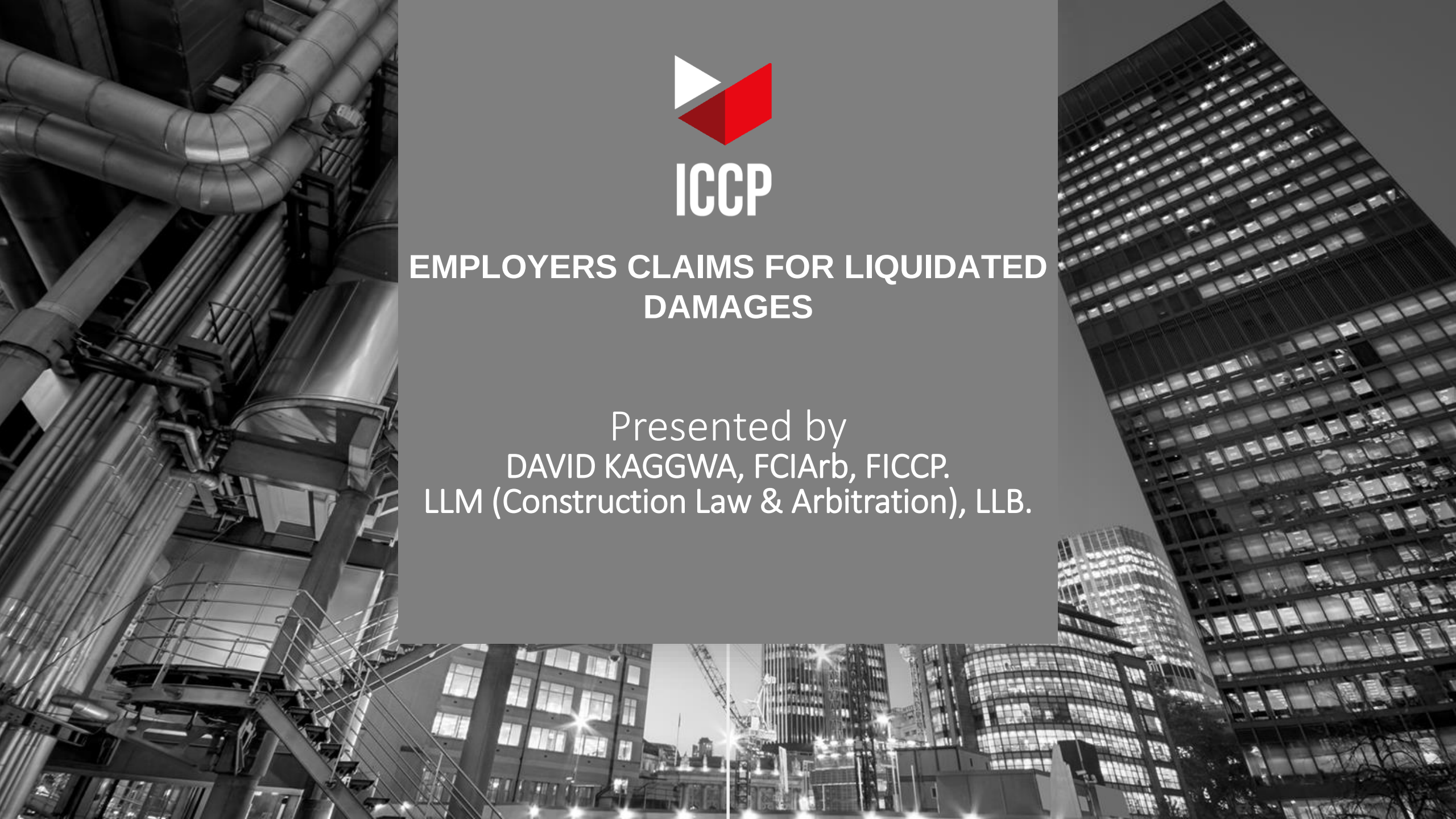

EMPLOYERS CLAIMS FOR LIQUIDATED DAMAGES

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INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

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TODAY'S WEBINAR

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- WHAT ARE LIQUIDATED DAMAGES/DELAY DAMAGES?
- HOW DO THEY ARISE?
- ELEMENTS OF A CLAIM FOR DELAY DAMAGES.
- ENFORCEMENT OF DELAY DAMAGES.
- PENALTY CLAUSES.
- THE PREVENTION PRINCIPLE.
- TIME AT LARGE.

WHAT ARE LIQUIDATED DAMAGES?

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- In the FIDIC 2017 Redbook, Sub-Clause 1.1.28, Delay Damages mean the damages for which the Contractor shall be liable under Sub-Clause 8.8 *[Delay Damages]* for failure to comply with Sub-Clause 8.2 *[Time for Completion].*

- The term Liquidated Damages is used in the JCT Contract while Delay Damages is used in the FIDIC Contract but they all relate to a pre-agreed fixed sum to which the Contractor is liable to pay the Employer should it fail to complete the Works by the Time for Completion.

- These funds are typically deducted from what the Employer owes the Contractor for the work executed.

WHAT ARE LIQUIDATED DAMAGES?

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- Time for Completion means the time for completing the Works or a Section under Sub Clause 8.2 *[Time for Completion]*, as stated in the Contract Data as may be extended under Sub-Clause 8.5 *[Extension of Time for Completion]*, calculated from the Commencement Date.

- Commencement date means the date as stated in the Engineer's Notice issued under Sub-Clause 8.1 *[Commencement of Works].*

- FIDIC 1999 Redbook Sub-Clause 8.7 provides that these delay damages shall be the sum stated in the Appendix to Tender, which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over-Certificate.

WHAT ARE LIQUIDATED DAMAGES?

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- FIDIC 2017 Sub-Clause 8.8, states that Delay Damages is the amount stated in the Contract Data, which shall be paid for every day which shall elapse between the Time for Completion and the date for Completion of the Works or Section.

- The benefit of delay damages is that they avoid the complexity of proving and assessing the actual loss where a delay occurs.

WHAT ARE LIQUIDATED DAMAGES?

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- To avoid payment of delay damages, in case of an Employer caused delay, a Contactor must follow the Claim Procure under the FIDIC 2017 Sub-Clause 20.2 *[Claims for Payment and/or EOT]* and obtain an Extension of Time.

- The purpose of an Extension of Time is to negate any claim for Delay Damages during the extended period.

EMPLOYER'S CLAIM FOR DELAY DAMAGES

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

SC 8.7 FIDIC 1999	SC 8.8 FIDIC 2017
• Employer to issue a Notice subject to Sub-Clause 2.5 [*Employer's Claims*]. • Notice to be given as soon as practicable. • Simpler claim procedure under Sub-Clause 2.5. • Delay Damages are capped as stated in the Appendix to Tender.	• Employer to give a Notice subject to Sub-Clause 20.2 [Claims for Payment and/or EOT]. • Notice to be given within 28 days. • Detailed Claim procedure similar for both Employer and Contractor. • Delay Damages are capped as stated in the Contract Data. However, that cap will not apply "in any case of fraud, deliberate default or reckless misconduct…"

ELEMENTS OF A CLAIM FOR DELAY DAMAGES

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- There must be a contract with a clause that allows a claim for delay damages.
- The Contract must have a date for practical completion or a mechanism to extend such a date.
- The Contract must include a mechanism for computation of delay damages.

HOW TO CLAIM FOR DELAY DAMAGES

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- The FIDIC Sub-Clause 2.5 FIDIC 1999 and the FIDIC Sub-Clauses 8.8 and 20.2 FIDIC 2017, the Employer's right to claim Delay Damages from the Contractor is well stipulated.

- The Delay Damages are expressed in the Contract Data as a percentage of the final Contract Price. These damages can also be capped at a maximum percentage of the final Contract Price.

- In both FIDIC 1999 and 2017, the Employer is required to issue a Notice as a prerequisite for its claim for Delay Damages.

NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago), the Court held:

"…it is hard to see how the words of clause 2.5 could be clearer. Its purpose is to ensure that claims which an employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given 'as soon as practicable'.

NOTICE BY EMPLOYER

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- Whereas an Employer is obliged to issue a Notice to the Contractor and present a claim for Delay Damages before the Engineer who is obliged to issue a Determination under the FIDIC Sub-Clause 3.5 (Red Book 1999).
- The Court had a different view in ***J Murphy & Sons Ltd v Beckton Energy Ltd*** that: -

  "The Employer's right to delay damages was not conditional upon an agreement or determination by the Engineer, Sub-clause 8.7 set out a self-contained regime for the trigger and payment of delay damages. A call on the bond would not be found to be fraudulent where the Employer believed it was entitled to delay damages under Sub-Clause 8.7, even though no entitlement had been determined under Sub-clauses 2.5 and 3.5"

ENFORCEMENT OF DELAY DAMAGES.

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- The amount of Delay Damages must be a reasonable estimate of the anticipated or actual loss caused to the Employer by the delay.

- The UK Supreme Court laid down the test in ***Cavendish Square Holding BV v Talal El Makdessi.*** The test is whether the delay damages clause protects any legitimate business interest.

- If so, whether the clause is extravagant, exorbitant or unconscionable. In cases where delay damages are proved to be unconscionable, such a clause may be declared by a Court to be unenforceable.

ENFORCEMENT OF DELAY DAMAGES.

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- In ***Triple Point Technology, Inc v PTT Public Company Ltd*** the Supreme Court in UK clarified that Liquidated damages are payable up to the date of termination, with general damages available thereafter.

- The Employer's interest is to have the Contractor perform the Contract, the Employer cannot have an interest in simply punishing the Contractor.

ENFORCEMENT OF DELAY DAMAGES.

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

The High Court in Uganda, ***Roko Construction Limited v Kobusinge Janet***, while setting aside part of an Arbitral Award held as follows:

"Liquidated damages are a way of pre-estimating the loss that will be suffered, usually as a result of delay, at the time the contract is entered into. In this sense liquidated damages provide certainty to both parties whose rights and liabilities are now fixed. A valid and mandatory liquidated damages clause which stipulates a positive amount of liquidated damages will evidence an intention by the parties that general damages cannot be claimed. The award of general damages on top of or in addition to liquidated and ascertained damages is a fundamentally erroneous proposition of law stated in the award such that a serious irregularity has occurred which has caused substantial injustice to the Applicant.

DELAY DAMAGES AS A PENALTY.

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- A penalty is a contractual clause that imposes liquidated damages that are unreasonably high.
- Such damages represent a punishment for breach, rather than a reasonable forecast of damages for the harm that is caused by the breach.
- A Contractor may challenge a Delay Damages clause if he argues that it is a penalty and not a genuine estimate of the losses that will be incurred by the Employer as a result of delays.

DELAY DAMAGES AS A PENALTY

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- In South Africa under the Conventional Penalties Act, the court can reduce the amount of Delay Damages that might be applicable if the Contractor can show that the Employer will be unjustly enriched if he receives the Delay Damages as specified in the Contract.
- In the UAE, the Court is empowered to vary the parties' agreement on Delay Damages to reflect the actual loss by reducing the Employer's claim or by setting them aside.
- If the amount to be paid as delay damages is greater than that which ought to have been paid, then it is a penalty. ***Dunlop Pneumatic Tyre Co. Ltd v New Garage and Motor Limited.***

DELAY DAMAGES AS A PENALTY

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- In ***Grocon Constructions (Qld) Pty Ltd v Juniper Developer***, the Queensland Supreme Court held that in determining whether a rate of Liquidated Damages stipulated in a contract constitutes a genuine pre-estimate of the non-defaulting party's loss, consideration must be given to the parties' negotiations in respect of Liquidated Damages.
- Employer had provided to the Contractor a detailed breakdown of its potential losses if practical completion of the project had not been achieved.
- The parties had equal bargaining power at the time of negotiating the contract.

DELAY DAMAGES AS A PENALTY

- The losses that will be suffered by the non-defaulting party, as a result of it being unable to use the works or the site from the date it could expect to as per the time frame for completion, must be accurately reflected by the rate specified in the contract.
- The Supreme Court held that the liquidated damages clause was a genuine pre-estimate of loss and therefore upheld it.
- The onus, of course, is on the Contractor to show that the penalty is out of proportion to the loss suffered by the Employer.

THE PREVENTION PRINCIPLE

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- The 'prevention principle' is a legal doctrine that protects a contractor from liquidated damages for delays caused by the Employer.
- The rationale for the rule is that a party to a contract should not be permitted to profit from its own default.
- An Employer may not enforce a Delay Damages clause against a Contractor where it is proved by the Contractor that it was prevented by the Employer from performing its obligations under the Contract.

THE PREVENTION PRINCIPLE

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- Lord Denning, in ***Amalgamated Building Contractors Ltd v Waltham Holy Cross Urban District Council***, said: *"… the building owner cannot insist on a condition if it is his own fault that the condition has not been fulfilled."*

- Brooking J in ***SMK Cabinets v Hili Modern Electrics Pty Ltd*** described the prevention principle as being *"grounded upon considerations of fairness and reasonableness"*.

THE PREVENTION PRINCIPLE

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- A Contractor may rely on the prevention principle in cases of breach of contract by the Employer such as failure to give access to site (FIDIC Red 1999 Sub-Clause 2.1) or a delay in issuing designs or instructions (FIDIC Red 1999 Sub-Clause 1.9).

- The prevention principle would apply even when the Employer's actions are legitimate, such as issuing a Variation Instruction. (FIDIC Red 1999 Sub-Clause 13.1).

THE PREVENTION PRINCIPLE

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

The prevention principle was set out in **Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board,**

"It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if the other party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."

THE PREVENTION PRINCIPLE

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- If the Employer does not extend the contract or there no mechanisms for extension of the Contract, the Contractor may rely on the prevention principle and avoid paying delay damages.
- FIDIC Sub-Clause 8.5*(e)* allows a Contractor to Claim for Extension of Time for any delay, impediment or prevention caused by or attributable to the Employer.
- The above clause was meant to provide a solution to the prevention principle in that a Contractor must claim for EOT when prevented, if not this will safe guard the Employer's right to Delay Damages.

TIME AT LARGE

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- Where the Contract does not provide for how to deal with an Employer's delay or
- If the Engineer ignores the Contractor's request for extension of time, the Employer will no longer be entitled to require the Contractor to complete the works by the contractual Time for Completion.
- Time will be at large.

Miller v London County Council (1934) where the Court held thus:

"...even if the clause had provided for an extension of time on account of the delay caused by the contractor, the failure in this case of the architect to extend the time would be fatal to the claim for liquidated damages. There had clearly been some delay on the part of the corporation. Accordingly, as the architect has not made 'by writing under his hand such an extension of time' there is no date under the contract from which the defendants' liability to pay liquidated damages for delay could be measured. And therefore, none can be recovered."

TIME AT LARGE

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- In situations where the Original Completion date ceases to apply, Time will be at Large and the Contractor is required to complete the works within a reasonable time.
- When time is at large, the Employer is not entitled to Delay Damages but to General Damages in case the Contractor fails to complete the works within a reasonable time.
- Reasonable time for completion is a matter of fact to be decided by a Court or Arbitrator when the claim arises but the Contractor bears the burden of proof. ***(Shawton Engineering Ltd v DGP International Ltd.)***

CONCLUSION

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

- The primary purpose of an extension of time provision is to preserve a Contractor's obligation to complete within a specified time and to avoid Time being at Large.
- The Extension of Time Sub-Clause 8.5 FIDIC 2017, preserves the Employer's right to Delay Damages under the contract, even when, by act of prevention, the Employer has delayed the Contractor and is responsible in part for the late completion.
- The Contract Data on Delay Damages must be reasonable in relation to the Employer's loss in case of delay in Completion.

QUESTIONS

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

CONTACT DETAILS

INSTITUTE OF CONSTRUCTION CLAIMS PRACTITIONERS

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

[2022] SGHC(A) 34

Civil Appeal No 20 of 2021

Between

Ser Kim Koi

… *Appellant*

And

(1) GTMS Construction Pte Ltd
(2) Chan Sau Yan (formerly known as trading as Chan Sau Yan Associates)
(3) CSYA Pte Ltd

… *Respondents*

Civil Appeal No 36 of 2021

Between

Ser Kim Koi

… *Appellant*

And

(1) GTMS Construction Pte Ltd
(2) Chan Sau Yan (formerly known as trading as Chan Sau Yan Associates)

(3) CSYA Pte Ltd

… *Respondents*

In the matter of Suit No 50 of 2014

Between

GTMS Construction Pte Ltd

… *Plaintiff*

And

Ser Kim Koi

… *Defendant*

And

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

… Third Parties in counterclaim

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 contract] — [Singapore Institute of Architects standard form contracts]
[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] — [Construction torts] — [Negligence]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Ser Kim Koi
v
GTMS Construction Pte Ltd and others and another appeal

[2022] SGHC(A) 34

Appellate Division of the High Court — Civil Appeals Nos 20 and 36 of 2021
Woo Bih Li JAD, Quentin Loh JAD and Chua Lee Ming J
22 July 2021

3 October 2022 Judgment reserved.

Quentin Loh JAD (delivering the judgment of the court):

Introduction

1 This is a bitterly fought and long running dispute between Mr Ser Kim Koi ("Mr Ser"), the owner of No. 12, No. 12A and No. 12B Leedon Park (collectively, the "Project"), his building contractor, GTMS Construction Pte Ltd ("GTMS"), as well as his architect, Mr Chan Sau Yan ("Mr Chan"). Mr Chan practised under a sole proprietorship, Chan Sau Yan Associates ("CSYA"). In October 2011, Mr Chan incorporated CSYA Pte Ltd and thereafter carried out his practice thereunder. References to Mr Chan will include CSYA and/or CSYA Pte Ltd, as the context shall require.

2 Mr Ser owned the plot of land, Lot 98388L, Mukim IV, at Leedon Park and decided to build three good class bungalows on that plot. They were designated No. 12, No. 12A and No. 12B by the relevant authorities. Mr Ser

engaged Mr Chan as his architect under a memorandum of agreement dated 16 June 2009 ("MOA")[1] and subsequently engaged GTMS, on the Singapore Institute of Architects, Articles and Conditions of Building Contract (Lump Sum Contract) (9th Ed, September 2010) (the "SIA Conditions"), to construct the three bungalows. The construction works and the parties' relationship started off well, but unfortunately as the works progressed, things did not proceed smoothly and it rapidly descended into acrimonious disputes between Mr Ser, GTMS, and Mr Chan.

3 In *GTMS Construction Pte Ltd v Ser Kim Koi (Chan Sau Yan and Chan Sau Yan Associates, third parties)* [2015] 1 SLR 671, GTMS applied for summary judgment against Mr Ser on the basis of two Interim Payment Certificates 25 and 26 ("IC 25" and "IC 26" respectively) which were issued by Mr Chan. Mr Ser resisted the application arguing that IC 25 and IC 26 were tainted by fraud. GTMS prevailed before the High Court but on appeal (see *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 (the "CA Judgment")), the Court of Appeal (the "CA") set aside the summary judgment. The CA found that on the evidence presented before it, neither IC 25 nor IC 26 had temporary finality (CA Judgment at [70]–[92]) and Mr Chan had issued the Completion Certificate ("CC"), IC 25, and IC 26 improperly, without belief in their truth and/or recklessly, without caring whether they were true or false. The CA also held that the fraud exception in cl 31(13) of the SIA Conditions included recklessness in certification (CA Judgment at [38]–[40]). Further the CC, IC 25 and IC 26 were not properly issued under the SIA Conditions (CA Judgment at [98]).

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[1] Appellant's Core Bundle ("ACB") Vol II(A) at pp 63–79.

4 The dispute then went back before the High Court for trial (the "Suit"). GTMS claimed unpaid sums from Mr Ser arising from two interim payment claims (*ie*, IC 25 and IC 26) and the final payment claim that were certified by Mr Chan. Mr Ser, in counterclaim, mounted a litany of allegations that GTMS and Mr Chan had entered into an unlawful means conspiracy against him by, among other things, improperly granting extensions of time, certifying as satisfactory deficient works that were not rectified, and certifying the Project as being complete when it was not safe for occupation. Mr Ser also alleged other contractual and tortious claims against GTMS and Mr Chan. In response, Mr Chan counterclaimed against Mr Ser for unpaid architect's fees.

5 After a trial spanning close to 60 days, the High Court judge (the "Judge"), in a detailed judgment spanning some 419 pages, allowed GTMS's and Mr Chan's claims. However, he dismissed the bulk of Mr Ser's claims. The Judge's decision is reported in *GTMS Construction Pte Ltd v Ser Kim Koi (Chan Sau Yan (formerly trading as Chan Sau Yan Associates) and another, third parties)* [2021] SGHC 9 (the "Judgment"). Thereafter, the Judge issued a supplemental judgment on costs in *GTMS Construction Pte Ltd v Ser Kim Koi (Chan Sau Yan (formerly trading as Chan Sau Yan Associates) and another, third parties)* [2021] SGHC 33 (the "Costs Judgment"), in which he ordered, among other things, for Mr Ser to pay part of the costs of the action to GTMS and Mr Chan on an indemnity basis.

6 Dissatisfied, Mr Ser appealed against the Judgment in AD/CA 20/2021 ("CA 20"), and subsequently against the Costs Judgment in AD/CA 36/2021 ("CA 36") as well, after he was granted leave to do so (see *Ser Kim Koi v GTMS Construction Pte Ltd and others* [2021] 1 SLR 1319).

7 Having considered the evidence and the parties' submissions, we allow CA 20 in part and dismiss CA 36. In our judgment, the Judge was correct to find that there was a delay in the completion of the works. However, with respect, we consider that he erred in his determination of the length of the delay, the certification process that should have been carried out, and the determination of liquidated damages. Further, the Judge erred in finding that Mr Ser had no claim against GTMS in liquidated damages for the delay, and the Judge erred in denying Mr Ser's claim against Mr Chan. However, we affirm the Judge's costs orders below. Before we give our reasons, we provide a brief factual background to the dispute.

Factual background

8 The full factual background has been set out comprehensively by the Judge in the Judgment. We need only refer to the salient facts for the purposes of these appeals.

9 It is important to appreciate that Mr Chan had a dual role in this Project. First, under cl 1.1(2) of the MOA,[2] Mr Chan was authorised to act as Mr Ser's agent in matters relating to the construction of the Project. Secondly, Mr Chan was also appointed to carry out certification duties under the SIA Conditions and cl 1.1(10)(a) of the MOA provided that in doing so, he "… shall discharge his certification duties under the building contract fairly and impartially and [Mr Ser] shall not interfere in the exercise of such certification duties".

10 GTMS was appointed as main contractor to carry out the construction of the bungalows ("the Works") for the Project pursuant to a tender exercise. The terms of engagement between GTMS and Mr Ser were governed by a Letter

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2 ACB Vol II(A) at p 66.

of Acceptance dated 13 May 2011 (the "LOA"), which incorporated the SIA Conditions.[3] The contract governing the relationship between GTMS and Mr Ser in relation to the Works (the "Contract") consisted of the LOA, the SIA Conditions, and other contractual documents as we shall elaborate on below. Under the terms of the Contract, GTMS was to undertake the Works for a sum of $13.13m. In addition, Mr Ser engaged several consultants on the recommendation of Mr Chan, namely: (a) Chee Choon & Associates ("CCA"), as the mechanical and engineering ("M&E") consultant; (b) Faithful+Gould Pte Ltd ("F+G"), as the quantity surveyor; (c) Web Structures Pte Ltd, as the civil and structural engineer ("Web"); and (d) Mr Leong Kien Keong, as the Resident Technical Officer ("RTO Leong") (collectively, the "Consultants").

11 The original completion date for the Works was 21 February 2013.[4] Over the course of the Works, GTMS made three requests for extension of time ("EOT"). The relevant extensions, for the purposes of these appeals, are the second and third EOTs ("EOT 2" and "EOT 3" respectively), both of which were granted by Mr Chan and totalled 55 days during the pendency of the Works:

(a) **EOT 2**: On 20 December 2012, GTMS requested for an EOT of 45 days due to, among other things, a delay by SP PowerGrid Ltd ("SPPG") in connecting the main incoming power supply and SPPG's late notice of the requirement to install an overground distribution box (the "OG Box"). Mr Chan granted EOT 2 on 7 February 2013 for a period of 40 days from 21 February 2013 (*ie,* the original completion date) to 2 April 2013 (see the Judgment at [14(b)]).

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3 Record of Appeal ("ROA") Vol III(A) at pp 13–18.

