best interest of the defendant when it instructed the plaintiff to change the off-form to plaster and paint.

559 Be that as it may, I note that in this instance, the change of specification was done without the approval of the defendant. As stipulated in cl 1.1(3) of the MOA:

> The Architect shall not make any material alteration to, addition to or omission from the approved design without the consent of the Client, except in cases in which they are necessary to comply with statutory requirements and/or for constructional reasons. In which case, the Architect shall subsequently notify the Client promptly and the additional cost incurred shall be paid by the Client.

560 It is not disputed that the third party did not *expressly* obtain the consent of the defendant for such alterations. However, I find that the defendant *impliedly* consented to such changes. Throughout the construction of the Project, neither the defendant nor any of his Assistants objected to the alterations that had been done. This was despite them having personally visited the site on multiple occasions, including during the various site inspections. This is hardly surprising, given that the alterations were an improvement from the

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756 TPWS at paras 243–244; NEs, 13 March 2020 at p 85, lines 5–15.

757 TPRS at para 32; NEs, 26 March 2020 at p 13, lines 2–10.

758 NEs, 2 April 2020 at p 156, line 7 to p 158, line 14.

original finish, for which the defendant was not billed (see [558] above). In fact, the first time the defendant took issue with the finishing of the external boundary wall was when the present suit commenced. It is apparent that this particular alleged defect was included as part of the defendant's avalanche of defects to overwhelm the plaintiff and the third party. For these reasons, I am not satisfied that the defendant has made out a case on this alleged defect.

(12) Loamy soil

561 The defendant alleges that the plaintiff failed to supply and backfill the Project with loamy soil, as required by Architect Instruction No 26 ("AI 26") dated 4 January 2013.[759] The defendant relies on the expert report of Mr Daniel Tay (DW10, "Mr Tay"), a senior design consultant from Landscape Konsortium Pte Ltd, a landscape consultancy firm. Mr Tay opined as follows:[760]

> 9. Based on our observation of the [Project on 18 March 2014], as well as soil samples which were obtained from the [Project], I can say conclusively that the soil delivered and filled on the [Project] was clayey sub-soil, and not the required loamy soil …
>
> 10. I observed during my [site visit] that a contractor was applying a few bags of what appeared to be loamy soil over the grass at the [Project]. I believe that what the contractor was attempting is commonly referred to as "top-dressing", and this is usually done as a method of rectification for sub-standard turfing works.
>
> 11. However, top dressing is not satisfactory as a rectification method in this case, since the loamy soil was required to be back-filled, under the terms of the contract, and not just sparingly and randomly sprinkled over the grass. …
>
> [emphasis in original]

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759 DWS at para 411; 20AB12677.

760 AEIC of Daniel Tay at p 6.

562 I am not convinced by Mr Tay's findings, as they were the result of mere visual observation.[761] As Mr Tay conceded:[762]

> Q: So, in summary, based on your observation of the site, the soil sample, the crush test and your experience, you came to the conclusion that the soil delivered and filled on the site was clayey subsoil; is that correct?
>
> A: Yes.
>
> Q: And just now you explained that the crush test is actually akin to visual observation; is that correct?
>
> A: Yes.
>
> Q: So, actually, the primary way you derived your conclusion was that the soil delivered and filled on the site was clayey subsoil was actually visual observation; correct?
>
> A: Yes.

563 However, loamy soil is made up of clay, silt and sand in equal parts, with a small proportion of humus.[763] Therefore, in order to determine whether the soil sample was loamy soil, it would have been important to know the proportion of these components. Mr Tay admitted his tests did not reveal the proportion of the components in the soil:[764]

> Court: So, therefore, knowing the percentage of the four elements is rather important before you can come to the conclusion —
>
> A: Yes.
>
> Court: — that whether this is a loamy soil —
>
> A: Correct.
>
> Court: — or this is a clayey subsoil?

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761 TPWS at para 270.

762 NEs, 3 July 2020 at p 39, line 19 to p 40, line 8.

763 NEs, 3 July 2020 at p 90, lines 9–23.

764 NEs, 3 July 2020 at p 91, line 24 to p 92, line 5; p 93, lines 4–23.

A: Correct. …

…

Court: … My point here is all those hard and lumpy [clay], do you know the composition of the four elements?

A: No.

Court: So you do not know. That's my point, you do not know. If you have done an analysis of those lumpy, and say, look at that, for instance, the reason that it is lumpy is because it's too much clay —

A: Yes.

Court: — it's 80 per cent clay. … But my understanding from your evidence thus far is you just simply look from your observation, you took some sample, you crush it. But will crushing tell you the composition?

A: Tell you the consistency.

Court: But can it tell you the composition of the sand/silt —

A: No.

564 An email dated 28 April 2014 from Creideas Design Pte Ltd ("Creideas"), the nominated subcontractor for landscape works, stated that normal top soil was used instead of loamy soil. Creideas was of the opinion that normal top soil was of better quality and more cost-effective.[765]

565 The plaintiff's, and the third party's, defence is that the Project was backfilled with an approved soil mixture ("ASM") containing loamy soil. To elaborate, NParks requires any external roadside planting to be backfilled with an ASM containing loamy soil, compost and washed sand in the ratio of 3:2:1 respectively. The plaintiff and the third party argue that since NParks had no issue with the type of soil used in the external road planting, this meant that the

765 SKK at para 216.

Project must also have been backfilled with an ASM containing loamy soil.[766] The plaintiff and the third party also rely on the expert report of Mr Leong Lian Chuan (PW3, "Mr Leong"). Mr Leong is a consulting arborist from Urban Forester Landscape Pte Ltd, a firm that specialises in advising on arboriculture and landscaping.[767] According to Mr Leong, based on his examination of the photographs provided to him by the plaintiff, the soil used at the Project was loamy soil as it matched the ratio of clay, sand and silt contained in loamy soil. Furthermore, there were laboratory reports from the Agri-Food and Veterinary Authority of Singapore which confirmed that the soil used was an ASM which contained loamy soil.[768]

566 The plaintiff did not provide the requisite volume of loamy soil for the Project. When cross-examined, Mr Leong conceded that the photographs did not provide conclusive evidence that the Project was backfilled with loamy soil. He agreed with the defendant's counsel that the photographs were consistent with Mr Tay's evidence that the loamy soil was merely applied on the Project by way of "top-dressing", rather than backfilled.[769] Furthermore, even though the Project might have been backfilled with an ASM which contained loamy soil, this fails to comply with AI 26, which clearly stipulates that the Project is to be backfilled with 641.8m^3 of loamy soil, and not a soil *mixture* containing loamy soil.

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766 PY at para 259; TPWS at para 271.

767 PWS at para 358.

768 32AB20497 and 32AB20498.

769 NEs, 26 November 2018 at p 26, lines 18–21.

567 However, although the defendant claims the costs of replacing the loamy soil,[770] the defendant has not proved that he has suffered any loss or damage by reason of the use of the ASM instead of loamy soil. In fact, the use of an ASM instead of loamy soil cannot properly be said to be a defect to begin with. The evidence shows that the ASM is of a better quality and more cost-effective than loamy soil (see [564] above). The price quoted by Creideas for the ASM was higher than the loamy soil. In fact, Mr Tay agreed that the ASM was better than loamy soil because the ASM was manufactured.[771] Therefore, the defendant's claim on loamy soil cannot succeed as the plaintiff provided a better quality soil that is more expensive than loamy soil.

(13) Sliding glass doors

568 The defendant also alleges that "[t]he sliding glass doors at the Project had not been properly installed *as they did not slide smoothly*. In addition, the said doors also *could not be properly locked*" [emphasis added]. He also alleges that these sliding glass doors could not be properly "collapsed".[772] The defendant relies on Mr Chin's and BAPL's observations that "there was difficulty in opening and closing the foldable glass doors".[773] For this, the defendant seeks the costs of replacing all the sliding glass doors at the Project, amounting to $246,160.[774]

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770 DWS at paras 426–427.

771 NEs, 3 July 2020 at p 58, lines 6–11; p 81, lines 1–2.

772 DWS at para 428; NEs, 15 November 2018 at p 125, lines 3–5.

773 DWS at paras 429, 430, and 432; CC at p 284 item B31.

774 DWS at paras 442–443.

569 In contrast, the plaintiff and the third party argue that there were no defects in relation to the foldable glass doors during the final site inspection:[775]

> Q: In paragraph 262 of your AEIC, you stated that in any case, there was no such issue during the final site inspection on 17 April 2013. Can you clarify what you mean by "no such issue"?
>
> A: We didn't experience any difficulty in opening or locking the doors when we walked through the house on 17 April 2013. So generally the air-con was turned on, so we did test a few doors, opened it up, fold a little, you know, randomly, we didn't test all of them. But in our opinion, it is actually a normal functional door.
>
> Q: So the doors all slid and folded smoothly without any defect?
>
> A: Yes, and you can lock it back later. And those that are not done properly, we did actually also list it in the list of so-called defects on the completion cert itself.
>
> …
>
> Q: Mr Yong, as of 17 April 2013, during the final site inspection, there was no difficulty in opening and closing of the foldable glass doors; is that right?
>
> A: Yes.
>
> Q: And the foldable glass door panels were not slanting down, as of 17 April 2013?
>
> A: Yes.

570 A possible reason for this difference in observations is that the doors had deteriorated due to the lack of maintenance. This is evident from the various BAPL reports adduced by Mr Chin, who in his December 2013 BAPL Report only noted a defect in one single foldable glass door. This pertained to one of the glass doors not being able to lock, which was subsequently rectified by the

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775 NEs, 2 June 2020 at p 140, line 5 to p 141, line 9; PWS at para 338.

plaintiff.[776] Despite having raised this particular defect, Mr Chin did not mention any other problems with the sliding glass doors, including the ease of opening and closing them. The number of alleged defects in the sliding glass doors, however, increased in his November 2014 BAPL report. The fact that lack of maintenance could be a possible reason for any difficulty in opening and closing the sliding glass doors is observed by Mr Chan in his AEIC where he states:[777]

> For example, [the defendant] complains that the sliding doors do not slide properly. If the sliding doors are not used regularly, or the hinges and joints of the sliding door mechanism are not oiled regularly, it would not be surprising that these items [will] start to malfunction. …

571 Accordingly, for the above reasons I dismiss the defendant's claim regarding the sliding glass doors.

(14) Summary on incomplete rectification works

572 In summary, the defendant has proven his case in respect of the following construction defects as of the date when the CC was issued (*ie*, 17 April 2013), on a balance of probabilities:

(a) The leakage in the swimming pools resulting from water seepage from the screed of the coping edge in the swimming pools (see [483]–[530] above). The plaintiff is liable for the cost of rectifying the screed, which is quantified at $4,678.40 for Unit 12, $3,823.20 for Unit 12A and $5,314.80 for Unit 12B, amounting to $13,816.40 in total.[778]

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776 PWS at para 339; Exhibit D10, at p 646, Item 60; DT at p 748.

777 CSY at para 123.

778 NEs, 27 October 2020 at p 127, lines 12–21.

(b) The grouting at the swimming pool is defective due to the plaintiff's failure to maintain the proper pH value of the water in the swimming pool before the handover on 21 and 23 July 2014. The plaintiff is liable for this defect, and the cost of rectifying the grouting is $4,555.20 for all three units (see [531]–[537] above).

(c) There were seven trellis beams constructed instead of eight. The plaintiff is liable for the amount that the defendant has been overcharged, which is $708.40 (see [538]–[541] above).

(d) The plaintiff is liable for the peeling of the intumescent paint at five locations on three trellis beams at Unit 12A. However, as the defendant has not quantified the cost of rectification, the plaintiff is liable for nominal damages. The amount of nominal damages must also be adjusted downwards as the defendant failed to mitigate his loss (see [550]–[554]). Thus, the plaintiff is liable for $500.

573 However, I find that, on a balance of probabilities, the defendant has not proven his case in relation to the following issues and accordingly these claims are dismissed:

(a) It was the gas pipe sleeve, and not the gas pipe, which had been dented/punctured. Moreover, the dent/puncture in the gas pipe sleeve had in fact been made due to investigations conducted as a result of the defendant's own complaints. Further, any defects in the gas pipe sleeve had been properly rectified by a licensed gas worker (see [393]–[416] above).

(b) The Volakas marble flooring is not defective, given that the alleged cracks, tonality, stains and other forms of impurities are natural inherent characteristics of the marble (see [417]–[435] above).

(c) The ironwood at the timber decking is not defective, given that the alleged cracks, splinters, stains and differences in tonality were not construction defects (see [436]–[443]).

(d) The variance in tonality of timber floor finish is not defective. Instead, these were characteristics inherent in the Indian rosewood itself and were not construction defects (see [444]–[448]).

(e) The application of paint on the aluminium cappings at the rooftop was not defective, as this method of rectification undertaken by the plaintiff was wholly appropriate. Further, the defects are *de minimis* in nature and does not affect the overall performance of the cappings (see [449]–[454] above).

(f) The steps and risers were rectified and complied with the statutory requirements after the TOP was issued by the BCA (see [455]–[482] above).

(g) The intumescent paint has a fire resistance of one hour instead of two hours which is specified under the contract. The contract also makes reference to fire safety requirements which accepted three exposed sides rather than four sides of the trellis beams to be coated with intumescent paint (see [542]–[549] above).

(h) Although the external boundary wall was not constructed with an off-form finish and was not in line with contractual specifications,

the defendant had implicitly agreed to such alterations (see [555]–[560] above).

(i) The supply and backfilling of the Project with loamy soil was not in line with contractual specifications. However, although this requirement as per AI 26 was not complied with, the defendant suffered no loss as the ASM cost more and was of a better quality than loamy soil (see [561]–[567] above).

(j) The sliding glass doors were not defective. Most of the defendant's allegations regarding the sliding glass doors were raised in November 2014 and were potentially due to a lack of maintenance (see [568]–[570] above).

574 The defendant submits that the CC ought not to be issued at all even up till today given the presence of the unrectified defects (*ie*, steps and risers, intumescent paint, trellis beams, external boundary wall, loamy soil, *etc*). I disagree with the defendant's submissions. I find that the CC could have been issued on 28 May 2013 (see above at [334]). Based strictly on the plaintiff's scope of work under the contract, the TOP could easily have been obtained at TOP Inspection 2 as the one non-compliant concrete step at the turf could easily be rectified by topping up the soil at the bottom of the step. The failure of TOP Inspection 2 was also related to other issues not due to the plaintiff's fault. If the TOP had been issued following TOP Inspection 2, then the defendant could have moved into the three units and utilised the premises as the defects which I have found would not have prevented the defendant from doing so. A reasonable architect would, therefore, have determined that Item 72(c) of the Preliminaries had been fulfilled, thereby allowing the issuance of the CC on 28 May 2013.

575 Further, in my view, the BCA, an objective and independent agency, had already approved the steps and risers, and the other purported defects were minor works in the opinion of the third party. Clause 24(5) of the SIA Conditions provides that "if any minor works are outstanding … the [third party] may (but shall not be bound to) issue a [CC], which shall record such outstanding work by way of a schedule attached to the certificate …" Hence, Item 72 has been satisfied as of today. Therefore, the third party could have issued the CC on 28 May 2013 although it was premature to issue the CC on 15 May 2013 when the steps and risers failed at TOP Inspection 1. Furthermore, although the intumescent paint relates to safety, it was still in compliance with the statutory requirements set out by the SCDF. Therefore, the earliest date on which the CC should have been issued by the third party remains 28 May 2013.

576 I now turn to address whether the presence of these defects supports the defendant's allegation that there was a conspiracy to injure him. I find that the plaintiff and the third party genuinely and honestly believed at the time that there was nothing improper in relation to the intumescent paint, trellis beams and external boundary wall. At best, the evidence only shows that the plaintiff and the third party failed to pay careful attention to the contractual requirements and ought to have sought the defendant's express consent to depart from these requirements. There is no iota of evidence that there was a conspiracy to injure the defendant. It is a myth that there was a conspiracy and it is a figment of the defendant's imagination as he opined that the third party favoured the plaintiff, particularly towards the end of the Project.

Was the third party correct when it issued the Payment Certificates?

(1) Did the third party exercise reasonable skill and care?

577 In relation to the three payment certificates, namely IC25, IC26 and the FC, which are the basis of the plaintiff's claim, the defendant is not disputing the quantification of the PC Sums. But the defendant alleges that there is no evidence that the plaintiff paid the NSCs the PC Sums. As for the PC Rate items the defendant's main contention is that the calculation of the PC Rate items by the QS was wrong. Further, the defendant submits that the third party should not have issued the three payment certificates namely, IC25, IC26 and FC, as the third party had failed to conduct an independent verification of the amounts claimed by the plaintiff. The alleged failure to exercise reasonable skill and care comprises three instances:

(a) the failure to withhold the costs of outstanding works in the schedule of the CC until the outstanding works were completed;

(b) the release of the first half retention moneys in IC25 without basis;[779] and

(c) the failure to properly account for the PC Rate items claimed by the plaintiff under the Project.[780]

At this point, I wish to reiterate that the court will not disturb the third party's assessment if that assessment had been carried out fairly and rationally (see above at [257]). Although there was a QS in the Project, the certification of the

779 DWS at para 163.

780 DWS at paras 215–216.

payment claims ultimately rests with the third party. This protocol is confirmed by Mr Ng in his AEIC, where he stated that "it is ultimately up to [the third party] alone to decide whether or not to adopt the Recommended Valuations [from F+G] as the basis for the issuance of its [IC25, IC26] and the FC".[781] Similarly, as stated by Mr Remus Goh Kok Han ("Mr Goh") in his AEIC, "[a]n architect has the full discretion to adopt the QS' evaluation and valuation of the works done in the construction project in a wholesale manner."[782]

578 When the third party received the QS's reports it did not undertake a minute or pedantic review of the details of the valuations or check the mathematics involved as the QS was engaged as a professional consultant to evaluate works done for the Project. Indeed, pursuant to Recital 4 of the SIA Conditions, the QS's duty is to "assist the Architect in all matters of valuation or measurement under the terms of the Contract".[783] It was only if an item or quantification was obviously incorrect or illogical that the third party would question the QS's reports. It is eminently logical that the third party placed great weight on the opinions of the QS. This was also evident from Mr Yong's explanation in court:[784]

> Q: … Mr Yong, why was CSYA comfortable with relying on Faithful+Gould in relation to issuance of CSYA's interim certificates and final certificates for payment?
>
> A: I mean, they are the professionals. We are not good with accountings on such. And as you can see, what we went through yesterday, it is actually not a very simple mathematical exercise. It's pretty complex. And that's why there's always a role called QS in the whole industry

781 NPK at para 80.

782 RG at para 28.

783 TPWS at para 16.

784 NEs, 4 June 2020 at p 21, lines 7–21.

> which … doesn't fall under the architects. And since the QS is actually on board, we should faithfully follow it as much as possible, and I believe they are fair and independent, they will do their own judgment accordingly and professionally.

579 By way of background, F+G was engaged as the QS of the Project and was involved in the coordination of the tender process (see [6] and [7(b)] above). As QS, F+G was involved at every stage of the Project to manage the costs and provide a valuation of the works completed.[785] At varying stages of the Project, the plaintiff submitted payment claims to F+G and CCA for the works completed. After reviewing these payment claims, F+G prepared interim valuations ("IVs"), which were sent to the third party, copied to the defendant, Mr Cheung, the plaintiff, and the relevant Consultants of the Project.[786] In addition, on 31 December 2013, the defendant, through Mr Cheung, engaged F+G to "prepare a valuation of the defective works found in the Units".[787] This was not within the initial scope of F+G's work, nevertheless, F+G complied with this request. Subsequently, F+G billed the defendant separately for this valuation.

580 Mr Ng was a QS and Senior Cost Manager previously working for F+G. He became involved in the Project as part of F+G's quantity surveying team shortly after the Project's tender had been concluded. Overall, it appears that he was heavily engaged in the Project. He said:[788]

> In this regard, I was the main contact point for the Project on F+G's side, and the main person arranging the contract documents for the signatures of the parties, preparing the

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785 NPK at paras 23–25; RG at paras 16–18.

786 NPK at para 63.

787 RG at para 19.

788 NPK at paras 10–11.

> valuations for payments, preparing the cost reports for the Architect and the Employer, carrying out the valuation of variations, and preparing the final accounts for the Project. To clarify, all of these duties excluded any work and tasks in relation to the mechanical & electrical ('**M&E**') scope of works for the Project. In order to do this, I would represent F+G at the fortnightly site meetings and site walks after each site meeting. I would also carry out other site walks and site reviews, review documents made available to me, seek clarification on various matters with GTMS Construction Pte Ltd ('**GTMS**') and the consultants for the Project to ascertain the progress of the Project so that F+G could provide its interim and final valuations (save for the M&E scope of works) for the Project accurately.
>
> I would also always report the progress and what I was doing for this Project to the rest of the team at F+G which were assigned to the Project …
>
> [emphasis in original]

581 I shall now deal with the allegations raised by the defendant.

582 In relation to the withholding of the costs of outstanding works, the relevant clause is 24(5) of the SIA Conditions, which is as follows:[789]

> Provided that, without prejudice to the Architect's powers under Clause 26.(3) of these Conditions, if any minor works are outstanding which can be completed following the removal of the Contractor's site organisation and all major plant or equipment, and without unreasonable disturbance of the Employer's full enjoyment and occupation of the property, then upon the contractor undertaking in writing to complete such outstanding work within such time or times as may be stipulated by the Architect, the Architect may (but shall not be bound to) issue a Completion Certificate, which shall record such outstanding work by way of a schedule attached to the certificate, together with the terms of the agreement with the contractor for its completion, including any agreement as to withholding and subsequently releasing any part of the Retention Monies otherwise payable on the issue of the certificate in accordance with Clause 31.(9) of these Conditions.

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789 5AB02953.

583 The third party listed the outstanding works for the plaintiff to attend to when the CC was issued. When the outstanding works were completed to the satisfaction of the third party, the latter authorised the release of half the retention sum in IC25 dated 3 September 2013. The third party further authorised the release of the balance of the retention sum in the FC dated 22 June 2015 when the Project was completed notwithstanding the defendant's allegations that there were numerous outstanding defects. The third party was entitled to exercise its professional judgment on whether the plaintiff had rectified the defects satisfactorily. In June 2015 when the FC was issued, the Project had already been completed for more than three years. However, the defendant adamantly refused to allow the plaintiff to enter the Project to rectify the outstanding defects. Thus, the third party opined that the balance of the retention sum should be released despite the defendant's refusal to pay IC25, IC26 and FC.