4 ROA Vol IV(AN) at pp 123–124 (Joint List of Agreed Facts), see para 7(a).

(b) **EOT 3**: On 1 April 2013, GTMS requested for an EOT of 40 days to complete the testing and commissioning for M&E works and the installation of light fittings for the Project. Mr Chan granted EOT 3 on 10 April 2013 for a period of 15 days, extending the previous completion date further from 2 April 2013 to 17 April 2013 (see the Judgment at [14(c)].

Over the course of the Works, Mr Chan issued a total of 26 interim payment certificates. Mr Ser made payment for the first 24 interim payments, but not for IC 25 and IC 26.

12 A summary of the timeline of events relevant to these appeals would be apposite:

Date	Event
20 December 2012	GTMS requests for a 45-day extension by way of EOT 2.
7 February 2013	Mr Chan grants EOT 2 for a period of 40 days, from 21 February 2013 (*ie*, the original completion date under the LOA) to 2 April 2013.
1 April 2013	GTMS requests for a 40-day extension by way of EOT 3.
10 April 2013	Mr Chan grants EOT 3 for a period of 15 days from 2 April 2013 to 17 April 2013.
17 April 2013	The final site inspection for the Project is conducted, for which Mr Chan, GTMS's representatives and the M&E engineers were present.
18 April 2013	The maintenance period of the Project commences.

Date	Event
30 April 2013	The Building and Construction Authority (“BCA”) inspects the Project for the issuance of Temporary Occupation Permit (“TOP”) (the “First TOP Inspection”). The Project fails the First TOP Inspection.
15 May 2013	Mr Chan issues the CC certifying completion of the Project as of 17 April 2013, with a Schedule listing outstanding minor works.
18 June 2013	A second TOP inspection for the Project (the “Second TOP Inspection”) is conducted. The Project fails the Second TOP Inspection.
3 September 2013	Mr Chan issues IC 25 for some $390,000 pursuant to GTMS’s Payment Claim No 25. The first moiety of retention money is also released under IC 25.
16 September 2013	The TOP is approved by way of photographic submissions.
6 November 2013	Mr Chan issues IC 26 for some $190,000 pursuant to GTMS’s Payment Claim No 26.
December 2013	Mr Chin Cheong ("Mr Chin"), managing director of Building Appraisals Pte Ltd ("BAPL"), compiles the report of defects and methods of rectification in a Report (the “2013 BAPL Report”).
12 May 2014	The Certificate of Statutory Completion is issued.
7 July 2014	Mr Chan issues the Maintenance Certificate (“MC”).
21 and 23 July 2014	The Project is handed over to Mr Ser.
November 2014	Mr Chin issues another report of defects and methods of rectification (the “2014 BAPL Report”).

Date	Event
22 June 2015	Mr Chan issues the Final Certificate ("FC") for some $450,000. The second moiety of retention money is released under the FC.
16 October 2018	BAPL releases the Report on the Schedule of Building Defects at Nos 12, 12A, 12B Leedon Park Singapore (the "2018 BAPL Report").

Procedural background

Claims below

13 In the Suit, GTMS and Mr Chan pursued relatively straightforward claims for unpaid sums under their respective contracts with Mr Ser. GTMS claimed for the sums due under the Contract, *ie*, sums certified under IC 25, IC 26 and the FC, plus tax. This amounted to $1,103,915.48 and interest.[5] Mr Ser preferred a counterclaim against GTMS claiming some $12,752,651 (see [16] below). Mr Ser also brought in Mr Chan and CSYA as third parties to the Suit and claimed some $10,853,718.63 from them. Mr Chan and CSYA counterclaimed $60,990 plus interest for unpaid fees due under the MOA.[6]

14 Mr Ser's claims were, in contrast, rather complicated. He alleged that GTMS and Mr Chan (and by extension, CSYA) were involved in an unlawful means conspiracy. On Mr Ser's account of events, the alleged conspiracy against him was based on the following:

(a) EOT 2 and EOT 3 were improperly granted. The contractual completion date for the Works should have remained as 21 February

5 ROA Vol II(A) at pp 47–48, para 17.

6 ROA Vol II(C) at p 105.

2013, instead of being extended to 17 April 2013. This was for a few reasons (Judgment at [17] and [20]):

(i) There was no proper basis for the grant of EOT 2 as GTMS had failed to exercise due diligence, a precondition under cl 23(1) of the SIA Conditions. While Mr Chan took into account SPPG's delay in electrical turn-on, he had failed to consider GTMS's own delay in electrical installation works which had to be done before SPPG could connect the incoming power supply, which Mr Ser asserted had been delayed for more than four and a half months.

(ii) Likewise, there was no basis for the grant of EOT 3, as GTMS had failed to exercise due diligence. Prior to electrical turn-on, SPPG had to conduct testing and inspection on-site and the Project had failed the first round of testing and inspection (the "First Testing") conducted on 14, 20 and 21 March 2013. This failure was due to construction-related issues caused by GTMS, which had to rectify such issues before the Project was able to pass the second round of testing and inspection (the "Second Testing") conducted on 27 March, 2 and 8 April 2013.

(b) The CC was prematurely issued because the Works could not be deemed to be completed by 17 April 2013. The contractual prerequisites, contained in cl 24(4) of the SIA Conditions and Item 72 of the preliminaries of the bills of quantities (the "Preliminaries"), which had to be fulfilled prior to the grant of the CC, were not fulfilled (Judgment at [23]–[28]). In the same vein, the MC was prematurely issued because there were still outstanding defects in the Works by 7 July 2014, when the MC was issued (Judgment at [29]–[30]).

(c) Since the CC and MC were prematurely issued, it followed that IC 25, IC 26 and the FC were similarly prematurely issued (Judgment at [32]–[33]).

(d) Further, the liquidated damages and the costs of rectifying defective works should have been deducted from the sums certified under IC 25, IC 26 and the FC. In the same vein, the first moiety of retention money under IC 25 should not have been certified (Judgment at [34]).

(e) Mr Chan approved GTMS's claims for Prime Cost Sum ("PC Sum") items and Prime Cost Rate ("PC Rate") items without basis. These claims needed to be supported with proper documentation, which GTMS failed to adduce (Judgment at [35]).

15 The alleged facts which gave rise to this claim in unlawful means conspiracy also supported *alternative* and *independent* claims in contract and negligence, which were also pursued by Mr Ser against GTMS and Mr Chan.

16 Correspondingly, Mr Ser made the following counterclaims against GTMS:

(a) liquidated damages of $3,600 per calendar day from 22 February 2013 to 21 July 2014;[7]

(b) the costs of rectifying all defective works, quantified at $1,632,415.20;

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7 ROA Vol II(B) at p 62.

(c) an account for the $787,742.09 paid to GTMS for the PC Sum items;[8]

(d) an account for the $1,757,835 paid to GTMS for the PC Rate items;[9]

(e) the utilities fees paid by Mr Ser before the Project was handed over on 23 July 2014, quantified at $27,916.82; and

(f) interests and costs.

Mr Ser further averred that Mr Chan ought to be liable for breaches of contractual and tortious duties and for his legal expenses incurred as a result of a related summary judgment application commenced by GTMS against Mr Ser, which we now turn to.

Decisions below

17 The Judge has set out his detailed reasoning in the Judgment and Costs Judgment and it is sufficient for these appeals to note the Judge's key findings in summary.

The Judgment

18 On 18 January 2021, the Judge delivered the Judgment. Broadly, the Judge granted GTMS's claims against Mr Ser and dismissed the majority of Mr Ser's counterclaims against both GTMS and Mr Chan. The Judge made the following findings.

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8 ROA Vol II(B) at p 70, para 73.

9 ROA Vol II(B) at p 70, para 73.

19 To begin with, both EOT 2 and EOT 3 were properly granted pursuant to cl 23 of the SIA Conditions, as SPPG, the entity responsible for the installation of electricity works, had delayed the power connection. This, in turn, caused a further delay in the testing and commissioning ("T&C") of the M&E works. The delay on the part of SPPG amounted to a *force majeure* event, which justified the grant of EOT 2 and EOT 3, within the meaning of cl 23(1)(a) of the SIA Conditions (Judgment at [296(b)]–[296(c)]).

20 However, notwithstanding the validly granted EOTs, the CC was nevertheless prematurely issued. This is because the Works could not have been deemed to be completed as of 17 April 2013. The earliest the Works could have been deemed to be completed was 28 May 2013. Among other things, the Judge found that:

(a) Item 72 of the Preliminaries was validly incorporated into the Contract, and the CC thus could not be granted unless the three requirements in Item 72 were satisfied (Judgment at [306] and [317]).

(b) Item 72(a) of the Preliminaries, which required that the Works be ready for occupation and use in Mr Chan's opinion, was satisfied on 28 May 2013, when the rectifications of the unequal steps and risers were completed. Even though the Project failed the Second TOP Inspection on 18 June 2013, this did not prevent Item 72(a) from being satisfied, since the Second TOP Inspection had failed due to reasons that were not within GTMS's scope of work (Judgment at [334]).

(c) Item 72(b) of the Preliminaries, which required all services to undergo satisfactory T&C, and for the testing documentation to be handed to Mr Ser, was satisfied by 17 April 2013. Even though the

testing documents were *not* handed to Mr Ser by the required date, this constituted a *de minimis* breach (Judgment at [381]).

(d) Item 72(c) of the Preliminaries, which required all work done under the Contract, including rectifications, to be of acceptable standards, was also satisfied as of 28 May 2013. While there were some defects outstanding with the bungalows, these defects were not so serious as to prevent Item 72(c) from being satisfied (Judgment at [574]).

On the basis that the CC could have only been issued on 28 May 2013 at the earliest, the revised maintenance period of one year would end on 27 May 2014.

21 Therefore, while the contractual completion period was validly extended cumulatively by EOT 2 and EOT 3 to 17 April 2013, the CC could have only been issued on 28 May, over a month later. However, Mr Ser was not entitled to any liquidated damages from GTMS in respect of this delay. This was because Mr Chan, as Mr Ser's agent, had instructed GTMS not to commence rectification of the steps and risers until after the First TOP Inspection (see [12] above). This constituted an act of prevention which rendered the liquidated damages clause inoperable as against GTMS (Judgment at [661]).

22 Further, the payment certificates pursuant to which GTMS claimed against Mr Ser, *ie*, IC 25, IC 26 and the FC (collectively, the "Payment Certificates"), were validly issued.

(a) First, there was no need, contrary to Mr Ser's position, for GTMS to furnish proof that it *actually paid* the nominated subcontractors and suppliers before it could claim payment from Mr Ser. It sufficed for GTMS to substantiate its payment claims with invoices

and quotations from the subcontractors and suppliers. Further, there was insufficient evidence to show that GTMS inflated its payment claims by concealing from Mr Ser discounts that it had received from the nominated subcontractors and suppliers (Judgment at [651]).

(b) Secondly, Mr Ser was wrong to insist that the payment claims be calculated by deducting certain sums that were handwritten by GTMS in its tender documents. Rather, the sums to be deducted were sums estimated by Mr Chan after discussion with the other consultants (Judgment at [636]–[643]).

23 Therefore, in summary, GTMS's claims under IC 25, IC 26 and FC were valid. Mr Ser's assertion of a conspiracy against him was unfounded and entirely bereft of evidence.

24 Accordingly, the Judge made the following orders:

(a) Mr Ser was to pay GTMS $1,103,915.48 in total, representing the unpaid sums under a series of tax invoices following the completed construction of the Project (Judgment at [707]–[710]);

(b) Mr Ser was to pay Mr Chan the sum of $60,990 plus interest of 3% above the prime rate from the amount due date, as part of the architect's fee, with Mr Ser being entitled to set off the sum of $10,388.56 from this amount (Judgment at [711]–[717] and [749(d)]); and

(c) Mr Ser's counterclaims were dismissed, save for his claim for (i) rectifying the grouting in the swimming pools for $4,555.20, (ii) for the amount overpaid in respect of the missing trellis beam for $708.40 and

(iii) for utility fees incurred in the Project up to 23 July 2014 (*ie,* the date when the Project was handed over) amounting to $27,916.82 (Judgment at [749(b)(xi)], [749(b)(xii)], and [749(b)(xix)]).

The Costs Judgment

25 On 10 February 2021, the Judge delivered the Costs Judgment. In summary, the Judge made the following orders (see [1] and [36]–[37] of the Costs Judgment):

(a) the judgment sum awarded to GTMS (*ie,* the sum of $1,103,915.48) was to include the default interest rate of 5.33% per *annum*;

(b) Mr Ser was to pay GTMS costs on a standard basis from 13 January 2014 (*ie*, the date the writ for the Suit was filed) up until 8 November 2018 (*ie*, the date of the commencement of the trial) with costs payable on an indemnity basis thereafter, given his unreasonable conduct in bringing a speculative action clearly without any basis, and his reckless conduct in the course of proceedings; and

(c) Mr Ser was to pay Mr Chan and CSYA costs on a standard basis from 29 January 2014 (*ie*, the date of the third party notice to join third parties to the Suit) up until 6 March 2017 (*ie*, the deadline for Mr Ser to accept the open offer to settle), with costs payable on an indemnity basis thereafter, given that two letters containing offers to settle made by Mr Chan and CSYA were more favorable to Mr Ser than the outcome under the Judgment and it would have been eminently reasonable for him to accept such offers.

26 The Judge also found that it was inappropriate to order two sets of costs in respect of each of the third parties, *ie,* Mr Chan and CSYA, because there was, in reality, little distinction made between them during the proceedings. In addition, the circumstances did not warrant the grant of a Certificate of Three Counsel, as sought for by Mr Chan, because while the matter may have been of great personal and professional importance to Mr Chan, the Suit did not go beyond what would usually be the case for parties personally involved in litigation.

Arguments on appeal

27 On appeal, Mr Ser does not seriously maintain that there was a conspiracy against him, and rightly so in our view. However, he maintains that the various claims in contract and negligence, which had constituted the alleged conspiracy (see [14] above), were wrongly rejected by the Judge.

28 In addition, Mr Ser argues that EOT 2 and EOT 3 were wrongly granted by Mr Chan as the preconditions in cl 23 of the SIA Conditions had not been duly satisfied. Further, the prerequisites in Item 72 of the Preliminaries (see [20] above) remain unsatisfied, with the effect that the CC (and all subsequent certificates predicated on the CC) could not have been issued even until today. There is thus a delay in the completion of the Works, which entitles Mr Ser to claim liquidated damages against GTMS and/or Mr Chan. Further, the certificates which GTMS rely on to claim against Mr Ser (*ie*, IC 25, IC 26 and the FC) were not validly issued.

29 GTMS and Mr Chan, in response, argue that the Judge was entirely justified in making the findings that he did. To this extent, they reproduce broadly their submissions before the Judge below. In relation to Mr Chan, one particular thread in his arguments is that even if he did not exercise due

competence in his capacity as an architect, Mr Ser could only, as a matter of law, mount a claim against GTMS and not him. As we shall go on to explain, we are unpersuaded by this argument.

Issues on appeal

30 The main issues to be determined in this appeal are hence:

(a) Issue 1: Whether EOT 2 and EOT 3 were properly granted by Mr Chan to GTMS;

(b) Issue 2: Whether the CC was properly granted by Mr Chan to GTMS;

(c) Issue 3: Whether IC 25, IC 26 and FC were properly issued; and

(d) Issue 4: The remedies available as between Mr Ser and GTMS, as well as between Mr Ser and Mr Chan.

Whilst we shall consider each of these issues in turn, the parties have unfortunately raised a host of sub-issues, quite a few of which are without any merit. It will be convenient to consider these sub-issues under each of the above main issues.

Issue 1: Whether EOT 2 and EOT 3 were properly granted by Mr Chan to GTMS

31 We begin with the grant of EOT 2 and EOT 3, both of which Mr Ser maintains were improperly awarded. The Judge found that the grant of EOT 2 and EOT 3 was justified by cl 23 of the SIA Conditions.

32 Under cl 23(1) of the SIA Conditions, an architect is given the power to issue an EOT to a contractor for certain specified events and circumstances provided the contractor has complied with the condition precedent under cl 23(2). The events and circumstances under which the contractor is entitled to an EOT are set out in cll 23(1)(a)–(q) and the relevant events for which EOTs may be given in this appeal, are as follows:[10]

> 23(1) 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:
>
> (a) Force Majeure;
>
> …
>
> (f) Architect's instructions under Clauses 1.(4)(a), 1.(4)(b) or 1.(4)(c), 7.(1) (or otherwise in accordance with that clause), 11.(2) (where permitted under that clause) and 14 of these Conditions (but not Architect's direction under Clauses 1.(3) or 12.(5)(b), 12.(5)(c) or 12.(5)(d) of these Conditions);
>
> …
>
> (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.
>
> 23(2) It shall be a condition precedent to an extension of time by the Architect under any provision of this Contract including the present clause (unless the Architect has already informed the Contractor of his willingness to grant an extension of time) that the Contractor shall within 28 days notify the Architect in writing of any event or direction or instruction which he considers

[10] ACB II(A) at pp 112–114.

> entitles him to an extension of time, together with a sufficient explanation of the reasons why delay to completion will result. Upon receipt of such notification the Architect, within 1 month of a request to do so by the Contractor specifically mentioning this Sub-Clause, shall inform the Contractor whether or not he considers the event or instruction or direction in principle entitles the Contractor to an extension of time.
>
> 23(3) *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]

33 A plain reading of cl 23(2) of the SIA Conditions makes clear that in order for an architect to validly issue an EOT under any provision of the Contract (including cl 23(1)), unless the architect has already informed the contractor of his willingness to grant an EOT, it shall be a condition precedent to the grant of an EOT that the contractor shall, within 28 days, notify the architect in writing of any event or direction or instruction which he considers entitles him to an EOT, together with a sufficient explanation of the reasons why delay to the completion will result.

34 Provided the condition precedent in cl 23(2) is complied with, a plain reading of cl 23(1) shows that ***three*** conjunctive requirements must be satisfied in order to issue an EOT. First, it must be shown that there is an event, or events, which falls within cl 23(1) of the SIA Conditions. Secondly, such an event or events must have in fact caused a delay. Thirdly, the contractor must have acted with due diligence and taken all reasonable steps to avoid or reduce the delay in completion.

35 Both Mr Chan and GTMS deny Mr Ser's allegation that EOT 2 and EOT 3 were improperly granted. They submit that the delays for which EOT 2 and EOT 3 were granted were solely caused by SPPG having delayed the arrangement for the power connection.[11] In particular, they refer to a letter dated 21 November 2012 sent by SPPG (the "21 November 2012 Letter"),[12] which they argue introduced an entirely *new* and previously *unforeseeable* requirement for an OG Box to be installed.[13]

A brief timeline of events

36 It will be useful at this juncture to briefly recapitulate the events leading up to the grant of EOT 2 and EOT 3. As referenced above, the Contract Completion Date was 21 February 2013.

37 Sometime between 8 October 2012 (when GTMS informed the consultants that the electrical meter compartments were ready)[14] and 22 October 2012 (when CCA stated that it had made the relevant arrangements with SPPG),[15] CCA made the request to SPPG for SPPG to lay the cable to the electrical meter compartments for the Project.[16]

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11 1st Respondent's Case ("1st RC") at paras 67–68; 2nd and 3rd Respondents' Case ("2nd and 3rd RC") at paras 56, 62.

12 ACB Vol II(B) at p 187.

13 1st RC at para 68; 2nd and 3rd RC at para 56.

14 ROA Vol V(AP) at pp 184–192, read with ROA Vol V(A) at p 170 (s/n 1348). *See* ROA Vol V(AP) at p 189, para 7.2 ("GTMS informed that all meter compartments are ready. CCA to follow up for inspection.").

15 ROA Vol V(AP) at pp 267–276, read with ROA Vol V(A) at p 173 (s/n 1375). *See* ROA Vol V(AP) at p 272, para 7.2 ("GTMS informed that all meter compartments are ready. CCA informed that CCA has already arranged with officers. GTMS to follow up.").

16 ROA Vol III(DU) at p 219, line 22–p 223, line 19; p 225, line 22–p 226, line 1; p 233, line 3–p 235, line 12 (1 July 2020).

38 By the 21 November 2012 Letter, SPPG informed Mr Ser that it would be necessary to install an OG Box for the Project, with a proposed location for the OG Box indicated therein as well:[17]

> Dear Sirs,
>
> NEW ELECTRICITY CONNECTION AT 12, 12A, AND 12B LEEDON PARK
>
> In connection with your application, we wish to inform you that ***it is necessary to install*** *an overground electricity distribution box* ***for connection of the new service cable to the electricity supply network***. The proposed location of the box is shown in the attached plan.
>
> 2. If the location is in anyway objectionable, please inform us immediately before the installation of the box which will be carried out after one week hereof. We would attempt to accommodate your suggestion for alternative location if it is feasible.
>
> Yours faithfully
>
> …
>
> [emphasis in italics and bold italics added]

This letter was forwarded by CCA to GTMS and CSYA on 26 November 2012.[18] 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 made some two years ago, in their letter dated 22 November 2010.[19]

39 Consequently, between 3 December 2012 and 17 December 2012, CCA worked with Web and the National Parks Board ("NParks") to ensure that the latter had no issues with the proposed location of the OG Box.[20] This entailed

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17 ROA Vol V(AQ) at p 194.

18 ROA Vol III(AN) at p 210, para 68; ROA Vol III(BO) at pp 172–174.

19 ROA Vol V(F) at pp 217–222.

20 ROA Vol III(AN) at pp 210–211, para 69; ROA Vol III(AQ) at pp 16–30; ROA Vol V(AO) at p 228; ROA Vol III(Q) at p 197.

making amendments to plans and drawings for the Project. CCA also relied on Mr Chan to expedite Mr Ser's approval for the location of the OG Box.[21] We note here that, according to Mr Philip Yong ("Mr Yong"), a director of CSYA, SPPG only started its works for the power connection for the Project on or around 23 February 2013 despite constant emails and telephone calls from CCA and GTMS to SPPG pleading with it to start works.[22]

40 On 20 December 2012, some three weeks after being informed of SPPG's OG Box requirement, (and therefore within the time limit in cl 23(2)), GTMS put in a written request for an extension of time of 45 days (*ie,* EOT 2):[23]

> Dear Sir
>
> …
>
> In the approved Construction Master Programme, we had planned to carry out the testing and commissioning of M&E works between 1st Oct 2012 and 29th Dec 2012. The meter compartments for all the units were ready as at Sept 2012 including the Main Electrical Boards. *But to date we have not obtained the electricity from PowerGrid to carry out the above.*
>
> Currently, we are ready to carry out the T&C for all units for the electrical and M&E works. Upon obtaining the electrical supply we would require about 45 working days to carry out the T&C.
>
> …
>
> We have increased our resources to expedite the works, but as for the electrical supply and the granite delivery, it is beyond our control.
>
> In view of the above, we would appreciate if you could kindly grant us at least 45 days EOT for this project.
>
> Thank you
>
> [emphasis added]

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21 ROA Vol III(Q) at p 197.

22 ROA Vol III(AN) at p 211, para 71; ROA Vol III(AQ) at pp 32–63.

23 ROA Vol V(AO) at pp 222–223.

41 On 15 January 2013, GTMS wrote to Mr Chan, submitting further substantiation for its EOT 2 request:[24]

> Dear Sir
>
> …
>
> We refer to our earlier letter reference GTMS/LEEDON/AM/201212/002 dated 20/12/2012 requesting for EOT.
>
> We are pleased to submit herewith further substantiation for the EOT claim.
>
> We have tabulated the delays of various items and attribute primarily to the delivery of stones that have resulted in the subsequent delays on the completion of sanitary wares, shower screen, vanity tops and cabinetry works.
>
> *In addition* to these, *Power Grid has not laid the incoming electrical cable nor installed the OG box. We will not be able to carry out the T&C for M&E works without this.*
>
> We have attached the extract of the approved master programme and indicated the extended duration we need for the T&C.
>
> I hope that you would be able to evaluate on the EOT claim favourably based on the information submitted to you.
>
> Thank you
>
> [emphasis added]

42 On 21 January 2013, CCA sent an email to SPPG seeking an update on the connection status.[25]

43 On 28 January 2013, a representative of CSYA, one Pakawadee Chiyachan (who was referred to as "Ms Wan" below) sent an email to GTMS referring to GTMS's letter of 15 January 2013, stating that "the power grid turn on will affect schedule of T&C of M&E" and requesting that GTMS "include

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24 ROA Vol V(AO) at p 224.

25 ROA Vol III(Q) at p 197.

in the critical path schedule for our reference for our fully [*sic*] view of assessment".[26] On 31 January 2013, GTMS responded by letter to Ms Wan's email of 28 January 2013, stating that the electrical meter compartments were ready in July 2012 and that the main electrical boards were installed in the end of August 2012:[27]

> Dear Sir
>
> …
>
> We refer to our EOT letter reference GTMS/LEEDON/AM/201301/003 dated 15th January 2013, and your e mail sent to us on 28th January 2013 to submit further substantiation for the above.
>
> In addition to the cause of delays cited in our above letter, *the main incoming power supply from PowerGrid required for testing and commissioning of the M&E services has also become a critical issue.*
>
> GTMS had reported to the Consultants that the meter compartments were ready on July 2012. The main electrical boards were installed in end August 2012.
>
> *On 26th Nov, PowerGird [sic] had informed the M&E Consultant that they require to install an OG Box in order to provide the power supply. The location of the OG box was finally confirmed on 5th Dec 2012 after consultation with NParks.*
>
> *GTMS had tele-communicated with PowerGrid … on several occasions to assist in expediting the incoming power supply. Other than the time taken by PowerGrid to obtain the road opening permit; they also had problems to mobilize their term contractor as there had been a fatal accident elsewhere that had demoralized the contractor's workers and therefore further delaying the works. The M&E consultant has been also chasing PowerGrid to expedite work as it is long overdue.*
>
> ***To date, PowerGrid has not commenced any works and we have no power supply to carry out testing*** *and* ***this will lead to further delay in obtaining TOP and subsequent handing over***.
>
> We need a minimum of 15 days per unit to carry out testing and commissioning. Therefore, we require **45 days** to complete

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26 ROA Vol V(AT) at pp 113–114.

27 ROA Vol V(AO) at p 228.

> testing and commissioning works from the date of meter installation.
>
> …
>
> [emphasis in bold in original; emphasis added in italics and bold italics]

44 On 7 February 2013, Mr Chan wrote to GTMS and granted EOT 2 for a period of 40 days, extending the original completion date under the LOA from 21 February 2013 to 2 April 2013, stating among other things:[28]

> …
>
> We noted that as per approved master programme, the T&C of M&E services is separated into 3 houses individually. However, as the T&C can be proceeded concurrently, so we will only base on the most critical path which is no. 12A.
>
> From the above table, we noted that GTMS will require 25 days for T&C of M&E Services Works and 15 days for Light fitting installation from the date of Electrical Turn-on.
>
> As informed by Chee Choon and Associates, Power Grid could not confirm the actual date to start the connection work. The earliest would be only after Chinese New Year (18/02/2013) and normally would take approximately 15 days to complete the connection works.
>
> 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&C Services works and Light Fitting Installation. We will review on the 15 days given for the electrical turn-on should there be further delay to the Power Grid part.
>
> Pursuant to Clause 23 of the [SIA Conditions], the Completion Date for the Works is to be extended from 21st February 2013 to 2 April 2013. You are advised to proceed with the Works Diligently to avoid further delay to the project.
>
> Yours Sincerely,
>
> …

45 On 7 March 2013, SPPG eventually completed its works.

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[28] ROA Vol V(AO) at pp 230–231.

46 On 1 April 2013, (within the time limit imposed by cl 23(2)), GTMS wrote to Mr Chan again, requesting an additional EOT of 40 days from 2 April 2013:[29]

> Dear Sir / Mdm,
>
> …
>
> We refer to your extension of time (EOT) letter dated 7 February 2013, granting us up to 2nd April 2013 and thereafter another forty (40) days for the testing and commissioning of the M&E works upon power turn-on.
>
> Please be informed that unit 12B power turn-on was on 27 March 2013. We have proceeded with the testing and commissioning (T&C) for unit 12B and installation of the light fittings. The PowerGrid retest for units 12A and 12 is on 2nd April 2013 and 8th April 2013 respectively.
>
> In view of this, we wish to request for the EOT of forty (40) days from 2nd April 2013 to complete the remaining T&C and the installation of the light fittings. You can apply for the TOP inspection on 29 April 2013 as the project will be substantially completed.
>
> …

47 On 10 April 2013, Mr Chan wrote to GTMS, granting EOT 3 for a period of 15 days. This thus extended the contractual completion date for the Works yet again, from 2 April 2013 to 17 April 2013:[30]

> …
>
> We refer to your application for extension of time (EOT) dated 1st April 2013, we are assessing your claims as per the followings:
>
> <u>Delay on Testing and Commissioning of the M&E Services due to delay on Electrical Turn-on by Power Grid</u>
>
> We are agreeable with our M&E Engineer, CCA & Partners Pte Ltd, to grant total of 15 working days extension (include ½ day on Saturday and not include Sunday/Public Holidays) from the

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29 ROA Vol V(AO) at p 232.

30 ROA Vol V(AO) at p 233.

> day of 1st Electrical Turn-on which is 27th March 2013 for delay on Electrical Turn-on. Refer to attached Annex 1.
>
> As per above evaluation, we are granting a total of 15 days of extension.
>
> Pursuant to Clause 23 of the [SIA Conditions], the Completion Date for the Works is to be extended from 2nd April 2013 to 17th April 2013. You are advised to proceed with the Works Diligently to avoid further delay to the project.
>
> Yours Sincerely,
>
> …

Preliminary points

48 Bearing that context in mind, we turn to consider next, three preliminary points raised by Mr Ser:

(a) whether cl 23(1)(a) of the SIA Conditions is unenforceable for vagueness;

(b) whether Mr Chan was entitled as a matter of law, to grant an EOT before the effect of any delaying factor had completely ceased; and

(c) whether the grant of an EOT may be retrospectively justified.

Enforceability of cl 23(1)(a) of the SIA Conditions

49 First, Mr Ser submits that the *force majeure* clause as provided for under cl 23(1)(a) of the SIA Conditions is too vague to be enforceable, as it simply states the phrase "*force majeure*" without more.[31] It is undisputed that there is no definition of the phrase "*force majeure*" within the Contract.

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[31] Appellant's Case dated 11 May 2021 ("AC") at para 79.

50 Mr Ser relies on the English High Court decision of *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 WLR 280 ("*British Electrical*") for the proposition that a *force majeure* clause which does not elaborate the types of events that may form the basis of *force majeure* is vague and uncertain.[32] There, the terms of a contract note in relation to a sale of steel contained the following clause: "[s]ubject to *force majeure* conditions that the government restricts the export of the material at the time of delivery" and the buyers relied on the note as evidence of a contract. McNair J rejected the buyers' argument and held that the contract note and the buyers' letter of acceptance did not purport to be an offer and acceptance constituting a written contract; the *force majeure* clause was so vague that it prevented the finding that any enforceable contract was made.

51 In our view, such a sweeping proposition as contended for by Mr Ser cannot be derived from *British Electrical*. That case is clearly distinguishable from the case before us. *British Electrical* was a case with a differently worded *force majeure* clause. The phrase used there was "*force majeure* **conditions**" [emphasis in bold added] and on the facts of that case, there were a variety of *force majeure* conditions in the trade but there was no evidence that any particular ones had been relied upon. The main issue in that case was the existence of a contract and McNair J took the view that irrespective of whether the word "conditions" was interpreted as stipulations or contingencies, the entire sentence was vague. He therefore held there was no consensus *ad idem* and there was hence no concluded contract between the parties. The more usual situations within which *force majeure* clauses arise are in the context of specific events that release the parties from their mutual obligations under a contract (see *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy

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[32] AC at para 79.

Publishing, 2012) ("*The Law of Contract*") at para 18.003). The present case falls within this category. In addition, this is quite a different kind of clause as it lies within a standard form contract where the *force majeure* provision is but one paragraph out of seventeen paragraphs in a subclause of clause 23 of the SIA Conditions governing extensions of time. Clause 23(1) and its seventeen paragraphs have to be construed in its context and within not only the SIA Conditions but also the contract between the parties.

52 Mr Ser, through his counsel, does himself no favours when he raises submissions of this nature. The phrase "*force majeure*" is of some antiquity. In the English common law, one will find references to *force majeure* in the decided cases, from well over a hundred years ago, on, for example, charterparties, marine insurance and commodity contracts, where *force majeure* applies as a matter of contract made between the parties. These cases decide whether one party is excused from his contractual obligations because of an event of *force majeure* as used in that particular contract. It can range from Acts of God to *vis major* to dislocation of businesses owing to civil war, insurrection, statutory embargoes or other acts of man on a large scale. To pick but one example, in *Matsoukis v Priestman & Co* [1915] 1 KB 681, it was interpreted to cover dislocation of business owing to a universal coal strike or accidents to machinery but not bad weather, football matches or a funeral. It all depends on how the provision is worded and deployed in the contract and taking into account, where apt or necessary, the relevant context.

53 More importantly, this kind of submission is also disingenuous because *force majeure* has been considered by the Singapore courts and several guiding principles may be extracted from these cases (see [73]–[77] below). There is a sufficient body of law in Singapore relating to building and construction contracts (as well as other contracts) on the use and meaning of the phrase *force*

majeure as used in the contracts under consideration. A submission that the phrase *force majeure* (standing by itself in one of seventeen paragraphs) without further elaboration amounts to unworkable vagueness and unenforceability will not even get off the ground.

54 The Judge had clearly considered the relevant law on *force majeure* (see the Judgment at [194]–[198]). Among other things, he noted that the term *force majeure* is explained in Chow Kok Fong, *Construction Contracts Dictionary* (Sweet & Maxwell, 2nd Ed, 2014) at p 198 as follows:

> … 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. …

Likewise, Eugenie Lip & Choy Chee Yean, *Contract Administration Guide to the SIA Conditions of Building Contact* (LexisNexis, 2nd Ed, 2009) ("*Contract Administration Guide*") states at para 2.127(a), in its discussion of cl 23(1)(a) of the SIA Conditions:[33]

> Clause 23.(1)(a): - Force majeure is not a term of art, although it is commonly used to refer to an event beyond the control of the contracting parties, which prevents them from properly performing their obligations. In this regard, several typical 'force majeure' events are already described as delaying events in Clause 23.(1), with the result *that the term 'force majeure' will probably be given a restricted meaning.*
>
> [emphasis added]

55 The doctrine of *force majeure* is referred to in *Halsbury's Laws of Singapore* vol 2 (Lexis Nexis, Singapore) at para 30.112; it makes reference to the Public Sector Standard Conditions of Contract (7th Ed, 2014) ("the PSSCC 2014"). The PSSCC 2014 likewise refers to "*force majeure*" without any accompanying definition. More generally, S Rajendran J observed in *Magenta*

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[33] Appellant's Bundle of Authorities ("ABOA") Vol 3 at p 217.

Resources (S) Pte Ltd v China Resources (S) Pte Ltd [1996] 2 SLR(R) 316 at [60]:

> 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 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***.
>
> [emphasis added in bold italics]

56 *Force majeure* (amongst other principles of law) was discussed in considerable 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*"), as we highlight below. The relevant legal principles espoused in various cases, coupled with a contextual interpretation of the SIA Conditions, goes a considerable way to ameliorating any concerns about vagueness and uncertainty and comports with the intention of the parties, objectively ascertained (see Chua Weilin & Ng Guo Xi, *Navigating Common Threads under the Doctrine of Force Majeure and the COVID-19 (Temporary Measures) Act 2020: Impact on the Construction Industry* [2020] SAL Prac 15 at para 17). The focus of the enquiry is more often than not, "determining what the parties have agreed – that is, a problem of *construction* of the *force majeure* clause in question" (*The Law of Contract* at para 18.018) [emphasis in original].

57 This kind of submission, raised in the context of the SIA Conditions, and in the wider context of other standard form construction contracts, (let alone its use in other legal contexts), also completely ignores the background and pedigree of these sets of standard forms. The SIA Conditions were drafted in 1979 by one of the leading construction silks of his day, the late Mr Ian Duncan

Wallace QC ("Duncan Wallace QC"), who also was, for many years, the editor of one of the leading textbooks on this subject, *Hudson's Building and Engineering Contracts*. This SIA standard form is still widely used in Singapore today. We find this kind of submission to be completely devoid of any merit.

58 Mr Ser's Appellant's Case and submissions on this subject are of the kind that will attract cost consequences, whatever the outcome of the case. Fortunately, his counsel did not pursue this argument with too much vigour, and in our view, rightly so. He ultimately conceded that "[e]ven if it is desirable to uphold the clause in some form, it must be construed to give effect to the objectively ascertained expressed intentions of the parties, as it emerges from the contextual meaning of the relevant contractual language, including other terms of the contract".[34]

Cessation of a delaying factor

59 Secondly, Mr Ser also argues that Mr Chan had acted improperly, and indeed prematurely, in granting the request for EOT 2 and EOT 3. Mr Ser says that cl 23(3) of the SIA Conditions only permits an architect to determine a request for EOT *after* the delaying factor has ceased to operate and it is possible to decide the length of period of extension beyond the contractual completion date in respect of such matter. The rationale for this, Mr Ser says, is clear. Simply, if the delaying event has not ceased, it is impossible to determine the precise impact on completion.[35] Mr Chan granted EOT 2 on 7 February 2013, before the end of the delaying event on 7 March 2013.

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34 AC at para 81.

35 AC at para 76.

60 This argument was raised below. The Judge rejected this and held that cl 23(3) of the SIA Conditions places an obligation on the architect to determine a contractor's application for an EOT and to notify the contractor of its decision. In his view, cl 23(3) does not state that an architect may not grant the EOT earlier if the architect is able to evaluate the EOT application before the cessation of the delay event (see the Judgment at [264]). The Judge relied on an extract from *Contract Administration Guide* at para 2.131 as support for his interpretation:[36]

> Hence, taken together, the combined effect of **Clauses 23.(3) and 23.(4)** is to require the Architect to come to his decision on the period of extension of time to be awarded as soon as the delaying factor has ceased to operate, it is possible to decide the length of the period of extension, and the Contractor has furnished sufficient information. Once he has decided on this issue, the Architect will then issue a written notification of his decision to the Contractor unless there are good reasons why a notification cannot be made immediately following his decision (in which case the Architect has up till the issuance of the Final Certificate to notify the Contractor).
>
> … [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.
>
> Therefore, whilst **Clause 23.(3)** does serve to protect the Architect should the circumstances are [*sic*] such that he is unable to legitimately come to a decision on the duration of the extension of time until a significant time after the delay has occurred (up till the issuance of the Final Certificate), ***it should not be read to give the Architect a license to delay a***

[36] ABOA Vol 3, Tab 28, pp 222–223.

> ***decision (or its notification) if it is one which he could have made earlier.***
>
> …
>
> 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 bold in original; emphasis added in bold italics]

61 The current cl 23(3) of the SIA Conditions (see [32] above) provides that after any delaying factor has ceased to operate and it is possible to decide the length of the EOT, the architect "shall determine such period of extension", but it goes on to provide that the architect shall *notify* the contractor of his decision in writing to extend time up to and including the issue of the Final Certificate. Three things are apparent from the words used in cl 23(3):

(a) First, the architect is charged with determining the length of the EOT after any delaying factor has ceased to operate. That accords with common sense as the EOT must be evident in many cases once the delaying event has ceased to operate.

(b) Secondly, it is noteworthy that cl 23(3) draws a distinction between an architect *determining* the EOT and *notifying* the contractor of the same. This is of some significance because many texts opine that giving an EOT, which determines the contractor's liability for liquidated damages, is but one aspect, and it is *also* preferable to give the contractor a time towards which he can plan, re-allocate or throw in extra resources and implement measures to complete the works by the extended date. However, cl 23(3) does not (as one might expect it to) set a relatively short time limit within which the architect *has to notify* the contractor of his decision. It is obvious that flexibility has been given to the architect with regard to notifying the contractor of his decision. This also accords

with common sense as a delaying factor may have ceased to operate, but there may be other "knock-on" effects to other works downstream, especially, but not only limited to, those lying on the critical path. Hence the architect is given flexibility, within a period up to the issue of the Final Certificate, to notify the contractor of the EOT.

(c) Thirdly, it is clear that in allowing the architect a further period of time, after the delaying factor has ceased to operate, within which he has to notify the contractor of the EOT, there can be no stricture on the architect to make a final determination of the EOT the moment the delaying factor has come to an end under cl 23(3). He is entitled to come to a tentative view for the reasons set out above, hence the additional time granted to *notify* the contractor of the same. However, as noted at [60] above, the *Contract Administration Guide* does state that once the architect has decided on the extension of time, he "...will then issue a written notification of his decision…" to the contractor "…unless there are good reasons why a notification cannot be made immediately following his decision…".

62 The original cl 23, as drafted by Mr Duncan Wallace QC, did not provide for such flexibility as to when the architect had to notify the contractor of the grant of an EOT. We can turn to Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell, 5th Ed, 2018) ("*Law and Practice of Construction Contracts* vol 1") at paras 21.287 and 21.288 to inform us of the history and changes made over various versions of cl 23(3):

> The version of this sub-clause in the first edition of the SIA Contract was worded very differently. The original drafting took the view that a contractor should have a target date of completion to work towards. Hence, the granting of time extensions serves more than to determine the contractor's liability for liquidated damages … Under the original version of

> the subclause, it would *not* be valid for a time extension to be certified retrospectively but this is mitigated by the provision that the architect is only required to certify the extension when the delaying factor has ceased to operate and when it is possible to determine the period by which time is to be extended. This particular point was also considered in *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* (1989). In a passage that was approved subsequently when the case went before the Court of Appeal, Thean J stated that the effect of clause 23(3) is that the architect is required to notify the contractor as to the extension of the contract completion date "as soon as any delaying factor has ceased to operate".
>
> The present version of clause 23(3) thus permits extension of time to be determined retrospectively although the period allowed for doing this is limited by the issue of the final certificate. *It will be appreciated that on this wording, the decision on time extension serves no purpose other than the calculation of the quantum of liquidated damages which may be recovered by the Employer.* Although the present version was no doubt introduced at the urging of architects it is respectfully suggested that this has the unfortunate result of shifting the focus of the extension of time provisions from one of compelling the pace of the work to make up for any lost time to that where the primary interest is the calculation of the quantum of liquidated damages.
>
> [emphasis added]

63 Mr Ser's assertion that the Judge erred in relying on the extract from *Contract Administration Guide* is misplaced. Mr Ser claims that when viewed in its totality, the extract nevertheless reiterates the importance of architects complying with cl 23(3) of the SIA Conditions.[37] However, this merely begs the question as to what the correct interpretation of cl 23(3) is and does not answer the question affirmatively. We agree with the Judge that cl 23(3) provides the latest date by which the architect must notify the contractor of its decision. Although cl 23(3) stipulates that the architect is to determine any period of EOT after the delaying factor has ceased to operate and it is possible to decide the length of the period of extension, we do not think this means that the architect

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37 AC at para 77.

can *only* decide the EOT *after* the delaying factor has ceased to operate and/or when it is possible to decide the length of the period of extension. Whilst Mr Ser is not wrong in saying that the cessation of the delaying event may allow the architect to determine the impact on completion with greater precision, it is reasonably conceivable that there are situations where it may be possible to determine the impact on completion even prior to the cessation of the delaying event. There is nothing in the words of cl 23(3) or elsewhere in the SIA Conditions that prohibits the grant of an EOT before the delaying factor has ceased to operate. This can happen where there is a delay in the arrival of some material or piece of equipment on site, but based on information received or by some other facts, which may include his experience, the architect is able to determine that the material or piece of equipment will arrive on site by a certain date. As noted above, the earlier an architect is able to determine the EOT application and issue the EOT certificate, the better. Consistent with this approach, cl 23(2) requires the architect, within one month from the receipt of a request from the contractor for an EOT, to inform the contractor whether or not he considers the event or instruction or direction *in principle* entitles the contractor to an EOT. This avoids a situation where the contractor has no assurance of a realistic completion date, which may in turn unnecessarily, and indeed deleteriously compromise the construction works. To hold otherwise may in fact cause architects to undesirably drag their feet. As Mr Chan points out, fairness requires the contract administrator to give a speedy decision on matters where timelines pose an issue (and indeed, liability) (see *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] 1 WLR 2339 at [49]).[38]

[38] 2nd and 3rd Respondents' Bundle of Authorities, Vol 1, Tab 3, para 49.

64 As the Judge observed, quite rightly in our view, the application for EOT 2 was submitted on 20 December 2012, close to the initial completion date of 21 February 2013. Mr Chan was of the view that the delay event was SPPG's delay in carrying out connection power works, and instead of delaying his decision on the EOT application till the issuance of the FC, Mr Chan processed the EOT application with input from CCA. There is evidence (from Mr Yong's AEIC, which stated that SPPG commenced its works for the power connection for the Project on or around 23 February 2013 and completed its works on or around 7 March 2013, and from the Minutes of Site Meeting No. 44 on 4 March 2013, which stated that the power connection would be completed by "this coming Thursday") that SPPG commenced its work after the 2013 Chinese New Year and completed it on or around 7 March 2013.[39] Mr Chan estimated, quite accurately as it turned out, that SPPG would complete its works within 15 days, and granted EOT 2 accordingly (see Mr Chan's letter to GTMS at [44] above). The Judge came to the view that the expeditious processing of the EOT application "cannot be faulted" (Judgment at [265]). We respectfully agree with the Judge.

Did Mr Chan consider cl 23 of the SIA Conditions in issuing EOT 2 and EOT 3?

65 Thirdly, Mr Ser submits that because Mr Chan did not consider the SIA Conditions in issuing either EOT 2 or EOT 3, it follows that Mr Chan's decision to grant EOT 2 and EOT 3 "was obviously wrong". He contends accordingly that it was "patently artificial" for the Judge to find Mr Chan's decision to be correct by reference to cl 23(1)(a) of the SIA Conditions, a clause that Mr Chan

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39 ROA Vol III(AN) at p 214, para 84 and p 215, para 86; ROA Vol III(AV) at p 271, para 7.2; see also ROA Vol III(DI) at p 223, line 25–p 224, line 2 (2 June 2020).

himself, as architect, never even applied his mind to.[40] Mr Ser bases his submission on Mr Chan's evidence at trial on 8 and 9 June 2020:[41]

> **[Monday 8 June 2020]**
>
> Q: If that's the case, *did you have the* ***practice of checking*** *the contract provision*, for example in this case the EOT provisions, ***before*** *you issue an EOT grant of any sort*?
>
> A: No, because we didn't practice –
>
> Q: So you didn't do that?
>
> A: Yeah.
>
> …
>
> **[Tuesday 9 June 2020]**
>
> …
>
> Q: And ***on Friday***, I think you gave evidence that EOT 2, *you granted it* ***without considering*** *clause 23*. Would that be correct?
>
> …
>
> A: Well, yeah, yes.
>
> …
>
> Q: Now that's EOT 2. EOT 3 was it the same as well, *you* ***did not consider*** *clause 23 when you granted EOT 3*?
>
> A: Yes.
>
> Q: Right? And that includes both the in-principle grant on the 2 April and the actual grant of 15 days on April; right, Mr Chan?
>
> A: It's all related yes.
>
> Q: So on both of those grants, *you* ***did not consider whether*** *GTMS'* ***grounds fell within*** *clause 23.(1)*?
>
> A: Yes.
>
> …
>
> [emphasis in italics and bold italics added]

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40 AC at para 75.

41 ACB Vol II(E) at pp 198–201.

66 At first blush, Mr Chan's answers to the questions are rather surprising. However, on a closer reading, we accept that Mr Chan's answers do not mean he had not considered cl 23 *at all* or that cl 23 was not in the background of his mind when he issued the EOTs. In our view, the above questions are an illustration of unfair questions and we are surprised that there was no intervention from counsel (although counsel for Mr Chan did address these questions in re-examination; see [68] below):

(a) The first question quoted above from 8 June 2020 was predicated on whether Mr Chan had a practice, generally, of "checking" the contract provisions "before" issuing an EOT, to which Mr Chan said "No" but was cut off when he tried to explain something.[42]

(b) On the next day, 9 June 2020, Mr Chan was asked *to confirm* his evidence given on an earlier day (this being Friday 5 June 2020), except that counsel *wrongly* recited Mr Chan's answer. Notably, counsel began his question with: "I ***think*** *you gave evidence that*…" and went on, *wrongly* we emphasise, to frame that evidence as "… *you granted* [EOT 2] ***without considering clause 23*** …" [emphasis added].[43] In fact, that was *not* what Mr Chan had said on 5 June 2020, as we address at [67] below.

(c) Mr Chan's answer to counsel on 9 June 2020 showed that he hesitated but decided, rather unfortunately, not to challenge the same. A more alert witness or counsel should have asked, especially since there was an intervening weekend, for the witness to be shown the transcript

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42 ROA Vol III(DL) at p 167, lines 1–7 (8 June 2020).

43 ROA Vol III(DL) at p 283, lines 5–7 (9 June 2020).

to refresh his memory. The upshot was that counsel managed to get Mr Chan to confirm something that he had *not* said.