584 In relation to the PC Sums and PC Rate items claimed by the plaintiff under the Project, I find that the third party acted diligently and properly accounted for such items. In order to approve the quantum of PC Sums, the third party issued architect's instructions to F+G to value the PC sums. The third party issued Architect's Instruction No 08 dated 10 July 2012, Architect's Instruction No 09 dated 10 July 2012, Architect's Instruction No 10 dated 10 July 2012, Architect's Instruction No 11 dated 10 July 2012, Architect's Instruction No 12 dated 10 July 2012, Architect's Instruction No 20 dated 26 September 2012, Architect's Instruction No 21 dated 26 September 2012 and Architect's Instruction No 22 dated 26 September 2012. Attached to each of these architect's instructions were detailed and voluminous documentation,

including quotations and invoices from the NS or NSC, for the PC Sums and the items that were being claimed.[790]

585 There is, therefore, simply no basis for the defendant's assertion that the architect's instructions had been issued without proper documentation. In fact, it appears that the architect's instructions and the accompanying documents had been more than sufficient for F+G to undertake a proper valuation of the PC Sums. As Mr Goh noted in his AEIC:[791]

> … F+G *does not need each and every document* in relation to the PC Sum and PC Rate items for a project to carry out its valuation for PC Sum and PC Rate items. What F+G does require in *certain limited situations* depending on the type of work that is being assessed are *quotations and/or invoices* for the PC Sum and PC Rate Items. [emphasis added]

586 It appears to me, therefore, that in issuing the architect's instructions, the third party did have access and proper regard to the documents that it required to account for the PC Sums.

587 The defendant had, in fact, been informed as to the various items, the breakdowns and the rates on multiple occasions. For every interim certificate that was issued, the IVs from F+G's valuations would be attached and the documents would all have been given to the defendant.[792] Further, on 23 June 2014, a letter was sent by F+G to the defendant's then solicitors, Eldan Law LLP, enclosing the invoices of all the PC Rate items submitted by the plaintiff during the construction of the Project.[793] Again, on 22 December 2014, F+G sent

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790 NPK at para 119; Vol 4 pp 1777–1831.

791 RG at para 107.

792 NEs, 4 June 2020 at p 77, line 14 to p 78, line 15.

793 NPK Vol 3 pp 1427–1489.

another letter to the defendant informing him of the various PC Rate items comprising stones, timber and tiles. It is evident that these various invoices and documentation had reached the defendant. As can be seen from a letter dated 14 November 2014 from Mr Cheung to F+G, Mr Cheung states that "[w]e note that you have sent the following to Eldan Law LLP" and goes on to list a series of tax invoices and delivery orders from various NSCs or NSs, before signing off "[f]or and on behalf of The Employer".[794] This was a reference to the defendant and is conclusive that he had indeed received the invoices and orders.

588 In any case, the PC Sums and the PC Rate items were discussed between the third party and F+G at an early stage of the Project, even before the calling of the tender. This allowed the PC Sums and PC Rate items to be included in the tender.[795] Further, I note that the PC Sums and PC Rate items were all quoted by NSCs or NSs that had been selected and approved by the defendant himself. In fact, the defendant through the third party had directed the plaintiff to contract with these NSCs or NSs, indicating that he had approved or known of their costs. With the defendant's heavy and close involvement in the course of the entire Project, it is hard to believe that he had not been aware of what these items or their values would be.

(2) Were IC25 and IC26 issued correctly?

589 At this juncture, I pause to deal with the question of whether there were irregularities in IC25 and IC26 and if these were issued in accordance with the Contract. This issue was not pleaded by the defendant, but it is nevertheless important as it was dealt with extensively by the CA in *Ser Kim Koi* (*Court of*

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794 NPK Vol 4 p 1717.

795 NPK at para 121.

Appeal) ([67] *supra*). This was one of the reasons the CA allowed the defendant's appeal. The CA opined that the failure to properly issue these payment certificates, or a huge unexplained disparity in the sums stated therein, would raise suspicions and lend credence to the defendant's broader allegation that there was a conspiracy between the plaintiff and the third party.

THE ISSUANCE OF IC25

590 In relation to IC25, a number of questions were raised by the CA:

(a) firstly, whether the moiety of the retention sum released had been done in compliance with the contractual terms;

(b) secondly, IC25 was issued several months after the CC had been issued and this suggested that there were substantial works to be done after the CC was issued; and

(c) thirdly, whether the amounts certified under IC25 were correct.

591 Under IC25, a moiety of the retention sum amounting to $328,250 was released to the plaintiff. In accordance with the Contract, this should only have been 50% of the retention sum, in compliance with cl 31(13) that the Architect "shall in all matters certify strictly in accordance with the Contract". In relation to this, the CA observed as follows:

> 70 The Architect failed to certify the release of one moiety of the retention sum upon issuing his Completion Certificate, as he should have under cl 31(9) of the SIA Conditions. Clause 31(9) provides:
>
> > Subject to Clauses 25 and 26 of these Conditions in regard to Phased or Stage Completion or Partial Occupation, *one-half of the Retention Monies not yet paid* ***shall be certified*** *as due to the Contractor* ***on the issue of the Completion Certificate under Clause 24.(4)*** *of these Conditions*, less only a reasonable sum to cover

> the cost of outstanding work (if any) not yet completed pursuant to Clause 24.(5) of these Conditions at the date of the said Certificate. …
>
> Whilst cl 31(9) allows the Architect to withhold a reasonable sum to cover the cost of outstanding work not yet completed, if any, there is no evidence from the Architect that this was the case or that it was withheld for that reason. Instead, IC 25 was issued some 4½ months after the works were, in the opinion of the Architect, 'complete' and complied in all respects with the contract and some three months and 19 days after he issued his Completion Certificate. The evidence shows the full moiety of the retention sum was released. In Interim Certificate 24 dated 1 July 2013 ('IC 24'), the retention sum was $644,195.65. In IC 25 (dated 3 September 2013) the retention sum was reduced to $315,945.65. The retention sum released to the Respondent was thus $328,250 or approximately 51% of the retention sum certified in IC 24. There is *no* explanation from the Architect whatsoever, despite his acknowledging in para 36 of his affidavit that 50% of the 'retention sum … *had to be released* upon the issuance of the Completion Certificate' [emphasis added]. IC 25 clearly did not comply with cl 31(13)'s stricture that the Architect 'shall in all matters certify strictly in accordance with the terms of the Contract'. The interim certificate is invalidly issued and, therefore, cannot have any temporary finality under the SIA Conditions.
>
> [CA's emphasis in *Ser Kim Koi (Court of Appeal)*]

592 On the evidence before the CA, it appeared that the sum of $328,250 amounted to 51% of the retention sum listed under Interim Certificate 24 ("IC24") dated 1 July 2013, which was listed as $644,195.65. However, the evidence before me shows that the total retention sum was not $644,195.65 as in IC24. In the Statement of Retention in Interim Valuation 24 adduced before the court,[796] the total retention sum was actually listed as $656,500.

593 The reason for this confusion in the retention sum is in IC24 itself,[797] the first page of which is annexed to this Judgment as Annex A. In IC24, the third

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796 24AB15172.

797 24AB15167.

party provided a list of values for contractual works and materials. These were works and materials that were certified as being carried out and delivered, pursuant to cl 31(1) of the SIA Conditions. These fell into three broad categories, namely: (a) work carried out by the Contractor; (b) unfixed goods and materials; and (c) nominated sub-contractor or supplier or designated PC work.

594 Under each of the specific items, the third party listed the term "(less retention)" where relevant. These indicated the retention sums that were calculated with reference to that specific type of work. It is here that the confusion arises. Under the first category of "work carried out by the Contractor", a sum of $644,195.65 was listed as the retention sum relevant to those works. This was the figure that the CA had utilised in its deliberations. At first blush, it would appear that this was indeed the correct figure to be utilised since it referred to the works that the plaintiff had carried out.

595 However, as was explained in court, this was not the full retention sum for the Project, as two other sums had to be added in. These other retention sums are found under the category of "nominated sub-contractor or supplier or designated PC work", specifically item (b) "Built-in-Kitchen Cabinet & Appliances", and item (c) "Built-in Wardrobe/Cabinet". The retention sums for these items were $6,910.57 and $5,393.78 respectively. Although they were listed as works completed by parties other than the plaintiff, *eg*, the NSCs, these works were still completed as part of the Project and the retention sums are still relevant.

596 The full and accurate figure for the Project's retention sum can, thus, only be derived by adding $644,195.65, $6,910.57 and $5,393.78, amounting to a total of $656,500.[798] This calculation was corroborated by Mr Ng as follows:[799]

> Court: How come these two figures were not added up front instead of putting in and say 644? Because it seems to be misleading, you know.
>
> …
>
> Court: You see right on top, it says there is a "(less retention)", "644,195.65". This was the figure that Mr Yap was referring to you earlier on.
>
> A: Yes.
>
> Court: And supposedly that was supposed to be the retention sum.
>
> A: Yes.
>
> Court: But apparently, if you look at the other items, (a) to (f), where they indicate "(less retention) – Not Applicable", and then except for (b) and (c), they say "(less retention)" and there are figures for less retention, so if you want to find the correct retention sum, you should add 644,195.65 plus the less retention at (b) and (c), and then it will take us to your correct figure which you have stated earlier on?
>
> A: Right.
>
> Court: Do you know why it was reflected this way instead of correctly reflecting the retention sum up front and then, for item (b) and (c), say "Not Applicable" … ? Do you know?
>
> A: If I were to interpret it based on the face of this interim certificate number 24, the $644,195.65, it means this is the retention to GTMS, as the main contractor. As for the item (b), the retention of $6,910.57, that is the retention applicable to this built-in kitchen cabinet and appliances. And as for the "(c)", the retention of $5,393.78, this is the retention on this built-in wardrobe or cabinet.

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798 PWS at paras 378–379.

799 NEs, 24 June 2020 at p 57, line 8 to p 59, line 7.

> Court: That means those are nominated subcontractor's retention, is it?
>
> A: Correct.
>
> Court: Then it makes sense to reflect it this way, then.
>
> A: Yes.
>
> Court: Without the explanation, that's why I don't blame the CA for taking the figure of 644.

597 Without the benefit of the Statement of Retention in Interim Valuation 24 or the parties' explanations it is easy to see why the CA utilised the sum of $644,195.65 instead of $656,500.

598 Having had the benefit of further evidence, however, I find that the moiety of $328,250 that was released to the plaintiff was 50% of the retention sum and not 51% as stated by the CA. The quantum of retention moneys as certified under IC25 was in fact in accordance with the terms of the Contract.[800] This was confirmed by the plaintiff's counsel, Mr Ng and the *defendant's counsel*, who all agreed that the total retention sum should rightly have been $656,500.[801]

599 I turn now to the issues relating to the apparent delay in the issuance of IC25, and whether substantial works were only completed after the CC had been issued. This issue was alluded to at [70] of *Ser Kim Koi* (*Court of Appeal*) (see above at [591]). The CA further stated as follows:

> 71 We also find it strange that the Respondent did not appear to have made any complaint about the late release of the retention sum, especially since it appears that the Respondent was, on its own admission, in a weak financial position …

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800 PWS at paras 380–381.

801 NEs, 24 June 2020 at pp 54–57.

Dennis Tan had this to say in an affidavit filed in related proceedings, *ie*, OS 317/2014:

> The [Respondent], in consideration of EQ Insurance Company Limited issuing the Performance Bond, have in turn executed an Indemnity in respect of the Performance Bond together with myself and another of the [Respondent's] director, Ms Phua Poh Hua. If the Performance Bond is allowed to be called upon, EQ would proceed against us and we can ill afford to pay and will probably be wound up or the Directors bankrupted thus preventing us from continuing with Suit No. 50 of 2014 [*ie*, the suit commenced by the Respondent for recovery of the sums owed under IC 25 and 26].

72 Most contractors, *a fortiori*, a contractor with financial issues, would be eagerly waiting for this release of a moiety of the retention sum and one would not expect a contractor to remain silent when this not insignificant sum was not being certified for release upon issue of the Completion Certificate. Indeed, the Judge who heard SUM 5454/2014 granted the application for stay of execution of his Judgment precisely because there must have been concerns over the Respondent's financial position …

73 The foregoing would invalidate IC 25. However, the amount certified in IC 25 is also questionable. IC 25 is dated 3 September 2013 and as noted above, certified payment of $390,951.96, of which $328,250 comprised the release of the first moiety of the retention sum under cl 31(9) of the SIA Conditions. IC 26 dated 6 November 2013 certified payment of $189.250.21. If works were complete as of 17 April 2013 and the works complied with the contract in all respects and fulfilled all the requirements of Item 72, why are these sums for work done being certified for payment months after certified completion on the terms of this contract? In so asking, we should not be taken to rule that there can never be interim payment certificates after completion. There are a number of valid reasons why such certificates may be issued, including correcting undervaluation of previous certificates (see cl 31(6)), items that were previously missed out by the parties, payment for variations (especially those that were issued late in the course of the project), or claims for work done in the month before completion. The Appellant makes this point in his affidavit:

> [T]he Completion Certificate is indicative of the fact that the Contract has been completed and performed in all respects. The fact that S$917,228.26 was certified by the Architects in Interim Certificates No. 23 to 26

> indicates that there was still a significant amount of work to be done as of the date of Completion as certified by the Architects and not just minor works as suggested by the Architects in their Completion Certificate.
>
> 74 It does seem incongruent that if the works were as complete as the contract required and as certified by the Architect, and given the scheme of interim claims and interim payments under the SIA Conditions, interim payment certificates were being issued some 4½ months and 6½ months after contract completion. It is also uncharacteristic for a contractor with financial issues to wait so long after having completed his works to make his interim payment claims. In this regard, it is noteworthy that the Architect offers no explanation in his affidavit. He merely deposes at paras 35 and 51:
>
> > 35. … The value of works certified in Interim Certificates No. 23 to 26 of $917,228.26 were for works carried out prior to completion or for sums payable as a consequence of completion and are not as the Defendant claims indicative of an alleged 'significant amount of work to be done' as at the date of completion.
> >
> > …
> >
> > 51. Interim Certificates No. 25 and 26 were for works completed, and are unrelated to the defects.
>
> 75 In one sense, paragraph 51 is true. The certificates are unrelated to the defects. An examination of the 'minor' defective items listed in Annexes 1.1 to 1.4 of the Completion Certificate (comprising some 109 pages of photographs with captioned 'defects') in relation to Unit Nos 12, 12A, 12B and the external works show just that, *ie*, minor items for rectification, *eg*, ceiling painting patchy, hole at ceiling to patch, remove floor marble stain, timber floor surface damaged, edge of wall painting to touch-up, aluminium window lockset loosen, cabinet doors not flush, aluminium capping loosened, *etc.* These are not works for which payment under the contract is due.

600 At the hearing before the CA, as seen from [76]–[78] of *Ser Kim Koi* (*Court of Appeal*), the third party did not adequately explain the certification of IC25 and IC26, which were disputed by the defendant. The third party was not a party to the proceedings at the summary proceeding stage taken out by the plaintiff against the defendant. It was, therefore, difficult for the CA to grant enforcement of these payment certificates, when the "temporary finality of [the

third party's] certificates [were] in question" (see *Ser Kim Koi (Court of Appeal)* at [77]). Indeed, Interim Certificate 23 ("IC23") was issued on 5 June 2013, IC24 was issued on 1 July 2013, IC25 was issued on 3 September 2013 and IC26 on 6 November 2013. All of these interim certificates for payment were granted long after the date of the issuance of the CC on 15 May 2013. Thus, the CA found it strange that the third party did not explain the certification process although the third party gave detailed explanations for the EOTs and the alleged defects. In this trial, the third party explained the procedure for the issuance of interim certificates, the purported delay in the issuance of the payment certificates. The third party explained that the issuance of the interim certificates and the state of building works are two different matters and these two activities were not necessarily correlated. The explanation lies in understanding the procedure resulting in the issuance of a payment certificate which is as follows:[802]

(a) The entire process would begin with the plaintiff submitting a draft progress payment claim to F+G and CCA for review, together with the supporting documents. The plaintiff's draft progress payment claim was usually submitted at the end of every month for the works that had been completed in that month.[803]

(b) CCA was in charge of reviewing the M&E portion in the draft progress payment claim while F+G would review the rest of the draft progress payment claim. CCA and F+G then furnished their views and preliminary comments to the plaintiff.

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802 PWS at para 383.

803 NEs, 3 June 2020 at p 110, lines 1–4.

(c) The plaintiff had the option of incorporating F+G and CCA's preliminary comments or to amend the amounts before submitting a formal progress payment claim to the third party, F+G and CCA, in accordance with cl 31(2) of the SIA Conditions.

(d) F+G would then evaluate the value of the works as claimed by the plaintiff in the formal progress payment claim. Thereafter, F+G issued an interim valuation to the third party, copying the plaintiff, the defendant and the Consultants in the Project.

(e) The third party evaluated the interim valuation, before issuing the interim payment certificate.

601 The first step, or the precursor, to the payment process, therefore, was the *plaintiff's* submission of a draft progress payment claim. Without the plaintiff's submission there was no need and, indeed, *no basis* for the third party to issue an interim payment certificate. It was, thus, solely up to the discretion of the plaintiff to decide when to submit its payment claim. This would have a direct impact on the timing of the certifications by the third party.[804] This point was also noted by Mr Yong in his testimony:[805]

> Q: Mr Yong, is it very uncharacteristic for there to be a large amount certified after completion?
>
> A: It's possible. It depends on when the contractor claimed.

602 The evidence before this court is that the *issuance of the payment certificates* was *independent of* when the works were *actually completed*. However, the works had to be completed before the plaintiff could submit its

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804 PWS at para 382.

805 NEs, 3 June 2020 at p 107, lines 18–21.

progress payment claim. After the works were completed it was left to the plaintiff to submit its progress payment claim with supporting documents. Hence, the date of the third party's interim certificate depended on when the plaintiff submitted its progress payment claim. In this instance, Payment Claim 25 leading to IC25 was filed by the plaintiff on 26 August 2013 while Payment Claim 26 leading to IC26 was filed by the plaintiff on 29 October 2013. The plaintiff filed its final account documents on 15 July 2015.[806] In these circumstances, the dates on which IC25, IC26 and the FC were issued were not out of the ordinary from the third party's point of view.

603 The evidence in this court shows that when the CC was issued, the third party and the Consultants were satisfied that the Project had been completed according to the approved building plans. This was confirmed at their meeting on 15 April 2013 and verified in their site meeting on 17 April 2013. In other words, in the view of the third party and the Consultants of the Project, the plaintiff had completed its works on 17 April 2013 under the Contract except for minor works that were listed by the third party in the schedule to the CC. Although the plaintiff had completed its building works under the contract, it had yet to submit Progress Claims 23 to 26 when the CC was issued, and the corresponding interim certificates were similarly not yet issued. Hence, the state of completion and the issuance of the interim certificates are two different issues and the interim certificate is not indicative of the state of building works at the time it was issued. The state of completion was independently evaluated by the third party and the Consultants, whereas the interim certificate was the result of the plaintiff's submission of his progress claim, *ie*, it was purely an accounting exercise. Hence, there can be a situation in which the works have already been

806 NPK Exhibit NPK-5.

completed for some time but the contractor for whatever reasons may have submitted his claim much later. The contractor, of course, would ideally like to submit its claim as soon as possible so that payment could be made expeditiously. However, the justification for the claim process may take time to prepare and the contractor may have limited manpower resources, which might make immediate submission of the claim not possible. This was what happened in this case in which IC23 to IC26 were issued after the CC. The defendant paid IC23 and IC24 but not IC25 and IC26.

604 Therefore, it may not be accurate to determine the state of the building works purely based on the dates of the interim certificates. The CA, with limited evidence, tried to make sense of IC25 and IC26. However, with the deepest respect, the CA mistakenly equated the amount of work done with the outstanding interim certificates issued by the third party, namely IC25 and IC26, and came to the conclusion that the CC was wrongly issued as there were substantial building works that had not been completed. This, perhaps, explains why the defendant did not pursue this issue and plead that IC25 and IC26 which were issued much later after the issuance of the CC showed that the Project was incomplete despite the findings of the CA.

605 It is also evident that the Works were complete, in the opinion of the third party and the Consultants, when the CC was issued. On 15 April 2013, two days prior to the issuance of the CC on 17 April 2013, the third party conducted a meeting with the Consultants, including F+G and CCA, to satisfy itself that the Project was completed. At this meeting, the third party informed the Consultants that it intended to issue the CC, certifying that all the Works were completed. The Consultants were also in agreement that their respective spheres of Works had been completed. The third party further informed the Consultants that there would be an inspection of the Project two days later (*ie*, 17 April

2013). The purpose of the inspection was to ensure that all Works had been completed and done in accordance with the contractual drawings and the Contract in relation to all the individual departments, for instance, the M&E works, structural works or architectural works. At the site inspection on 17 April 2013, the third party and the Consultants were satisfied that the Project was completed, save for some minor works.

606 Why then, did the plaintiff make "late submissions" of Payment Claim 25 ("PC 25") and Payment Claim 26 ("PC 26")? Mr Tan explained in his AEIC:[807]

> The plaintiff was too preoccupied with the consultant F+G concerning settlement of variation works and outstanding backlog of claims, among other claim issues, thus, the late submission of this claim.

607 Mr Yong opined that there was no "uncharacteristic delay"[808] in the submissions of PC 25 and PC 26, and this was not out of the ordinary:[809]

> Court: Now, before progress claim 25, is there any pattern in relation to the filing of the progress claim by the contractor? Namely, in other words, what I'm trying to ask you is whether he filed in his progress claim late, in relation to the work done, this is on the assumption that if I were the contractor and if financially I'm tight, I will want to file in ASAP.
>
> A: Yes.
>
> …
>
> Court: However, if I don't have any financial issue, there's no urgency for me to file in the claim ASAP?
>
> A: Yes, I understand.

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807 DT at para 32(b); PWS at para 385.

808 NEs, 3 June 2020 at p 120, line 8.

809 NEs, 3 June 2020 at p 116, line 24 to p 118, line 8.

> Court: So in this particular case, in this project, is there any pattern or there's no pattern in relation to filing of claims by GTMS?
>
> A: It's normal, except for I think somewhere around 22, 23, they're starting to delay a little bit because they're rushing for the work on site. And then after that was really the final accounts, where they were trying to rush for payments. That was the only time that we get GTMS rushing us. So other than that, it is quite normal.
>
> Court: When you say "quite normal", meaning what?
>
> A: It is just a monthly submission that they have done to us, so there wasn't a rushing for, "Could we have it faster or earlier". Because the timeline for the whole assessment is already set out in the table that was shown earlier, the F+G. … But in this case we never come across GTMS … writing to us to ask for faster assessment except for the final account.