(d) Counsel then triumphantly, or so he thought, predicated his next question on another twist, which was not what the other two questions and answers stood for: "So … *you* ***did not consider*** *whether GTMS's* ***grounds fell within*** cl 23.(1)?"[44] [emphasis added], to which Mr Chan answered in the affirmative.

67 Read in context, however, Mr Chan's earlier evidence under cross-examination on Friday, 5 June 2020 (in the week before his continued cross-examination on 8 and 9 June 2020), in fact shows that Mr Chan was familiar with what cl 23 stated and that he had considered cl 23 in granting the EOTs:[45]

> Q: So you must be very familiar with clause 23, if not today, in 2013, when you were certifying the extension of time? Were you familiar, Mr Chan, in 2013?
>
> A: With -- sorry, with the?
>
> Q: With clause 23 of the SIA standard form.
>
> A: Yeah, we know that there's a clause for extension of time, yes.
>
> *Q: Yes. But were you familiar with what the clause provides for in 2013, when you certified the extension of time?*
>
> …
>
> *A: Yes. Force majeure, inclement weather and all that, yes.*
>
> …
>
> *Q: … Did you consider the language in clause 23 when you decided whether or not to grant GTMS the EOT on 7 February 2013?*
>
> *A: Yes.*

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44 ROA Vol III(DL) at p 284, lines 19–21 (9 June 2020).

45 ROA Vol III(DK) at p 237, line 7–p 242, line 2 (5 June 2020).

Q: *So you did; right?*

A: *Yes.*

Q: Did you go through this clause with Mr Yong on that day when you discussed?

A: Not -- we didn't particularly look at it, yeah.

Q: So, no, you didn't look at this clause in February 2013, when you had that discussion with Mr Yong as to whether or not to grant the EOT; right?

A: Yeah.

…

Q: So clause 23 wasn't discussed; right?

A: Yeah, it wasn't.

Q: It was just a decision as to whether or not to grant --

A: Yes.

Q: -- and that's it, without reference to the contract and what it requires; right?

A: *Because it was very obvious that, you know, GTMS is due for an extension of time.*

…

Q: … when you had a discussion with Mr Yong in deciding whether to grant GTMS EOT on 7 February 2013, did you consider what the contract requires you, as the certifier, to consider before granting the EOT?

A: Well, not the contract – as a – not contractually.

Q: You considered the facts, but not the contractual requirements; right?

A: Yeah.

Q: And can I suggest to you, Mr Chan, that that is the wrong approach because you are required, under the contract, to certify strictly in accordance with the contract?

A: Yes.

…

> *Q:* *Mr Chan, you didn't think it was important, on 7 February 2013, for you to consider what the contract requires you to consider; right? It didn't cross your mind?*
>
> *A:* *Yeah, because it was so obvious to us.*
>
> *Q:* *It's so obvious to you even without considering –*
>
> *A:* *Because PowerGrid was so far behind, yeah.*
>
> [emphasis added]

In our judgment, even if Mr Chan had not expressly discussed cl 23 with his representative, Mr Yong, or physically "look[ed]" at the clause when he granted the EOT, this was not because Mr Chan had failed to consider cl 23 – in fact, Mr Chan's evidence from 5 June 2020 shows that he was familiar with cl 23, had considered it and was of the view that it was "very obvious" that GTMS fulfilled the requirements for granting an EOT under cl 23. This was also consistent with his AEIC, where Mr Chan said he was "broadly familiar with the SIA Conditions" and his interpretation of them was "informed by my prior practical experience over my many years in practice".[46] It was therefore disingenuous of counsel to characterise Mr Chan's earlier evidence on 5 June 2020 as an admission that he had not considered cl 23, just because Mr Chan may not have read the SIA Conditions or expressly discussed it in his conversation with Mr Yong before granting the EOT.

68 For completeness, we note that in re-examination on 10 June 2020, Mr Chan's counsel did revisit the question at [66(a)] above concerning whether Mr Chan had a practice of "checking" the contract provisions:[47]

> Q: So, Mr Chan, when Mr Chong asked you whether you had the practice of checking the contract provisions in relation to the EOT provisions before you issue an EOT

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46 ROA Vol III(AI) at pp 193–194, para 39.

47 ROA Vol III(DM) at p 295, lines 11–17 and p 297, line 23–p 298, line 14 (10 June 2020).

> grant, and you said "no", why are you comfortable with this method of working?
>
> A: This has been a method that we have been using in the office since I started practicing.
>
> …
>
> Q: Mr Chan, Mr Chong asked you whether you were careless for not checking the contract provisions, for example, in relation to the EOT grants, and you said "yes". Would you like to explain your answer?
>
> A: Well, I think we did not refer to – I mean, we did not consider the clause 23.
>
> Ct: What do you mean by "we did not consider the clause 23"? In granting the EOT, is it?
>
> A: When we were assessing the EOT, yes.
>
> …
>
> Ct: No, no, I don't understand your explanation. Are you telling me that you did not consider clause 23 when you were considering the EOT application?
>
> A: Yes, yes. Yes, your Honour.

While Mr Chan's evidence in re-examination appears to contradict his earlier evidence at [67], in our view this merely goes to show that Mr Chan is one of those witnesses who gets muddled during cross-examination. Further, read as a whole and in context, Mr Chan's counsel had phrased opposing counsel's question as whether Mr Chan had been careless for "not checking" the contract provisions, rather than whether Mr Chan had "considered" the contract provisions. As we explained at [67], even if Mr Chan had not "check[ed]" the contract provisions, it did not logically follow that Mr Chan had failed to *consider* cl 23 in granting the EOT or did not know of the relevant factors entitling a contractor to an EOT.

69 Finally, we note that the unreliability of this kind of evidence at [66] and the futility of making a submission thereon is readily seen when we consider the

contemporaneous correspondence between GTMS and Mr Chan leading up to the grant of the EOT (see [40]–[47] above):

(a) In GTMS's letter to Mr Chan dated 20 December 2012, it is expressly stated that GTMS was seeking an EOT.[48] It is a long letter, *headed* "Request for EOT …", and containing reasons for an EOT. It expressly states that this is due to the late connection to the power grid, which in turn delayed the testing and commissioning of the M&E Works. Obviously, this could not be done without power from the mains. There can be no doubt, on the contents of this letter and the following correspondence, as to what facts were being relied upon for the grant of EOTs.

(b) In subsequent substantiation, GTMS cited the requirement for an OG Box late in the day on 21 November 2012 and SPPG's further delays in constructing the OG Box and making the cable connections from the power mains (see [41] above). It was certainly not lost on GTMS that it could apply for an EOT, and that could only have referred to cl 23(1) which has the words "Grounds" and "23. EXTENSION OF TIME" in bold print in the side note and heading of that clause. It is hard to believe an architect reading that letter and not being aware that the SIA Conditions contained a clause granting the power to an architect to extend time, particularly since EOTs and liquidated damages loom large in almost *any* building and construction contract. Mr Chan certainly must have known there was one because Mr Chan's representative (Ms Wan) sent GTMS an email dated 28 January 2013 to GTMS in response to GTMS's letter of 15 January 2013 asking GTMS to submit further

48 ACB Vol II(B) at pp 189–190.

substantiation. It cannot be a coincidence that cl 23(4)(a) gives the architect the express power to do so. We have set out the sequence of communication in [41]–[47] above, and note that these communications were headed, "REQUEST FOR EOT-FURTHER SUBSTANTIATION".

(c) On 7 February 2013, as noted in [44] above, Mr Chan sent GTMS his detailed two-page letter dealing with his assessment of the application for EOT. That letter is headed: EXTENSION OF TIME APPLICATION". In fact, Mr Chan expressly referred to cl 23 of the SIA Conditions in this letter.[49] Mr Chan likewise referred to cl 23 of the SIA Conditions in his letter to GTMS on 10 April 2013 granting EOT 3.[50]

70 Taking all this evidence into account, and especially the contemporaneous correspondence, it is clear that Mr Chan did have a working knowledge of the SIA Conditions in relation to EOT and that he did have cl 23 in mind when considering the EOT requests. It is noteworthy that cl 23(1) and the paragraphs within that subclause have changed very little from the first edition of the SIA Conditions. In our judgment, Mr Chan would not have to check and read cl 23(1) each time he issued and signed an EOT because he would know generally what kind of events would entitle a contractor to an EOT. Hence, for example, we do not think that Mr Chan would have to read cl 23(1) every time he was dealing with a delay caused by an architect's instruction ("AI") or the requirements of a government authority or statutory undertaker, in assessing the corresponding application for an EOT by a contractor, because Mr Chan would know generally that there was power to extend time for such events

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49 ROA Vol V(AO) at pp 230–231.

50 ROA Vol V(AO) at p 233.

and, as we have referenced above, he specifically said as much on 5 June 2020 (see [67] above). It is also undisputed that Mr Chan himself did not work in isolation. For example, his representative, Mr Yong, testified that he (Mr Yong) was "familiar with the contract",[51] that he was involved in determining the 40-day duration of EOT 2, and had "briefed" Mr Chan on this,[52] and that he knew the architect was "supposed to grant an extension of time in accordance with [cl 23].[53] Mr Chan and his team looked at the facts of the case and even discussed the EOT application with CCA to consider if an EOT was warranted.[54] It is also undisputed that the Architect was entitled to rely on his team to carry out and/or assist him in his duties, given that architects, like all professionals, are entitled to delegate their duties to other qualified professionals in the same organisation (see *East Ham Corporation v Bernard Sunley & Sons Ltd* [1966] AC 406 at 427).[55]

71 Furthermore, just because Mr Chan did not *profess* to rely on cl 23 of the SIA Conditions at the time he granted the EOT, this does not mean he cannot subsequently rely on it now in these proceedings. It all depends on the facts of each case and the context. Indeed, such retrospectivity is not unknown to the law. For example, in the context of termination of an employment contract, it has been held that even if an employer summarily dismisses an employee pursuant to a contractual right without relying on any particular clause in the contract, the employer may nevertheless seek to rely on it later on based on

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51 ROA Vol III(DE) at p 265, lines 21–25 (30 March 2020).

52 ROA Vol III(DF) at p 100, line 14–p 101, line 14 (30 March 2020).

53 ROA Vol III(DF) at p 151, lines 20–23 (31 March 2020).

54 ROA Vol III(AN) at p 212, para 75; ROA Vol III(DE) at p 202, lines 11–23 (27 March 2020) and ROA Vol III(DF) at p 92, lines 4–11 (30 March 2020).

55 2nd and 3rd Respondents' Bundle of Authorities, Vol 2, Tab 17.

newfound evidence (see *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 at [43]).

Clause 23(1)(a) of the SIA Conditions

72 We now turn to consider whether SPPG's delay constitutes a "*force majeure*" event within the meaning of cl 23(1)(a) of the SIA Conditions. The burden of proof falls on GTMS and Mr Chan to demonstrate that the facts bring the case within the clause and ought to be construed so as to include delays by SPPG (see *Tandrin Aviation Holdings Ltd v Aero Toy Store and another* [2010] EWHC 40 at [48]).

The meaning of "force majeure" in cl 23(1)(a) of the SIA Conditions

73 Having undertaken a review of several authorities, the Judge held that "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 default of either party" (Judgment at [197]). He thus concluded that it would be appropriate to "construe the clause based on its general and established meaning … [to refer to] an event that was radical and out of the parties' control, which occurred without either party's fault" (Judgment at [198]).

74 The CA in *RDC Concrete* emphasised that the "most important principle with respect to *force majeure* clauses entails 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" (at [54]). Similarly, *The Law of Contract in Singapore* cautions that a "*force majeure* clause operates by reference to its terms" (at paras 18.007 and 18.008):

> In construing such terms, if one is giving effect to what the parties have *agreed*, in the usual cases, parties would most likely only have agreed to make provision for events which they might reasonably have foreseen *could* occur over the course of performance of the contract. That said, given appropriate wording, it must surely be open to the contracting parties to agree to incorporate *force majeure* events whose occurrence might well *not* have been reasonably foreseeable …
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> [emphasis in original]

75 As observed in *Law and Practice of Construction Contracts* vol 1 at para 21.254:

> Clause 23(1)(a): The term *force majeure* may be understood as an "unforeseeable event beyond the control of any of the parties to the contract, the effect of which is to release the parties from performing their remaining obligations under the contract". The concept has also been described as "a reference to all circumstances independent of the will of man" and considered to be wider in meaning than the other frequently encountered phrase, "Act of God". It has been ruled to include any "direct" legislative or administrative interference. The operation of the concept is framed by the context of the background and relationship of the parties to the contract. For this reason, it should be construed with reference to the words preceding and following the expression, with due regard being given to the nature and general terms of the contract: see *China Resources (S) Pte Ltd v Magenta Resources (S) Pte Ltd* (1997).

76 In *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106, cl 3 of the contract in question provided that the "Supplier shall be under no *obligation* to supply the concrete if the said supply has been disrupted by … any other factors arising through circumstances beyond the control of the Supplier". The parties had entered into a contract for concrete to be supplied over a period of time. Supply was however made much more difficult when the Indonesian government announced it was imposing a ban on the export of sand. First, the CA held that the ban was a disruption within the meaning of cl 3 (at [50]–[64]). Secondly, in citing *Goldlion Properties Ltd v Regent National Enterprises Ltd* [2009] HKFCA 58 with approval, the CA rejected any free-

standing principle that a contracting party could only rely on a *force majeure* clause if it had taken all reasonable steps to avoid the *force majeure* effects of the event in question, stating instead that "[w]hether the affected party must have taken all reasonable steps before he can rely on the *force majeure* clause depends, in the final analysis, on the precise language of the clause concerned" (at [66]). However, not *any event* that is beyond the parties' control necessarily constitutes a *force majeure* event; hence it is well-established that a change in economic or market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not regarded as being a *force majeure* event (*The Concadoro* [1916] 2 AC 199*, Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497).

77 In our view, the essence of a *force majeure* event is a radical event that prevents the performance of the relevant obligation (and not merely making it more onerous), and which is due to circumstances beyond the parties' control: see for example, *Chitty on Contracts* vol 1 (Hugh Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2019) at para 15-164. The CA observed in *Sato Kogyo* at [57] that "*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" [emphasis added in bold underlined italics]. The use of the words "radical" and "external" by the CA suggests that the phrase "*force majeure*" would cover only those events or circumstances which were generally not, at the time the contract was entered into, contemplated or expected to or which might reasonably have been foreseen to occur during the performance of the contract (see [74] above).

78 We agree with Mr Ser's submission that the text of the Contract, and in particular the SIA Conditions, ought to assume primary importance in the

contextual approach to interpretation that the court applies.[56] Similarly, we agree with the Judge's observation that the scope and coverage of cl 23(1)(a) necessarily "has to be considered in the context of the entirety of cl 23(1) which deals with EOT in the SIA Conditions" (Judgment at [199]).

79 In our view, the events and circumstances covered by cll 23(1)(a) to (e)[57] are rare and uncommon, especially when one considers the hundreds of construction contracts which are completed in Singapore without any of these events or circumstances materialising.

80 On the other hand, those events and circumstances covered by cll 23(1)(f) to (k) and (n) to (q)[58] are of a very different nature; they cannot be said to be uncommon, their impact on the construction project is not so great as those in cll 23(1)(a) to (e) and many are even events and circumstances which one would expect to occur, *eg*, not receiving instructions or drawings from the consultants on time, variations in the permanent and temporary works, AIs on P.C. or provisional sum items.

81 Clearly, many of the events and circumstances set out in cll 23(1)(b)–(e) could fall within the meaning of *force majeure* events and circumstances. However, the fact that they have been separately placed in succeeding paragraphs of sub-clause (1) shows that *force majeure* events and circumstances under cl 23(1)(a) covers *force majeure* events and circumstances other than those set out in cll 23(1)(b)–(e). What cl 23(1)(a) covers will therefore be, as we have stated above in [77], radical external events and circumstances that prevent

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56 AC at para 81.

57 ACB Vol II(A) at p 112.

58 ACB Vol II(A) at p 113.

the performance of the relevant obligations and which are due to circumstances beyond the parties' control – for example, the COVID-19 pandemic and the "lock down" that followed over much of 2020 and 2021, the shortage of labour and materials due to the COVID-19 pandemic lock-downs, the prohibition of travel between countries and the ensuing disruption of supplies and manufacture of goods and material. We note, for completeness, that cll 23(1)(l) and (m) specifically cover the shortage of labour and the shortage of goods or materials respectively resulting from domestic and foreign government actions.

Whether SPPG's delay constitutes a "force majeure" event

82 In the light of the above, we respectfully disagree with the Judge's conclusion that SPPG's requirement for an OG Box constituted a "*force majeure*" event within the meaning of cl 23(1)(a) of the SIA Conditions.

83 First, SPPG's requirement for an OG Box does not amount to such a *radical* or external event that is beyond the contemplation or control of the parties or something unforeseen to occur during the performance of the contract. It does not belong to the same category or types of events set out in cll 23(1)(a) to (e) of the SIA Conditions. It is common knowledge in the building and construction industry (indeed it is general knowledge) that the electrical supply for any dwelling comes off or is drawn from the electrical grid of Singapore, whether directly in landed property, or indirectly, through electrical transformers and/or switchgear, servicing condominiums or blocks of flats. A dwelling *must* therefore be connected to the electrical grid to enable it to draw its electricity. In that context, the connection to draw electricity from the grid *is an inevitability*.

84 Besides being a physical impossibility, it is also common knowledge that a home owner cannot simply engage his own contractor and tap his

electricity off the power grid. There are laws, regulations and rules governing how one can draw electricity from the electrical grid. How one draws electricity from the power grid is (as we set out below) within the sole purview and requirements of SPPG. In landed property, the anticipated electrical load or usage, the number of phases for electricity, the kind of distribution board boxes and the number and kinds of fuses and circuit breakers are also regulated by electrical codes and standards. Whilst in the past, houses or landed property were connected to the power grid from mains laid underneath or near the roads, it is not uncommon, for some time now, to use OG Boxes for housing estates with landed properties rather than allow connections directly to the mains underneath the roads for each and every house. This is readily seen in housing estates with landed property (especially those comprising semi-detached and detached houses) and Leedon Park is no exception. This would be all the more so in this case because three adjacent bungalows are being built on one plot of land. Tapping off the power mains at three different locations (especially if it lay underneath the road fronting the bungalows) for each bungalow would not make much sense when compared to making one tap off the mains to the OG Box and then for each bungalow to tap their electricity supply from the OG Box, which would be designed to have a few tap-off points. As stated above, SPPG would only use its own contractors to connect the cables from the mains to the OG Box and from the OG Box to the meter compartments of each bungalow. SPPG's initial quotation to Mr Ser dated 22 November 2010 with regards to the electricity connection stipulated that Mr Ser had to provide a "150 mm dia[meter] UPVC cable entry pipe from intake point to undercross roadside drain along Leedon P[ar]k", and the attached quotation for $17,869 was for service connection work to be carried out *by* SP PowerAssets Ltd ("SP

PowerAssets").[59] Therefore, those cabling works could not have been done by GTMS even if it wanted to. This was confirmed by witnesses, including Mr Lee Keh Sai ("Mr Lee"), Mr Ser's expert witness.[60]

85 With that factual context, it would be convenient to deal with Mr Ser's contention that, unlike the Public Sector Standard Conditions of Contract (8th Ed, 2020) (the "PSSCOC 2020") and the Federation Internationale des Ingenieurs-Conseils Conditions of Contract for Construction (the "FIDIC Conditions"), two other standard forms commonly used in Singapore, there is a conspicuous omission to any reference of acts of delay occasioned by public authorities in the *force majeure* provision found in cl 23(1)(a) of the SIA Conditions. Cl 23(1)(a) only contains the phrase "*force majeure*" without any other words or elaboration.[61] Mr Ser submits that this shows an intentional omission by the drafters who did not intend for matters like the SPPG delay to constitute a ground for EOTs (whether under *force majeure* or otherwise) and intended that the contractor bears that risk.

86 Mr Ser's submissions on this point are without merit. First and foremost, whilst the phrase "*force majeure*" in cl 23(1)(a) is not linked to an event like the requirement of an OG Box, there are two other paragraphs within cl 23(1), *viz*, cll 23(1)(f) and (o), under which such an event is covered for an EOT, as we will discuss later (see [92]–[104] below). Secondly, whether an event like the requirement of an OG Box by SPPG, is tagged onto the phrase "*force majeure*" or not depends on the wording of that particular clause and its contractual context. A comparison of these provisions from the three different standard

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59 ROA Vol V(F) at pp 217–218.

60 ROA Vol III(CV) at p 50, line 12–p 51, line 16 and p 52, line 23–p 53, line 19 (25 February 2020).

61 AC at para 83.

form contracts will show that *force majeure* is one event which can give rise to an EOT, but so is compliance with the requirements of any law, regulation, by-law or public authority or public service company. Before we examine these provisions in the PSSCOC and FIDIC standard forms, we pause to note that the FIDIC Conditions (commonly referred to as the "Red Book") was first in time, the SIA Conditions followed some 23 years later in 1980 and the first edition of the PSSCOC was published 15 years down the line in 1995.[62]

87 First, the FIDIC standard form contract has been in common use for international construction contracts since its inception in 1957 (Jeremy Glover and Simon Hughes, *Understanding the New FIDIC Red Book, A clause-by-clause Commentary* (Sweet & Maxwell, 2016) at pp xi and xiii). Mr Singh cites cl 8.6[63] of the 2017 FIDIC Conditions of Contract ("FIDIC 2017") as a clause dealing with EOT for delays caused by authorities. Clause 8.6 provides that if the contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities or private utility entities in the "[c]ountry", these authorities or entities delay or disrupt the contractor's works and the delay or disruption was "[u]nforeseeable", then this delay or disruption will be considered as a cause of delay under cl 8.5(b) giving an entitlement to an EOT. The 1999 FIDIC Conditions of Contract ("FIDIC 1999") had the equivalent of cl 8.6 of FIDIC 2017 in cl 8.5 and of cl 8.5(b) in cl 8.4(b). FIDIC 1999 also contained cl 19 entitled "Force Majeure", which defines *force majeure* as an exceptional event or circumstance which is beyond the parties' control, which such party could not reasonably have provided against before entering into the contract, which having arisen, such party could not reasonably have avoided the outcome, and which is not substantially attributable to the other party. Clause

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62 ABOA Vol 3 at Tab 31, p 253.

63 ABOA Vol 3 at Tab 29, clause 8.6 of FIDIC (2nd Edition 2017).

18 of FIDIC 2017 is almost identical to cl 19 of FIDIC 1999, except that it is now called "Exceptional Events". Furthermore, both cl 18 (FIDIC 2017) and cl 19 (FIDIC 1999) go on to provide, in similar wording, for events included within the phrase "exceptional event" or "*force majeure*" respectively. This list of events bears great similarity to cll 23(1)(c), (d) and (e) of the SIA Conditions. Neither cl 18 of FIDIC 2017 nor cl 19 of FIDIC 1999 mentions acts of public authorities; both editions of FIDIC deal with this in separate sub-clauses.

88 Secondly, cl 14.2 of the PSSCOC 2020 is phrased in broadly similar terms to cl 23(1) of the SIA Conditions. Similar to cl 23(1)(a) of the SIA Conditions, cl 14.2(a) of the PSSCOC provides that the time for completion may be extended where such delay has been caused by "[a]n event which is beyond the Contractor's reasonable control (a force majeure event)". Clauses 14.2(b), (c), (f) and (q) of PSSCOC contain paragraphs similar in content to cll 23(1)(b), (c), (d), (e), (l) and (m) of the SIA Conditions. Importantly, cl 14.2(e) of the PSSCOC separately provides an entitlement to EOT which is caused by: "[c]ompliance with the requirements of any law, regulation, by-law or public authority or public service company as stipulated in Clause 7.1", which in turn mandates that the Contractor "comply with and give notices required by any law, regulation, or by-law, or by any public authority or public service company, relating to the Works, or, in the case of a public authority or public service company, with whose systems the same are or will be connected".[64]

89 Contrary to Mr Ser's submission, there are more similarities than differences between the standard form conditions of contract. They contain differing uses of the phrase *force majeure*, but they also list other events or causes entitling the contractor to an EOT which are fairly similar in content

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64 ABOA Vol 3 at pp 261–263.

across the three forms. This only emphasises that in construction contract law the drafters have, through experience, set out the most likely causes for delays and made provision for it, not only as a matter of fairness but also as an allocation of risk and preservation of the right to impose liquidated damages.