608 It is clear that the delay in the submission of PC 25 and PC 26 does not mean that substantial works by the plaintiff were outstanding. My findings above were confirmed by Mr Ng on behalf of F+G, as seen from the following exchange in court:[810]

> Court: … Mr Ng, am I right to say that before GTMS can make a claim, he must have completed their work?
>
> A: Correct.
>
> Court: If he had not completed their work, he cannot submit his claim?
>
> A: He can choose to submit, but we would not value it.
>
> Court: You mean he can choose to submit, but you will not evaluate it?
>
> A: We will put zero.
>
> Court: So that means that you will not process his claim, he has to complete it?
>
> A: Correct.

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[810] NEs, 23 June 2020 at p 124, line 16 to p 126, line 9; p 134, line 18 to p 136, line 1.

Court: Right. If he had completed the work, he can either claim immediately or he can claim — assuming he was preoccupied with his work or with his other projects, he's got no time to make a claim – he can claim, say, three months, four months, after the work had been completed. Can he do that —

A: Can.

Court: — or will you proactively process the claim immediately upon completion of that work?

A: No, because our variation is always corresponding with what is being claimed.

Court: So, in other words, if his piece of work had been completed, say — now it's June; right?

A: Correct.

Court: Let's say his work is completed in April, but he hasn't filed his claim.

A: Okay.

Court: Will you proactively estimate the value of his work that he has completed in April?

A: No.

Court: You wait for his claim; right?

A: Yes.

Court: So if he filed his claim late, then the claim will be late.

A: Correct.

Court: Correct? So if he file [h]is [claim] on the very dot, the very day when he completed the work, you will process his claim?

A: Yes.

Court: So it is very much dependent on the contractor to file the claim?

A: Correct.

…

Court: Now, my question to you is: therefore, the interim certificate or even the progress claim by the contractor, is it a good barometer to gauge the amount of work that had been done? Let me explain. What I mean is that if,

> say, for instance, the claim is 80 per cent, does it mean — that's why I used the word "barometer", in other words, it's a good gauge of the progress of the work. I'm just looking purely from a claim perspective and nothing else, just from a claim perspective. If the claim shows that the contractor only claimed 80 per cent, can it conclusively be said that only 80 percent of work had been completed?
>
> A: I don't —
>
> Court: Just purely from a claim perspective.
>
> A: Okay. If purely from the claim perspective, no, it is not conclusive to say that it represents the value of the work.
>
> Court: You need to verify, right, because, as I said —
>
> A: You have to look at progress report, and et cetera, et cetera, and finding out why the contractor choose not to claim when the work has been completed. There are many factors and reasons behind it, but you cannot say that you just look at the variation and say that, "Oh, I'm paying up to 80 per cent so it means the project is 80 per cent done." The progress report would be a more appropriate document to look at.
>
> Court: So you need to look at other evidence in order to establish what is the extent of the work to be done. You just cannot simply take —
>
> A: The value.
>
> Court: — the value of the claim?
>
> A: Correct.

609 I turn now to the amount certified under IC25. On this issue, the relevant portions of the *Ser Kim Koi* (*Court of Appeal*) ([67] *supra*) state as follows:

> 78 … Nonetheless, without derogating from the foregoing, we shall put that to one side and examine Dennis Tan's explanations contained in his third affidavit dated 30 April 2014. He attributed the amount certified under IC 25 to prime cost ("PC") adjustments. At para 17, he states:
>
> > … The $337,892.94 worth of work was not done after completion. The amount certified was not because of the work being done after completion but because of the PC rate adjustments. The [Respondent] had completed all

> the PC rate items like marble, tiles, granite, timber parquet, timber decking by Mar 2012 (see under Main Building Works for Interim Valuation from No.22 to No.25 … wherein the amounts were capped at about 95% until PC rates are adjusted on a later date.

Dennis Tan's explanation is not only quite unconvincing, it is instead misleading by making reference across five payment certificates, IC 22 to IC 26, because they stretch from an interim valuation ("Interim Valuation") as of 14 March 2013 (about one month before 'completion') to 31 October 2013. We should point out that the interim certificates do not show the PC items. We have to look at the accompanying Interim Valuation for the 'Prime Cost & Provisional Sums' ('the PC Items'). A perusal of the Interim Valuation by M/s Faithful & Gould, the quantity surveyors, shows there was indeed an increase in the PC Items, but that occurred between the Interim Valuation for IC 23 and IC 24. The PC Items increased from $596,015.15 to $788,126.90. However the PC Items in the Interim Valuations for IC 24 and IC 25 *remain unchanged* and in IC 26 there was only a very small increase of $19.19 compared to IC 25:

Interim Certificate/ Interim Valuation	PC Items Valuation	Change
IC 22 (19 April 2013) IV 22 (14 March 2013)	$583,229.26	-
IC 23 (5 June 2013) IV 23 (30 April 2013)	$596,015.15	+$12,785.89
IC 24 (1 July 2013) IV 24 (30 May 2013)	$788,126.90	+$192,111.75
IC 25 (3 September 2013) IV 25 (31 July 2013)	$788,126.90	-
IC 26 (6 November 2013) IV 26 (31 October 2013)	$788,146.09	+$19.19

So there were clearly no PC rate adjustments in IC 25.

> 79 Dennis Tan's attempt to then suggest the PC rate adjustments were under the main building works is also misleading. First, there is already an item for PC Items in the Interim Valuation and, as noted above, except for an increase between IC 23 and IC 24, the PC Items remains, in effect, constant from IC 24 to IC 26. …
>
> [emphasis in original]

610 At the outset, I am grateful for parties' clarification on the relevant terminology at the hearing before me. I shall make extensive references to the Summary of IVs (the "Summary") adduced by the plaintiff to the court. This can be found in Annex B of this Judgment. I shall now explain the various terms relating to the Prime Cost:

(a) **Prime Cost ("PC") Sum items**: PC Sum items in the Contract refer to the items in the Project that are based on a lump sum. Examples of such PC Sum items include the ironmongery, landscaping, built-in wardrobes, cabinets, built-in kitchen appliances and sanitary wares. The PC Sum items were provided by the defendant's NSCs. The value of these PC Sum items was included under S/N 2 of the Summary ("Prime Cost & Provisional Items"). In this Project, according to Mr Yong and Mr Ng there were no Provisional Items. Thus, S/N 2 of the Summary should have been "PC Sum Items".

(b) **PC Rate items**: PC Rate items constituted those that were calculated in the Project based on a rate per square metre. Examples of such PC Rate items include the supply of marbles, tiles, Indian rosewood and ironwood. These items were also provided by the defendant's NSCs. The values of these PC Rate items are included within S/N 3 of the Summary ("Main Building Works") and S/N 4 of the Summary ("External Works") for each of the three units. For the relevant IVs (namely IV25, IV26 and IV27), however, there were no PC Rate items

for "External Works". Therefore, I shall refer solely to S/N 3 of the Summary for the PC Rate items under these IVs.

(c) **PC Rate adjustments**: F+G had to value PC Rate items that were actually used for the Project against the estimated sum in the Contract and make adjustments accordingly. This was carried out in the following manner:

(i) The PC Rate items were entered under the "Main Building Works" at S/N 3 of the Summary. Payment for PC Rate items in IV 26 is stated under the column "Net Amounts Recommended for Payment" and the values are as follows: $113,590.77 for Unit 12, $115,474.38 for Unit 12A and $108,827.79 for Unit 12B.

(ii) The above figures for PC Rate items have to take into account the variations for these items which are indicated under "Building Works" in S/N 7 of the Summary. The variations take into account any differences between the PC Rate items that were actually used in the Project and the budgeted PC Rate items in the contract, either in terms of the quantity used or the price of the material per square metre. For IV26 under S/N 7 there is a negative figure of ($185,287.91). This means there was a saving of $185,287.91 for the PC Rate items when compared to the Contract sum.

According to the Summary, the PC Rate adjustments were conducted separately from the PC Sum adjustments. Thus, PC Rate adjustments had no effect on the PC Sum items.[811]

(d) **PC Sum adjustments**: F+G had to value the PC Sum items that were actually used for the Project against the estimated sum in the Contract and make adjustments accordingly. This, however, was only done in the final accounts, unlike the PC Rate adjustments that were done at the stage of IV26. The PC Sum adjustments were carried out in the following manner:

(i) The PC Sum items were entered under the "Prime Cost & Provisional Sums" at S/N 2 of the Summary. According to Mr Ng there were no Provisional Sums in the Project. Thus, S/N 2 of the Summary should be called PC Sum as it deals solely with PC Sum items and not Prime Cost and Provisional Sums. The payment for PC Sum items in IV27 (Final) is indicated under the column "Net Amount Recommended for Payment" for the sum of $437,843.91.

(ii) The above figure for PC Sum items has to take into account the variations for these items under "Building Works" in S/N 7 of the Summary. For IV27 (Final), under S/N 7 there is a negative figure "(322,146.02)". This has to be subtracted from the sum of $437,843.91 as part of the adjustment for PC Sum items.

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811 NEs, 3 June 2020 at p 125, line 20 to p 126, line 3.

(e) **PC items**: The PC items in the Summary do not refer to both PC *Sum* items and PC *Rate* items. PC items refer only to PC Sum items in the Project. In *Ser Kim Koi* (*Court of Appeal*), the term "PC items" was utilised as a shortened form of the phrase "prime cost and provisional sums". This phrase refers to the PC Sum items.

611 There was some confusion regarding PC Rate and PC Sum in the Summary which led to the CA rejecting Mr Tan's explanation. The confusion arose because the Summary does not clearly state the PC Sum and PC Rate items. The PC Sum items are in S/N 2 and the adjustment for the PC Sum items was done in the final account. On the other hand, the PC Rate items are co-mingled with the Building Works in S/N 3(a) and Exterior Works in S/N 3(b) of the Summary. Furthermore, the PC Rate figures in S/N 3(a) and 3(b) have to be adjusted with the variation at S/N 7, especially in IV26. Mr Tan's explanation in his third affidavit dated 30 April 2014 was referred to by the CA in *Ser Kim Koi* (*Court of Appeal*) at [78] (see [609] above). He said that for IV26 the PC Rate under the "Main Building Works" for the three units had to be adjusted against the "Variation" in S/N 7 of the Summary. This was rejected by the CA because the PC items only reflected an amount of $19.19 as the "Net Amount Recommended for Payment" under IV26. On that basis, the CA concluded that there could not have been any PC Rate adjustments for IV26. Unfortunately, when the CA referred to the PC items under the "PC and Provisional Sum" in S/N 2 of the Summary, that referred not to PC Rate items but to PC Sums. Thus, the comparison is not of the same items.

612 Hence, a change in the values of the PC Sum items is completely different from any PC Rate adjustments.[812] Instead, the process for the PC Rate adjustments is as explained in [610(c)(i)] and [610(c)(ii)] above. The figure of 337,892.94 emerges when one sums up the three figures for the three units listed at [610(c)(i)] above, as follows:

Cumulative Amount Recommended for Payment			
	IV25	**IV26**	**Change**
Unit 12	2,549,179.32	2,662,770.09	+113,590.77
Unit 12A	2,448,269.62	2,563,744.00	+115,474.38
Unit 12B	2,315,084.55	2,423,912.34	+108,827.79
		Total	+337,892.94

613 The sum of $337,892.94 was, therefore, a result of the addition of the sums referred to above at [610(c)(i)]. The PC Rate figure had to be adjusted before payment to the plaintiff could be made as there was a variation for "Builder's Work" at S/N 7 of the Summary. This is the negative figure of "($185,287.91)" and it had to be subtracted from the sum of $337,892.94. This confusion could only have been cleared during the trial.

614 This was confirmed by Mr Yong in the trial, as follows:[813]

> Q: Yes, your Honour. And under IV26, you'll see the net amount recommended for payment under "Main Building Works". What Mr Dennis Tan was trying to explain is that the reason the main building works' sums increase is because of the PC rate adjustment, but you have to read this in conjunction with the negative

812 PWS at paras 393–395.

813 NEs, 3 June 2020 at p 140, line 1 to p 141, line 1.

> variation PC rate adjustment below. And as the previous amounts were not certified up to 100 per cent of the value of PC rate items, after this sum is regularised and calculated, which takes quite some time, which is why it's usually only done at the end, you will see a net sum of $152,000 certified to GTMS under IC26.
>
> Mr Yong, do you agree that this is exactly what Mr Dennis Tan stated in 2014, that the PC rate adjustments were made in IC26?
>
> A: Yes, the PC rate adjustment is made in IC26.
>
> Court: So this adjustment wasn't done at the final certificate, is it?
>
> A: Sometimes it's also done partially in the final certificates, but in this case it is — basically, it's the QS that decides when you can actually go about doing it. So as much as possible, if all the items are clear, everybody has a clear understanding of the area, the changes and all this, they can go ahead and start going through this process.

615 Furthermore, the sums in IV26 did not mean that the Works were only belatedly completed after IC25 had been issued. This was explained by Mr Yong, as follows:[814]

> Q: Mr Yong, do you therefore agree that just because $900,000 was certified in IC23 to 26, there must have been a lot of work completed after completion?
>
> A: No. In fact, there's no new works completed after completion. It's only rectification work. The only new works, if you would like to consider, is the barricades that raised by BCA for safety, the invisible grill that is changed to glass. Those were the few items that was technically new items.

616 Mr Ng, the QS, also agreed with Mr Yong that IV23, IV24 and IV25 which were processed after the issuance of the CC did not mean that the Project

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814 NEs, 3 June 2020 at p 102, line 24 to p 103, line 8.

was not completed on 17 April 2013. This can be seen from the exchange between myself and Mr Ng which I have quoted extensively at [608] above.

617 This is in stark contrast to the observations made by the CA on this issue at [79] and [80]:

> 79 … Secondly, the main building works were 95.73%, 95.5% and 95.51% (for Unit No 12, 12A and 12B respectively) complete by value in Interim Valuation 22, on which IC 22 was based, and this figure remained constant from IC 22 to IC 25. It was only in IC 26 that the main building works increased to 100% by value:
>
> (a) Interim Valuation No 22 (on which IC 22 dated 19 April 2013, was based) for Unit Nos 12, 12A and 12B were respectively:
>
> | | | |
> |---|---|---|
> | (i) | Contract sum: | $2,662,770.09 |
> | | Contractor's Claim: | $2,549,179.32 |
> | | Valuation: | 95.73% |
> | (ii) | Contract sum: | $2,563,744.00 |
> | | Contractor's Claim: | $2,448,269.62 |
> | | Valuation: | 95.50% |
> | (iii) | Contract sum: | $2,423,912.34 |
> | | Contractor's Claim: | $2,315,084.55 |
> | | Valuation: | 95.51% |
>
> (b) Interim Valuation No. 23, 24 and 25 (on which IC 23, 24 and 25 respectively were based) all contain identical figures on completion by value as those in (a)(i), (ii) and (iii) above for the three units.
>
> (c) Interim Valuation No 26 (on which IC 26 dated 3 November 2013 was based) for Unit Nos 12, 12A and 12B were all 100% completed by value:
>
> | | | |
> |---|---|---|
> | (i) | Contract sum: | $2,662,770.09 |
> | | Contractor's Claim: | $2,662,770.09 |
> | | Valuation: | 100% |
> | (ii) | Contract sum: | $2,563,744.00 |

	Contractor's Claim:	$2,563,744.00
	Valuation:	100%
(iii)	Contract sum:	$2,423,912.34
	Contractor's Claim:	$2,423,912.34
	Valuation:	100%

> 80 The significance of the above figures is first that the three units were only 95.73%, 95.5% and 95.51% complete respectively by value when IC 22 was issued on 19 April 2013 (with valuation as at 14 March 2013), which was 2 days after the works were completed on 17 April 2013, and remained at the same level of completion by value through to IC 25 which was issued on 3 September 2013, some 4½ months after the Architect certified the works were complete. Secondly, this fact, *ex facie,* shows that there were no further works done between the issue of IC 23 dated 30 April 2013 and IC 25 dated 3 September 2013 as valued by the quantity surveyor because the level of completion of these units by value did not change. On the evidence before us, IC 25's $62,701.96 (the remainder after deducting $328,250 of retention monies released) could not have been for any PC rate adjustments.

618 At first blush, the CA's observations appeared logical. In addition to the above, the "Net Amount Recommended for Payment" for the "Main Building Works", listed under row S/N 2 of the Summary, remained at zero in IV23, IV24 and IV25. It was only in IV26 that the sum of $337,892.94 was recommended to be paid to the plaintiff, suggesting that it was only then that the Works had been completed.

619 Again, it was only with the full benefit of the trial process as well as the further evidence and detailed explanation from the parties that it is clear that the amount claimed or subsequently certified by the third party did not represent the state of the building works. In IV22 to IV25, the valuation of the "Main Building Works" for Units 12, 12A and 12B for PC 22 to PC 25 submitted by the plaintiff had consistently remained at 95.73%, 95.50% and 95.51% respectively.

620 This was not because almost 5% of the building works in each of the houses had remained incomplete even though the CC had already been issued. Instead, the figures remained capped at those values pending the PC Rate adjustments. This was explained by Mr Ng in court as follows:[815]

> A: So on IV-25, if we focus on the serial number 3 for the main building works, unit 12, 12A and 12B, we can see the percentage of the valuation is not yet 100 per cent. They are hovering between 95.5 per cent to 95.73 per cent.
>
> Court: And the reason is because you didn't take into account certain items; right?
>
> A: Correct. But if I move on to IV-26 on the same item, serial number 3 for main building works under unit 12, 12A and 12B, you can see the percentage has now all become 100 per cent.
>
> Court: So, for example, the item on granite, which is at page 15738, you have assessed it to be zero?
>
> A: Yes, hence the reason in IV-25 they are not yet 100 per cent; they are still at 95 per cent.
>
> Court: So, in other words, payment was not made for the granite?
>
> A: Yes, has not been made yet.
>
> Court: And you KIV to IV-26?
>
> A: Correct, hence the reason in IV-26 you will see 100 per cent.
>
> Court: And the reason? The reason why?
>
> A: [I]s the reason because in 7(a) for IV-26, I already start to do a omission of a negative figure of 152,800 —
>
> Court: No, sorry. What I meant is you didn't make any payment for the granite in IV-25.
>
> A: Yes.
>
> Court: And what was the reason for not making payment?

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815 NEs, 24 June 2020 at p 26, line 14 to p 29, line 3; p 31, lines 4–22.

A: We are still finalising the actual quantities on the finalisation of the adjustment of the PC rate item.

…

A: Because, like I explained earlier on, our approach is to use the contract quantity, multiplied by the contract unit rate, PC unit rate —

Court: Yes, that's correct.

A: — and then substitute it with the actual awarded rate, multiplied with the actual area.

Court: Yes.

A: So that needs to take a bit of time, in terms doing this calculation, hence the reason, in the statement of final account, you will see about 20-odd pages on this calculation. So at IV-25, we believe that we haven't finished the calculation yet and have not reached an agreement between GTMS and F+G.

Court: So instead of holding back that payment, you prefer to —

A: KIV them.

Court: You KIV, and then those that you are able to evaluate and come to a landing, you will let it go —

A: Correct.

Court: — and then KIV this item for further consideration?

A: Yes, correct.

Court: Okay. So it doesn't mean, then, that no work was done at all in relation to the granite material; right?

A: Correct.

…

Court: Before you go: Mr Ng, for a person who was not involved in the project or not a QS, just by looking at the documents of your valuation, your interim valuation, where you identify work done, you cannot fault anyone by looking at it and say that at that point of your evaluation, whatever the date may be, it is 95 per cent complete; right?

A: Right.

> Court: But you are looking from an accounting perspective, the valuation perspective. You are not looking at it from the perspective of the state of work at that point. Would I be right?
>
> A: Correct.
>
> Court: And that's the reason why, when you find that if the sum valuation of the items are taking a bit too long, instead of holding back payment, holding back certification of payment, you KIV it, although work had already been done?
>
> A: Correct.

621 Therefore, given that the PC Rate adjustments had only occurred in IC26, as found above at [610]–[613], it was only at this point that the valuation of the "Main Building Works" in the row of S/N 3 of the Summary could be adjusted to 100%. Moreover, these sums were clearly due to the PC Rate adjustments for works that had *already* been carried out prior to completion, notwithstanding the delay in the issuance of the payment certificates.

THE ISSUANCE OF IC26

622 I turn now to deal with the certification under IC26. In *Ser Kim Koi* (*Court of Appeal*), the CA again found IC26's certification questionable. The main issues that arose can be distilled into two broad grounds:

(a) Similar to IC25, questions were raised in relation to the sums certified, whether they were in relation to PC Rate adjustments and when the Works had been completed (*Ser Kim Koi* (*Court of Appeal*) at [82]–[87]).

(b) Whether the sums for the M&E works in IC26 were accurately accounted for (*Ser Kim Koi* (*Court of Appeal*) at [88]–[91]).

623 In relation to the first ground, given the overlap in issues raised regarding IC25 and IC26, my observations as above in [590]–[620] apply *mutatis mutandis* to IC26. I shall simply summarise the following points that have arisen as a result of the evidence produced in the hearing before me:

(a) Unlike the previous ICs, IC26 took into account PC Rate adjustments, as explained in [610(c)], [612]–[613].[816] The changes are reflected in the amounts paid for "Main Building Works" in the row of S/N 3 of the Summary and the variations for "Builder's Works" in the row of S/N 7(a) of the Summary.

(b) Therefore, the changes in the valuation amount in IC26 were not as a result of works being valued after completion or the issuance of the CC. It is clear that the relevant works had already been carried out prior to completion and the third party and the Consultants were satisfied that the Project was complete.

(c) As a corollary, the items and valuations certified in IC26 were done accurately and were properly accounted for.

624 It is the second ground, which raises a new issue in relation to the M&E items, that I now focus on. In this regard, the relevant paragraphs from *Ser Kim Koi* (*Court of Appeal*) are as follows:

> 87 The Respondent has attempted to support its explanation by annexing a table in Dennis Tan's third affidavit, entitled 'Leedon Park – Comparison Table of Interim Valuation No. 25 & 26'. Here, the Respondent purports to provide some figures to account for the PC rate adjustments. First and foremost, this table is that of the Respondent, not the Architect or the quantity surveyor. Secondly, these figures and remarks

816 PWS at para 397.

cannot be readily matched against the figures reflected in the 'Prime Cost & Provisional Sums' column on Interim Valuation No 26.

88 A similar trend appears in the accounting of the M&E works:

(a) In Interim Valuation No 23 ('IV 23'), on which IC 23 was based, as of 30 April 2013, the M&E works for the Buildings was claimed and valued at $1,980,795.78 and this comprised 86.35% of the contracted sum for M&E works.

(b) In Interim Valuation No 24 ('IV 24'), on which IC 24 was based, as of 30 May 2013, the M&E works for the Buildings was valued at $2,002,712.59 which comprised 87.3% of the contracted sum, an increase of $21,916.81 or 0.95% of the contracted sum.

(c) In Interim Valuation No 25 ('IV 25') on which IC 25 was based, as of 31 July 2013, the M&E works for Buildings was valued at, $2,031,200.59, which comprised 88.54% of the contract sum, an increase of $28,488 or 1.24% of the contracted sum.

(d) In Interim Valuation No 26 ('IV 26'), on which IC 26 was based, as of 31 October 2013, the M&E works for the Buildings had suddenly increased to $2,267,956 or 98.86% by value of the contracted sum. This was an increase of $236,755.41 or 10.32% of the contracted sum.

89 These facts raise similar questions but with heightened significance because first, these are M&E items, and secondly they are explicit requirements stipulated in Item 72. The M&E works were only 86.35% complete by value as of 30 April 2013. They increased marginally by 2.19% through IC 24 to IC 25. Unless there were omissions or sums withheld over quality issues, of which no evidence at all has been proffered, it defies belief that at 86.35% completion by value, all services, including M&E services, could have been tested, commissioned and found to be operating satisfactorily. If at all so, then there is no explanation as to the sudden increase of M&E work by 10.32% in IC 26. Needless to say there is no explanation from the Architect or the M&E Consultant.

90 Although it is not for the Respondent to explain the Architect's certification, again the Respondent has attempted to explain the figures by stating that:

> [T]he omission of $205,605.41 is separated under Interim Valuation No.26 whereas it was still under M&E

> Works in Interim Valuation No.25 … In fact, the amount certified for Interim Valuation No.26 was only $31,150.00 because the physical works were already completed before 17.4.13. This certified sum is for the submission of operation manual and drawings and the regularization of the contract sum arising from variation works … $236,755.41 worth of M&E work was not done after completion.

91 This explanation by the Respondent is difficult to understand or follow but the following points can be made:

> (a) The first point to note is the admission by the Respondent that IC 26's payment for M&E items was for the submission of 'operation manuals'. This means Item 72(b) was not fully complied with until after IV 25 which valued works as at 31 July 2013.
>
> (b) The next point of note is the Respondent's cryptic remarks referring to an omission of $205,605.41 which 'was separated' in IC 26 whereas it was 'still under M&E works in [IC 25]'. The Respondent then states that the net certification for M&E works in IC 26 was only $31,150 which was for the submission of operation manuals, drawings and 'the regularization of the contract sum arising from variation works'. It is difficult to make much sense of these statements.
>
> (c) On their face, the interim certificates (as is usual in the industry) do not have a sufficient level of breakdown to validate the first point made in Dennis Tan's statement above at (b), *eg*, it does not contain a separate M&E component, let alone the figure $205,605.41, as M&E works are within the item: 'Work carried out by Contractor: $11,334,625.80' (for IC 25).
>
> (d) When we turn to the immediate underlying document, the Interim Valuation by the quantity surveyors, IV 25 only shows the M&E works as a one-line item containing the M&E contract sum, the contractor's claim, the valuation and remarks. It is important to note that it *does not show* an omission of $205,605.41 since the M&E contract sums remains at $2,294,002 and the respondent's claim and QS valuation stands at $2,031,200.59 (and in IV 24, the same M&E contract sum appears with a contractor's claim and QS valuation of $2,002,712.59). There is no other notation showing an omission of that nature or sum on the rest of that document comprising IV 25.

(e) In IV 26, although the same one-line M&E contract sum of $2,294,002 is stated, as noted before, the contractor's claim and valuation by the QS is now $2,267,956.00, an increase of $236,755.41 which is 98.86% of the M&E contract value. However, we now find the $205,605.41 figure stated by Dennis Tan in IV 26. It appears as Item 7 variations at (b), where there is an omission of $205,605.41. No such omission appears in the earlier interim valuations. Half of Dennis Tan's first point is correct – we do find that omission in IV 26. However, his point that the $205,605.41 omission in IV 25 was under M&E Works is not correct.

(f) We now move down a further level, since these are M&E works, to examine the M&E consultants' valuation and payment recommendations ('M&E Valuation'); again some, but not all or complete copies, are exhibited in Dennis Tan's affidavit.

(g) As a preliminary point, the M&E Valuations are confusing because they carry the same progress claim number 26 but have different dates which seem to indicate that M&E Valuation No 26 dated 12 August 2013 should be No 25 and the M&E Valuation No 26 dated 30 September 2013 is properly numbered '26'. We treat this accordingly and although someone has written in manuscript '25' for both documents, we ignore this manuscript notation.

(h) M&E Valuation No 25 shows:

(i) The M&E original contract/subcontract value at $2,294,002 which is, as expected, consistent with the figure set out in IV 25, and where, as noted above, as at 31 July 2013, the amount claimed and valued was $2,031,200.59 or 88.54% of the contract value.

(ii) It records, for the first time, variations (additions) EI 01 to EI 04 amounting to $218,106.59 and, as one would expect, an increased present contract/subcontract value by that amount to $2,512,108.59.

(iii) The previous M&E Valuation, numbered 24 and dated 6 June 2013 states no variations orders issued 'to date'; unless there is an explanation put forward, and there is none, the conclusion to be legitimately drawn is that EI 01 to EI 04 were issued after M&E Valuation 24; we note that EI 01 to EI 04 were not put in evidence

although they could have shed some light on this.

(iv) This raises questions as to what M&E works were being ordered at this stage, at or more than 3½ months after works were certified 'complete'. No explanation has been given by any party.

(v) We should in fairness point out that there *may* be an answer at a document entitled Cost Report No 6 which carries the date 15 January 2013 (but which we note may not be the full document), where there are items with sums corresponding or approximately corresponding to those found in these EIs:

(A) EI 01 for $4,635 has a corresponding sum in this document against S/No 26, AI No 18, 'Additional of Emergency Lights' with the remarks 'Regularize Engineer instruction; M & E 01, as advised by M&E Engineer'.

(B) EI 02 for $194,800.59 has an approximate corresponding sum in this document at S/No 25, AI No 16 where the first line carries the words: 'Omission of Provisional Sum ($400,000)' and the second line has 'Supply and delivery of light fittings and accessories $196,748.60' and with similar remarks: 'Regularize Engineer instruction; M & E 02, as advised by M&E Engineer'.

(C) EI 03 for $2,640 has a corresponding sum in this document against S/No 27, AI No 23 with the words: 'Supply and install water sub-meters for swimming pools' and with similar remarks: 'Regularize Engineer instruction; M & E 03, as advised by M&E Engineer'.

(D) EI 04 for $16,031 has a corresponding sum in this document at S/No 23, AI No 3 with the words: 'Additional jacuzzi jet' and with similar remarks: 'As advised by M&E Engineer'.

(vi) This raises more questions than it provides possible answers. The obvious question

arises from the discrepancy in the date of this document and the dates recorded in the M&E Valuations for the EIs. There is no explanation as to the nature of this document, what it represents or whether AI means Architect's Instructions under the SIA Conditions or just costings for consideration of these items and not necessarily items that were in fact ordered and installed. It also does not tell us whether the works comprised in these items were carried out or not and, if so, when. If these were variations ordered by January 2013, then at least IC 22 (19 April 2013) and the interim certificates after that, and probably a few interim certificates prior to that, were wrong and under-certified. This would include IC 23 and IC 24. Importantly, we do not know if this is a complete document and, equally importantly, there were other items in this document which do not appear in the EIs set out in M&E Valuation No 25 as one would expect, *eg*, S/No 28, AI No 25 with the description: 'Supply and delivery of light fittings and accessories', '21,453.421' and with the remarks: 'As advised by M&E Engineer'.

(i) M&E Valuation No 26 shows the original contract/subcontract value at $2,294,002 as well as EI 01 to EI 04, but there is now an EI 05 which records an omission of $423,712 thereby bringing the revised M&E subcontract value down to $2,088,396.59. EI 05 has also not been put in evidence. This raises the following doubts:

(i) Why was such a large omission being effected by an EI at this late stage? There is no explanation as to what these *M&E omissions* comprised of. Importantly, if the contract works were completed as of 17 April 2013, that there can be an omission of this size and at this stage cries out for a compelling explanation. It is possible for works to be omitted for various reasons including reducing the amount of works for cost or aesthetic considerations or because they were no longer needed or because the contractor cannot supply or do the works or that parts of the M&E works were no longer necessary. Reasons like this should bring about an omission by an EI at a much earlier point in time and *before* completion. Unfortunately the

> Architect and M&E consultant have chosen to remain silent.
>
> (ii) Although Dennis Tan seems to suggest a specific omission or omissions amounting to $205,605.41 that was within IC 25, which as we have said above cannot be the case, it seems that that figure comes from deducting $218,106.59 comprised in EI 01 to EI 04 (issued after 6 June 2013) from this omission of $423,712 by EI 05 in or around 30 September 2013.
>
> (iii) Importantly, if an omission of this large sum occurred before completion on 17 April 2013, or at some earlier stage and was being accounted for only in M&E Valuation No 26 and/or IV 26, in the sense of reducing the M&E contract sum only at that stage, then the previous valuations of works done by the M&E consultants and the quantity surveyors were erroneous and any interim certificate based on these valuations would be similarly erroneous and invalid and certainly could not be clothed with temporary finality under cl 31(13); $423,712 is an omission of 18.47% of the original M&E subcontract sum or 16.86% of the revised M&E subcontract value after adding EI 01 to EI 04.

[emphasis in original]

625 The numerous questions that arose in the CA's determination were undoubtedly caused, once again, by the documentary evidence, or lack thereof. Having had the full account of the IVs that were adduced before me, I find that there was indeed a reasonable explanation for the valuations certified in IC26. I shall now elaborate.

626 For M&E works, the various values are reflected in the row of S/N 5 of the Summary. Under IV26, in the column of "Cumulative Amount Recommended for Payment", a figure of $2,267,956.00 was listed for M&E works. In contrast, in the column of "Cumulative Amount Recommended for Payment", a corresponding figure of only $2,031,200.59 for M&E works was

listed under IV25. The difference between the two values is $236,755.41 and is listed as "Net Amount Recommended for Payment" under IV26. As the CA observed, this was an increase of 10.32% of the contract sum for M&E works, which was reflected as $2,294,002.00 under the "Contract Sum" column. Therefore, it appeared that only 10.32% of the M&E works had been completed during this time.

627 As with the PC Rate items, however, it was explained at the trial that M&E works were also subjected to a variation sum before payment to the plaintiff. This was reflected in the row of S/N 7(b) of the Summary as "Variations – M&E Works". This variation sum for M&E Works is found in the column "Net Amounts for Payment" for IV26, listed as "(205,605.41)", indicating that $205,605.41 was to be subtracted.[817]

628 This was the exact figure that Mr Tan had termed as an "omission" that was "separate" under IV26 before the CA. When one subtracts this variation sum from the amount recommended for payment under IV26, what is left is a sum of $31,150. This sum of $31,150 comprises the two sums certified by CCA in the documents annexed to IV26: $26,860.00 in payment recommendation M&E 25 dated 16 September 2013,[818] and $4,290 in payment recommendation M&E 26 dated 30 September 2013.[819]

629 This sum, being the true value of the M&E works certified under IV26, was about 1.36% of the total contract sum of M&E works. This was a far cry from the 10.32% noted above in [626]. The implication of this was that prior to

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817 NEs, 2 July 2020 at p 54, lines 1–11.

818 27AB16760.

819 27AB16758.

this, at least 98.64% of the M&E works had been *certified* for *payment*. There was, therefore, no sudden unexplained increase in the M&E works completed.

630 A more fundamental question, however, arises as to the extent of M&E works that had been done as at the date of completion. It bears emphasizing that as with the PC items above at [602], the date of certification for M&E works was *not* indicative of the date on which the works were actually completed. This is unsurprising, given that the process of certification for M&E works was similar to that of PC items, with CCA and F+G both following the same process listed above at [600]. The certification of the M&E works was, therefore, only dependent on when the plaintiff submitted its claim for the works. Given the plaintiff's delay in submitting its payment claims for the PC Sum items, as explained above at [606]–[608], it is also to be expected that there were delays in the submission of its payment claims for the M&E works. Nevertheless, it is clear that the M&E works were also completed as at the date of the issuance of the CC. This follows from the rigorous process of inspection by the third party and the Consultants, as explained above at [603]. This was confirmed by Ms Chua at the trial:[820]

> Court: Because you have told us the completion date, you, together with all the other consultants, were satisfied that all works have been done except for some outstanding minor work?
>
> A: Yes.
>
> Court: So what I want to understand from you here: if there's a difference between these two figures of about 10 per cent, does it suggest that really on 17 April, it wasn't completed?
>
> A: No.
>
> Court: It wasn't like that?

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820 NEs, 2 July 2020 at p 52, line 17 to p 53, line 19.

> A: No, because I'm always very conservative in recommendation, because I always deduct 5 per cent from whatever they claim. This is my practice, because it's always good that I hold it … and also, on top of that, there's item where it is O&M — there is, like, the defect liability period where they are supposed to execute the maintenance work, which I will not certify anything until the final payment. So these thing … will be left empty, even though they claim. So, no, it doesn't mean that 10 per cent difference, it means that 10 per cent outstanding work, no.
>
> Court: So, in other words, the valuation of work is different from the assessment of whether the M&E work had been completed?
>
> A: Yes.

631 Therefore, I find that IC26 was issued properly and in accordance with the contractual terms.

General observations of the CA's findings regarding the retention sum and the interim certifications

632 I was given to understand by the parties that the CA did not ask the parties to address its concerns regarding the retention sum, whether the interim certificates reflect the state of the building works for the Project and the accounting aspects of the interim certificates. It is clear from the CA's judgment that it was seeking to appreciate and understand the figures in the documents regarding the M&E works and Cost Report No 6. This led the CA to remark that these raised "more questions than [they] provide[d] possible answers" (see *Ser Kim Koi (Court of Appeal)* ([67] *supra*) at [91(vi)]). Thus, the CA came to its own conclusion on those issues from the affidavits and the documents before it. This is, indeed, a huge undertaking as this trial clearly reveals the complexity of the accounts and the works of F+G, the QS. If the CA had the benefit of the parties' submissions on those issues or concerns before it came to a decision, the CA would have been able to appreciate those issues better.

ACCURACY OF THE FIGURES IN IC25 AND IC26

633 The defendant now contends that the values certified by F+G in IC25 and IC26 were done incorrectly. The challenge mounted against the values, however, is a highly specific one – that the values used by F+G in determining the payments for the *PC Rate items* was not done correctly. I would like to state that the defendant is not challenging the quantification of the PC Sum items *per se*. He is only challenging the quantification of the PC Rate items, specifically the proper method which should have been used to make adjustments to the PC Rate items.[821] The defendant's challenge as to the PC Sum items relates to the proof of payment of the PC Sum items, which I shall further elaborate below.

634 In ascertaining the appropriate amount to be paid to the plaintiff, F+G would follow the process as set out in cl 28(5) of the SIA Conditions as follows:

> **Payment for Work by Nominated Sub-Contractors or Suppliers**
>
> Subject to any defence set-off or counterclaim of the Employer under or by virtue of this Contract, the sums due to the Contractor in respect of Nominated Sub-Contractors and Suppliers shall be determined by *deducting the* ***relevant*** *P.C. or Provisional or Contingency Sums from the Contract Sum* and by *substituting therefore the amount of the relevant Sub-Contractor's or Supplier's accounts showing the sub-contract value of the work carried out by them*, together with any sums by way of profit or attendance that may have been priced by the Contractor in the Schedule of Rates or elsewhere in the Contract Documents (but not any sums due to the Sub-Contractor by way of damages or compensation in respect of any negligence, default or breach the sub-contract by the Contractor, unless and to the extent that the same shall for any reason be recoverable by the Contractor from the Employer under or by virtue of any provision of this Contract). In the case of Contingency Sums appropriate adjustments (if applicable) may also be made to any preliminary items in accordance with Sub-Clause (4) hereof.

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821 NEs, 27 October 2020 at p 97, line 11 to p 98, line 7.

[emphasis added in italics and bold italics]

635 Thus, the "relevant" PC Rate sums have to be deducted from the Contract Sum, before substituting the actual value of the work that had been completed. Again, the parties do not dispute the value of the actual work completed that was to be substituted, which was calculated by multiplying the area in the contractual drawings with the actual unit rate of the PC Rate items quoted by the NSCs.[822] The only dispute that arises is which sums are referred to by the word "relevant".

636 The defendant's counsel contends that the term "relevant" should refer to the budgeted sums written by the plaintiff in the schedule of prices for the PC Rate items in the tender documents for the Project (the "tender breakdown prices").[823] According to the defendant, this means that F+G should have omitted $2,034,823.97 instead of $1,376,837 in the Statement of Final Account.[824] The plaintiff takes issue with the use of the tender breakdown prices. It contends that the relevant sums were those estimated by the third party after discussion with the Consultants. In this instance, the PC Rate sums were calculated by the plaintiff from the PC Rates given by the third party. Thus, Mr Ng explained that those were not the tender breakdown prices. The plaintiff and the third party contend that the "relevant" sum was the value utilised by F+G, or what they term the "contract allowance".[825] F+G had derived the contract allowance by taking the contractual unit rate of the PC Rate items

822 NEs, 25 June 2020 at p 100, line 11 to p 101, line 1.

823 DWS at paras 246, 247 and 249.

824 DWS at para 257; Drew & Napier LLC's letter to the court dated 13 August 2020 at para 4.

825 PWS at paras 398 and 424.

provided by the third party, multiplied by the area in the contract drawings.[826] I refer to the value used by F+G as the "measured sum". The plaintiff submits that this method is supported by the authorities, relying on Lim Pin, *Contract Administration and Procurement in the Singapore Construction Industry* (World Scientific Publishing Co Pte Ltd, 2016) at p 86, which states that:[827]

> In respect of adjustment to PC Supply rate items, only the amount arising from the PC Supply rate will be omitted. The amount added shall be based on the invoice rate for the supply of material.

637 I accept the plaintiff's and the third party's submissions. I am unable to agree with the defendant's interpretation of the term "relevant" for the following reasons. Firstly, the tender breakdown prices listed in the tender documents should not be utilised as they do not reflect the *actual contractual value* of the items. The contractors are free to list any values for each of the items in the schedule of prices in accordance with their tender strategies, notwithstanding that such values must be "fair and reasonable".[828] For instance, contractors could quote higher sums for items completed earlier in the construction, allowing them to claim earlier or "front-load" their payments.[829] The tender breakdown prices are, hence, clearly not reflective of the actual contractual values of the PC Rate items.

638 Secondly, cl 28(5) of the SIA Conditions anticipates that owners may have difficulties in ascertaining the values of the PC Sums and PC Rate items

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826 NEs, 25 June 2020 at p 98, line 20 to p 99, line 3; TPWS at para 155.

827 PWS at para 430.

828 PWS at paras 428–429; TPWS at para 156; NEs, 24 June 2020 at p 104, line 14 to p 105, line 7.

829 NEs, 22 June 2020 at p 80, lines 16–18.

at the tender stage, notwithstanding that the contractor is to "ensure that the rate and price for each time shall truly represent the full value of the item".[830] Moreover, during the construction there will often be changes in specifications, be it in relation to materials or quality, quantity, *etc*. Such changes result from a variety of reasons, but will naturally have an impact on the value of the works actually done. This is why even the measured sum, that is based on contractual rates and drawings, differs from the value of the actual work completed. Therefore, as between the tender breakdown prices and the measured sum, the measured sum is a more accurate reflection of the estimated value of the work.

639 Thirdly, cl 28(5) of the SIA Conditions is intended to be an equitable method of adjustment for the value of the work done. To use the contractor's tender breakdown prices that are not derived from any rates or measurements related to the works itself may not be a fair and equitable method of adjustment for the PC Rate items. Mr Ng testified that in his opinion as a QS, his method was the "fair and reasonable way to make such adjustment[s]".[831] I agree with Mr Ng that the method he had utilised, which was also that advocated by the plaintiff and the third party, is eminently fairer. This is evident when one compares the two methods alongside each other.

640 This is best illustrated via a simple hypothetical example. First, assume a contract with only *one* PC Rate item and *one* non-PC Rate item. Based on the contract drawings and the PC Rate, the *measured sum* for the PC Rate item is $5,000. However, in the schedule of prices, the contractor has indicated a lower *tender breakdown price* of $3,000 for the PC Rate item. As noted above at [638],

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830 5AB02479.

831 NEs, 25 June 2020 at p 90, lines 21–22.

there is some room for variability as to the tender breakdown price depending on the contractor's pricing strategy. Furthermore, the contractor has priced the *non-PC Rate item* as $10,000. This results in an overall contract sum of $13,000. Next, assume that the contract was completed and there were *no changes* to the PC Rate or the quantities used as the as-built drawings matched the contract drawings exactly. After applying the adjustment process of deducting the "relevant" sum and adding the actual sum expended, the result under each method of calculation would be as follows:

Adjustment process	**F+G's method ($)**	**The defendant's method ($)**
Initial contract sum	13,000	13,000
Relevant sum	- 5,000 (the measured sum)	- 3,000 (the tender breakdown price)
Actual sum	+5,000	+5,000
Final contract sum	**13,000**	**15,000**

641 In a situation where there are no changes to the PC Rate or the quantities of the PC Rate item, one would expect as a matter of fairness that the contract sum should stay the same. Indeed, this is the result that is obtained under F+G's method, as seen by the final contract sum emphasised in bold. In contrast, the defendant's method of calculation would result in the final contract sum being *increased* from $13,000 to $15,000, despite the fact that no changes were actually made to the contract specifications. This illustrates how F+G's method of calculation (*ie*, deducting the measured sum) will result in more accurate adjustments being made to the contract sum, allowing for fairer results. It will

also result in greater certainty to the owner. This point was corroborated by Mr Ng as follows:[832]

> A: Yes, because if I would be the client, I would stick to F+G adjustment method.
>
> Court: No, "client" you're referring to whom? You say —
>
> A: If I'm the owner of a house, I would rather stick to F+G adjustment method.
>
> Court: Why?
>
> A: Because regardless of — if assuming that the rate and quantity does not change, as the owner, I only committed to a lump sum of 10.5 million, and at the end of the project, there's no change, because the rate and the quantity does not change. But if I am using Mr Chong adjustment method, I do not have a certainty in terms of how much I need to pay. I will only have the certainty after all the actual sum has been fully expended.
>
> Court: So you are not too certain whether that lump sum would be more or less; right?
>
> A: Yes, because if there is no change, but I'm still not certain how much I need to pay in the end. But for F+G adjustment method, assuming that you are not changing the rates, you are not changing the quantity, my commitment can be fairly guaranteed. Because I didn't initiate any change, so why should I have the less certainty in terms of how much I need to pay, because in the end, it's a lump sum.
>
> …
>
> Court: Do you think your method is fairer?
>
> A: Yes, because it is undeniable that the PC rate and the contract drawings are —
>
> Court: Come again, sorry?
>
> A: It is undeniable on how you determine the contract allowance. There's no need to dispute or argue about it because the PC rate is already stipulated by the consultant in the tender stage. So if I put in $100 per

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832 NEs, 25 June 2020 at p 114, line 3 to p 115, line 22.