90 Moreover, Mr Ser's contention is erroneous from a more basic perspective. Whilst SPPG's requirement for an OG Box is *not* a *force majeure* event, there are sixteen other paragraphs in cl 23(1) which cover a whole host of other events under which the project architect can grant an extension of time. The draftsman of the SIA Conditions, Duncan Wallace QC, was acutely aware that if any act of the employer or his consultants fell outside those paragraphs in cl 23(1) (or elsewhere in the SIA Conditions which mention the grant of an EOT), and that act prevented the contractor from completing his works on time, it would lead to, *inter alia*, two very important consequences; first, the employer would lose the right to impose liquidated and ascertained damages and secondly, it would set the time for completion of the contract at large. This is due to the prevention principle as espoused in cases like *Roberts v The Bury Improvement Commissioners* (1870) LR 5 CP 310 which has been applied in Singapore, see *eg*, *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634. We return to this at [92] below.

91 How *force majeure* came to play such a central role in the EOTs for the present case should be laid squarely on the shoulders of counsel. When applying for EOT 2 and EOT 3, GTMS did not cite the paragraph within cl 23(1) under which they were making their application. Similarly, Mr Chan, when granting EOT 2 and EOT 3, only cited the grant of EOTs under cl 23; he too did not cite the paragraph under which he was granting the EOTs. However, GTMS cited

cll 23(1)(a) and (q) in its Consolidated Reply and Defence to Counterclaim.[65] In CSYA's Consolidated Defence and Counterclaim (Amendment No. 2), Mr Chan similarly cited cll 23(1)(a) and/or (q).[66] *Force majeure* was therefore made a live issue by the parties' pleadings. In our judgment, however, for the reasons we have set out above, it could not be said that the EOTs were validly granted pursuant to cl 23(1)(a).

Applicability of other sub-paragraphs in clause 23(1)

92 That being said, we are of the view that SPPG's requirement for an OG Box falls within a "statutory obligation" covered by cl 7 and cll 23(1)(f) and/or (o), which specifically provide for an EOT in such an event. Our reasons are as follows.

93 In cl 23(1)(f), there is the power to extend time as a result of an AI in respect of, *inter alia*, "cl 7.(1) (*or otherwise in accordance with that clause*)" [emphasis added]. Clauses 23(1)(f) and (o) have one common basis – cl 7 of the SIA Conditions. Clause 7(1) is headed "STATUTORY OBLIGATIONS" and provides:[67]

> **The Contractor shall comply with** and give all notices required by **any** instrument, rule or **order** under any written law applicable or any regulation or bye-law **of** any Government authority or **any statutory undertaker which has any jurisdiction with regard to the Works or with whose systems the same are or will be connected**. …
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> [emphasis added in bold]

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65 ROA Vol II(A) at pp 66–67, para 24.

66 ROA Vol II(C) at p 12, para 12A.

67 ACB Vol II(A) at p 102.

94 The contractor is therefore contractually bound, in mandatory language, to comply with any order of any "statutory undertaker" which has any jurisdiction with regard to the Works or with whose systems the Works will be connected – such "systems" would include the power grid. The order does not necessarily (though it can) emanate from an AI. Clause 7(1) provides for the situation where the Government authority or statutory undertaker initiates the "order". It then goes on to provide that the contractor shall, before making any variation to the Works as set out in the contract documents, give the architect a written notice specifying and giving the reasons for such a variation, and states that the architect *may* issue a direction or instruction with regard to that variation. If, within seven days of giving such notice, the contractor does not receive any direction or instruction from the architect, *he shall proceed with the work conforming* to, *inter alia*, the order and that varied work "shall be *deemed* to be a variation ordered by a written instruction of the Architect, *and if appropriate* an extension of time shall be given to the Contractor" [emphasis added]. This therefore provides for the situation where the architect does not react to the notice – the contractor nonetheless *has to comply* with the order and may claim that this is a variation. If for any reason the architect refuses to act, the contractor is still contractually bound to comply with the "order" because failing to do so will prevent the project from being completed. That will not be to the benefit of anyone, least of all the owner. The contractor is then left to his remedies, *ie*, arbitration as the last resort, if he is not paid for the cost of complying with the "order" or for not getting any EOT.

95 The same analysis applies to cl 23(1)(o). Clause 23(1)(o) provides that an EOT may be granted on "the grounds for extension mentioned in Clauses … 7 … of these Conditions."

96 In this case, we think that GTMS was entitled to apply for an EOT pursuant to cll 23(1)(f) and/or (o) in respect of SPPG's requirement for an OG Box to connect SPPG's cables to the bungalows for the supply of electricity from the power grid.

97 In our judgment, SPPG is clearly the "statutory undertaker" (by devolution) which has the power to oversee and operate the power grid in Singapore and to impose conditions or its requirements on the supply of electricity. This was a regulatory power previously exercised by the Public Utilities Board ("PUB"), a "statutory undertaker" in traditional and somewhat outmoded, though time-honoured, description. Although this is not a point taken by parties, it is important that this aspect is made clear as the term "statutory undertaker" in cl 7(1) needs to be given its updated context and meaning. This court can take judicial notice that the ownership of and use of electricity from the power grid of Singapore used to be under the purview of the PUB, which also dealt with piped gas and the harvesting, collection and control of water. The following is public knowledge made through public announcements by the PUB, Ministry of Trade and Industry ("MTI") and other Government agencies:

(a) In 1995, the Government of Singapore decided to corporatise the electricity and piped gas functions of the PUB. This was a move towards privatisation which would be for the benefit of Singapore (Public Utilities Board, "PUB News Release, Public Utilities Board Annual Report 1995" (12 September 1996)). The Public Utilities Act 1995 (No. 26 of 1995) was passed on 7 July 1995 and took effect from 1 October 1995 (the "PU Act 1995"). The PU Act 1995 reconstituted the PUB as a statutory Board and provided for the transfer of the property, rights and liabilities in respect of its electricity, gas and related undertakings to successor companies.

(b) The corporatisation of PUB's electricity and gas departments was effected by s 61 of the PU Act 1995 whereby the PUB would transfer the necessary properties, rights and liabilities to Singapore Power Ltd. Thus, on 1 October 1995, Singapore Power Ltd, a holding company with five main subsidiary companies, *viz*, PowerGen (Senoko) Ltd, PowerGen (Seraya) Ltd, PowerGrid Ltd, Power Supply Ltd and PowerGas Ltd took over the electricity and piped gas operations of the PUB. The PUB retained the water authority and took over its new role and regulator of the privatised electricity and piped gas industries in Singapore (ss 3 and 61 of the PU Act 1995; *Singapore Parliamentary Debates, Official Report* (7 July 1995) vol 64 at cols 1361–1366 (Yeo Cheow Tong, Minister for Trade and Industry)).

(c) On 11 March 2000, the MTI, through a Government Press Release, announced it would continue with its aim to divest the power generation companies by their transfer to Temasek Holdings Ltd ("Temasek") and thereby separate the ownership of the retail business from the power grid. Whilst privatisation of the retail business would increase competition for the benefit of consumers and present them with a greater choice of service providers, the power grid, for obvious reasons, would remain a monopoly (Ministry of Trade and Industry, "Further Restructuring of the Electricity and Gas Industries" (11 March 2000) in *Singapore Government Press Release*).

(d) By virtue of the Public Utilities Act 2001 (which was passed on 16 March 2001), on 1 April 2001, the PUB Water Department was merged with the Sewerage and Drainage Departments under the Ministry of the Environment (now the Ministry of the Environment and Water Resources), while PUB's regulatory role in the electricity and gas

industries was transferred to the new Energy Market Authority (the "EMA") (see ss 3, 6 and 60 of the Public Utilities Act 2001 (No. 8 of 2001); *Singapore Parliamentary Debates, Official Report* (16 March 2001) vol 73 at cols 1317–1327 (Peter Chen, Acting Minister for Trade and Industry)). The EMA is a statutory board under the MTI and was established by the Energy Market Authority of Singapore Act 2001 (No. 9 of 2001). Sections 6 and 7 of the most recent version of the Act (this being the Energy Market Authority of Singapore Act 2001 (2020 Rev Ed) (the "EMA Act")) set out EMA's powers and duties, and under s 6(1)(*g*), the EMA exercises licensing and regulatory functions in respect of electricity systems and services.

(e) Under the most recent version of the Electricity Act 2001 (2020 Rev Ed) (the "Electricity Act"), which also commenced with effect from 1 April 2001:

(i) The EMA is charged with the general administration of the Electricity Act and the exercise of the functions and duties imposed on EMA by the Electricity Act (see s 3(1));

(ii) No person shall engage in the transmission of electricity without an electricity licence granted by EMA under section 9 (see also ss 6(1)(*b*), 9(1)(*b*));

(iii) SP PowerAssets owns and manages the national electricity transmission system or power grid. SP PowerAssets appointed SPPG as the agent to carry out the management and operation of all aspects of the transmission business:

(iv) SP PowerAssets holds a transmission licence from EMA;

(v) SPPG is licensed by the EMA as the transmission agent licensee (see also *Seng Foo Building Construction Pte Ltd v Public Prosecutor* [2017] 3 SLR 201 at [6]).

(f) As a transmission licensee, SPPG has the following powers and duties under the Electricity Act:

(i) Under s 25(1)(*a*), where any person requires a supply of electricity, SPPG may require that person to accept any condition requiring the person to provide sufficient premises and to construct such rooms, buildings or structures as may be considered necessary by SPPG to accommodate and house the electrical plant required for the purposes of the supply;

(ii) Under s 25(1)(*b*), SPPG may require that person to accept any condition giving SPPG the right to use the premises, rooms, buildings or structures provided or constructed under paragraph (*a*) for the purposes of the supply; and

(iii) Under s 31(1)(*a*), SPPG may, for any purpose connected with the carrying on of the activities authorised by or required under its electricity licence, install any electric line/electrical plant, any structure for housing or covering any such line or plant, and any meter, switch or other apparatus for the purpose of, *inter alia*, directing or controlling the supply of electricity.

(g) Under s 16 of the Electricity Act, the EMA has issued several codes of practice, one of which is a Transmission Code for transmission licensees dated 6 August 2021. Under para 4.2.6, the transmission licensee (*ie*, SPPG) shall not connect any installation to the transmission system if the connection applicant fails to comply with the procedures

> and requirements for connection to and use of the transmission system set forth in the Transmission Code and the connection agreement.

98 In this case, it was SPPG that required the OG Box in its 21 November 2012 Letter (using mandatory language "… it is necessary …") as the means by which the three bungalows would draw electricity from the power grid. This, in our view, was an order of a "statutory undertaker" which operates the power grid and with whose "system" the bungalows would be connected – with or without an AI or an architect's direction. We have already referred above as to how that 21 November 2012 Letter went first to Mr Ser, and then to CCA, and finally to CSYA and GTMS (see [38] above). Other than constructing the meter boxes and having the SPPG required items referenced above on hand, any work beyond the meter boxes to the electrical mains was not within GTMS's scope of works. The work that ensued was that of the consultants on the siting of the OG Box. The rest was up to SPPG to make the connections. All this did not involve GTMS.

99 Therefore, EOT 2 and EOT 3 were, in principle, correctly granted by Mr Chan under "Clause 23". The communications between SPPG, Mr Chan, GTMS and the other consultants made it plain, beyond doubt, what events and requirements were being relied upon for an EOT. We note that neither GTMS nor Mr Chan specifically mentioned which particular paragraph in cl 23(1) was being relied upon. Whilst that may be characterised as undesirable, sloppy or careless in some purist quarters, in our judgment, there was no doubt that the EOTs were being sought and granted on the ground of the OG Box requirement by SPPG and the consequent delays, which thereby caused a delay to the Works. We are therefore of the view that this did not mean there was no valid application for, nor an invalid grant of, EOTs under cl 23(1).

100 We observe here that Mr Chan had raised cl 23(1)(o) in the middle of the trial and cited it in his closing submissions (Judgment at [212]–[214]).[68] The applicability of cl 23(1)(o) was therefore a live issue before the Judge and the parties made submissions thereon. However, because the parties had not pleaded cl 23(1)(o), the Judge saw no need for him to determine that point. We pause to note that we see little prejudice in considering these three paragraphs in this case because the facts upon which they rest are the same for all three paragraphs, and they all emanate from SPPG's requirement for an OG Box. Importantly, none of these facts are disputed.

101 The Judge nonetheless proceeded to deal with cl 23(1)(o) for completeness. The Judge opined, *inter alia*, that there was no "variation" of GTMS's contractual work within the meaning of cl 7(1) because the OG Box was to be constructed by SPPG, and there was no evidence of any AIs or verbal instructions for GTMS to carry out any variation works as a result of SPPG's delays (Judgment at [213]). Two points arise from this which, with respect, need correction.

102 First, just because the OG Box was to be constructed by SPPG does not mean that the OG Box requirement did not amount to a variation within cll 23(1)(f) or (o) and 7(1) of the SIA Conditions; these provisions and sub-paragraphs simply do not impose any such limitations. In our view, it is plain that the requirement for an OG Box fell within the meaning of a "variation" to the Works, even if SPPG was the one constructing it (see [103(b)(iii)] below). The direct connection from the power mains, across the drain, to the meter box of each bungalow was changed by SPPG's requirement of an OG Box; the

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68 ROA Vol IV(U) at p 42, para 78–p 56, para 104.

supply from the OG Box to each bungalow no longer crossed the drain but lay beneath the pavement fronting each bungalow.

103 Secondly, on the facts, there was no need for any AI or verbal instructions or directions from Mr Chan to GTMS because the requirement of an OG Box (and concurrence on the proposed location) came directly from SPPG in its 21 November 2012 Letter to Mr Ser. Subsequently, on 26 November 2012, CCA's Linda Chua Hwee Hwee ("Ms Chua") sent a copy of the 21 November 2012 Letter to GTMS *and* CSYA by email; that email appears in Ms Chua's AEIC,[69] where she deposes that after SPPG informed Mr Ser of the OG Box requirement, "[w]e" forwarded the letter to CSYA and GTMS on 26 November 2012.[70] We note the following:

(a) Under cl 23(1)(f), a contractor is entitled to an EOT if it is delayed due to, *inter alia*, "Architect's instructions under Clauses …7.(1) (*or otherwise in accordance with that clause*) …" [emphasis added]. An entitlement to an EOT under cl 23(1)(f) therefore was not based *only* on an AI; as referenced above, cl 7(1) requires, in mandatory terms, the contractor to comply with any "order" made by a statutory undertaker with whose systems the Works will be connected. Plainly, GTMS would be in no position to refuse to "comply" with SPPG's requirement for an OG Box and in any case, GTMS would not have to carry out any additional works in relation to SPPG's requirement.

(b) Cl 7(1) requires the contractor who receives such an order to give the architect written notice of the same before embarking on any variation to comply with such an order. We note that in this case:

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69 ROA Vol III(BI) at pp 271–274.

70 ROA Vol III(BI) at p 211, para 43.

(i) There was no need for any such notice to be given by GTMS because, as noted above, the requirement for an OG Box was conveyed *by* CCA *to* GTMS, which would have been the first time GTMS knew of SPPG's requirement, and CSYA was copied on that email.

(ii) Further, the evidence shows that it was the consultants who had to then proceed to deal with this new requirement by SPPG. Web liaised with NParks to ensure the latter had no issue with the location of the OG Box and stated they would issue the necessary construction drawings once this was obtained.[71] GTMS was not involved in the follow-on steps necessitated by SPPG's requirement.

(iii) We have also referenced above that cl 7(1) provides that works conforming to such an "order" shall be deemed to be a variation ordered by a written instruction of the architect (to the Works "designed, specified or chosen by or on behalf of the Architect or the Employer") if no directions or instruction are received by the contractor within seven days of giving the written notice to the architect; this was a variation in that the design of the electrical supply to the bungalows had to be modified (with the construction of the OG Box), but one without direct construction cost consequences to GTMS because it fell under the works to be carried out by SPPG (and its contractors) and it would have to be paid for by Mr Ser.

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[71] ROA Vol III(BI) at p 274.

(iv) However, because there were delays caused by SPPG, which impacted a critical path activity of testing and commissioning of the M&E works, the architect was specifically empowered under cl 7(1), "if appropriate", to grant an EOT to GTMS, which is also covered by cll 23(1)(f) and (o) (see [95] above).

104 In summary, we find that SPPG's requirement for an OG Box in its 21 November 2012 Letter was an event falling under cl 7. We hence find that EOT 2 and EOT 3 were validly issued under cl 23(1), whether pursuant to cll 23(1)(f) and/or (o).

The other requirements in Clause 23(1) of the SIA Conditions

105 We now proceed to consider the other requirements under s 23(1) of the SIA Conditions for an EOT, *viz*, whether the delay event in question did in fact cause a delay, and whether the contractor, *ie,* GTMS, acted with due diligence and took all reasonable steps to avoid or reduce the delay in completion. For the reasons that follow, we agree with the Judge's analysis and findings that such requirements were in fact fulfilled.

106 In respect of the grant of EOT 2 and EOT 3, Mr Ser argues that:

(a) While Mr Chan took into account SPPG's delay in electrical turn-on for EOT 2, he failed to consider GTMS's own delay in the electrical installation works which had to be done before SPPG could connect the incoming power supply. Mr Ser points to the Project's Master Programme (the "MP"), under which GTMS was required to complete the construction of electrical meter compartments by or prior to 9 July 2012. However, the electrical meter compartment doors for

Units 12 and 12B were only installed or on around 1 December 2012. Owing to this delay, the Contractor ought not to have been granted any additional time under EOT 2.[72]

(b) As for EOT 3, prior to the 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. The Project failed the First Testing and Inspection. Mr Ser argues that the reasons for the failure were due to construction-related issues caused by GTMS. Consequently, GTMS had to rectify these construction-related issues before the Project passed the second round of testing and inspection conducted on 27 March, 2 April and 8 April 2013 (the "Second Testing and Inspection"). Accordingly, GTMS again failed to exercise due diligence and was not entitled to any EOT.[73]

107 GTMS and Mr Chan respond as follows:

(a) In respect of EOT 2, while GTMS was in delay of the MP, the timelines contained therein were *not peremptory* and rather, were flexible with a built-in float or a buffer. The MP is primarily to monitor the reasonable progress of the Works and does not stipulate contractual deadlines that ought to be strictly complied with. Mr Chan had assessed that *but for* the delay events by SPPG, the Project could still be completed on schedule, notwithstanding GTMS's delay in installing the electrical meter compartment doors.

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72 AC at paras 86–89.

73 AC at paras 101–104.

(b) As regards EOT 3, although the Project failed SPPG's First Testing and Inspection, these were not construction faults. GTMS had constructed the electrical installation works fully in accordance with the M&E construction drawings for the Project. The comments arising from SPPG's First Testing and Inspection required GTMS to make some amendments on the single line diagram. There were also comments for GTMS to rectify some signage, earthing and minor statutory non-compliance issues.

108 In holding that the other requirements under cl 23(1) of the SIA Conditions were duly fulfilled, the Judge found that:

(a) GTMS's delay in the installation of the electrical meter compartments *would not have delayed* the completion of the Works, as this 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 were ready in or around early October 2012 and they were ready for survey by SPPG. Although the electrical meter compartment doors were only ready in November 2012 and installed on or around 1 December 2012 at the latest, there was simply no requirement that the doors be installed *before* SPPG would be willing to commence work. In addition, the presence or absence of the electrical meter compartment doors had no bearing on whether SPPG could carry out the installation works as the doors were not essential for the installation of a cabler to facilitate incoming power supply (Judgment at [220]–[228]).

(b) While GTMS may have appeared to be behind the schedule for the installation of the electrical meter compartments *vis-à-vis* the MP, as

they were ready in or around early October 2012 when the MP provided for them to be ready by 9 July 2012, this could not *ipso facto* mean that GTMS was in delay as the MP incorporated a period of float to allow the Contractor to catch-up and meet the completion date of 21 February 2013. This in-built float was a 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. By choosing to remain silent at the relevant times and site meetings, Mr Ser clearly understood that the MP was not a rigid schedule of activities (Judgment at [229]–[231]).

(c) The timelines in the MP were not peremptory. GTMS had acted with due diligence because GTMS, Mr Chan and indeed CCA, remained confident that notwithstanding the installation of the electrical doors on 1 December 2012, 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. The delay in installation of the compartments and doors would not have caused delay in the completion of the Project but for SPPG's OG Box requirement and the Contractor's delay had no nexus to SPPG's delay (Judgment at [232]–[236]).

(d) Upon knowledge of SPPG's delay, GTMS also took reasonable mitigation efforts to reduce the delay (Judgment at [252]–[255]).

(e) Mr Chan had made a fair and rational assessment with regard to GTMS's request for EOT 2. Mr Chan had sought and reviewed a critical path analysis of SPPG's delay, sought the views of CCA and requested the relevant information from GTMS. This was even though it was not strictly necessary for Mr Chan to do so (Judgment at [259]).

(f) GTMS had acted with due diligence in relation to EOT 3. CCA confirmed that GTMS had constructed the M&E works fully in accordance with the M&E construction drawings (Judgment at [269]).

109 Although Mr Ser claims it "is not disputed" that GTMS was supposed to complete the meter compartment works by 9 July 2012, this is with respect, myopic.[74] As the Judge observed, and we agree, this must be viewed in light of the fact that the MP incorporated a float and the timelines were neither peremptory nor prescriptive. Mr Ser had no persuasive answer to this. We agree with Mr Chan that while the MP recorded GTMS's plans to commence the SPPG power connection works on 9 July 2012, it was not strictly contractually obliged to do so and its failure cannot be conclusive of a lack of due diligence.[75]

110 The electrical meter components, as stated above, were ready in or around early October 2012. Whilst Mr Ser alleges that the site was "not ready for SPPG until at least February 2013",[76] we disagree. As Mr Chan points out, at no point in time did SPPG inform any member of the Project team or Mr Ser that they would not carry out its works because the Project site was not ready. The Judge observed that CCA had kept chasing SPPG to come to the Project site (Judgment at [200(d)]). Likewise, the ongoing works at the turf outside the Project along the external boundary wall did not hinder SPPG's works, neither did the M&E works inside all three stories of the units that were still being carried out as at 2 February 2013. Mr Ser points to photos taken by RTO Leong that "showed that there were ongoing works at the turf outside all three units

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74 AC at paras 86 and 88.

75 2nd and 3rd RC at para 54.

76 AC at para 92.

along the external boundary wall – obstructing SPPG's cable laying works".[77] But this avoids Mr Foo and Mr Yong's evidence regarding the excavation works, which the Judge accepted, that the excavation works were within the site and caused no hindrance to SPPG (Judgment at [245]–[247]). This is evidence that accords with the photographs of those works put before the Judge and we agree.

111 Mr Ser also argues that the Judge erred in finding that the electrical meter compartment doors were not required (Judgment at [226]), in having not considered the testimony of several witnesses.[78] But the Judge's finding is not plainly against the weight of the evidence. The Judge placed emphasis on the concession of Mr Ser's own electrical expert witness, Mr Lee, that the electrical meter compartment doors were not essential for the installation of cables to facilitate incoming power supply and not only that, that they might get in the way of SPPG's installation works (Judgment at [223]–[224]). RTO Leong's evidence was to the same effect (Judgment at [225]). The Judge had considered and weighed the evidence before him, as he was entitled to do in coming to a conclusion. Further, it is telling, as the Judge observed, that SPPG's letters dated 22 November 2010 and 25 August 2011 did not state that the electrical compartment doors had to be ready for the incoming power supply and only alluded to the electrical switchboard and cable entry pipes to be ready.[79]

112 It is true that one of the reasons cited in GTMS's request for EOT 3 was for "PowerGrid retest for units 12A and 12 is on 2 April 2013 and 8 April 2013

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77 AC at para 92.

78 AC at para 90.

79 1st Respondent's Supplemental Core Bundle at pp 132–133.

respectively",[80] but it was understood that EOT 2 and EOT 3 were based on the *same root cause*.[81] Despite the lack of written clarity in GTMS's request, both Mr Chan and CCA confirmed that they understood the underlying basis of the request, and Mr Chan proceeded to grant EOT 3 (Judgment at [290]–[293]). We do not think that there is basis to impugn this finding.

113 Finally, we also agree that the OG Box requirement was beyond the control of the parties, and had occurred without the parties' fault (Judgment at [202]–[203]). Certainly, it appears that Mr Ser has not intimated otherwise.[82] Although Mr Ser asserts that it is GTMS's "own delay in submitting the request to SPPG that caused GTMS to find out about the requirement for an OG Box only later",[83] he is wrong as it was CCA that made the request to SPPG (see [37] above) and it is not disputed that SPPG had never intimated such a requirement before 21 November 2012,[84] *ie,* by way of the 21 November 2012 Letter.[85] Likewise, the time taken by SPPG in carrying out the power connection works was beyond the control of the parties, and such reasons were not attributable either to Mr Ser, Mr Chan or GTMS (Judgment at [205]–[206]). We echo the Judge's observations in this regard.