> metre square, there's no need to argue about it. It's 100, the contract allowance PC unit rate.

642 Finally, I also notice that the defendant failed to call an expert QS to support his method of calculation of the PC Rate items. In contrast, Mr Ng was himself a pundit QS and testified that based on his knowledge and experience, his method of calculation is "common" whereas he had never come across the defendant's method of calculation. While the defendant submits that Mr Ng had disagreed that F+G's method was used in the industry,[833] this is not entirely accurate and reflects only one portion of his evidence. I reproduce his evidence in this regard:[834]

> Court: Your method of valuating works for the contractor, do you know whether that is the usual method where the QS evaluate the contractor's work?
>
> A: For the adjustment of PC rates and PC sum?
>
> Court: Yes.
>
> A: Yes, it's common.
>
> Court: Common in the industry; right?
>
> A: From what I know, yes.
>
> Court: You know Mr Chong has his own method of computation.
>
> A: Yes.
>
> Court: Is that acceptable in the industry?
>
> A: I, personally, have not come across this.
>
> Court: Would you have used this method?
>
> A: No.
>
> …

833 DWS at para 256.

834 NEs, 25 June 2020 at p 113, line 7 to p 115, line 22.

> Court: Any other reason why you would prefer to use your method?
>
> A: I will assume F+G has adopted this adjustment method is because it has gone through so many years of experience in F+G as a company. So the method must have been in place for many years, even longer than my experience.

643 For these reasons, I accept the plaintiff's and the third party's submission that for the purpose of adjustments, the "relevant" sum should be treated as the measured sum. Thus, F+G had applied the correct approach to quantifying the PC Rate items in the Contract.

644 The defendant also claims that the plaintiff was not entitled to payment for both the PC Sums and PC Rate items as the plaintiff produced invoices rather than proof of payment to the NSCs.[835] This argument is based on cl 31(11)(a) of the SIA Conditions, which provides that the plaintiff must provide the third party and F+G with "supporting documents, vouchers and other documents including documents relating to the accounts of the Designated or Nominated Sub-Contractors or Suppliers". In response, the plaintiff and third party argue that the submission of an invoice was sufficient.[836] They rely on cl 28(5) of the SIA Conditions, which provides that the relevant PC Sums are to be substituted with, *inter alia*, the "amount of the relevant Sub-Contractor's or Supplier's accounts showing the sub-contract value of the work carried out by them".

645 I agree with the plaintiff and the third party's submissions. Mr Ng stated that F+G would use the unit rate stated in the architect's instruction, checked

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835 DCS at paras 225–227, 239.

836 PWS at paras 435–436; TPWS at para 158.

against the invoice submitted by the plaintiff.[837] He further explained as follows:[838]

> Q: … Now, what sort of documentation did F+G review or require from GTMS in their evaluation for the PC sum items?
>
> A: First of all, we will look at the architect certificate, the architect instruction, because the PC sum will be expanded [*sic*] with the issuance of architect's instruction. So in the architect instruction, it comes with a copy of the quotation from the nominated subcontractor or supplier. And we will also require GTMS to submit any form of invoices that reflected GTMS is due to pay to the respective subcontractor or supplier.
>
> …
>
> A: … So I think F+G, when we prepare the statement of final account, we focus heavily on the architect's instruction. In the architect's instructions, it clearly instructed GTMS to carry out certain part of the work … So whether the proof of payment, is it required to ascertain whether GTMS actually physically or how much they exactly pay … we didn't go into the investigation on that. We relied on the fact that GTMS has carried out as per the architect's instruction, at the sum stipulated in the architect's instruction.
>
> …
>
> Q: … Now, for PC rate, actually what you are also supposed to look at are the actual rates that are paid by the contractor to their suppliers or nominated subcontractors; right, Mr Ng?
>
> A: Similarly to how we look at PC sum, first of all, we will look at the architect instructions in terms to determine what is the rates that the architect instructed GTMS to purchase the selected material at the rates.
>
> Q: So actually I think what you're trying to say is actually even for PC rate items, you look at what I call the

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837 NPK at para 128.

838 NEs, 23 June 2020 at p 7, lines 1–12; p 18, line 25 to p 19, line 11; p 26, lines 8–23.

> nominating instruction, but what is the AI actually that brings the NSC in or the supplier in; correct?
>
> A: Correct.

646 As Mr Ng pointed out, there is nothing in the Contract stipulating that F+G and/or the third party was required to obtain proof of payment from the plaintiff.[839] Based on the clauses cited by all parties, there is no express requirement that proof of payment be submitted. Rather, cll 31(11)(a) and 28(5) refer generally to "supporting documents, vouchers and other documents" which show the "sub-contract value of the work carried out by [the NSCs]".[840] In ascertaining the "value" of this work, it was appropriate for F+G to consider the value attributed to it in the architect's instructions, checked against the invoice. Furthermore, the defendant's case rests upon the assumption that before the Statement of Final Account is issued, the plaintiff must have made payment to all of its subcontractors in order for it to be able to provide proof of payment. However, this is not always the case. In fact, the plaintiff has yet to pay some of the NSCs pending the outcome of this trial.[841] The NSCs or NSs would look to the plaintiff for payment and not the defendant. Therefore, it would not have made commercial sense for the parties to intend, by cll 31(11)(a) and 28(5), that the plaintiff be required to submit proof of payment. Thus, I find that it was appropriate for the plaintiff to have submitted the relevant invoices.

647 I observe that the defendant had made numerous progress payments to the plaintiff prior to IC25. He had no problem making those progress payments without any proof of payment from the plaintiff. However, after the

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839 NEs, 25 June 2020 at p 14, lines 8–9.

840 PRS at para 39.

841 PWS at para 440.

commencement of the Suit by the plaintiff, he now raises the issue of the need to have proof of payment from the plaintiff.

648 A final issue relates to the accuracy of the actual unit rate of the PC Rate items quoted by the NSCs, which was used to compute the value of the actual work completed. The defendant produced several credit notes given by the NSCs to the plaintiff, which the defendant claims should have been taken into account in the Statement of Final Account. The defendant submits that the manner in which the invoices and credit notes were issued suggests that the plaintiff wanted to conceal the fact that it had received discounts from the NSCs.[842] In support of his submission, the defendant cites a portion of Mr Tan's testimony where he stated that his QS "may have kept quiet about discount".[843] The defendant further alleges that the plaintiff failed to provide proof of payment to the NSCs, although it must have evidence of such payment in its possession.[844]

649 I do not accept this argument and find it to be unmeritorious. As Mr Ng explained, there were many possible reasons for such credit notes:[845]

> Q: Do you agree that if there is excess material after installation of the material, GTMS may return the balance?
>
> A: Yes.
>
> Q: So GTMS may return the balance material that are not used for installation, and when this happens, do you agree that the subcontractor may reduce the sums due

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842 16AB10797; 16A10659; 18AB11479; 18AB11502; 19AB12181; 19AB12299; DWS at para 230.

843 DWS at para 233.

844 DWS at para 234.

845 NEs, 25 June 2020 at p 67, line 17 to p 69, line 11.

from GTMS to the subcontractor because of this return of the balance material?

A: It sounds reasonable.

…

Q: Mr Ng, do you agree that credit notes for the supply of materials, they may be issued by the subcontractor simply because GTMS returned excess material back to the contractor?

A: Yes.

Q: Mr Ng, do you agree that for credit notes for the supply of materials, they may be issued by the subcontractor because GTMS has returned unsatisfactory materials that were supplied by the subcontractor?

A: Yes. These are just one of the many reason[s] that the supplier may issue a credit note for.

Q: Do you agree that the credit note by a supplier may also be issued if GTMS rejects a material because the wrong cut size of the material is given to GTMS?

A: Yes, I repeat my answer. These are one of the many reasons that the supplier may issue a credit note for. So it goes on. If you have more questions about different scenarios then, the answer would be the same. I wouldn't know what is the reason because I'm not the supplier.

Q: But for F+G, it does not matter to F+G whether or not these credit notes were issued to GTMS as long as all the materials were installed satisfactorily on site; is that right?

A: It depends, because if the credit notes are meant solely for discounted rate, then it does matter.

650 If the defendant wishes to contend that the plaintiff enjoyed discounts which it did not pass on to the defendant, this is a matter for him to prove on a balance of probabilities. The defendant cannot simply allege that the plaintiff has failed to produce evidence rebutting the defendant's allegations. As Mr Ng testified, these credit notes would only be relevant for the Statement of Final Account if they were given for the plaintiff to enjoy a discounted rate on the PC

Rate items. Given that there could have been a multitude of reasons why the credit notes were issued,[846] the credit notes in and of themselves are not sufficient to make out the defendant's allegation. If the defendant believes that the plaintiff benefited from the discounts given by the NSCs he should have called those NSCs concerned to testify instead of making insinuations of impropriety by the plaintiff without any proof. After all, these were the NSCs chosen by the defendant himself. Furthermore, although Mr Tan did state that his QS may have "kept quiet about discount", this was cited out of context. I set out the full exchange, as follows:[847]

> Q: And it's up to GTMS to claim for what is the proper rate to be applied for PC rate items. Right?
>
> A: Yes.
>
> Q: So the initiative actually comes from you, right, Mr Tan?
>
> A: Yes, but at the end of the day there is a lot of discussion between my QS and F+G. So F+G would have taken plus and minus into consideration. So omissions or credit note like this are also considered. Sometimes my QS may have kept quiet about discount. So this come from F+G. So what I'm saying is it's not necessary one-way track. It's both parties because ultimately it is F+G who certify the amount.
>
> Q: I understand, Mr Tan. That is what my client is concerned with, because like you said, sometimes my QS may have kept quiet about discount.
>
> A: No, no, I didn't say that.
>
> Q: That's what you said.
>
> A: I said my QS – yes, I said my QS may have kept quiet about the discount and it's picked up by F+G so they will then make sure that the discount is taken into consideration. I'm telling you honestly. What I'm trying to say is that F+G is a certifying body. You should clarify that with F+G rather than me.

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846 TPWS at para 159.

847 NEs, 12 November 2018 at p 122, line 12 to p 124, line 9.

…

Q: So if your QS, like you say, in your own words, "My QS may have kept quiet about discount", F+G wouldn't know, would it?

A: I'm giving a hypothetical case. I'm not saying that my QS did that. I'm saying that if my QS have not raised the omission, F+G would raise the omission. That's all I'm saying.

651 It is clear from the above that Mr Tan was not suggesting that his QS concealed any discounts from F+G. As Mr Tan said, that was "hypothetical" and intended to explain that any attempt to conceal discounts would have been discovered by F+G.[848] In this light, Mr Tan's evidence does little to support the defendant's case. Even if it shows that concealment of discounts is a possibility, this does not meet the standard of proof on a balance of probabilities as required of the defendant.

SUMMARY ON THE ISSUANCE OF IC25 AND IC26

652 In summary, I find that IC25 and IC26 were issued in accordance with the contractual terms. In relation to the questions raised by the CA in *Ser Kim Koi (Court of Appeal)* ([67] *supra*), the plaintiff and the third party provided sufficient and satisfactory explanations for the following reasons:

(a) The release of the moiety of the retention sum of $328,250 under IC25 was accurately 50% of the total retention sum, as the total retention sum was $656,500 and not $644,195.65.

(b) The plaintiff had a backlog of progress payment claims, and this led to the delay in its submission of progressive PC 23 to PC 26 after the

848 PRS at para 44.

issuance of the CC. This, in turn, caused a delay in the issuance of IC25 and IC26. This provided the plaintiff a steady stream of claims for its finances.

(c) The amounts certified under IC25 and IC26 were proper and correctly quantified.

(d) The works certified under IC25 and IC26 had been completed prior to the issuance of the CC although the progressive payment claims were submitted much later.

653 These findings are only possible because of the veritable wealth of evidence that was adduced before me, while the CA only had scanty affidavits containing limited evidence. This was a point repeatedly emphasized by the CA, in particular at [86] and [92] as follows:

> 86 … The Respondent's explanation for these figures is inconsistent with the evidence presented. It should also be noted that of the documents exhibited by the Respondent, there are many missing documents, and some important documents that are exhibited are not complete.
>
> …
>
> 92 It may well be the case that at the substantive or final determinative arbitral or court proceedings matters will be clearer with all the relevant and complete documents being produced and the parties are cross-examined. However, at this stage, based on what appears in IC 26 and its immediate underlying documents, there are serious irregularities and unexplained discrepancies that deprive IC 26 of any temporary finality.

654 Furthermore, the sums tabulated in the Summary were flummoxing and unnecessarily complex, which required extensive explanation, as seen from the following exchange:[849]

> Court: But, you see, I find this table sometimes can be very misleading, because you see, IV26, you have a column to say the net amount recommended for payment, for payment, which is 236,755.41. You cannot pay 236,755.41 because there is a negative figure below of 205,000. So the actual net amount recommended for payment should be 30,000-over. Is that correct, Mr Yong?
>
> A: Yes. But this table, which is set up by F+G, works in this way, and this is — this is, in fact, a summary of all their IV. There is always a summary IV which is set in this particular pattern. There will always be this amount and there will be always this subtraction. So unless somebody is going to reset this figure, then you will get a real figure.
>
> Court: Yes, because it's very misleading.
>
> Q: Your Honour, I believe this is done for accounting reasons because it's, I think, easier for them to not have to adjust the figures around, because this summary, yes, your Honour, is done because of accounting reasons.

655 This problem before the CA was aggravated by the absence of the third party in the summary judgment proceedings. Thus, the third party was not able to provide its reasons or explanations to the CA. In this regard, I reproduce the CA's observations at [76] that:

> It behoves the Architect, whose certificates are being challenged in these circumstances, to furnish an explanation for the payment certified under IC 25 and IC 26 when he filed his affidavit. Although not strictly applicable to the filling of affidavits, it is nonetheless of relevance to note that under cl 31(13) of the SIA Conditions, there is a duty on the part of the Architect to clarify upon either party's request '[i]n any case

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849 NEs, 3 June 2020 at p 184, line 23 to p 185, line 18.

> of doubt', what was or was not taken into account in his certificate. In [*H P Construction & Engineering Pte Ltd v Chin Ivan* [2014] 3 SLR 1318] at [18], this court stipulated this as one of the requirements that confers temporary finality on the architect's certificates in that his clarification, if requested, would set out the basis of *his* independent professional judgment. Here, in the light of these proceedings, to which he is a party, one would have expected the Architect to explain the basis of the disputed certificates. But, for reasons best known to himself, he has chosen not to do so. [emphasis in original]

656 The third party should have provided to the CA clear reasons or explanations for its decisions, as its interim certificates confer temporary finality.

Implications of the wrongful issuance of the completion certificate

657 I have found at [334] that the earliest date for the CC of the Project certified by the third party was 28 May 2013, instead of 17 April 2013. The CC, properly issued on 28 May 2013, should also have reflected that the Project was completed pursuant to cl 24(4) of the SIA Conditions and Item 72 of the Preliminaries.

(1) Unlawful means conspiracy

658 However, the premature issuance of the CC does not support the defendant's claim of unlawful means conspiracy. Notwithstanding that the CC was prematurely issued, I find that there was no conspiracy between the plaintiff and the third party in this regard.

659 I accept the third party's explanation that the premature issuance of the CC was an honest mistake as it had overlooked Item 72 of the Preliminaries.[850]

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850 TPWS at paras 142–143.

Mr Chan was upfront on the stand and candidly acknowledged his mistake. Mr Chan explained his mistake as follows:[851]

> Q: Then look at the part where it says, at line 13, when you were asked about the SIA contract 24.(4).
>
> A: Yes.
>
> Q: You said that you really rely on the SIA contract, clause 24.(4). So in your many years of experience as an architect —
>
> …
>
> Q: … So in your many years of experience as an architect, you have been relying on clause 24.(4) of the SIA conditions for the issuance of the completion certificate; is that right?
>
> A: Yes.
>
> Q: So relying on this clause has been the practice and norm in the construction industry; is that right?
>
> A: Yes.

660 The third party had acted in good faith based on its experience, commercial understanding and the practical reality, as stated above at [327]. Unfortunately, in issuing the CC, the third party had not factored in Item 72(a) of the Preliminaries, as stated above at [327] and [368]. Although these are the reasons that demonstrate that the CC was improperly issued, they conversely rebut any claims of a conspiracy between the plaintiff and the third party. Given that there was no other evidence adduced to demonstrate a conspiracy in relation to the issuance of the CC, the defendant's claim on an unlawful means conspiracy must fail. As such, the premature issuance of the CC does not lead to the conclusion that there was a conspiracy between the plaintiff and the third party to defraud the defendant by unlawful means.

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851 NEs, 2 June 2020 at p 3, lines 3–21.

(2) The defendant's claim against the plaintiff for liquidated damages

661 Furthermore, the premature issuance of the CC does not entitle the defendant to claim liquidated damages from the plaintiff for the period between the extended completion date and the date when the CC should have been issued (*ie*, from 17 April 2013 to 28 May 2013). This is because it was the third party, in its capacity as the defendant's agent, who had instructed the plaintiff not to commence rectification of the steps and risers until after TOP Inspection 1.[852] This constitutes an act of prevention which renders the liquidated damages clause inoperable against the plaintiff.

662 The principles surrounding the concept of an act of prevention are well-settled in Singapore and have been approved in many cases (see *eg*, *Yap Boon Keng Sonny* ([385] *supra*) at [34]; *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2011] 4 SLR 455; *Chua Tian Chu and another v Chin Bay Ching and another* [2011] SGHC 126 at [58]–[64]). An act of prevention is an event that "operates to prevent, impede or otherwise make it more difficult for a contractor to complete the works by the date stipulated in the contract" (see *Law and Practice of Construction Contracts* at para 9.155). The effect and rationale of an act of prevention are explained in *Law and Practice of Construction Contracts* at paras 9.156 and 9.157 as such:

> 9.156 The legal consequence of an act of prevention is that the date for completion originally stipulated in the contract ceases to be the operating date for the completion of the works. In the absence of the adequate contractual provision for the adjustment of the completion date on account of the prevention, time is said to be set at large. This principle is considered to be an equitable remedy and has been attributed to the legal maxim that *no man shall take advantage of his own wrong*. Setting time at large ensures that whoever 'prevents a thing from being done

852 DWS at para 570; 22AB14702; NEs, 12 June 2020 at p 78, line 21 to p 79, line 9.

> shall not avail himself of the non-performance he has occasioned'. As a result, unless an extension of time provision exists which can substitute a new date for completion for the original completion date, *the result is that there is no longer a date from which liquidated damages can run – time is set at large – and the employer thereby loses his right to enforce the liquidated damages provisions*. …
>
> 9.157 It has been established that the result is not affected by the magnitude of the delay attributed to the employer's act of prevention … Hence, *the liquidated damages clause is rendered inoperable notwithstanding that the employer's act in these situations represents only a very small portion of the contractor's overall delay*. …
>
> [emphasis added]

663 Warren L H Khoo J in *Kwang In Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1997] 1 SLR(R) 907 similarly explained as follows at [18]:

> … It is settled law that acts of prevention by the employer resulting in delays in the contractor's performance of a building contract have the effect of setting at large the stipulated date for completion, with the result that the employer's right to claim or deduct liquidated damages is gone, since there is no longer a valid date for completion from which any liquidated damages can be calculated. Such a result can be prevented by providing in the contractor for extensions of time in the event of the employer's acts or omissions affecting the progress of works, and by the actual grant of extensions of time. Both the provisions for extension and the actual grant or grants of extension are necessary. The omission of either has the effect of setting time for completion at large in the event that prevention on the part of the employer does occur (*Peak Construction Ltd v McKinney Foundations Ltd* (1971) 69 LGR 1).

664 In this case, the issues relating to the steps and risers were discovered on or around 17 April 2013.[853] This was also the rightful and new contractual completion date, taking into account the granting of EOT 2 and EOT 3. After

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853 NEs, 27 October 2020 at p 45, lines 7–17; p 46, lines 2–5.

this discovery, the third party, as the defendant's agent and clothed with actual or apparent authority, instructed the plaintiff not to commence rectification works until after TOP Inspection 1, which took place on 30 April 2013.[854] The delay of rectification works was, perhaps, because the third party considered the steps and risers as minor works that could be rectified after TOP Inspection 1. This prevented the plaintiff from completing the rectification works sooner. Although the SIA Conditions do contain provisions pertaining to the grant of EOT, no EOT was *actually* granted in respect of the third party's direction to delay rectification works. Accordingly, the time for completion was set at large. I note that if the plaintiff had commenced rectification works immediately, it would probably have completed rectification works *after* the completion date of 17 April 2013. Therefore, it was likely to have been in delay regardless of the third party's instruction. However, as explained in the passage from *Law and Practice of Construction Contracts* above, this is immaterial. It is well-settled that an act of prevention renders the liquidated damages clause inoperable even if the contractor himself was also in delay. This is because the effect of the act of prevention is to set time at large. Therefore, even if the contractor is in delay, there is no completion date from which to calculate the liquidated damages due from the contractor.

665 For these reasons, the liquidated damages clause in the Contract is rendered inoperable. As such, the defendant cannot claim for liquidated damages against the plaintiff. The defendant also cannot claim general damages against the plaintiff as the third party, his agent, had issued the CC on 15 May 2013 to take effect on 17 April 2013. Thus, the plaintiff is not liable to the

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854 22AB14071–22AB14072.

defendant for any damages, liquidated or otherwise, in respect of the premature issuance of the CC.

(3) Maintenance period

666 The premature issuance of the CC resulted in a cascading effect on the maintenance period. As explained above at [29], based on the CC that the third party issued, the maintenance period of the Project commenced on 18 April 2013 (*ie*, the day after the certified completion date) and ended on 17 April 2014. Had the CC been properly issued on 28 May 2013, the maintenance period of the Project should rightly have commenced on 28 May 2013 and ended on 27 May 2014.

667 However, I disagree with the defendant that the premature issuance of the CC by the third party resulted in him being unable to get the plaintiff to rectify the defects. The third party issued the MC on 7 July 2014. The MC certified that the defects within the Project had been satisfactorily rectified and was properly issued, as stated below at [669]–[671]. Given that the MC was issued *after* the end of the original maintenance period (*ie*, 17 April 2014), it is clear that the third party was not limited by the maintenance period in deciding when to issue the MC.[855] Even under the revised maintenance period of up till 27 May 2014, there would be no difference as the MC was still issued *after* the end of the revised maintenance period. Hence, the premature issuance of the CC in no way deprived the defendant of the opportunity to get the plaintiff to rectify the alleged defects.

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855 TPWS at para 190.

668 In any event, the plaintiff had at all times been willing to rectify the alleged defects in the Project. It was, in fact, the defendant who did not allow this to happen, denying the plaintiff and the third party entry to the Project repeatedly beginning from around July 2014.[856] Therefore, the defendant cannot now turn around and allege that he had been unable to request the plaintiff to rectify the alleged defects due to the premature issuance of the CC.

Maintenance certificate

669 I also find that there was no conspiracy in relation to the third party's issuance of the MC on 7 July 2014. As held by Prakash J in *Liew Ter Kwang* ([258] *supra*), the court will not lightly disturb the third party's assessment, as long as it is made fairly and rationally. The defendant has failed to show that the third party did not exercise its discretion objectively, impartially and professionally.

670 In the circumstances, there is no basis to conclude that the third party issued the MC without proper due diligence, or in concert with the plaintiff. The evidence reveal that the third party issued the MC only after the defects raised by the defendant through BAPL had been satisfactorily rectified.[857] I note that the defendant had, by this point in time (*ie*, 2014), embarked on his campaign against the plaintiff and the third party, going out of his way to fastidiously uncover minute defects with the help of BAPL. In such circumstances, particularly when the defendant was highly unreasonable and made extraordinary and hyperbolic demands, the third party was well-entitled to exercise its own independent judgment and conclude that the defects were

856 NEs, 2 June 2020 at p 141, line 7 to p 142, line 12; TPWS at para 309.

857 TPWS at paras 145 and 190.

satisfactorily rectified, and thereafter issue the MC. This led the defendant to suspect that the third party and the plaintiff were in a conspiracy to defraud him.

671 Furthermore, the third party formed its opinion that the defects had been properly rectified together with the other Consultants, strengthening the inference that the MC was properly issued. I, therefore, dismiss the defendant's claims in relation to the MC.

Summary on conspiracy claim

672 Having dealt with each of the individual issues, I now summarise my overall findings in relation to the defendant's conspiracy claim. The defendant claims that the conspiracy against him began at the start of the Project, from as early as March or April 2011, as mentioned at [104] above. In effect, his allegation of conspiracy tainted and seeped into each and every step of the construction process of the Project.

673 However, having thoroughly analysed the contemporaneous evidence and having heard the testimonies of the witnesses, I find that the defendant's conspiracy allegations hold no water. In particular, the following allegations made by the defendant in relation to the alleged conspiracy are utterly devoid of merit:

(a) Beginning with the tender process, the defendant claims that the third party "pushed" for the plaintiff to be appointed over other contractors, making "life difficult" for the other contractors and asking them to "stay away". However, the evidence shows that the entire tender process was conducted transparently, fairly and thoroughly, as explained above at [160]–[179].

(b) The defendant's allegations that the various EOTs granted by the third party to the plaintiff were pre-determined are based on the defendant's own erroneous imagination. There is simply no evidence to back up such spurious claims. All the parties involved in the processing of the EOTs acted with utmost professionalism and independence, as explained above at [180]–[295].

(c) The defendant alleges that the premature issuance of the CC gives rise to the inference of a conspiracy. I have found that the CC should only have been issued on 28 May 2013 after the completion of rectification works on the steps and risers which were raised in TOP Inspection 1 instead of on 15 May 2013 and taking effect on 17 April 2013. This was an error of judgment as the third party, at the material time, did not realise that Item 72 applied, or that Item 72(a) required him to consider whether the failure to obtain the TOP was due to any faults in the construction attributable to the plaintiff. I accept that this was an honest mistake.[858] This oversight has nothing to do with any conspiracy to injure the defendant. Furthermore, Item 72(b) was satisfied by 17 April 2013 as the requisite T&C had been conducted and the handover of the relevant documents requirement is *de minimis* (see [336]–[382] above). Although there were certain incomplete rectification works such as the trellis beams, intumescent paint, the screed in the swimming pool and the grouting of the swimming pool wall (summarised above at [383]–[576]) none of these show that there was a conspiracy to injure the defendant. The third party may have overlooked some issues, but it consistently acted in good faith, based on

858 TPWS at paras 142–143.

its experience, commercial understanding and practical reality, as explained above at [298]–[668].

(d) The issuance of the MC by the third party was done fairly, rationally and in consultation with its team of professionals as explained above at [669]–[671]. There was no conspiracy to injure the defendant in relation to the issuance of the MC.

(e) The payment certificates were issued in accordance with the contractual terms, as explained above at [589]–[656].

674 It seems that when the plaintiff sought to enforce its certified payment claims the defendant tried to avoid his own contractual liability by coming up with the conspiracy allegation. This underscores and aptly reflects the general findings I made earlier in this judgment, at [79]–[119] above, in relation to the conspiracy claim that:

(a) The defendant had a propensity to recklessly make allegations and speculations based on his own suspicions. All of these were highly tenuous and unsupported by any evidence whatsoever, and in fact were based on his own "feelings".

(b) The defendant's version of events was highly incredible. He alleged that he knew about the conspiracy from the very beginning but had chosen to remain silent. Despite such knowledge, he took no action, did not inform any of his hand-picked Assistants of such conspiracy, and did not make a police report or lodge a complaint to the respective professional bodies.

(c) The defendant maintains a highly hyperbolic claim and takes an unreasonable position, refusing to mitigate any of his losses despite clear and reasonable opportunities for him to do so. He had the financial means to rectify the defects but refused to do so. He also insisted on absolute rectification of any type of defects, even those that were extremely minute in nature.

675 The defendant refused to call any of his hand-picked Assistants as witnesses to support his case. They would have been best placed to bolster his conspiracy allegations, if these were in fact true. His refusal to call any of them suggests that his allegations of conspiracy were likely fabricated and an afterthought, conceived after the plaintiff demanded for the last three outstanding payments. Furthermore, Mr Yong testified that throughout the entire construction of the Project, the plaintiff had not threatened, offered a reward, compensation or bribe to the third party to gain an advantage.[859] The defendant failed to adduce any persuasive evidence to the contrary.

676 Finally, these observations are also reflective of those I made in relation to the defendant and his case generally, at [120]–[135] above. In summary, having observed the defendant throughout the multiple days of cross-examination, I find that he was an unreliable witness. He constantly made excessive and unreasonable demands of the plaintiff and the third party, becoming infuriated when neither agreed to accede to his demands or take his side. He then embarked on a campaign against them, utilising the generous financial resources at his disposal and enlisting the help of Mr Chin in an attempt to expose as many flaws as he could in the Project. Beyond the fact that Mr Chin

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[859] NEs, 6 April 2020 at p 60, line 18 to p 61, line 16.

himself was not a credible witness, such actions only exposed the incredulity and inaccuracies in the defendant's allegations, demolishing the last vestiges of his conspiracy claim.

The defendant's claim in negligence against the third parties

677 In addition to its claim for unlawful means conspiracy, the defendant submits that the third parties breached their duty of care in tort owed to the defendant. This extends to the third parties' roles in certification and supervision. According to the defendant, the third parties breached their duty of care by the following:

(a) failing to read the Contract;[860]

(b) granting EOT 2 and EOT 3;[861]

(c) issuing the CC on 15 May 2013 certifying completion on 17 April 2013;[862]

(d) failing to issue a Delay Certificate;[863]

(e) failing to account for non-compliant and/or defective work in the interim payment certificates and FC;[864]

(f) failing to supervise the Project;[865] and

860 DWS at paras 490–491.

861 DWS at paras 492–504.

862 DWS at paras 487, 505–511.

863 DWS at para 514.

864 DWS at paras 515–516.

865 DWS at paras 563–589.

(g) failing to design the pavilion of Unit 12A in accordance with the BCA Regulations.[866]

678 The third parties do not dispute that the first third party owes a duty of care towards the defendant in relation to the scope of services set out in Part 2 of the MOA. However, the third parties contend that the second third party does not owe the defendant a duty of care, as the defendant refused to sign the deed of novation.[867]

679 I have already dealt with the issues concerning the grants of EOTs, the alleged irregularities in the interim payment certificates and FC, and the design of the pavilion of Unit 12A. As explained above, I reject the defendant's submissions as regards those issues. I shall now consider (a) whether the second third party owed the defendant a duty of care; (b) the third party's duty of supervision; and (c) the premature issuance of the CC and failure to issue a Delay Certificate, both of which relate to the third party's failure to read the Contract.

Whether the second third party owed the defendant a duty of care

680 I do not accept the defendant's submission that the second third party owed the defendant a duty of care. The law regarding when a duty of care arises is well-settled. In *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"), the CA set out the two-stage test of proximity and policy considerations, preceded by the preliminary issue of factual foreseeability. The first stage of proximity includes physical,

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866 DWS at paras 610–622.

867 TPWS at para 166.

circumstantial and causal proximity, as well as the twin criteria of voluntary assumption of responsibility and reliance (see *Spandeck* at [81]).

681 In my view, the defendant's case fails at both the first and second stages of proximity and policy considerations. The case of *Man B&W Diesel S E Asia Pte Ltd and another v PT Bumi International Tankers and another appeal* [2004] 2 SLR(R) 300 ("*PT Bumi*") is instructive. In that case, the CA found that no duty of care was owed by two subcontractors to a shipowner. In reaching this decision, the CA considered that the contract between the shipowner and the main contractor made the main contractor solely responsible for any defect that arose (see *PT Bumi* at [36]). Furthermore, it was the shipowner's "deliberate choice that there was no direct contractual relationship" with the subcontractors (see *PT Bumi* at [38]). As such, the CA found that the shipowner had relied only on the main contractor, and not the two subcontractors; conversely, there had been no assumption of duty by the subcontractors *vis-à-vis* the shipowner. In these circumstances, to "infer such a duty [of care] would run counter to the specific arrangement which [the shipowner] had chosen to make with [the main contractor]" (see *PT Bumi* at [48]).

682 In this case, by refusing to sign the deed of novation, the defendant elected not to enter into a contractual relationship with the second third party (see [154] above). This was a deliberate choice, signifying the defendant's lack of reliance on the second third party. For the same reason, it cannot be said that the second third party assumed any responsibility towards the defendant. Turning to the second stage, policy considerations similarly militate against the imposition of a duty of care. As in *PT Bumi*, imposing a duty of care would run counter to the contractual arrangement between the defendant, the first third party and the second third party. It would not be fair for the court to allow the defendant a backdoor remedy in tort for something he could not obtain in

contract. Therefore, the defendant has no claim against the second third party in the tort of negligence, as no duty of care arises. I shall now consider whether the defendant has a case against the first third party.

The duty of supervision

683 It is not disputed that the tortious duty of care owed by the first third party to the defendant includes a duty to supervise (see *Sim & Associates v Tan Alfred* [1994] 1 SLR(R) 146 ("*Sim & Associates*")).[868] The defendant claims that the third party failed to supervise the Project. The defendant focuses in particular on the steps and risers. According to the defendant, Mr Chan was not present at the pre-TOP inspection on 17 April 2013, where the defects in the steps and risers were first discovered.[869] Further, the third party did not supervise the rectification works conducted in relation to the steps and risers.[870]

684 I begin with the applicable law in respect of the duty of supervision. I am mindful of the observations made by the CA in *Sim & Associates* at [40], as follows:

> The standard of supervision required of an architect ultimately depends on the facts of each case, in particular on the terms of his contract with the employer and the main building contract. In the absence of any provision in the contract requiring a higher degree of supervision, an architect is merely required to give the building works reasonable supervision. …

685 The CA further cited the following proposition, at [43]:

> … The architect must give such reasonable supervision to the works as enables him to give an honest certificate that the work

868 DWS at paras 485 and 563; TPWS at para 170(c).

869 DWS at paras 565–566.

870 DWS at para 580.

> has been properly carried out. He is not required personally to measure or check every detail, but should check substantial and important matters … But prolonged and detailed inspection and measurement at interim stage is impractical and not to be expected.

686 Similarly, Vinodh Coomaraswamy J in *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd* [2019] 4 SLR 628 explained at [97]:[871]

> I do add, however, that in my view the supervision duty does not go so far as to oblige an architect to prevent all deviations before they occur. This is because I accept that the architect, in carrying out the supervision duty, does not have to be to be continuously present on-site. An architect who complies with the supervision duty may nevertheless fail to prevent a deviation that occurs between the visits made to discharge the duty. That said, the supervision duty does entail in practical terms a duty to detect a gross deviation … and to act promptly to get the deviation rectified in a timely manner so as not to jeopardise the completion date of the project.

687 I also find helpful the observations of the English High Court in *Ian McGlinn v Waltham Contractors Ltd and others (No 3)* [2007] EWHC 149 (TCC) at [218(a)] and [218(e)]:[872]

> In light of these various authorities, I would summarise the legal principles relating to an architect's obligation to inspect as follows:
>
> > (a) The frequency and duration of inspections should be tailored to the nature of the works going on at site from time to time …
> >
> > …
> >
> > (e) However, even then, reasonable examination of the works does not require the inspector to go into every matter in detail; indeed, it is almost inevitable that some defects will escape his notice …

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871 TPWS at para 176.

872 TPWS at para 178.

688 Applying these principles to the present case, I do not find that the third party was negligent in the supervision of the rectification works of the steps and risers. I also find that the third party supervised the Project to the standard of a reasonably competent architect. This is evident from the following:

(a) Ms Chiyachan, the third party's employee, would attend site meetings and site walks. She would thereafter update Mr Yong on what transpired during these meetings. Mr Yong would also call her to clarify parts of the minutes for these meetings, if necessary.[873]

(b) Mr Yong would supervise the third party's employees and update Mr Chan, seeking his advice and input for more complicated issues. Mr Yong would also visit the Project site often.[874]

(c) Mr Chan also visited the site about once a month, for instance, to attend site meetings. He also made informal visits to the Project as he had to pass the Project on his way home. Mr Chan acknowledged that he relied on Mr Yong and Ms Chiyachan, whom he had put in charge of the Project, to report the relevant matters to him. He read the minutes of the site meetings. He also had access to the email account used for the Project and would read all the emails sent to that email account by clients and other parties.[875] Thus, Mr Chan was always kept updated on the

873 NEs, 11 June 2020 at p 73, line 16 to p 74, line 12; TPWS at para 200(c).

874 NEs, 27 March 2020 at p 133, line 25 to p 134, line 10; p 139, lines 22–24; TPWS at paras 200(d) and 203(a).

875 NEs, 4 June 2020 at p 107, line 21 to p 108, line 4; p 108, line 21 to p 110, line 8; p 110, line 16 to p 111, line 8; p 111, lines 14–16; TPWS at paras 200(a), 200(e) and 203(c).

current state of the Project and he knew what was happening in the Project.

689 The above shows that Mr Chan, as well as the other employees of the third party, were involved in supervising the progress of the Project. It was not necessary for Mr Chan himself to personally supervise the Project. He was entitled to delegate tasks to his employees under his supervision.[876] In fact, this is envisioned in the Contract itself. Article 3 of the SIA Conditions states that the design of the Works will be carried out under the architect's *supervision or administrative control*.[877] This is also supported by authority. In *East Ham Corporation v Bernard Sunley & Sons Ltd* [1966] AC 406 (cited with approval by the CA in *Sim & Associates* ([683] *supra*) at [56], Viscount Dilhorne observed at 427F that:

> Each month [the architect] had to certify the value of the work properly executed. It follows that at least once a month he had to examine the work done and satisfy himself that it had been properly done. Presumably he would keep himself informed of the progress of the work and, while the contract did not require *him or his representatives* to be always upon the site, he would regard it as his duty to go there or to *send his representative* there to inspect the sufficiency of the work done … [emphasis added]

690 In relation to the steps and risers, specifically, I do not find any lapses in the third party's supervision for the following reasons. First, the defendant himself acknowledges that the defects in the steps and risers were discovered by the third party at an inspection conducted on 17 April 2013. Although Mr Chan was not present at that inspection, the inspection was attended by the

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876 TPWS at para 26.

877 TPRS at para 72.

third party's representatives.[878] This shows that the third party was adequately supervising the Works.

691 Secondly, although the third party's representatives were not physically present when the rectification works were carried out,[879] this does not mean that the third party was not supervising the Works. The authorities cited above make clear that the duty of supervision does not require the architect to be present on-site at all times. As Ms Chiyachan explained, the third party would ask the plaintiff for updates, request for photos or request to go to the site to verify the plaintiff's progress.[880] The evidence shows that the third party inspected the steps and risers after the rectification works were carried out by the plaintiff, and provided photographs of the rectified steps and risers to the BCA through a letter dated 6 September 2013.[881] Furthermore, I have found that the steps and risers were eventually properly rectified. This attests to the adequacy of the third party's supervision.

692 Finally, although the third party instructed the plaintiff not to rectify the steps and risers until after TOP Inspection 1,[882] this does not pertain to supervision. Rather, it is a separate issue which I shall consider below. Indeed, the fact that instructions were given by the third party to the plaintiff regarding the rectification of the steps and risers points towards there being supervision by the third party.

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878 DWS at paras 565–566.

879 DWS at para 580.

880 NEs, 12 June 2020 at p 113, lines 6–17.

881 23AB14652; 25AB15838.

882 DWS at para 568.

693 For these reasons, I reject the defendant's submission that the third party breached its duty of supervision, whether generally or specifically in relation to the steps and risers.

The premature issuance of the CC and failure to issue a Delay Certificate

694 As I have found above, the CC should have been issued on 28 May 2013. I find that the third party was negligent in issuing the CC prematurely. Mr Chan candidly admitted that when issuing the CC, he had only considered cl 24(4) of the SIA Conditions. He was not aware of Item 72 of the Preliminaries and therefore did not consider whether the requirements set out in Item 72 had been met.[883] This fell below the standard of a reasonably competent architect. I note that cl 31(13) of the SIA Conditions requires the architect to "certify strictly in accordance with the terms of the Contract". In order to be able to certify strictly in accordance with the terms of the Contract, the architect must have read the terms of the Contract and must have been reasonably familiar with them. As such, the third party's failure to do so constituted a breach of its duty of care, albeit that such a breach was not ill-intentioned.

695 As for the delay in obtaining the TOP, I find that the third party was not negligent for the failure of TOP Inspection 2 on 18 June 2013 and the eventual granting of the TOP on 16 September 2013. This is because the reasons for such failure did not arise from its breach of duty of care. Instead, as I have observed above, it arose from a difference in opinion between the third party and the BCA (see [330] and [333] above).

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883 DWS at para 507; NEs, 4 June 2020 at p 129, line 2 to p 130, line 1.

696 I turn now to the damages for the third party's negligence. The defendant submits that by prematurely issuing the CC, the defendant was prevented from recovering liquidated damages from the plaintiff.[884] Having found that the EOTs were correctly granted, the rightful completion date would have been on 17 April 2013. There was, therefore, a delay from 17 April 2013 to 28 May 2013. However, the defendant claims against the third party for liquidated damages of $3,600 per calendar day of delay from 21 February 2013 (the original completion date) up till today, amounting to a total of $9,842,400 as at the date of the written submissions.[885]

697 I do not accept the defendant's claim. First, I note that the amount claimed is inaccurate and excessive, given that I have found that the CC should have been issued on 28 May 2013. Any claim in liquidated damages, therefore, should only run from 17 April 2013 to 28 May 2013. Secondly and more importantly, the claim for liquidated damages is one that should be made against the plaintiff, not the third party. The liquidated damages clause is contained in the Contract between the defendant and the plaintiff (specifically, cl 24(2) of the SIA Conditions), to which the third party is not a contracting party.[886] In this regard, Lee Seiu Kin J's observations in *Store+Deliver+Logistics Pte Ltd v Chin Siew Gim (trading as S G Chin and Associates)* [2012] SGHC 89 at [26] are apposite:

> … Furthermore, the [liquidated damages] clause is contained in the Building Contract between the plaintiff [owner] and [the contractor]; the parties to that agreement agreed that damages of $2,500 is a pre-estimate of the losses that the plaintiff would suffer as a result of each day of delay in completion. It was not

884 DWS at para 518.

885 DWS at para 214.

886 TPWS at para 317.

> part of the Contract between the plaintiff and the defendant [the architect]. Therefore even if the plaintiff had suffered losses arising from the delayed completion which can be attributed to the defendant, the plaintiff cannot claim this in the form of [liquidated damages] but must prove actual losses it had incurred as a result of the delay. …

698 Furthermore, cl 31(1) of the SIA Conditions stipulates that all of the certificates issued by the third party have only "temporary finality". Thus, it is open to the court hearing the substantive proceedings to "open up and revise" these certificates "with a view to the final resolution of the dispute" and the parties' rights *vis-à-vis* each other (see the CA's decision in *Chin Ivan* ([66] *supra*) at [33]). In this respect, I have disallowed the defendant's claim against the plaintiff for liquidated damages at [665] above. It is therefore not open to the defendant to claim for liquidated damages against the third party.

699 Thirdly, the CA's decision in *PPG Industries (Singapore) Pte Ltd v Compact Metal Industries Ltd* [2013] SGCA 23 relied upon by the defendant can be distinguished as the facts are vastly different. In that case, the CA upheld the High Court's decision that the respondent was entitled to claim from the appellant liquidated damages that were paid to the main contractor by the respondent's subsidiary as a result of the appellant's breach of contract. The CA explained at [19] that the subsidiary's liability for liquidated damages constituted "ordinary damage" falling within the first limb of the rule in *Hadley v Baxendale* (1854) 165 ER 145. Therefore, the respondent could claim damages for such loss. It is notable that in that case, the respondent had *already incurred the liquidated damages and made payment for the same* (see *Compact Metal* at [12]). This is vastly different from the present case, where the defendant is claiming for a hypothetical sum of liquidated damages which he claims he was *deprived the opportunity of claiming*. I have explained that in this

case the defendant cannot claim liquidated damages from the plaintiff. Therefore, I find *Compact Metal* to be inapplicable to this present case.