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80 ACB Vol II(B) at p 194.

81 ROA Vol V(AO) at p 234.

82 AC at para 87.

83 AC at para 87.

84 ACB Vol II(B) at p 187.

85 ACB Vol II(B) at p 187.

Summary on EOT 2 and EOT 3

114 For the reasons set out above, we are of the view that EOT 2 and EOT 3 were validly granted by Mr Chan pursuant to cll 23(1)(f) and/or (o) of the SIA Conditions.

Issue 2: Whether the CC was properly granted by Mr Chan to GTMS

115 We turn next to the propriety of the issuance of the CC. On 17 April 2013, a final site inspection was held with Mr Chan, GTMS's representatives and the M&E engineers present. The parties do not dispute that at that time, the parties did not object to the direction of Mr Chan's representative, Mr Yong, that all the works save for minor outstanding works, including the steps and risers, were for all practical intents and purposes completed and that 17 April 2013 would be the completion date.[86] However, on 30 April 2013, despite the bungalows failing the First TOP Inspection, Mr Chan nonetheless issued a CC, some 15 days later, on 15 May 2013 certifying completion as of 17 April 2013.[87] On 18 June 2013, the bungalows failed the Second TOP Inspection. The TOP was finally issued by BCA on 16 September 2013, without a physical inspection but after a written submission by Mr Chan with accompanying marked up drawings and photographs of the remedial work.

116 The Judge found that the CC had been improperly and prematurely issued, as the Works could not have been deemed to be completed as of 17 April 2013. Instead, the Judge found that the Works could have been deemed completed at the earliest on 28 May 2013. Central to the Judge's reasoning was his view that the CC could be issued *prior* to the issuance of the TOP, and could

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86 1st RC at para 16.

87 ROA Vol V(AY) at pp 90–91.

have easily been issued by the time of the Second TOP Inspection on 18 June 2013 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 Judge found that the soil around the last step had settled thereby causing the non-compliant riser. Consequently, Mr Ser could have moved into and assumed occupation of the three bungalows. He could have also utilised the premises as the defects would not have prevented him from doing so. A reasonable architect, in the Judge's view, would have determined that Item 72 of the Preliminaries would have been fulfilled on 28 May 2013, thereby permitting the issuance of the CC (Judgment at [574] and [575]).

Whether the Preliminaries were incorporated into the Contract

117 On appeal, Mr Chan restates his objection that the Preliminaries, having not been incorporated into the Contract, neither binds Mr Ser nor GTMS, and thus cll 24(4) and 24(5) of the SIA Conditions are the *only* pre-requisites governing the issuance of the CC. Mr Chan says Mr Ser "consistently and purposefully 'put [Volumes 1A, 1B and 2 of the formal contract documents] aside' and refused to sign these, evincing an intention not to be bound by them".[88] Notwithstanding the CA's analysis on Item 72 of the Preliminaries in the CA Judgment, Mr Chan contends that such deliberate withholding was not evidence before the court then. It is not disputed that Item 72 of the Preliminaries were contained in Volume 1B of the formal contract documents (Judgment at [306]). Volumes 1A, 1B and 2 of the formal contract documents were prepared by F+G and CCA (Judgment at [6]). It is undisputed that these formal contract documents were not signed by Mr Ser.

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88 2nd and 3rd RC at para 25.

118 We hence begin with the anterior question of whether the Preliminaries were validly incorporated into the Contract. The Judge found in the affirmative (Judgment at [303]–[306]).

119 The Judge observed 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. This was the case, as the conduct of both Mr Ser and GTMS evinced such an agreement. While Mr Ser did testify that he had "just put the contract aside", Mr Chan and GTMS continued to work on the Project (Judgment at [305]). The Judge found that having been reminded to sign the formal contract documents at site meetings, Mr Ser "must have known that [GTMS] and [Mr Chan] were operating on the basis that the formal contract documents applied" and his "inaction despite such knowledge evinced to [GTMS] his acquiescence to the formal contract documents being part of the Contract" (Judgment at [306]).

120 We see no reason to disagree with the Judge's finding. It is telling that in support of his argument, Mr Chan refers to [152]–[154] (in addition to [303]–[305]) of the Judgment.[89] But it is not apparent how this assists his case at all. The evidence given there was in respect of Mr Ser's refusal to sign a deed of novation forwarded to him on 20 December 2011. However, this deed of novation concerned the contractual transfer of all of Mr Chan's rights, duties and obligations *vis-à-vis* Mr Ser arising from the MOA, to CSYA Pte Ltd, which had yet to be incorporated at the date of the MOA. Yet, Mr Ser's refusal to sign this deed of novation, as was Mr Chan's evidence, had nothing to do with the formal contractual documents prepared by F+G and CCA. Mr Chan's submission completely ignores innumerable acts of the parties carried out over a considerable period of time, from the time of the LOA in May 2011 to the

[89] 2nd and 3rd RC at para 25.

time the disputes arose towards the end of 2013, all of which point to the parties' acceptance of a binding contract for the construction of the bungalows being in place. For example, Mr Chan and his team of consultants prepared the tender documents, there was a tender process and the contract was awarded to GTMS. There can no doubt that the tender documents set out the Contract Documents and Drawings. Mr Chan also signed and sent out the Letter of Award.[90] Mr Chan administered the Contract as if it was a binding contract, *eg*, considering GTMS's claims for interim payments, considering the quantity surveyor valuation for the interim payments[91] and issuing Interim Certificates Nos. 1 to 24, which were duly paid by Mr Ser. Payment of the sums set out in this process were also drawn from the Bills of Quantities and Schedules of Prices, of which Item 72 was a part.[92] Mr Chan also accepted in his AEIC that the Preliminaries were included in the Contract and that certain conditions in Item 72 had to be fulfilled before the CC could be issued.[93] It also bears mention that GTMS's Mr Dennis Tan ("Mr Dennis Tan") as well as Mr Chan himself, gave evidence that they agreed the Contract included these formal contract documents (Judgment at [305]). Mr Chan's attempt to contest this is but a belated attempt to sanitise his own evidence, and ought to be rejected accordingly.

121 For completeness, Mr Chan has also proffered no satisfactory rebuttal apart from a mere assertion that there is a conflict of meaning between Item 72

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90 ROA Vol III(A) at pp 13–18.

91 *See eg* ROA Vol V(AF) at p 225 (Interim Certificate No. 8 stating a net valuation of $2,891,005.48 (with less $2,489,207.38), resulting in a total amount of $401,798.10 due to GTMS) and Interim Valuation No. 8 from F+G at pp 116–199 (see p 120 which sets out the same numbers).

92 *See eg* ROA Vol V(AF) at p 123, which sets out the valuation in accordance with the description in the Preliminaries at ROA Vol V(K) at pp 109–112.

93 ROA Vol III(AI) at p 188, para 25 and p 210, para 107.

of the Preliminaries and the SIA Conditions.[94] This argument is, in our view, without merit, for the reasons explained by the Judge in the Judgment at [313]–[315].

122 We agree with the Judge that the Preliminaries were properly incorporated into the Contract. Item 72 of the Preliminaries specifically provides three preconditions for the issuance of the CC (Judgment at [299]):[95]

> 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.
>
> …

123 In addition, in determining whether the CC may be issued, Item 72 of the Preliminaries must be read together with cl 24(4) of the SIA Conditions, requiring the architect to refer to the contract concluded between the owner and the contractor:[96]

> 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

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94 2nd and 3rd RC at para 26.

95 ACB Vol II(A) at p 159.

96 ACB Vol II(A) at p 115.

> when the Works *appear to be complete and to comply with the Contract in all respects.*

We now turn to deal with the requirements of Item 72 of the Preliminaries.

Item 72(a)

124 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***" [emphasis added]. The crux of the issue is whether Mr Chan was entitled, as a matter of law, to issue the CC on 15 May 2013, certifying contract completion as of 17 April 2013, notwithstanding the Project failing the First TOP Inspection on 30 April 2013 (see [12] above).

125 The Judge did not overlook the primacy of the plain words of Item 72(a) of the Preliminaries. He observed, in respect of the failure of the First TOP Inspection, that "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." Such minor works "would have posed a danger to the occupiers of the Project" (Judgment at [326]). Likewise, even though Mr Chan claimed that he had acted in good faith based on his experience, commercial understanding and practical reality, "none of these reasons can override the clear and express language of Item 72(a) of the Preliminaries" (Judgment at [327]). The Judge held that Mr Chan should not have issued the CC on 15 May 2013 certifying completion on 17 April 2013 (Judgment at [328]). We agree.

126 However, with respect, the Judge proceeded to sidestep this construction of Item 72(a) and opined that the Works could satisfy Item 72(a) of the Preliminaries even though the Project had not yet passed (and indeed failed)

both the First TOP Inspection and the Second TOP Inspection, so long as the reasons for the failure of the inspections were *not due to construction-related issues that were within the contractor's scope of work* (Judgment at [324]). The relevant point of distinction, according to the Judge, was between construction-related issues and non-construction-related issues. The Judge found that the Project had failed the First TOP Inspection because of construction-related issues, *ie*, due to the unequal steps and risers. As such, the CC could not have been issued before 30 April 2013 (Judgment at [328]). However, the Judge found that the Project had failed the Second TOP Inspection because of non-construction related issues. In particular, the Judge considered that the Second TOP Inspection failed, among other things, due to the last step at the landscape area of one of the bungalows being higher than permitted; this was not a construction-related error. Rather, this was due to the settlement of the landscaped soil, which was a natural phenomenon (Judgment at [334]).

127 On that basis, Item 72(a) could have been completed *prior* to the Second TOP Inspection on 18 June 2013 (Judgment at [324]–[333]). And Item 72(a) of the Preliminaries would have been completed on 28 May 2013, when the rectifications of the unequal steps and risers were completed. Specifically, the rectification works started on 17 May 2013 and took 11 days to complete (Judgment at [334]).

128 On appeal, Mr Ser argues that the Judge erred in concluding that Mr Chan was legally entitled to issue the CC notwithstanding the failure of the Second TOP Inspection. Mr Chan and GTMS are broadly aligned in their position. They say that Item 72(a) of the Preliminaries was satisfied and the CC was legitimately issued. Mr Chan maintains his position below that the "objective fact is that as at 17 April 2013, the Project could be physically

occupied and used".[97] GTMS, on the other hand, rests its case on the Judge's finding that the CC could have only properly been issued by 28 May 2013.[98] It says that Item 72(a) of the Preliminaries is satisfied if the Architect is of the opinion that the Project is "physically ready for occupation *ie,* Practical Completion had been achieved".[99] Any reasons for the failure of TOP was due to issues that were wholly beyond its control.[100]

The general nature of a CC and a TOP

129 The parties' arguments on whether it was permissible for Mr Chan to issue the CC on 15 May 2013 *prior* to the issuance of the TOP by the BCA on 16 September 2013 bring into focus the purpose of, as well as the differences between, a CC and a TOP:

> (a) **Completion Certificate**: Under cl 24(4) of the SIA Conditions, the Architect shall issue a CC when the Works appear to be complete and to comply with the contract in all respects. The first aspect of note is that the CC concerns contractual rights and obligations between the Employer and the Contractor, as certified by the Architect, but subject to the dispute resolution provisions in cl 37 of the SIA Conditions. The second aspect to note is that the parties are free to agree upon any specific conditions or circumstances under which a CC is to be issued. The parties here have done so by the inclusion of Item 72 of the Preliminaries (see [122] above). Item 72 of the Preliminaries *expressly* imposes preconditions before the CC can be issued.

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97 2nd and 3rd RC at para 30.

98 1st RC at paras 15 and 23.

99 1st RC at para 18(a).

100 1st RC at para 19(a).

(b) **Temporary Occupation Permit**: The TOP is different in two key respects. First, the TOP is a document issued by a statutory authority, *ie,* the BCA and thus statutorily provided for. Secondly, the TOP is concerned with regulatory compliance. This has been made clear by the then Minister for National Development, Mr Khaw Boon Wan (*Singapore Parliamentary Debates, Official Report* (17 August 2015), vol 93 (Khaw Boon Wan, Minister for National Development)):[101]

> The granting of the Temporary Occupation Permit and the Certificate of Statutory Completion is dependent on the building meeting the respective regulatory requirements of agencies such as SCDF for fire safety, BCA for structural safety and PUB for drainage and sewerage provisions.

The basis and power for the issuance of the TOP is the Building Control Act (Cap 29, 1999 Rev Ed) (the "BC Act"), which applies to all building works (see s 4 of the BC Act). The TOP is only *prima facie* evidence that a building is suitable for occupation and shall not be taken to be evidence of compliance with the BCA or other written laws (see s 12(4) of the BC Act). In addition, Regulation 42 of the Building Control Regulations 2003 (No. S 666) provides that "[o]n completion of any building works, the developer of the building works shall apply to the Commissioner of Building Control for (a) a certificate of statutory completion; or (b) a temporary occupation permit". Regulation 43(3) makes clear that a TOP may be granted where, among other things, every report or certificate by the appropriate qualified person has been submitted to the Commissioner of Building Control, and the certificate from the builder has been submitted to the commissioner within 7 days of the completion of the building works.

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101 2nd and 3rd Respondents' Bundle of Authorities, Vol 8, at p 78.

130 Although the CC and the TOP are very different in origin, nature, characteristics and requirements, and they serve different purposes, parties are nonetheless free to, and sometimes do, predicate the issue of a CC on the attainment of the TOP. They can do so expressly or by necessary implication. Short of that contractual link, the fact that a building has achieved contractual completion, (with or without minor defects), does not mean that it will attain TOP and the converse also holds true.

131 Mr Chan accepts, as he must, that the *statutory* issuance of a TOP is quite different from the *contractual* issuance of a CC.[102] The *statutory* issuance of a TOP is intended as a preliminary step towards the issuance of the Certificate of Statutory Completion (the "CSC"). Practically, and as its name suggests, this is an important step as it entitles a person to occupy the building during the pendency of the CSC (see s 12(2)(*b*) of the BC Act). It is hence common industry practice for owners in strata developments, for example, to occupy their properties after the issuance of the TOP with the CSC only being issued at a later date. In contrast, the issuance of the CC may, according to the terms of the construction contract, be employed as a contractual mechanism to trigger other obligations. For example, in *Liang Huat Aluminium Industries Pte Ltd v Hi Tek Construction Pte Ltd* [2001] SGHC 334 ("*Hi Tek*"), the High Court observed that a completion certificate in a building contract is usually issued for various reasons, such as (a) to stop damages or liquidated damages for delay from running; or (b) to start the commencement of the maintenance period, or as it is sometimes called, the defects liability period (at [17]). In addition, the issuance of a completion certificate "does not mean that there can be no further claims or that no call should be made on an on-demand bond thereafter" (*Hi Tek* at [18]).

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102 2nd and 3rd RC at para 33.

This too, is the position articulated by GTMS, which states that a "Completion Certificate does not allow actual occupation and use of the Premises".[103]

The CC in this case

132 We now turn to Mr Chan's issue of the CC before the grant of TOP for the Project in this case. Mr Chan and GTMS both say that the Judge's ruling that Mr Chan could do so is an unimpeachable decision. Mr Ser disagrees and claims that to hold otherwise would "be to set a dangerous precedent as to what building owners can expect from their architects and contractors … [and] make a mockery out of the TOP process, allowing the occupation of the building months before the BCA deems it safe".[104] Mr Ser also asserts that the CA Judgment "found that the *CC could not have been issued before TOP* on 16 September 2013" [emphasis added].[105]

133 GTMS contends that Item 72(a) of the Preliminaries is concerned with "practical completion" and that such practical completion was in fact achieved before the issuance of the TOP. Mr Thulasidas, counsel for GTMS, cites no authority for this proposition and construction of Item 72(a). We have little hesitation in rejecting this argument. Item 72(a) unambiguously states that the Works have to "… be ready for occupation and for use." Mr Ser could not have entered into occupation and used the bungalows on 17 April 2013 because the TOP had not been issued and it is an offence under s 12 of the BC Act for anyone to occupy and use a building without a TOP. Mr Thulasidas erroneously attempts to use cl 24(4) to rewrite the clear words of Item 72(a). The learned author, Chow Kok Fong, (in *The Singapore SIA Form of Building Contract: A*

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103 1st RC at para 17.

104 AC at para 7.

105 AC at para 9.

Commentary on the 9th Edition of the Singapore Institute of Architects Standard Form of Building Contract (Sweet & Maxwell, 2013) ("*Commentary on SIA Standard Form*")) opines, at para 24.14, that the use of the word "appear" in the phraseology of cl 24(4), ("… when the Works appear to be complete and to comply with the Contract in all respects"), corresponds to "substantial completion" or "practical completion" as provided in other standard forms such as cl 2.27 of the 2016 JCT Design and Build form, (citing *Jarvis & Sons v Westminster Corp* [1970] 1 WLR 637, 646). The learned author supports his construction by referring to cl 24(5) which allows the architect to certify completion even if there are minor works outstanding which can be completed following the removal of the contractor's site organisation and all major plant and equipment and without unreasonable disturbance of the employer's full enjoyment and occupation of the property as well as the completion of outstanding work or making good defects during the maintenance period under cl 27. Practical completion is a concept that is well-known to construction law, and its principles have recently been usefully summarised by Coulson LJ in the English Court of Appeal decision of *Mears Ltd v Costplan Services (South East) Ltd and others* [2019] EWCA Civ 502. However, in this case, cl 24(4) of the SIA Conditions has to be read in conjunction with Item 72(a) of the Preliminaries. The issue really turns upon what Item 72(a) means.

134 Mr Chan also relies on a speech given by a Member of Parliament, Mr Kenneth Chen Koon Lap (*Singapore Parliamentary Debates, Official Report* (16 March 1993), vol 60 at cols 1298–1300 (Kenneth Chen Koon Lap)), to say that it has been "envision[ed] that the TOP and CC have 2 different scopes, but are related in that the CC *must* be issued before the TOP can be issued" [emphasis added]:[106]

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106 2nd and 3rd Respondents' Bundle of Authorities, Vol 8, pp 72–73.

> …
>
> Before I proceed further, I must declare that I am a practising architect. In our booming construction industry, more building projects are being designed and implemented. They are subject to controls by regulatory bodies such as the Building Control Division and the Fire Safety Bureau. *In order to ensure the safety of these buildings, checking and inspection by these regulatory authorities are necessary.* But because of the sheer volume of the projects to be processed, the time taken can be quite considerable.
>
> With regard to the Fire Safety Bureau, I understand that it is experiencing a tremendous shortage of manpower. *This, to a certain extent, aggravates the cause of delay in the issuing of approval and temporary occupation permit in a completed building.* …
>
> [emphasis added]

However, this does not take Mr Chan's case anywhere. It is clear that the comment was made in passing, addressing a current issue, *viz*, a manpower shortage in the Fire Safety Bureau leading to delays in their approval which in turn led to delays in the issue of the TOP; it does not purport to say *either* that such practice is commonplace, or that Parliament envisioned that the CC *must* be issued before the TOP. No weight can be given to this statement in support of Mr Chan's submission.

135 In the CA Judgment, the CA found that the CC was fraudulent, in that it had been issued recklessly without caring as to its truth or falsity, and had not been issued in accordance with the Contract. The CC requirements were not met as the Project premises had neither undergone TOP inspection nor obtained TOP as at the CC date and therefore would not have been fit for occupation under s 12 of the BC Act. However, the CA emphasised that its "findings at this enforcement stage … will necessarily be *prima facie* and non-conclusive at the substantive and final determination of the disputes between the parties" (CA Judgment at [105]). That said, the CA made the following observations that remain pertinent to the present case (at [43]–[45]):

> 43 Clause 31(13) requires that the Architect "shall in all matters *certify strictly* in accordance with the terms of the Contract" [emphasis added]. It is, therefore, apposite to see what this contract called for in relation to the Completion Certificate and its issuance. Clause 24(4) … provides that the Architect shall issue the Completion Certificate "when the Works appear to be complete and to comply with the Contract in all respects" whereupon the Contract "shall be deemed to be completed". More importantly, Item 72 of the preliminaries … sets out when works can be deemed completed in order for the Completion Certificate to be issued. …
>
> 44 The meaning of the phrase in Item 72 para (a), "All parts of the Works ***are … ready*** for ***occupation and for use*** …" [emphasis added in bold italics], 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 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 [BCA] …
>
> [emphasis in original]

136 It is important to note that at trial, Mr Chan and Mr Yong both admitted that they had not read Item 72 in the Preliminaries when the CC was issued. They only came to know of it when this suit was commenced.[107] Mr Chan also admitted under cross-examination that, had he read Item 72 of the Preliminaries at that point of time, he may not have issued the CC in the way that he did,

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107 ROA Vol III(DF) at p 272, lines 3–8 and p 275, lines 4–20 (31 March 2020); ROA Vol III(DG) at p 276, lines 13–25 (2 April 2020); ROA Vol III(DH) at p 10, lines 18–21, p 12, lines 18–25 and p 38, lines 8–25 (2 April 2020); ROA Vol III(DK) at p 83, line 6–p 84, line 1; p 85, line 14–p 86, line 3 and p 88, line 7–p 91, line 10 (4 June 2020) and ROA Vol III(DL) at p 296, lines 4–8 (9 June 2020).

though he then went on to say that he "would not consider prelim 72" and would "ignore it totally".[108]

137 The Judge however, held that the above-cited passage in the CA Judgment "cannot be taken to stand for the *absolute* proposition that a CC can *never* be issued if the TOP is not obtained" [emphasis in original] (Judgment at [322]). Instead, the Judge proposed a more "nuanced inquiry", which involves, first, determining GTMS's scope of works under the Contract, and second, to determine whether the reasons for failure of the TOP Inspections were due to construction-related issues within their scope of works; if the failure of the TOP was not due to construction-related issues, it would be justifiable for Mr Chan to issue the CC (Judgment at [322]–[324]).

138 With respect, the CA was *not* laying down any general proposition in the CA Judgment; it was addressing the construction of the Contract before it. Further, with respect, we do not think that the terms of Item 72(a) leave any room for doubt as to what it means or for the adoption of a nuanced inquiry. It provides unambiguously that the Works must be ready "for occupation and for use". This, in our view, means that the Works cannot be occupied and used as a dwelling *before* obtaining the TOP. Who caused, and is therefore liable for, the delay in obtaining the TOP is a separate question altogether. That is a question of liability as between GTMS and/or Mr Chan to Mr Ser (as Mr Ser did not contribute to the delay in obtaining the TOP). We therefore cannot agree with the Judge when he opined that if the delays in obtaining the TOP were due to non-construction factors and not within the scope of GTMS's work, then they were beyond the control of GTMS; in those circumstances, GTMS would have completed its contractual responsibility and it would be justifiable for Mr Chan

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108 ROA Vol III(DK) at p 93, line 7–p 95, line 10 (4 June 2020).

to issue the CC notwithstanding that the TOP had not been obtained (Judgment at [324]).

139 We also cannot, with respect, agree with the Judge's reliance on *Schindler's Lifts (Singapore) Pte Ltd v Paya Ubi Industrial Park Pte Ltd and Another* [2004] SGHC 34 ("*Schindler's Lifts*") (Judgment at [322]). As Mr Ser rightly points out, that case simply was not concerned with a dispute over the issuance of a CC before TOP. Nor did it involve any dispute over a term similar to Item 72(a) of the Preliminaries. Rather, the action was founded on a claim for retention moneys due for variations and outstanding works. There was simply no consideration there of whether such an action was proper. Hence, in so far as any reliance is placed on *Schindler's Lifts* for the proposition that a CC may be issued *prior* to the obtaining of the TOP, it is misplaced as that case does not stand for such a principle. That case is clearly distinguishable on the facts. For completeness, Mr Chan's reliance on *Schindler's Lifts* to suggest that the issuance of a CC before the TOP is "not uncommon in industry practice" is likewise unfounded.[109] It all depends on the terms and conditions of the contract in question.

140 It is telling that Mr Chan has not sought to uphold the Judge's approach or endorse the nuanced enquiry or test that the Judge employed. Instead, Mr Chan points out that Item 72(a) of the Preliminaries does not state that "occupation and use" refers strictly to legal occupation and use (*ie,* that of a TOP). There is no reference to TOP anywhere in Item 72(a) of the Preliminaries. This absence, Mr Chan says, must lead to the conclusion that Item 72(a) of the Preliminaries is not concerned with the TOP. Mr Chan says that a distinction ought to be drawn between physical and legal occupation; Item 72(a) of the

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109 2nd and 3rd RC at para 33.