700 Hence, the defendant is limited to general damages in respect of the third party's negligence in issuing the CC prematurely. However, the defendant has not adduced any evidence to quantify his loss. In the course of the proceedings, the defendant stated that he was no longer pursuing a claim in loss of rental income and I rejected his subsequent attempt to re-introduce this head of claim. In so far as the defendant claims that the delay in obtaining TOP was due to the third party's breach in its design duties, this is a separate issue which I shall address at [703] below. The defendant has neither pleaded nor adduced evidence showing any other losses he might have suffered by the third party's premature issuance of the CC. Accordingly, the court can only award nominal damages of $1,000 to the defendant.

701 In respect of the third party's decision to instruct the plaintiff to hold off on rectifying the steps and risers until after TOP Inspection 1, I have already explained that this constituted an act of prevention, such that the defendant can no longer claim for liquidated damages against the plaintiff. In light of this, the argument could be made that the third party was negligent in issuing such instructions, thereby costing the defendant the opportunity to claim liquidated damages against the plaintiff. However, this argument was not raised by the defendant in the pleadings or the submissions. The defendant has also not established whether the third party was negligent in issuing such instructions. The third party's instructions to the plaintiff to delay rectification works was

only raised by the defendant in relation to the third party's alleged breach of its duty to supervise the Project,[887] which I have dealt with above.

The defendant's claim in contract

702 The defendant submits that the third parties are liable for breach of contract based on the following:

(a) granting EOT 2 and EOT 3 in breach of the relevant EOT-related provisions in the Contract;[888]

(b) issuing the CC on 15 May 2013 certifying completion on 17 April 2013, in breach of the obligation under cl 31(13) of the SIA Conditions to "certify strictly in accordance with the terms of the Contract";[889]

(c) failing to issue a Delay Certificate, in breach of cl 24(1) of the SIA Conditions;[890]

(d) failing to account for non-compliant and/or defective work in the interim payment certificates and FC in breach of the obligation under cl 31(13) of the SIA Conditions to "certify strictly in accordance with the terms of the Contract;[891]

887 DWS at paras 569, 570 and 589.

888 DWS at paras 492–504.

889 DWS at paras 487, 505–511.

890 DWS at para 514.

891 DWS at paras 515–516.

(e) failing to act impartially in granting EOT 2 and EOT 3 and in the issuance of the CC, in breach of cl 1.1(10)(a) of the MOA;[892]

(f) failing to supervise the Project, in breach of the obligation under cl 1.1(7) of the MOA;[893]

(g) making unauthorised changes to the Project, in breach of cl 1.1(3) of the MOA, in respect of the intumescent paint, external boundary wall planters finish and timber decking;[894]

(h) failing to design the pavilion of Unit 12A in accordance with the BCA Regulations in breach of cl 1.1(2) of the MOA;[895] and

(i) failing to exercise a reasonable standard of skill and care, in breach of cl 1.1(1) of the MOA.[896]

703 These grounds are similar to those in the defendant's claim against the third party in the tort of negligence. I have already dealt with most of these issues in my decision on the defendant's claim in negligence, as well as the defendant's claim in unlawful means conspiracy. I shall only make two observations. First, I note that although the defendant made reference to the invisible grille in his pleadings, his specific claim (at [702(h)] above) in relation to the *design* of the pavilion of Unit 12A was not specifically pleaded.[897] This

892 DWS at paras 530 and 548.

893 DWS at paras 563–589.

894 DWS at paras 597–609.

895 DWS at paras 610–622.

896 DWS at para 482.

897 TPRS at para 36.

would have been sufficient to dismiss the defendant's claim, notwithstanding my further finding that the third party was not in fact negligent in designing the pavilion at Unit 12A. Secondly, I also reiterate that in relation to the premature issuance of the CC, I do not find that there was any improper motive underlying this. Rather, I accept the third party's explanation that it was an honest mistake. Therefore, as regards the defendant's claim at [702(e)] above, I find that the third party's premature issuance of the CC does not support the inference that it was not acting impartially.

704 I turn now to the defendant's claim at [702(g)] above in respect of the timber decking. The defendant alleges that the timber decking was not constructed in accordance with the contract drawings. While the contract drawings stipulated that the timber strips were to be removable, they were eventually affixed to the supporting structure of the Project.[898] For this, the defendant claims from the third party the sum of $51,167.[899]

705 I do not accept the defendant's claim, as the evidence shows that the defendant in fact agreed to such a change. As Mr Yong and Ms Chiyachan testified, the defendant decided not to proceed with planting trees in the basement. Therefore, the third party directed that the openings in the decking be covered by taking out the removable panels and having the original timber planks cover the entire length of the decking. This was due to safety concerns, which the defendant agreed to.[900] Furthermore, the defendant and his Assistants did not raise any objection, express or implied, during the course of the Project.

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898 DWS at paras 603–606.

899 DWS at para 609.

900 PY at paras 286–291; AEIC of Pakawadee Chiyachan at paras 241–248; TPRS at para 33; 17AB11259.

706 For the above reasons, I dismiss the defendant's claims in contract against the third party, save for its claim in respect of the third party's premature issuance of the CC, for which I award nominal damages (see [702(b)] above).

The plaintiff's claim

707 The plaintiff's claim revolves around the payment of sums that it avers it is owed following the completed construction of the Project.[901] To recapitulate, the claimed sums are based on and comprise the following:[902]

(a) The IC25 was issued by the third party on 3 September 2013, pursuant to the plaintiff's PC 25 dated 26 August 2013. On 3 September 2013, the plaintiff issued Tax Invoice No LP025 ("TI25") to the defendant for the sum certified under IC25 of $390,951.96 plus 7% GST of $27,366.64, totalling $418,318.60.

(b) The IC26 was issued by the third party on 6 November 2013, pursuant to the plaintiff's PC 26 dated 29 October 2013. On 6 November 2013, the plaintiff issued Tax Invoice No LP026 ("TI26") to the defendant for the sum certified under IC26 of $189,250.21 plus 7% GST of $13,247.51, totalling $202,497.72.

(c) The FC was issued by the third party on 22 June 2015. On 23 June 2015, the plaintiff issued Tax Invoice No LP-027 ("TI27") to the defendant for the sum certified under the FC of $451,494.54 plus 7% GST of $31,604.62, totalling $483.099.16.

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901 Plaintiff's Closing Submissions ("PCS") at paras 448–449.

902 PSOC at paras 6–16.

708 Each of the payment certificates issued by the third party had been preceded by a recommended valuation issued by F+G to the third party. I note that the sums within the recommended valuations all mirrored the values stated within IC25, IC26 and the FC.[903] However, this is not out of the ordinary, as explained by Mr Goh:[904]

> An architect has the full discretion to adopt the QS' evaluation and valuation of the works done in the construction project in a wholesale manner. Accordingly, *it is not surprising if an architect does so*. Even if there is a discrepancy between the architects and the QS' evaluations and valuations of the work done in the construction project, or a divergence between the architects and the QS' views on these matters, the QS will explain to the architects the reasoning between the QS' evaluation and valuation of the works done in the construction project, which the architects, cognisant of the QS' expertise and skills in this area, will generally understand and accept. As such, *architects will usually adopt the QS' evaluation and valuation of the works done in the construction project in a wholesale manner*. [emphasis added]

709 The plaintiff was entitled to payment from the defendant within a specified number of days following the issuance of a tax invoice. As stipulated in cl 31(16) of the SIA Conditions:[905]

> **Payment of Contractor**
>
> The Contractor will be paid the interim or the final payment (as the case may be) on the date immediately upon expiry of 35 days after (or otherwise by such time or on such day as stated in the Appendix), if the Contractor is a taxable person under the Goods and Services Tax Act who has submitted to the Employer a tax invoice for the interim or the final payment, in accordance to and in compliance with Section 8 of the SOP Act, the date the tax invoice is submitted to the Employer, or in any other case, the date on which or the period within which the payment response is required to be provided under Sub-Clause

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903 NPK Vol 2 at pp 863, 949; Vol 3 at p 1037.

904 RG at para 28.

905 5AB02964.

> (15)(a) or (15)(b) hereof (or otherwise by such time or on such day stated in the Appendix).

710 Notwithstanding the lapse of 35 days following each of the tax invoices issued, the defendant refused to make the relevant payments. The total sum due as a result of TI25, TI26 and TI27 amounts to $1,103,915.48. As evident from the defendant's payment response issued to the FC dated 1 July 2015,[906] the defendant refused to make payment to the plaintiff on the basis that he was entitled to make numerous deductions from the plaintiff's claim, such that the plaintiff was ultimately liable to pay him the sum of $1,282.397.23. Given my findings above regarding the accuracy and propriety of IC25, IC26 and the FC, I find that the plaintiff is entitled to the sums certified therein.

The Architect's Fee

711 The third party's claim against the defendant revolves around the payment of the Architect's Fee.[907] As mentioned above at [62], pursuant to cl 2 of the MOA, the third party was to be paid for its professional services, in accordance with the stipulations under the Schedule to the MOA.

712 The third party claims the following two outstanding payments. Firstly, pursuant to cl 2.2(m) of the MOA, 3% of the Architect's Fees became payable when the Project obtained the TOP. This amounts to $34,200.00 plus 7% GST of $2,394.00, totalling $36,594.00. Secondly, pursuant to cl 2.2(n) of the MOA, 2% of the Architect's Fees became payable when the Project obtained the CSC. This amounts to $22,800.00 plus 7% GST of $1,596.00, totalling $24,396.00.

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906 NPK Vol 3 at pp 1145–1382.

907 TPWS at para 339.

713 In this instance, the TOP for the Project was obtained on 16 September 2013, as explained above at [64]. Hence, there is no basis for the defendant to withhold the payment of $36,594.00. The defendant argues that the TOP was obtained several months after the contractual completion date and after two previous failed TOP inspections. Further, the Project remained unsuitable for occupation even after the issuance of the TOP due to its numerous defects.[908] However, these arguments simply miss the point. The relevant clauses, namely cll 2.1(5)(b) and 2.2(n) of the MOA, are unambiguous. These clauses are as follows:

> 2.1(5) This stage consists of:-
>
> …
>
> (b) Applying for an obtaining Temporary Occupation Permit (TOP), Certificate of Statutory Completion (CSC) and endorsement on plan on completion from the relevant authorities. Preparation and completion of as-built drawings.
>
> …
>
> 2.2 MANDATORY MODE OF PAYMENT FOR BASIC SERVICES IN STAGES
>
> …
>
> (n) For services as described in Clause 2.1(5)(b). On obtaining Temporary Occupation Permit (TOP) from the Building and Construction Authority.

714 It is clear from these clauses that no allowance is made for any deviations from the payment mechanism based on the types of arguments that the defendant now raises. This is further underscored by cl 1.3(2) of the MOA that states:

> …

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908 Defendant's Reply & Defense to Counterclaim (Amendment No 1) at para 44.

> All fees or charges due to the Architect shall not be reduced or withheld on *account of any dispute or question whatsoever* between the Client and the Building Contract or any other party.
>
> [emphasis added]

715 Similarly, the CSC for the Project was obtained on 12 May 2014, as explained above at [64]. Payment of $24,396.00 should, therefore, rightly have been made to the third party by the defendant. Clause 2.2(n) unambiguously states:

> 2.2 MANDATORY MODE OF PAYMENT FOR BASIC SERVICES IN STAGES
>
> …
>
> (n) For services as described in Clause 2.1(5)(b). On obtaining Certificate of Statutory Completion (CSC) from the Building and Construction Authority.

716 It is not in dispute that both of the sums remain unpaid to date. Therefore, in addition to the payment of the above sums, I find that the third party is also entitled to interest on those sums as a result of the defendant's failure to issue payment. This is pursuant to cl 1.3(6) of the MOA that provides:

> Without relieving the Client of the obligation to pay the account, the Client shall pay interest on all fees due and not paid within the period stated in the conditions or if no period is stated, within 14 days of rendering account. The interest shall be 3% above the prevailing prime rate.

717 Accordingly, the defendant is liable to pay to the third party the sum of $60,990 plus interest of 3% above the prime rate from the amount due date.

Expenses incurred in the summary judgment application

718 Having dealt with the parties' respective claims I now return to the issue of the summary judgment application. The defendant avers that he incurred $726,516.00 in defending against the plaintiff's application for summary

judgment, the subsequent appeals and related interlocutory applications. He further avers that as he only managed to recover $77,433.37 in legal costs from the plaintiff, the third party should be liable to compensate him for the outstanding costs he had incurred, amounting to the sum of $649,082.63. The defendant claims this on the basis that such costs had been incurred as "a consequence of the [third party's] issuance of these irregular and/or invalid certificates".[909] For instance, if the third party had not issued the CC prematurely, the defendant would have been able to set off liquidated damages against the sums certified in IC25 and IC26. As such, the plaintiff would not have had grounds to commence this Suit to enforce the certified payment claims against the defendant.[910]

719 I reject the defendant's claim against the third party for legal expenses. The defendant did not plead that he suffered loss of $649,082.63 as out-of-pocket legal expenses in defending the plaintiff's summary judgment application. This was only raised in the defendant's AEIC, where he exhibited copies of invoices from the solicitors representing him at the time of the summary judgment application.[911] On this ground alone this claim is dismissed. However, for completeness I shall deal with the merits of this claim.

720 Turning to the substantive merits of the claim, I observe first that there are some discrepancies in terms of the evidence.[912] It is not clear whether the work reflected in these invoices had been undertaken for the purpose of the

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909 DWS at paras 527–528; SKK at para 15.

910 DWS at paras 524–526.

911 TPWS at para 302; TPRS at paras 7–8; SKK at pp 163–172.

912 TPWS at para 302.

summary judgment application because no breakdown was provided by the defendant. When asked about this, the defendant insisted that based on his memory, his solicitors had only undertaken work in relation to the summary judgment application. However, he himself acknowledged that his memory might not be accurate, as follows:[913]

> Q: … Mr Ser, without a breakdown of the work done, we can't actually tell whether the work done was for the summary judgment or for other parts of the case; do you agree?
>
> A: Yes.
>
> …
>
> Q: … How do you know, looking at this invoice, that this work is 100 per cent for summary judgment?
>
> A: From my memory, they only do summary judgment.
>
> …
>
> Q: … Mr Ser, I am going to just simply put it to you that looking at these invoices, you can't tell whether it was for summary judgment work or for other work. Do you agree?
>
> A: I agree, but —
>
> Q: Okay.
>
> A: — as I say if you want to know exactly, I can write to them.
>
> …
>
> Q: … Are you saying — you appear to be saying that based on your memory, MPillay only did the Court of Appeal hearing; correct?
>
> A: Yes, because after Court of Appeal hearing, we move out from MPillay.
>
> Q: Okay. Mr Ser, could it be that your memory is incorrect?
>
> A: I'm not so, please tell me where.

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913 NEs, 23 January 2019 at p 41, line 23 to p 47, line 15; TPRS at para 10.

Q: You agree with me that your memory might be incorrect?

A: It can be.

721 It turned out that the defendant's memory was indeed incorrect. The third party relies on several letters dated 18 July 2014, 23 July 2014, 25 July 2014, 4 August 2014, 25 August 2014, 10 October 2014 and 5 June 2015.[914] These letters were from the defendant's previous solicitors to the third party's solicitors and the plaintiff's solicitors at the time, pertaining to matters separate from the summary judgment application. This was acknowledged by the defendant as follows:[915]

Q: You previously said that MPillay only did work relating to the summary judgment.

A: Yes.

Q: Right?

A: From —

Q: From memory.

A: From memory, yes.

Q: But, again, I have shown you quite clearly that your memory is wrong. Do you accept that?

A: Yes.

Q: … You claim the sum of $649,082.36 from my client; correct?

A: Yes.

Q: I also showed you that number is incorrect, do you agree?

A: Yes.

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914 35AB22324, 35AB22382; 35AB22606; 35AB22475; 36AB23103, 36AB23237.

915 NEs, 23 January 2019 at p 76, line 22 to p 77, line 18; TPRS at para 11.

> Q: And you also agreed that you had no other number to propose to this court as to what that claim should be; you agree?
>
> A: Yes. I got to look at these MPillay invoicing and take it out.

722 Moreover, the defendant also included invoices which appear to incorporate work done from 27 May 2015 to 12 April 2016. This period was *after* the summary judgment application was heard by the CA in *Ser Kim Koi (Court of Appeal)* ([67] *supra*). That suggests that the work reflected in these invoices could not have been done for the purposes of the summary judgment application. For these reasons, I find that the evidence adduced by the defendant is sorely lacking and unreliable in showing exactly how much he actually spent in relation to the summary judgment application.

723 More fundamentally, it should be noted that the summary judgment application was between the plaintiff and the defendant, as explained above at [65]–[68]. The third party was not a party to the proceedings in the summary judgment application. Its only involvement there was the filing of a brief affidavit in support of the plaintiff's application. As a non-party, the starting point here is clear: any costs arising out of the summary judgment application should not be borne by the third party. It is a matter that has to be resolved as between the plaintiff and the defendant. Furthermore, the application for summary judgment by the plaintiff related to IC25, IC26 and FC, which were properly issued by the third party.

724 The only possible legal leg upon which this claim for expenses against the third party can possibly stand is if the third party had actually conspired against the defendant. However, as established above at [70]–[675], there is no evidence of any conspiracy in this case. Accordingly, the defendant's claim

against the third party for legal expenses incurred in the summary judgment application must fail.[916]

Utility fees

725 The defendant also mounts a claim against the plaintiff for the utility fees of the Project.[917] This claim is based on items 26 and 27 of the Preliminaries of the Main Contract,[918] which require the plaintiff to provide and maintain water, lighting and electricity power supply up until the date of completion of the Project. Although the defendant's primary position is that the Project remains incomplete to date, he only seeks for the plaintiff to bear the cost of the utility fees until the handover date (*ie*, 23 July 2014).[919]

726 The plaintiff agreed to pay the utility fees when cross-examined in court as follows:[920]

> Q. Do you accept that under the main contract, GTMS has a contractual obligation to pay utility fees —
>
> A. Yes.
>
> Q. — until the date of completion?
>
> A. Yes.
>
> Q. Yes. You know it is Mr Ser's case that even up to today the project is actually not completed — or rather the completion certificate should not be issued because the steps and the risers remain unresolved. Right, Mr Tan?
>
> A. Yes.

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916 TPWS at para 302; TPRS at para 15.

917 DWS at para 36.

918 5AB02557.

919 SKK at paras 107–108.

920 NEs, 12 November 2018 at p 126, line 6 to p 127, line 5.

> Q. Mr Ser has made a claim that is set out in his AEIC for utility fees until the date of hand-over —
>
> A. Yes.
>
> Q. — of the project. I think that is 23 July 2014.
>
> A. Yes.
>
> Q. Do you accept that GTMS has to bear these utility fees?
>
> A. I did not reject.
>
> Q. Mr Tan, I think I need something more than that. Do you agree to pay or do you disagree to pay for this?
>
> A. As of now I would say I can agree to pay. Yes.
>
> Q. Up to the date of hand-over, that's 23 July 2014. Right?
>
> A. Yes.

727 This was also confirmed in a subsequent Agreed Statement of Facts tendered by the parties as follows:[921]

> The [plaintiff] has agreed to pay to the [defendant] utility fees for the Project up to the date of handover on 22 and 23 July 2014 in the amount S$27,916.82.

728 Accordingly, I order the plaintiff to make the necessary payment of $27,916.82 to the defendant for utility fees incurred.

The application for amendment of the defendant's further and better particulars

729 In the midst of the final tranche of the hearings, the defendant filed Summons No 871 of 2020 ("SUM 871/2020") to amend his further and better particulars (the "F&BP"). The F&BP was served on 9 March 2018, pursuant to the plaintiff's request dated 7 February 2018. The third tranche of the trial started on 18 February 2020 and on 25 February 2020, the defendant filed

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921 Agreed Statement of Facts at para 38.

SUM 871/2020 to amend its F&BP. There was no accompanying affidavit to this application.

730 In SUM 871/2020, the defendant sought to amend his case in relation to the claim for damages arising from the plaintiff's delay in the completion of the Project. In the defendant's view, this application was necessary to "correct the errors" in the F&BP.[922] Broadly, there were two key aspects in the application to amend the F&BP which substantially changed the defendant's counterclaim against the plaintiff:

(a) the claim for loss of rental income; and

(b) the relevant time period for the calculation of liquidated damages.

731 On 9 March 2020, after hearing the parties' arguments, I dismissed the defendant's application in SUM 871/2020. I shall now explain my reasons for not granting this application.

732 Order 20 r 5(1) of the Rules of Court is the applicable provision relating to the amendment of pleadings. The CA in *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 ("*Review Publishing*") at [110] and [113] reproduced O 20 r 5(1) of the Rules of Court and explained the legal principle as follows:

> 110 … O[rder] 20 r 5(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) gives the court a wide discretion to allow pleadings to be amended at any stage of the proceedings on such terms as may be just. Order 20 r 5(1) reads:

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922 Summons for Amendment filed in SUM 871/2020 dated 24 February 2020.

> Subject to Order 15, Rules 6, 6A, 7 and 8, and this Rule, the Court may *at any stage of the proceedings* allow the plaintiff to amend his writ, or any party to amend his pleading, *on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct*. …
>
> …
>
> 113 The guiding principle is that ***amendments to pleadings ought to be allowed if they would enable the real question and/or issue in controversy between the parties to be determined*** (see *Wright Norman v Oversea-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 ('*Wright Norman*') at [6], [*Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502] at [102], [*Asia Business Forum Pte Ltd v Long Ai Sin* [2004] 2 SLR(R) 173] at [10] and *Ketteman v Hansel Properties Ltd* [1987] AC 189 ('*Ketteman*') at 212; see also [*Singapore Civil Procedure 2007* (G P Selvam ed) (Sweet & Maxwell Asia, 2007)] at para 20/8/8 and [*Singapore Court Practice 2006* (Jeffrey Pinsler gen ed) (LexisNexis, 2006)] at para 20/5/3). However, an important caveat to granting leave for the amendment of pleadings is that it must be just to grant such leave, having regard to all the circumstances of the case. Thus, this court held in *Asia Business Forum* that the court, in determining whether to grant a party leave to amend his pleadings, ***must have regard to 'the justice of the case'*** (at [12]) and must bear in mind (at least) two key factors, namely, ***whether the amendments would cause any prejudice to the other party which cannot be compensated in costs*** and whether the party applying for leave to amend is ***'effectively asking for a second bite at the cherry'*** (at [18]). These two key factors were endorsed recently again by this court in [*Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737] at [58].
>
> [CA's emphasis in *Review Publishing* in italics; emphasis added in bold italics]

733 In my view, this application was made very late into the trial. The first tranche of the trial was from 8 November to 30 November 2018 and the second tranche was from 16 January to 31 January 2019. This application was made after the commencement of the third tranche of the trial and after the defendant had been extensively cross-examined by the plaintiff's and the third party's respective counsel. It seems that this application was an attempt to salvage the defendant's counterclaim against the plaintiff, which I shall elaborate below.