Preliminaries is concerned only with physical occupation.[110] Specifically, Item 72(a) of the Preliminaries concerns readiness for occupation and not the legal ability to occupy, and by 17 April 2013, the Project could *already* be physically occupied and used.

141 In support of his argument, Mr Chan cites the case of *Lee Kay Guan and another v Phoenix Heights Estate (Pte) Ltd* [1977–1978] SLR(R) 284 ("*Phoenix Heights*").[111] He says that this case recognised the "distinction between readiness for occupation and the legal ability or authority to occupy".[112] In our view, that case is of no relevance to the issues in the present case. There, the plaintiffs sought damages for breach of the contract of sale and purchase of a property from the defendant. The defendant delayed in completing the property and a temporary occupation licence (the precursor to the TOP) was issued in November 1974. However, the plaintiffs refused to take possession until April 1975. Notice to complete was given in December 1975. The defendant admitted liability for damages up to the date of the temporary occupation licence but disputed that it ought to be liable up to the issue of the notice to complete. Choor Singh J dismissed the claim, holding that the plaintiffs did not suffer any financial loss from November 1974 to December 1975 and had no valid reason for not taking possession and occupying the property from November 1974 onwards. No such distinction of the sort suggested by Mr Chan was in fact drawn in that case. The High Court noted that during the issuance of the temporary occupation licence, the plaintiffs "could have been in occupation of the house" as they were "offered possession of the house …. with the necessary authority from the Building Control Division in the form of a [temporary

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110 2nd and 3rd RC at para 31.

111 2nd and 3rd Respondents' Bundle of Authorities, Vol 5, pp 117–119.

112 2nd and 3rd RC at para 31.

occupation licence]" (*Phoenix Heights* at [7]). It is patently unclear how the case stands for any such proposition as propounded by Mr Chan.

142 Mr Chan's submission on Item 72(a) is also without basis. On a true construction of Item 72(a), there can be no "physical" occupation or use of the bungalows as dwellings without the issue of the TOP; reference has already been made to s 12 of the BC Act (see [129(b)] above). We find Mr Chan's submission very surprising, especially from a professional point of view. In the BCA standard form for application of a Temporary Occupation Permit,[113] which Mr Chan submitted on 23 April 2013, there is a "Standard Requirements" section which he had to fill in and the first requirement was as follows:

> NO OCCUPATION OF BUILDING
>
> The building must not be occupied before a TOP/CSC has been issued as provided for under Section 12(1) of the Act.

Mr Chan had filled in: "Complied With". Indeed, as GTMS rightly concedes, a CC "obviously cannot allow [Mr Ser] to occupy nor use the [p]remises".[114]

143 With respect, we cannot therefore agree with the Judge's conclusion (Judgment at [322]) that:

> (a) in this case, it is clear and undisputed that Item 72(a) and cl 24(4) of the SIA Conditions do not state that TOP has to be obtained before the architect can issue the CC, and
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> (b) secondly, in a situation where the architect has issued the CC notwithstanding the failure of the TOP Inspections, a more nuanced inquiry is needed.

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113 ACB Vol II(B) at pp 135-137, see p 136.

114 1st RC at para 18.

In our view, Mr Chan was not entitled to issue the CC before the grant of TOP under this Contract on 16 September 2013. For the purposes of these appeals, we proceed on the basis that the CC ought to have been issued on 16 September 2013, that being the earliest date when it could have been issued.

144 Because of the delay in obtaining the TOP and the consequent delay that that would have on the issue of the CC, it is necessary to examine, for the purposes of liability, who was responsible for the delays. Unfortunately, because of the Judge's approach in using a more nuanced inquiry to determine whether a CC can be issued before TOP, some of his analysis and findings of fact in relation to the various items causing the bungalows to fail the TOP Inspections and attribution of fault therefore are, with respect, not entirely clear nor, in some important instances, adequate to determine liability. This was also caused by counsels' shortcomings at the trial in not drawing the Judge's attention to how cl 24, and in particular cl 24(3), is meant to operate in such circumstances. We now turn to the issue of which party was liable for the delays in the issuance of the TOP.

The First TOP Inspection

145 The Judge found (Judgment at [328]) that the First TOP Inspection failed "… for *several reasons*, *including* the non-compliant steps and risers which was a construction matter within [GTMS's] scope of responsibility" [emphasis added]. He correctly pointed out that Mr Chan knew the steps and risers were non-compliant before the application for the First TOP Inspection. He therefore found that Mr Chan should not have issued the CC on 15 May 2013 certifying that the Project was completed on 17 April 2013. With respect, we agree.

146 However, the Judge did not go into the *other* reasons why the bungalows failed the First TOP Inspection. Once there is more than one reason for the

delay, an arbitrator or judge must evaluate the reasons and determine their potency as effective causes for the delay. This should have been carried out not only for the First TOP Inspection but also the Second TOP Inspection right until TOP was obtained. This exercise should have included the period of delay for each of the reasons, to what extent they overlapped time-wise and whether one reason operated independently of the others or also had a cumulative delaying effect on the other reasons. With those findings, the law on concurrent delay can be applied; for example, what EOT GTMS should have received for the additional works, and further, the legal consequences of additional work at this stage of the Project had to be considered and applied to ascribe liability. To be fair, a Judge can only deal with the case before him as it is pleaded and run. All counsel below have to shoulder responsibility for this state of affairs.

147 We return to the First TOP Inspection. In BCA's letter dated 30 April 2013,[115] issued immediately after the bungalows failed the First TOP Inspection, the BCA listed the following items of non-compliance causing the bungalows to fail the First TOP Inspection:

(a) Failure to comply with cll E.3.4.1, E.3.4.2 and E.3.4.4 (**"Steps and Risers issue**") as there were unequal treads and risers in:

(i) Steps at all staircases;

(ii) Steps at landscapes;

(iii) Steps at swimming pools;

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115 ACB Vol II(B) at pp 138–139.

(b) Failure to comply with cl H.2.1 (**"Landscape Railings issue"**), as there were no railings at landscape areas where there was a drop of one meter or more;

(c) Failure to comply with cl H.3.2.1:

(i) Parapet walls at the roof were not constructed to a minimum height of one meter (**"Parapet Walls at Roof issue"**), and

(ii) Parapet walls at the outdoor deck/pavilion were also not constructed to a minimum height of one meter (**"Parapet Walls at the Pavilion issue"**). The inadequate height of the barrier resulted from the BCA finding that the height of the parapet was less than one meter when measured off a built-in concrete bench at the barrier of the outdoor deck/pavilion for Unit No. 12A, although the height of the barrier was one meter when measured from the pavilion floor;

(d) Failure to comply with cl H.3.4.3 (**"Gap issue"**), as there was a gap between a barrier and the wall at a pavilion which was wider than the maximum permissible width of 100mm.

148 In an email dated 15 May 2013 from Ms Wan (CSYA) to a query from Wilson Cheung (who was writing on behalf of Mr Ser) on the items that caused the First TOP Inspection to fail, Ms Wan set out a table of the non-compliant items, corresponding to the BCA letter referenced above, and stated the nature of the error and the parties responsible. Ms Wan noted in her table that the item or items at:

(a) [147(a)] above (the Steps and Risers issue) were construction errors and GTMS had to level all non-compliant steps; these related, in effect, to all the internal staircases of the three bungalows and some external steps.[116]

(b) [147(b)] (the Landscape Railings issue) above referred to the areas in Unit 12B's swimming pool where there were no barriers across areas with drops of one meter or more. This was a design error or omission by CSYA, who had "missed out" the barriers, and GTMS was asked to add steel railings at those areas to remedy the same.

(c) [147(c)] above related to two areas:

(i) Parapet Walls at Roof issue: The barriers at the roof were not constructed up to one meter in height; this was a GTMS construction error and GTMS were told to "…top-up non-compliance [*sic*] walls";

(ii) Parapet Walls at the Pavilion issue: CSYA had "missed out" barriers at the pavilion/outdoor deck at Unit 12A; GTMS was asked by CSYA to add an invisible grille at the Unit 12A pavilion at the area above the built-in concrete bench;

(d) [147(d)] above (the Gap issue) related to a gap in the parapet wall which was more than the maximum allowable gap of 100 mm (cl H.3.4.3). This was a construction error and GTMS was asked to extend the parapet wall to close the gap to 100 mm.

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116 ROA Vol V(AY) at pp 200–201.

We pause to observe that the above can also be seen from a two-page CSYA letter dated 6 September 2013 to BCA with accompanying drawings and marking out of the non-compliant items as well as photographs;[117] this letter was written after the bungalows failed the Second TOP Inspection on 18 June 2013 and documented for BCA all the rectifications that had been carried out to comply with BCA's written directions on those items and areas which caused the bungalows to fail their TOP Inspections.

PARAPET WALLS AT THE PAVILION ISSUE

149 From the evidence, especially Ms Wan's 15 May 2013 email, it appears that, save for (a) the Landscape Railings issue at Unit 12B's swimming pool (see [147(b)] above) and (b) the Parapet Walls at the Pavilion issue, *ie* the missing barrier at the pavilion/outdoor deck of Unit 12A (see [147(c)(ii)] above), the rest were construction errors or defects caused by GTMS's defective construction. The latter of these two items, *ie* the Parapet Walls at the Pavilion issue (see [147(c)(ii)] above), whilst not a construction issue, was found by the Judge not to be the fault of Mr Chan because there was a genuine difference of opinion between the BCA and Mr Chan (Judgment at [332]–[333]) on safety regulation H.3.2.1. Mr Chan had provided for a glass barrier parapet one meter in height at the pavilion of Unit 12A, where there was a drop of 1.45 meters.[118] However the disagreement arose over the area where there was a built-in concrete bench abutting the glass parapet. The Judge found that the glass barrier was one meter in height as measured from the finished pavilion floor, in compliance with cl H.3.2.1; however, if the height of the glass parapet was

117 ACB Vol II(B) at pp 150–164.

118 ROA Vol III(CG) at p 134, lines 13–14 (19 November 2018).

measured from the top of the bench seat to the top of the glass parapet, it was only 0.55 meters high.[119]

150 The Judge found that the BCA Regulations provided that "[t]he height of a barrier is measured vertically from the finished floor level to the top of the barrier…"[120] and there was a difference in opinion between Mr Chan and the BCA officer who inspected the bungalows at the First TOP Inspection. The Judge also referred to the building plans which stated the height of the glass parapet with the built-in bench at Unit 12A's pavilion was 1000 mm from the "finished floor level".[121] The Judge held that since the BCA had approved the building plans, it should not have faulted this aspect of the design at the First TOP Inspection (Judgment at [333]). After the First TOP Inspection, Mr Chan proposed installing an invisible grille behind the built-in bench in an attempt to comply with the height requirement for the barrier (though at or sometime before the Second TOP Inspection, BCA did not approve the invisible grille and Mr Chan eventually asked GTMS to install glass barriers which met the 1-meter height requirement as measured from the seat of the built-in bench to the top of the barrier (Judgment at [333])). The Judge found that Mr Chan's design of the barrier and the replacement invisible grille could not be said to be negligent, and GTMS's construction of the original barrier, in accordance with the drawing, could not be described as a construction error. With respect, we cannot agree with the Judge on two points.

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119 ROA Vol III(CG) at p 134, lines 22–25 (19 November 2018).

120 See Exhibit D27.

121 ROA Vol III(DJ) at p 255, line 18–p 258, line 8 (4 June 2020); ROA Vol IV(AG) at p 114, para 39.

151 First, we have grave reservations on the Judge's construction of cl H.3.2.1. Section H of BCA's Approved Document of Acceptable Solutions[122] is titled: "Safety from Falling" and cl H.1 states: "The objective of cl H.2.1 is to protect people from injury caused by falling." That is the main objective of section H. Cl H.2.1 states that where there is a vertical drop of one meter or more, appropriate measures must be taken to prevent people from falling from a height. Clause H.3.1 states that cl H.2.1 is satisfied if a barrier is provided in accordance with cl H.3.2 to H.3.5. Those clauses mandate a barrier of one meter (cl H.3.2.1(a)), although there is one exception at H.3.2.1(b), *viz*, that the barrier can be 900 mm from the lower edge of windows, stairs, ramps, and galleries or balconies with fixed seating in areas such as theatres, cinemas and assembly halls. Whilst Note 1 to cl H.3.2.1 (which was relied on by the Judge) specifically provides that the height of the barrier is measured vertically from the finished floor level to the top of the barrier, Note 2 provides that the height of the barrier at the flight of stairs is measured vertically from the pitch line to the top of the barrier. This means the barrier is *not* measured from the tread of the top step nor the tread of the bottom step of that staircase but along the pitch line between the two. In our view, cl H.3.2.1(b) and Note 2 clearly indicates that where it is not appropriate, the measurement for the height of the barrier is not taken from the finished floor level. We do not think, with respect, that the Judge was right to conclude that there was a genuine difference of opinion. In our view, the BCA officer inspecting the bungalows was correct in his interpretation that the height of the barrier should be one meter above the top of the seat of the built-in concrete bench. That accords with the aim of section H, *viz*, to protect persons from injury by falling from heights and an appropriate measure would be a barrier of one meter in height measuring from the bench. Otherwise, for anyone

122 Exhibit D27.

standing on that bench, the effective barrier to prevent that person from falling over would only be 0.55 meters and to exacerbate the case, the drop at that point would have been some 2 meters (1.45 meters plus the 0.55 meters). That cannot, on any view from the point of safety, be correct. Mr Chan admitted under cross-examination that if somebody was standing on the bench, there was a risk that this person may fall from the pavilion.[123] The Judge also commented, when viewing a photograph of a worker standing on that bench with the parapet barely reaching his hip, that it was "very dangerous" if someone was standing on the bench as he might fall over, and Mr Chan agreed.[124] This will be all the more so when one considers the possibility of children running around the pavilion and along the bench who would not be sitting on the bench, something Mr Chan also acknowledged under cross-examination.[125]

152 Secondly, we cannot agree with the Judge's ruling or comment that since the BCA had approved the drawings, they should not have faulted the design. The BC Act provides, *inter alia*, for a scheme where the responsibility for accuracy, design, compliance and adequacy of engineering or architectural matters fall squarely upon the shoulders of the architects, engineers and accredited checkers ("AC") or specialist ACs: see s 5 BC Act. These professionals are charged with the responsibility to ensure that the building works comply with the regulatory requirements: see s 9. The BC Act also mandates that every developer of building works must employ the requisite professionals: see s 8. Section 5(5) clearly provides that the Commissioner of Building Control may, on the basis of the required certificates signed by these professionals, approve the submitted plans without checking the designs and

123 ROA Vol III(DM) at pp 194–196.

124 ROA Vol III(DM) at pp 183–184.

125 ROA Vol III(DM) at p 70, lines 10–25.

calculations of any building works; notwithstanding s 5(5), the Commissioner is entitled, under s 5(6), at his sole discretion to carry out random checks on the detailed structural plans, design calculations or geotechnical aspects of any building works before granting the approval. For completeness, there are also provisions against liability of its officers, see ss 32(1) and 32(3). Insofar as the Judge had held at [333] that BCA "should not have faulted [the relevant] aspect of the design at TOP Inspection 1", this does not represent the law. Holding otherwise would mean that if BCA wrongly or mistakenly approved the requisite submission of drawings, designs, calculations and responses to queries from the BCA, they cannot be corrected subsequently when discovered or that the design responsibilities and obligations of the professionals involved had shifted to BCA's doorstep. In our judgment, the fact that the designs were approved by BCA does not remove the responsibility of a qualified person to ensure that the buildings works are designed in accordance with the provisions of the BC Act (see s 9(1)(*a*)(i) of the BC Act, read with the definition of a "qualified person" under s 2(1)(*a*)). Accordingly, the Judge had erred in finding that Mr Chan had not been negligent in his design.

The Second TOP Inspection

153 The Second TOP Inspection was held on 18 June 2013. As noted above, the bungalows failed the Second TOP Inspection; the BCA officer identified a different set of non-compliant items, not identified in the First TOP Inspection (save for the Parapet Walls at the Pavilion issue, which was still outstanding). On 18 June 2013, the BCA wrote to Mr Ser and Mr Chan, noting the cause of the bungalows failing the Second TOP Inspection as follows:[126]

126 ACB Vol II(B) at pp 143–145.

(a) Failure to comply with cll E.3.4.1, E.3.4.2 and E.3.4.4 for the steps at the Reinforced Concrete Flat Roofs for all bungalows (**"RC Roof" issue**); and

(b) Failure to comply with cl 3.4.4; the last step at the landscape area of Unit 12A was non-compliant as the riser was higher than the permitted maximum (**"Landscape Step" issue**).

(c) The BCA also requested the structural plan approval for the installation of barriers and for the QP to confirm that all glass used as barriers and at a height of more than 2.4 meters complied with cl H.3.5 and N.3.2 and N.3.3 (this related to the Parapet Walls at the Pavilion issue where a higher glass barrier at the built-in concrete bench at Unit 12A pavilion was eventually erected).

154 We have mentioned above that the Judge stated (Judgment at [332]) that Mr Chan, in an effort to comply with BCA's Written Direction on 30 April 2013 on the height of the glass barrier abutting the built-in bench at Unit 12A's pavilion (the Parapet Walls at the Pavilion issue), asked GTMS to install an invisible grille at that location. Unfortunately, this too was rejected by the BCA, and eventually a taller glass barrier was installed. The Judge held (Judgment at [333]) that it was this difference in opinion as to how the height of the barrier at Unit 12A's pavilion should be measured which caused the bungalows to fail the Second TOP Inspection. However, the BCA letter dated 18 June 2013 also mentioned the two items set out above, although [153(c)] above related to the taller glass barrier in relation to the Parapet Walls at the Pavilion issue.

155 As stated above, upon TOP being obtained for the bungalows on 16 September 2013, Item 72(a) was complied with, and, subject to the issue relating to Item 72(b) which we deal with below, this is the earliest date on which the

CC could have been issued. The Judge however found that the *main* reason for the failure of the First TOP Inspection was caused by GTMS's construction errors. With respect, we disagree (see [162(d)] below). Leaving aside the Landscape Step issue which we address later, since GTMS had remedied all the defects in relation to the steps by 28 May 2013, delay in completion from the extended Completion Date after 17 April 2013 to 28 May 2013 was caused by GTMS (Judgment at [334]). However, the Judge declined to award Mr Ser any liquidated damages because of the prevention principle, a matter which we will deal with elsewhere: see above at [21] and below at [307].

PARAPET WALLS AT THE PAVILION ISSUE

156 The Judge found the three matters which caused the failure of the Second TOP Inspection, *viz*, the RC Roof issue, the Landscape Step issue and the Parapet Walls at the Pavilion issue, were not the fault of GTMS, but were caused by "natural phenomenon and design issues falling within [Mr Chan's] purview" (Judgment at [329] and [334]). We have dealt above with the Parapet Walls at the Pavilion issue. For the reasons we have set out above, we find that Mr Chan caused, and is therefore responsible for, the delay in the issuance of the TOP occasioned by the non-compliance of the barrier at the built-in concrete bench at the pavilion of Unit 12A (the Parapet Walls at the Pavilion issue).

RC ROOF ISSUE

157 In relation to the RC Roof issue, the Judge found that the concrete steps on the roofs of all three bungalows were not part of the contract drawings and had only been added subsequently through AI No. 15, dated 14 August 2012 (Judgment at [330]).[127] The relevant part of AI No. 15 stated, *inter alia*:

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127 ROA Vol V(AM) at pp 130–137.

"Additional of [*sic*] concrete steps in cement screed finish with groove lines as nosings" and "To refer to attached drawings for reference". The attached drawings to AI No. 15 did not contain any details for the construction of these steps, such as the dimensions for width, tread and riser. Closer examination shows some very faint and incomplete markings that could be interpreted as two steps at the relevant parts of the roof.[128] There are also some words that are unreadable nearby those faint markings. The Judge accepted the evidence of Mr Dennis Tan that these steps were "non-standard and not typical in design" (Judgment at [330]). Mr Dennis Tan also stated in cross-examination that there were differences in the heights of the roofs of each bungalow and he was just told one day to provide steps at these areas to aid movement from one level to the other; Mr Dennis Tan described this as an "ad hoc" request and an "ad hoc design".[129] Mr Chan said in his submissions below that he should not be liable for this because GTMS had constructed the steps in response to a late request by Mr Ser.[130] GTMS therefore constructed two-steps to bridge the difference between the roof heights which resulted in the risers being more than 175 mm; BCA failed to approve that and required a three-step design so the risers would be less than 175 mm.[131] We note these were steps added at the flat concrete roofs of the three bungalows and they were to be used by workers for maintenance. We also note this was not commented on or picked out as a non-compliant item at the First TOP Inspection. The Judge found that Mr Chan had considered the steps at the roofs fell within "certain exceptions" (without specifying which exception(s) in the Judgment at [330]), but the BCA officer at the Second TOP

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128 ROA Vol V(AM) at pp 130, 135 and 137.

129 ROA Vol III(CC) at p 233, lines 9–13 (9 November 2018).

130 ROA Vol IV(U) at p 137, para 285.

131 ROA Vol III(CC) at p 232, line 2–p 233, line 16 (9 November 2018).

Inspection took a different view. The Judge therefore concluded that it was neither a construction defect by GTMS nor a design error by Mr Chan.

158 We find this rather unfortunate because we do not know which exception the Judge was referring to. We can surmise from Mr Chan's closing submissions at paras 282, 283 and 285,[132] referred to by the Judge in footnote 435 of the Judgment, that Mr Chan was referring to cl E.3.4.4 Note 2(a) (the roof service areas were akin to where the plant and equipment of the Project were kept) and Note 2(d) (that the Project was being built for Mr Ser's own use). The Note to cll E.3.4.1to E.3.4.4 states that the requirements in cll E.3.4.1 to E.3.4.3 do *not* apply to (a) plant and equipment rooms, (b) the production area of an industrial building, (c) attic rooms in residential buildings and (d) houses built by the owners for their own use. We do not think (a) is applicable in the present case as the flat concrete roofs are not the equivalent of or akin to plant and equipment rooms, where there are space constraints, (and similarly as with attic rooms, in para (c), in residential buildings). Paragraph (d) is also not applicable, in the light of Mr Ser's stand at trial that these bungalows were built for investment purposes and renting out and not for his own use.[133] Therefore, the requirements in cll E.3.4.1 to E.3.4.4 do appear to us to apply to the Project, as does the requirement in cl E.3.4.4 for the risers and treads within each flight of stairs to be of uniform height and size (albeit with a tolerance of +/- 5 mm in any flight of stairs). This was certainly the view of the BCA Inspectors. It appears to us that there was probably an omission by Mr Chan to issue a proper drawing with instructions for the construction of these steps. First, if the faint markings are what they appear to be and are to be interpreted as showing two steps at the relevant parts of the roofs of each bungalow (and leaving aside the unreadable

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132 ROA Vol IV(U) at pp 136–138.

133 ROA Vol III(CN) at p 197, lines 11–12 (22 January 2019).

words that may or may not relate to those steps), then GTMS cannot be faulted for constructing two steps at each location. Secondly, if they are not, then it can hardly be good or responsible architectural practice to omit to do so, leaving a contractor to his own devices for the construction of these steps. In Mr Chan's submissions below,[134] his justification that this was not a defect because GTMS had constructed the steps as the result of a late request by Mr Ser and Mr Chan had inspected and supervised the same in line with Mr Ser's request, rings hollow. Although these steps were on the RC concrete roofs, compliance with at least the maximum riser height and tread width (none of which could have been an issue here as there were no site constraints) would obviously have been required for the safety of workers carrying out maintenance or other work on those roofs, particularly given the possibility of such workers also carrying equipment. Nonetheless, bearing in mind Mr Dennis Tan's evidence, the AI No. 15's drawings possibly not showing the steps to be constructed, the absence of any cross-examination on the points noted above, the absence of a finding by the Judge on these facts, and the absence of any other findings and any proper focus on this issue by the parties in their submissions, we do not think there is sufficient basis for us to intervene in this finding of fact below that this was neither a construction error by GTMS or a design error by Mr Chan.