734 The original F&BP regarding the claim for loss of rental income and liquidated damages was similar to the defendant's Defence and Counterclaim on his claim against the plaintiff for the plaintiff's delay in the Project. No attempts were made to amend this aspect of the pleadings since the original Defence and Counterclaim was first filed in February 2014. Subsequently, three amendments were made to the Defence and Counterclaim. The latest was in October 2018. None of the amendments to the counterclaim related to the substance of the application. Hence, there had been no attempts to amend the pleadings on the defendant's claim for loss of rental income and liquidated damages until now (*ie*, more than six years later).

735 In relation to the F&BP, which was lodged on 9 March 2018, the defendant's answers significantly mirror the Defence and Counterclaim regarding his claim for loss of rental income and liquidated damages. No amendments were made to the F&BP for about two years. I am cognisant that delay *per se* does not equate to injustice (see *Review Publishing* at [114]–[115]; *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 212). In this case, however, it is undeniable that there was inordinate delay. This application arose because of damaging evidence given by the defendant in court when the plaintiff's and the third party's respective counsel cross-examined him. The amendments sought were effectively an attempt to get a second bite of the very same cherry that the defendant had earlier given up.

736 This can be seen from how, under the amendments, the defendant attempted, *inter alia*, to introduce a claim for loss of rental income as an alternative to liquidated damages. The proposed amendments to the F&BP were

as follows (the amendments sought are reflected in underline and strikethrough):[923]

> (a) Please state if the Defendant is claiming for the diminution in value due to the alleged non-completion of works or the costs of rectification to the alleged works or the costs for the total replacement of the said works; and
>
> Answer: SKK is claiming for liquidated damages and in the alternative loss of rent from the contractual completion date (i.e. 22 February 2013) to the date the Court finds that the **completion certificate** should have been issued under the contract ~~the Handover Date (i.e. 21 July 2014).~~
>
> [emphasis in original]

737 However, the defendant had clearly informed the court during his cross-examination that he did not wish to pursue a claim for the loss of rental income. He categorically stated:[924]

> Q: Going back to page 156, and I don't have an answer to this, or I don't have a clear answer to this, in this case are you still proceeding with your claim for rental income, "Yes" or "No"?
>
> A: Our claim is on liquidated damages.
>
> …
>
> Q: … As of today, Mr Ser, are you claiming for your claim for loss of rental income, "Yes" or "No".
>
> A: *No. We are claiming for liquidated damages.*
>
> [emphasis added]

738 The defendant had unequivocally and irrevocably stated that he did not intend to pursue a claim for the loss of rental income notwithstanding his claim for loss of rental income in his pleadings. It is clear that he is now only claiming

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923 Draft Amendments to F&BP at para 1.

924 NEs, 22 January 2019 at p 58, lines 11–25.

for liquidated damages. Therefore, it was not open to the defendant's counsel to subsequently seek to retract from that position through an amendment to the pleadings that was at odds with what the defendant himself had previously stated in court.

739 The defendant's counsel, initially, submitted that in re-examination the defendant had clarified that he was seeking the loss of rental income as an alternative claim. The third party's counsel challenged his recollection and the defendant's counsel sought an adjournment to check. This was granted. After the lunch adjournment the defendant's counsel conceded that he had erred and that he did not re-examine the defendant about the loss of rental income. Thus, on record, the defendant clearly stated in court that he did not wish to claim for the loss of rental income and he is only claiming for liquidated damages. Accordingly, the defendant's counsel indicated that he was not pursuing the amendment regarding the loss of rental income and that he would remove all references to the loss of rental income in the application. However, the defendant continued to pursue the other aspects of its application to amend his F&BP, in particular, amendments that related to the duration of the liquidated damages.

740 For this remaining aspect of the amendments, the defendant sought to extend the time period relevant to the calculation of the claim for liquidated damages. As seen from the quote in [736], the period for the defendant's original claim for liquidated damages was from 22 February 2013 to 21 July 2014 (*ie* from the contractual completion date to the handover date, a total of 515 days).

741 The defendant sought to amend the relevant dates, such that the claim for liquidated damages spanned from the contractual completion date (22 February 2013) to *today*. An example of such an amendment that was

sought is as follows (amendments sought are reflected in underline and strikethrough):[925]

> (b) Please state the quantum of damages claimed against the Plaintiff due to the said non-completion or late completion of the commissioning and/or testing of air-conditioning and mechanical ventilation works.
>
> Answer: SKK repeats paragraph 58D of his Defence and Counterclaim (Amendment No. 2). GTMS failed to complete the Project and/or failed to perform all that was required for the Architect to issue the CC, even up to today ~~the Handover Date~~. Therefore, as at today GTMS is at least liable to pay liquidated damages and in the alternative loss of rent for 2,558 ~~515~~ days' delay from the contractual completion date to today ~~the Handover Date~~ i.e. from 22 February 2013 to today ~~21 July 2014~~. The quantum of damages for liquidated damages arising out of 2,558 ~~515~~ days' delay is S$9,208,800.00 ~~S$1,854,000.00~~. …

742 As is evident, the amendments sought were extremely drastic. In effect, it multiplied the duration for which liquidated damages were being sought by almost five times, from 515 days to 2558 days and counting. Notwithstanding this drastic disparity, the defendant argued that this would be consistent with the initial pleadings. In particular, he relied on the following paragraph of the Defence and Counterclaim:[926]

> Therefore, GTMS is at least liable to pay liquidated damages for 515 days' delay from the contractual completion date to the Handover Date i.e. from 22 February 2013 to 21 July 2014.

743 The defendant argued that the words "at least" merely indicated a minimum number of days that was relevant to the claim for liquidated damages. It was, therefore, entirely consistent to allow the relevant amendments.

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925 Draft Amendments to F&BP at para 1.

926 DDCC at para 58D(d).

744 With due respect, I disagreed with the submissions of the defendant's counsel. The defendant's pleadings and the F&BP have to be considered in the context of his claim. Considering the entire paragraph quoted above at [742] in full, it is clear that the period for which liquidated damages were being claimed was specifically identified (*ie*, from the contractual completion date of 22 February 2013 to the handover date of 21 July 2014). To ensure that there was no misunderstanding regarding the period of liquidated damages the defendant's pleadings further indicated that this was for a total period of 515 days. This period of liquidated damages was consistently prescribed in the initial pleadings as well as the amended pleadings. There was simply no ambiguity or room for a contrary interpretation in this regard. This is emphasized and made even clearer beyond all doubt in a subsequent answer provided in the F&BP:[927]

> (b) Please state if these claims for losses and damages due to late completion overlap with the claims for liquidated damages by the Defendant in the D&CC.
>
> Answer: No it does not overlap. SKK is claiming for liquidated damages and in the alternative loss of rent from the contractual completion date (i.e. 22 February 2013) to the Handover Date (i.e. 21 July 2014). SKK is claiming for loss of rental from the date after the Handover Date until to date.
>
> [emphasis in original]

745 Therefore, there were two distinct periods of time in the defendant's claim for liquidated damages and loss of rental income which he was now not pursuing. The first was for liquidated damages for the period beginning on the completion date and ending on the handover date (*ie*, 22 February 2013 to 21 July 2014). The second was for the loss of rental income from the handover date (*ie*, 21 July 2014) to today.

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927 F&BP Amendment No 3 at para 27.

746 What the term "at least" referred to (see [742] above) was not the *duration or extent* of the claim as now alleged by the defendant, but rather the *type or nature* of claim that could be brought. For instance, the defendant is claiming other types of damages such as additional utility charges incurred arising from the delay. It would be a significant change to the defendant's claim for liquidated damages if the court had allowed the amendments proposed in SUM 871/2020. The trial had not only started but the plaintiff had testified and closed its case. This application, if granted, would have been a grave injustice, grossly unfair and highly prejudicial to the plaintiff. To the extent that the defendant is also seeking to make the third party liable for any liquidated damages the plaintiff is liable to pay the defendant, the third party would also be prejudiced. It is evident that the amendments were the consequence of the defendant's testimony in court when he said that he did not wish to claim for the loss of rental income. If the period for which liquidated damages are being claimed is limited to 515 days, this will reduce his claim significantly. This explained the motive behind the amendments proposed in SUM 871/2020.

747 Accordingly, I dismissed the application in SUM 871/2020. On the issue of costs, under the Costs Guidelines in Appendix G, an application for the amendment of pleadings is in the range of $1,000 to $6,000. The plaintiff sought costs of $5,000 while the third party asked for $3,500. The defendant proposed costs of $1,000. I ordered the defendant to pay the costs of SUM 871/2020 to the plaintiff and the third party fixed at $2,000 each, inclusive of disbursements.

748 Despite the dismissal of SUM 871/2020, the defendant continued to pursue and make submissions that he is claiming from the plaintiff and/or the third party liquidated damages up till today instead of the handover date, *ie*, 21 July 2014.

Conclusion

749 For the above reasons, I issue the following orders:

(a) In relation to the plaintiff's claim against the defendant, I allow the plaintiff's claim against the defendant for the sums due under TI25, TI26 and TI27, amounting to $1,103,915.48 in total.

(b) In relation to the defendant's counterclaim against the plaintiff:

(i) I dismiss the defendant's claim against the plaintiff that there was a conspiracy between the plaintiff and the third party to injure the defendant.

(ii) I dismiss the defendant's claim against the plaintiff for liquidated damages of $3,600 per calendar day of delay from 21 February 2013 (the original contractual completion date) to present.

(iii) I dismiss the defendant's claim against the plaintiff for the loss of rental income due to the delay by the plaintiff in the completion of the Project.

(iv) I dismiss the defendant's claim against the plaintiff for the costs of rectifying the dented/punctured gas pipe.

(v) I dismiss the defendant's claim against the plaintiff for the costs of rectifying the alleged cracks, tonality, stains and other forms of impurities in the Volakas marble flooring.

(vi) I dismiss the defendant's claim against the plaintiff for the costs of rectifying the alleged cracks, splinters, stains and differences in tonality in the ironwood at the timber decking.

(vii) I dismiss the defendant's claim against the plaintiff for the costs of rectifying the alleged variance in tonality of the Indian rosewood timber floor finish and other defects.

(viii) I dismiss the defendant's claim against the plaintiff for the costs of rectifying the alleged defects in relation to the aluminium cappings at the rooftop.

(ix) I dismiss the defendant's claim against the plaintiff for damages in relation to the steps and risers, which were in compliance with the statutory requirements as of 28 May 2013.

(x) I dismiss the defendant's claim against the plaintiff for the costs of rectifying the alleged leakage in the swimming pools. However, I find that there were leaks from the screed at the capping edge of the swimming pools and these have to be rectified. The cost of rectification works for the three swimming pools is estimated at $13,816.40. The plaintiff is to pay this sum to the defendant.

(xi) I allow the defendant's claim for the costs of rectifying the grouting in the swimming pools as the plaintiff failed to maintain the pH value of the water in the swimming pools before the Project was handed over to the defendant. The plaintiff is to pay the defendant $4,555.20.

(xii) I allow the defendant's claim against the plaintiff for the amount overpaid in respect of the missing trellis beam, amounting to $708.40.

(xiii) I dismiss the defendant's claim in respect of the intumescent paint applied to the trellis beams, except for the

peeling of the intumescent paint in the three trellis beams of Unit 12A of the Project. However, given that the defendant has failed to adequately quantify the costs of rectification works and failed to mitigate his loss, I order the plaintiff to pay to the defendant nominal damages of $500 for the peeling intumescent paint.

(xiv) I dismiss the defendant's claim against the plaintiff for damages in relation to the change to plaster and paint finish of the external boundary wall instead of an off-form finish.

(xv) I dismiss the defendant's claim against the plaintiff for damages in relation to the supply and backfilling of the Project with ASM soil rather than loamy soil.

(xvi) I dismiss the defendant's claim against the plaintiff for damages in relation to the alleged defective sliding glass doors.

(xvii) I dismiss the defendant's claim for an account of moneys for the $787,742.09 paid by the defendant to the plaintiff for the PC Sum.

(xviii) I dismiss the defendant's claim for an account of moneys for the $1,757,835 paid by the defendant to the plaintiff for the PC Rate items. I also reject the defendant's method of adjustment for the PC Rate items and instead accept the adjustment methodology of Mr Ng, the defendant's QS for the PC Rate items.

(xix) I allow the defendant's claim against the plaintiff for all utility fees incurred in the Project up to 23 July 2014 (the date when the Project was handed over to the defendant), amounting to $27,916.82.

(c) In relation to the defendant's counterclaim against the third parties:

(i) I dismiss the defendant's claims against the second third party as the defendant failed to sign and return the deed of novation. The second third party was acting as the first third party's agent at all times. Furthermore, the second third party did not owe the defendant a duty of care.

(ii) I dismiss the defendant's claim against the third parties that there was a conspiracy between the plaintiff and the third parties to injure the defendant.

(iii) I dismiss the defendant's claim against the third party in contract and in negligence, save that I allow the defendant's claim against the third party for the premature issuance of the CC. However, since the defendant has failed to prove his loss, I award nominal damages amounting to $1,000.

(iv) I dismiss the defendant's claim against the third party for the expenses incurred by the defendant in defending against the plaintiff's summary judgment application.

(d) In relation to the third party's counterclaim against the defendant, I allow the third party's claim against the defendant for the Architect's Fees due upon obtaining the TOP and the CSC for the Project, amounting to $60,990 plus interest of 3% above the prime rate from the amount due date. The third party has acknowledged that the defendant is entitled to set-off the sum of $10,388.56 from this amount.

> This results in a final amount of $50,601.44 that is due from the defendant to the third party.[928]

750 I shall now hear parties on the issue of costs.

Tan Siong Thye
Judge of the High Court

Thulasidas s/o Rengasamy Suppramaniam and Mendel Yap (Ling Das & Partners) for the plaintiff;
Chong Chi Chuin Christopher, Josh Samuel Tan Wensu, Chen Zhihui and Calvin Lee (Drew & Napier LLC) for the defendant;
Thio Shen Yi SC, Monisha Cheong, Md Noor E Adnaan and Uday Duggal (TSMP Law Corporation) for the third parties.

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928 TPCN at para 95; NEs, 4 June 2020 at p 167, line 20 to p 168, line 18.

Annex A: First page of IC24

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CSYA

Contractor's copy

INTERIM CERTIFICATE No: 24

Project : Main Contract Works at 12 Leedon Park

Date of Certificate: 1 July 2013

Date of Valuation : 30 May 2013

Contractor :
GTMS Construction Pte Ltd
37 Jalan Pemimpin #04-01C
Block A Clarus Centre S(577177)

Original Contract Sum	:	$ 13,130,000.00
Variations to Date	:	$ -
Adjusted Contract Sum	:	$ -

Pursuant to Clause 31(1) of the Contract Conditions, I hereby certify that the total value under the Contract of the work and materials carried out and delivered by the Contractor calculated in accordance with Clause 31(2) of the Contract Conditions was as follows:

Work carried out by Contractor	$	11,271,923.84
(less retention)	$	644,195.65
Unfixed Goods and Materials	$	0.00
(less retention at %)	$	0.00
Nominated Sub-Contractor or Supplier or Designated PC Work	$	
(a)Sanitary Wares, Fittings & Accessories	$	122,104.88
(less retention) – Not Applicable	$	0.00
(b)Built-in Kitchen Cabinet & Appliances	$	276,422.80
(less retention)	$	6,910.57
(c)Built-in Wardrobe/Cabinet	$	215,751.20
(less retention)	$	5,393.78
(d)Ironmongery _ Ewins Pte Ltd	$	27,343.30
(Less retention) – Not Applicable		0.00
(e) Landscaping	$	120,000.00
(Less retention) – Not Applicable	$	0.00
(f) Ironmongery - Keong Industries Pte Ltd	$	9,350.00
(Less retention) - Not Applicable	$	0.00
Unfixed Goods and Materials	$	0.00
(less retention at %)	$	0.00
TOTAL	$	11,386,396.02
Less Sums previously certified	$	11,172,477.37
AMOUNT DUE (EXCLUDING GST)	$	213,918.65

CERTIFIED BY

CHAN SAU YAN, SONNY
ARCHITECT

DISTRIBUTION

[x] Client	Mr & Mrs Ser
[x] C&S Engr	Web Structures
[x] M&E Engr	Chee Choon & Associates
[x] QS	Faithful & Gould

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Annex B: Summary of IVs (Exhibit P29)

P29

PROPOSED ERECTION OF 3 UNITS OF 2 STOREY DETACHED DWELLING HOUSE WITH A BASEMENT AND A SWIMMING POOL AT LOT 98388L, MUKIM 04 LEEDON PARK (BUKIT TIMAH PLANNING AREA)

SUMMARY

S/N	DESCRIPTION	CONTRACT SUM ($)	%	IV 22 Cumulative Amount Recommended for Payment ($)	%	IV 23 Cumulative Amount Recommended for Payment ($)	Net Amount Recommended for Payment ($)	%	% based on FA	IV 24 Cumulative Amount Recommended for Payment ($)	Net Amount Recommended for Payment ($)	%	% based on FA	IV 25 Cumulative Amount Recommended for Payment ($)	Net Amount Recommended for Payment ($)	%	% based on FA	IV 26 Cumulative Amount Recommended for Payment ($)	Net Amount Recommended for Payment ($)	%	IV 27 (Final) Cumulative Amount Recommended for Payment ($)	Net Amount Recommended for Payment ($)
1	Preliminaries	972,198.00	94.56%	919,268.00	94.56%	919,268.00	-	94.56%		919,268.00	-	98.11%		953,798.00	34,530.00	98.97%		962,198.00	8,400.00	100.00%	972,198.00	10,000.00
2	Prime Cost & Provisional Sums	1,225,990.00	47.57%	583,229.26	48.62%	596,015.15	12,785.89	64.28%	100.05%	788,126.80	192,111.75	64.28%	100.05%	788,126.80	-	64.29%	100.05%	788,146.09	19.19	100.00%	1,225,990.00	437,843.91
3	Main Building Works Unit 12	2,662,770.09	95.73%	2,549,179.32	95.73%	2,549,179.32	-	95.73%		2,549,179.32	-	95.73%		2,549,179.32	-	100.00%		2,662,770.09	113,590.77	100.00%	2,662,770.09	-
	Unit 12A	2,563,744.00	95.50%	2,448,269.82	95.50%	2,448,269.82	-	95.50%		2,448,269.82	-	95.50%		2,448,269.82	-	100.00%		2,563,744.00	115,474.38	100.00%	2,563,744.00	-
	Unit 12B	2,423,912.34	95.51%	2,315,084.55	95.51%	2,315,084.55	-	95.51%		2,315,084.55	-	95.51%		2,315,084.55	-	100.00%		2,423,912.34	108,827.79	100.00%	2,423,912.34	-
4	External Works Unit 12	272,131.54	99.63%	271,131.54	99.63%	271,131.54	-	99.63%		271,131.54	-	99.63%		271,131.54	-	99.63%		271,131.54	-	100.00%	272,131.54	1,000.00
	Unit 12A	508,303.90	99.80%	508,303.90	99.80%	508,303.90	-	99.80%		508,303.90	-	99.80%		508,303.90	-	99.80%		508,303.90	-	100.00%	509,303.90	1,000.00
	Unit 12B	265,946.13	99.62%	264,946.13	99.62%	264,946.13	-	99.62%		264,946.13	-	99.62%		264,946.13	-	99.62%		264,946.13	-	100.00%	265,946.13	1,000.00
5	M&E Works	2,294,002.00	82.58%	1,894,387.77	86.33%	1,980,795.78	86,408.01	87.30%	97.36%	2,002,712.59	21,916.81	98.54%	98.74%	2,091,200.59	88,488.00	98.86%	110.22%	2,267,956.00	234,755.41	100.00%	2,294,002.00	26,046.00
	Total Cumulative Value of Work Done	13,160,000.00	86.11%	11,753,802.09	89.65%	11,952,955.99	99,193.90	91.49%	97.17%	12,067,324.85	214,028.86	91.96%	97.85%	12,150,042.85	83,018.00	96.38%	102.38%	12,713,110.09	563,067.24		13,160,000.00	476,889.91
6	Less Lump Sum Discount	(80,000.00)		(56,020.88)		(56,454.22)	(433.34)			(56,564.13)	(109.91)			(56,880.17)	(316.04)			(59,804.18)	(2,924.01)		(60,000.00)	(195.82)
	Total Cumulative Value of Work Done After Lump Sum Discount	13,130,000.00		11,697,781.21		11,796,541.77	98,760.56			12,010,460.42	213,918.65			12,073,162.38	62,701.96			12,653,305.91	580,143.53		13,130,000.00	476,694.09
7	Variations a) Builder's Works			8,088.72		32,435.60	24,346.88			32,435.60	-			32,435.60	-			(152,852.31)	(185,287.91)		(474,938.33)	(322,146.02)
	b) M&E Works																	(205,605.41)	(205,605.41)		(239,508.34)	(31,303.53)
	Total Cumulative Value of Work Done Before Retention Adjustment			11,705,869.93		11,828,977.37	123,107.44			12,042,896.02	213,918.65			12,105,597.98	62,701.96			12,294,846.19	189,250.21		12,418,092.73	123,244.54
8	Less Retention			(556,500.00)		(556,500.00)	-			(556,500.00)	-			(328,250.00)	328,250.00			(239,250.00)	-		-	328,250.00
9	Total Cumulative Value of Work Done After Retention Less Previous Payment			11,049,369.93 (10,445,368.41)		11,172,477.37 (11,049,369.93)	123,107.44			11,386,396.02 (11,172,477.37)	213,918.65			11,777,347.98 (11,386,396.02)	390,951.96			11,960,596.19 (11,777,347.99)	189,250.21		12,418,092.73 (11,966,598.19)	451,494.54
	Amount Due to Contractor (excluding GST)			604,001.52		123,107.44				213,918.65				390,951.98				189,250.21			451,494.54	