LANDSCAPE STEP ISSUE

159 As for the height of the riser at the last step of the landscape area of Unit 12A exceeding the limit, the Judge found that it was not a construction error nor a design error because the cause was the settlement of the soil next to the last step, causing an increase in the riser. That was a natural phenomenon. We note

134 ROA Vol IV(U) at p 137, para 285.

that when the bungalows failed the First TOP Inspection, there was a warning (albeit, a standard one) in the BCA letter dated 30 April 2013:[135]

> The *non-compliances listed above are* ***non-exhaustive***. Under Section 9 of [the] Building Control Act, you are required to ensure that the building works comply with the regulatory requirements. ***You should re-conduct a full inspection*** on the entire development and rectify all non-compliances. ***When you have done so, please apply*** *for a re-inspection* by submitting a fresh form BCA-CSC-RQSI. …
>
> [emphasis in italics and bold italics added]

160 The BCA letter dated 18 June 2013, when the bungalows failed the Second TOP Inspection, was even more pointed:[136]

> The non-compliances listed above are non-exhaustive. Under Section 9 of [the] Building Control Act, you are required to ensure that the building works comply with the regulatory requirements. **You should:**
>
> **a) re-conduct a full inspection on the entire development;**
>
> **b) rectify all non-compliances and**
>
> **c) confirm to us in writing (with photographs where applicable) that all non-compliances on-site have been rectified**
>
> …
>
> [emphasis in original]

161 It is obvious that Mr Chan or Mr Yong did not re-conduct a full inspection after the bungalows failed the First and Second TOP Inspections because they did not pick up the further non-compliant items. Indeed, Mr Chan admitted as much under cross-examination.[137] If Mr Chan or his teams had done so, they would have noticed the settlement of the soil next to the last step at the

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135 ACB Vol II(B) at p 139.

136 ACB Vol II(B) at p 144.

137 ROA Vol III(DM) at p 104, lines 15–21 and p 107, lines 12–24 (9 June 2020).

landscape area in Unit 12A and should have realised there were possible issues with the steps at the roofs because no drawings or details had been issued by CSYA and the steps had risers beyond 175 mm. If so, Mr Chan or Mr Yong should have asked GTMS to top up the soil before the inspection. It bears noting that at the First TOP Inspection, when all the steps were under scrutiny by the BCA, they found nothing amiss with this last step at the landscape area. Mr Chan should also have contacted BCA regarding the steps at the roof and could probably have done something about confirming if those steps fell within the exceptions.

Our findings

162 At this juncture, we make the following findings and rule as follows:

(a) The Contract Completion Date was correctly and validly applied for and extended to 17 April 2013 by EOT 2 and EOT 3.

(b) As of 18 April 2013, the works were in delay and there being no other matters entitling GTMS to any further EOT pending, Mr Chan should have issued a Delay Certificate under cl 24(1) of the SIA Conditions. Liquidated damages would then have started to run from 18 April 2013. Mr Ser would have had the option to deduct these accrued liquidated damages from any sums payable to GTMS (see cl 24(2) of the SIA Conditions).

(c) Under the terms and conditions of this Contract, including Item 72(a), the CC could not be issued before the TOP was issued; on this basis, the earliest point in time when the CC could have been issued was 16 September 2013, when the TOP was obtained. As the Judge has not made any alternative findings of fact as to when the CC should have

been issued after TOP was obtained and the parties have not made proper submissions thereon, we find that the CC should have been issued on 16 September 2013 and, save for considering the relative causes for the delay, liquidated damages could *theoretically* have run from 18 April 2013 to 16 September 2013.

(d) The bungalows failed the First TOP Inspection. Five reasons were given by BCA therefor and from the evidence below we find and hold as follows:

(i) Steps and Risers issue: There were construction errors in relation to the risers found on all the internal staircases, landscape areas and swimming pools, responsibility and liability for which rests on GTMS. GTMS does not dispute this. The Judge found that this was the *main* reason for the failure of the First TOP Inspection (Judgment at [325]). With respect, we disagree. The Judge expressly acknowledged, and discussed to varying degrees, some of the other reasons for the bungalows failing the First TOP Inspection. These other errors, which we list below, would have caused a delay to the Project achieving TOP, but there were no proper or adequate findings as to responsibility therefor, the causative potency or degree to which it was a cause of delay, the time required to rectify each of these other defects or non-compliances, the different reasons for the same, their concurrency or otherwise and how they would have impacted, both singly, in combination and cumulatively, the time taken to remedy and ready the Project for the Second TOP Inspection. This is an unsatisfactory state of affairs.

(ii) The Judge has made one other finding of fact, *viz*, GTMS completed rectification of all the non-compliant steps and risers within 28 days of the First TOP Inspection, *ie,* by 28 May 2013. There was evidence to support such a finding and we cannot say that the Judge's finding is against the weight of the evidence. However, that does not resolve the issues surrounding the failure to obtain TOP and therefore the delay in the issuance of the CC. Without the Judge's reasons for his conclusion and in light of the other reasons for the failure of the First TOP Inspection, which include Mr Chan's own admitted design errors and omissions, there should have been an analysis and findings for these other reasons, which we discuss below, within the relevant time periods:

(A) first, the 28 days for GTMS to rectify the construction errors (1 May 2013 to 28 May 2013), and

(B) secondly, the remaining 21 days, unaccounted for in terms of remedying other non-compliances, (29 May 2013 to 18 June 2013) to the Second TOP Inspection.

With respect, the Judge's finding that GTMS's construction errors were the *main* reason for the bungalows failing the First TOP Inspection is a finding against the weight of evidence and cannot stand.

(iii) Parapet Walls at Roof issue: GTMS were also responsible, and therefore liable, for construction errors in building parapets that did not reach up to the required height of one meter. There is no finding of fact as to the extent of this defect, the amount of time required to rectify the same and by

what date it was rectified, nor was there any finding as to the causative potency and the degree to which this contributed to any of the overall delays in completion. This should have been, but was unfortunately not, done. In the absence of any submissions with sufficient detail on this point, we are constrained against making any specific findings in this regard on appeal, save to say that from the photographs and drawings submitted by Mr Chan to the BCA in his letter dated 6 September 2013,[138] this defect is not extensive and, given that this involves different trades (from that of the tread and risers of the internal staircases), these defects could be rectified well within the 28 day period as found by the Judge. In addition, we note in Mr Chan's submissions below that this inadequacy in height was a matter of millimetres and could be easily rectified within a few days.[139] There was also evidence in Mr Dennis Tan's cross-examination to the effect that "some of the parapet walls were a bit less than 1m" and rectification just involved "top[ping] it up a bit".[140]

(iv) Gap issue: In Ms Wan's email dated 15 May 2013 (referenced at [148] above), she attributes this non-compliance as a construction error. She states that GTMS was asked to extend the wall to "close" the gap to 100 mm. Although this looked like a fairly minor error from the photographs submitted to the BCA in Mr Chan's 6 September 2013 letter, there is no finding as to how long this took to be rectified, the date when

138 ACB Vol II(B) at p 150.

139 ROA Vol IV(U) at pp 132–133, paras 273–274.

140 ROA Vol III(CG) at p 131, lines 12–20.

rectification work commenced and the date by which it was completed, nor was there a finding as to how much this contributed to the overall delay. This again should have been, but was unfortunately not, done. However, we are prepared to accept, on the evidence that this defect was confined to one area[141] and could be carried out well within the 28 day period, especially as it involved a different trade from the tread and risers of the internal and external staircases.

(v) Landscape Railings issue: Mr Chan failed to provide barriers at the swimming pool of Unit 12B where there was a drop of one meter or more; this was a design error for which Mr Chan was responsible and liable. Mr Chan asked GTMS to install steel railings in compliance with cl H.2.1. There are no findings by the Judge as to whether an AI with a drawing was issued, if so when it was issued, how long it took to fabricate the steel railings, to deliver them to site and how long it took to install the same. This is most unfortunate; these would have been important findings because rectification of this error by Mr Chan would have involved additional work in a period of delay when liquidated damages were running. This would trigger the potential operation of cl 24(3)(a), *viz*, a Termination of Delay Certificate, (and a Further Delay Certificate under cl 24(3)(c) if the delay is still continuing after the additional works are completed). We note there is a document, AI No. 39,[142] which was entitled: "ADDITIONAL GALVANISED STEEL

141 ACB Vol II(B) at pp 154 and 179.

142 ROA Vol V(BD) at pp 274–275.

RAILING AT NO.12B-SWIMMING POOL" said to be sent by fax and by post, but this was dated 23 September 2013. This was seven days after TOP was obtained. It said work was to proceed immediately, and it acknowledged a cost claim for this work and referred to an attached drawing, which was a photograph with railings superimposed on it and with overall dimensions for the railings but with no actual details of the members comprising the railing. The "AI" was signed by Mr Chan, but the endorsement stating that the "Instruction also constitutes a net EXTENSION/REDUCTION OF ____ days to the Contract Period" was not filled in and the "AI" was not signed or acknowledged by GTMS. This document was stated to be copied to Mr Ser, Web, CCA and F+G. Although there is no finding as to when the rectification work was started and when steel railings would have been completed, it is clear it had been complied with by the Second TOP Inspection. We note a similar document appears in the Final Accounts[143] and this is signed by GTMS and dated 30 September 2013 but is otherwise similar to the document referenced above with some important parts left blank. We note however, that there does not appear to be an accompanying F+G document on the amount payable for this AI, (unlike AI No. 34). We are similarly unable to ascertain the relative sequence and impact of these works on the overall delays caused by the non-compliant deficiencies identified in the First TOP Inspection. However, from the foregoing facts, it almost certainly should have triggered the issue of a Termination of

143 ROA Vol III(BQ) at pp 108–254, see p 165.

Delay Certificate under cl 24(3)(a) of the SIA Conditions. We discuss this significant omission by Mr Chan below (see [165]).

(vi) Parapet Walls at the Pavilion issue: Mr Chan also failed to provide for an adequate barrier above the built-in concrete bench at the pavilion of Unit 12A. In our view, for the reasons set out above, Mr Chan was wrong in measuring the height of the barrier from the floor level and not the top of the built-in concrete bench. As referenced above, there is evidence that Mr Chan attempted to initially resolve this by asking GTMS to install an invisible grille behind the bench. We have no evidence as to how GTMS was told to do this. We have referred to Ms Wan's email of 15 May 2013 with a table of the non-compliant items from the First TOP Inspection. In that email, in referring to this issue, Ms Wan has stated: "To add invisible grille at No. 12A pavilion". It appears work started on this defect fairly soon after the First TOP Inspection. From the photographs in the evidence relating to this invisible grille it was not simply adding cables; there were vertical as well as horizontal cables for the first 900 mm and then only vertical cables for the next 900 mm.[144] There is an email dated 9 July 2013 from Mr Nishanthan, (another Professional Engineer engaged by GTMS for the purpose of submission to the BCA for the invisible grilles), of SMS Consulting Engineers to GTMS's Mr Juan Ocampo which indicates that they had seen BCA on a walk-in consultation.[145] There were issues over the tensile strength of the 2 mm diameter

144 ROA Vol V(BB) at pp 198–203.

145 ROA Vol V(BB) at p 192.

(invisible grille) cables as they had to be able to deflect 175 mm to stay within their safe tensile capacity. This was rejected by the BCA on 11 July 2013 because the deflection of 175 mm between two cables was not acceptable.[146] Mr Chan then attempted to apply for a modification and/or waiver to allow for a maximum 175 mm deflection between two cables but this was rejected by the BCA on 19 July 2013.[147] Mr Chan made further proposals to address this concern between 23 to 31 July 2013. It was only on 1 August 2013 that Mr Chan instructed GTMS to proceed and measure and install a glass barrier (parapet) instead.[148] Mr Chan issued AI No. 34 on 26 August 2013 for the glass barrier.[149] The glass barrier was only installed on 30 August 2013 and it was only after BCA's approval, finally given on 6 September 2013, that Mr Chan applied for TOP.[150] As noted above, this also involved a QP's submission with cl H.3.5, N.3.2 and N.3.3 (see [153(c)] above) for a glass barrier of more than 2.4 meters. Regretfully, there were again no relevant findings of fact necessary to assess relative delays as between GTMS and Mr Chan. Potentially, this was an operative cause for the delay in obtaining the TOP from or very soon after 30 April 2013 up to perhaps 30 August 2013 (when the compliant glass barrier was installed) or even close to 16 September 2013 (when TOP was obtained), given that the BCA had to ask Mr Chan about the QP's

146 ROA Vol III(AD) at pp 31–32, para 91 and p 229.

147 ROA Vol III(AD) at p 32, paras 92–93 and p 236.

148 ROA Vol III(AD) at p 33, para 101 and p 261.

149 ROA Vol V(BB) at pp 295–296.

150 ROA Vol III(AD) at p 33, paras 103–106 and pp 267–271.

confirmation of compliance with cl H.3.5, N.3.2 and N.3.3 for a glass barrier of over 2.4 meters. This similarly raises the issues relating to and operation of cl 24(3) as noted in [162(d)(v)] above. There must have been verbal instructions or directions or a request from Mr Chan, well before AI No. 34, (which was dated 26 August 2013), to GTMS to carry out the various remedial works to the Parapet Walls at the Pavilion in Unit 12A. We note AI No. 34 was included in the Final Accounts as was an evaluation by F+G for payment for the "[a]dditional glass railing with aluminium capping at no. 12A-pavilion".[151]

(e) Two reasons were given by the BCA for the bungalows failing the Second TOP Inspection on 18 June 2013:

(i) RC Roof issue: All the steps at the RC flat roofs of all bungalows failed to comply with cll E.3.4.1, E.3.4.2 and E.3.4.4. These were not construction defects and GTMS was therefore not liable. The facts surrounding the issue of these steps have been set out above at [158]. There are no findings in relation to which exception the Judge was relying upon (although, as noted above, an inference *might* be drawn from Mr Chan's submissions), how or when these steps were rectified, how much they contributed to the overall delay and similar issues as raised above. We are therefore constrained by these limitations from intervening in or departing from the findings of the Judge.

(ii) Landscape Step issue: The last step at the landscape area of Unit 12A had a riser that was non-compliant with cl 3.4.4. The

151 ROA Vol III(BQ) at p 206.

Judge held that this was a natural phenomenon, and no one was responsible for this (Judgment at [331]). We take a different view. First, Mr Chan should have carried out his own inspection, as he was advised to by the BCA to do, prior to the Second TOP Inspection, but he failed to do so. If he had done so, he would have noted the soil settlement and ordered that the soil be topped up *before* the Second TOP Inspection. As referenced above, when all the steps (in relation to tread and risers) were under scrutiny during the First TOP Inspection, this step was not found to be a non-compliant item. It is therefore reasonable to infer that this settlement occurred subsequent to the First TOP Inspection. This was not a serious non-compliant item and it could certainly be rectified easily. Furthermore, it was something that fell within the Defects Liability Period ("DLP"). Evidence was given by Mr Yong in his AEIC that this was rectified by GTMS in the space of one day, *viz*, by 19 June 2013.[152] We know by the time Mr Chan wrote to the BCA on 6 September 2013 this item had been rectified. Secondly, this settlement, occurring within the soil and turfing of the external works, is usually due to insufficient compaction of the soil or due to improper soil drainage. It is not something "natural", as occurring in undisturbed soil as such, but occurring in part of GTMS's landscaping external works. However, this is a very minor issue, especially given the other delay events, and perhaps was considered not worthwhile to explore. Save for expressing our views, this has no effect as a delay event in this case.

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152 ROA Vol III(AN) at p 240, para 193 and ROA Vol IV(N) at p 97, para 129.

For convenience, we summarise the above in the following table:

	Judge's findings	**Findings of this court**
The First TOP Inspection		
Steps and Risers issue	Construction error	Construction error
Landscape Railings issue	No finding	Design error/omission
Parapet Walls at Roof issue	No finding	Construction error
Parapet Walls at the Pavilion issue	Neither; difference of opinion	Design error; non-compliance with BCA's safety requirements in BCA's Approved Document of Acceptable Solutions[153]
Gap issue	No finding	Construction error
The Second TOP Inspection		
RC Roof issue	Neither; difference of opinion	Neither; insufficient basis to intervene in Judge's finding

153 Exhibit D27.

Landscape Step issue	Neither; natural phenomenon	CSYA's error in not conducting a full re-inspection and noticing the settlement of the soil and taking remedial action before the Second TOP Inspection. It was not a natural phenomenon but is of no effect as a delay event in view of the other delay events.
Parapet Walls at the Pavilion issue	Neither; difference of opinion	Design error; non-compliance with BCA's safety requirements in BCA's Approved Document of Acceptable Solutions[154]

163 With this unsatisfactory state of affairs, we now turn to consider what should have been the proper analysis for the delays and allocation of responsibility therefor between the respective parties and what ought to have been done.

154 Exhibit D27.

164 We start with the fact that the Contract Completion was validly extended to 17 April 2013. We have referred to the meeting between the parties on 17 April 2013 (see [12] above). GTMS filed their statutory Builder's Certificate of Completion of the Building Works, dated 19 April 2013, declaring that they had executed the works in accordance with the plans as supplied by the QP and in accordance with the provisions in the BC Act and Regulations ("Builder's Certificate of Completion").[155] Mr Chan filed his required Certificate of Supervision on 23 April 2013.[156] We note Mr Chan also applied for the First TOP Inspection on 23 April 2013 and the First TOP Inspection took place on 30 April 2013.[157] GTMS's Construction Programme,[158] which became the approved master programme,[159] catered for a 2 week (plus 2 day float) period leading up to and for the TOP Inspection after completion of their Works:[160]

TOP	
Duration:	14 days
Start:	12/01/13
Finish:	28/01/13

In Mr Chan's application form for a TOP Inspection, he had to confirm that the site office, work sheds, hoardings, etc had been demolished and the site completely cleared of all construction material and debris.[161] Hence, GTMS was in delay from 18 April 2013, as all these works and steps had to be carried out and completed before the application for the First TOP Inspection. As we have

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155 ACB Vol II(B) at p 132.

156 ACB Vol II(B) at pp 133–134.

157 ACB Vol II(B) at p 135.

158 ACB Vol II(A) at pp 278–290, see p 290.

159 ROA Vol V(Q) at p 156.

160 ACB Vol II(A) at p 290.

161 ACB Vol II(B) at p 136.

stated above (see [162(b)]), Mr Chan ought to have issued a Delay Certificate under cl 24(1) on or fairly soon after 18 April 2013 as there was no legitimate reason in this case to take a longer time to make a decision thereon. Even though cl 24(1) entitles an architect the latitude up to the issue of the Final Certificate to issue a Delay Certificate, there was no legitimate reason to delay the issue of a Delay Certificate in this case as the circumstances requiring its issue were clear, without complexity or ambiguity on the facts. Whether and/or when liquidated damages start to run is a matter that has grave consequences for both contractor and employer; it therefore behoves the architect to act promptly and with clarity when he carries out his certification function under cl 24(1), so the parties know where they stand. There may well be cases where there is complexity or ambiguity on the facts surrounding the decision whether to issue a Delay Certificate or not, hence the latitude granted in cl 24(1), but this is certainly not such a case. In the absence of any finding of delays caused by Mr Chan during that period, GTMS is liable for the delay up to the First TOP Inspection.

165 The causes for the bungalows failing the First TOP Inspection have been examined above. The Judge's finding is that GTMS completed its rectification of the tread and risers for all staircases by 28 May 2013. We have found that the rectification of the other causes for the TOP Inspection failure attributed to GTMS could have been done in that same period up to 28 May 2013. If GTMS was not liable for any delays after 28 May 2013, then Mr Chan ought to have issued a Termination of Delay Certificate under cl 24(3)(a) which provides:

> 24(3)(a)
>
> If while the Contractor is continuing work subsequent to the issue of a Delay Certificate, the Architect gives instructions or matters occur which would entitle the Contractor to an extension of time under Clauses 23(1)(f), … 23(1)(o) … and if such matters would have entitled the Contractor to an

> extension of time regardless of the Contractor's own delay and were not caused by any breach of contract by the Contractor, the Architect shall as soon as possible grant to the Contractor the appropriate further extension of time in a certificate known as a "Termination of Delay Certificate."

166 Clause 24(3) specifically deals with delay events, which would usually entitle the contractor to an EOT under cl 23, when the contractor is already in delay, *ie*, still carrying out the construction works after the contract completion or extended contract completion date, and a Delay Certificate has already been issued under cl 24(1). Hence if additional works are required under an AI or other verbal order or request by the architect, during the delay period, the architect is empowered to issue a Termination of Delay Certificate under cl 24(3)(a) of the SIA Conditions, in respect of those additional works. This makes clear that liquidated damages that have accrued up to the issue of the Termination of Delay Certificate remain intact, but do not continue to run after the Termination of Delay Certificate is issued; however if upon completion of the additional works, the contractor is still in delay, then a Further Delay Certificate can be issued, in which case the imposition of liquidated damages resumes from that date. This delineates the boundary between the earlier delay and further delay caused by new delay events or acts of prevention (see *Commentary on SIA Standard Form* at paras 24.11 to 24.13). Cl 24(3) serves a very important function of preserving the right of the Employer to liquidated damages that have already accrued when additional works during the period of delay are necessary and allows for a resumption of liquidated damages if the contractor still remains in delay after the additional works are completed. It should be noted that cl 24(3), (unlike earlier editions of the SIA Conditions of Contract), does not apply to the events set out in cll 23(1) (a)–(e), (l), (m) and (q).

167 There were thus two significant events which, with respect, counsel and therefore the Judge, missed or failed to deal with:

(a) First, as mentioned above, one of the effective causes for the failure to obtain TOP on 30 April 2013, was the design error or omission by Mr Chan to provide for a railing at the swimming pool of Unit 12B where there was a drop of more than 1 meter.

(b) GTMS *must* have been "instructed" by an AI or verbally requested or otherwise asked to install the missing railing because this was rectified by the Second TOP Inspection. As this was an omission in the Drawings, one would have expected an AI or some request to GTMS with a drawing for GTMS to fabricate and then install the railing on site. This additional work meant and entailed an EOT and cost consequences. As mentioned above, there is a document, "AI No. 39" (see [162(d)(v)] from CSYA to GTMS to "add galvanised steel railing with paint finish at no.12B-swimming pool" with a reference to an attached drawing. However, as noted above, this is dated 23 September 2013, which is after TOP was obtained, and there is no corresponding evaluation by F+G, (unlike AI No. 34) in the Final Accounts although it appears in Valuation No. 27 (Final)[162] under the "PARTICULARS OF VARIATION WORKS", Item No. 19. Be that as it may, since this omission must have been rectified by the Second TOP Inspection on 18 June 2013, it would also have an important effect on the concurrent delay and liquidated damages being accumulated against GTMS. We deal with this in greater detail below.

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[162] ROA Vol III(BS) at pp 198–294, see p 283.

(c) Secondly, the inadequate height of the barrier at the built-in concrete bench at the Unit 12A pavilion would also have required additional works, *viz*, the installation first of an invisible grille and later its dismantling and erection of a taller glass barrier, which would, in turn, have entailed submission of QP calculations and endorsement for strength and stability compliance. This would have held up the issue of the TOP and therefore the CC. The scant documentary evidence on the steps taken by Mr Chan and their corresponding dates have been set out at [162(d)(vi)] above. There is an "AI No. 34", which is dated 26 August 2013,[163] and therefore could not have been the date when Mr Chan first instructed or requested GTMS to carry out the rectification. We note there is a signed copy appearing in the Final Accounts together with an evaluation by F+G. Again, there are no findings in relation to these events upon which we can assess a potential EOT that should have been issued, which would have, in turn, triggered a Termination of Delay Certificate as Mr Chan was solely responsible for this omission. This additional work would have entailed time and costs consequences. It would similarly affect the liquidated damages ticking away as against GTMS with a far longer effective causative effect compared to the missing railing at Unit 12B.

Both these events would have potentially attracted the operation of cl 24(3) and stopped the accumulation of liquidated damages against GTMS.

168 To complete the factual framework, as noted above, the failure of the Second TOP Inspection was also not due to any construction works for which GTMS were responsible. Rectification of the concrete steps at the roofs of the

163 ROA Vol V(BB) at pp 295–296.

bungalows would similarly have involved additional works ordered by Mr Chan but there are no findings of fact thereto as well as the soil settlement next to the Landscape Step. Mr Chan incorrectly submitted below that neither GTMS nor CSYA was responsible as they had no control over the settlement of the soil.[164] As mentioned above, this of course ignores the fact that the settlement occurred sometime between the First and Second TOP Inspections and Mr Chan failed to inspect the Project before either of the TOP Inspections. GTMS contended below that settlement was a natural phenomenon for which it cannot be held responsible.[165] We take a contrary view; this was not a "natural phenomenon" (Judgment at [334]), but in all probability a construction issue for the reasons set out above, albeit minor, within the landscape external works.

169 We also note the following dates. Mr Chan applied for the Second TOP Inspection on 31 May 2013,[166] three days after GTMS completed their rectification work under the First TOP Inspection list. Although Mr Chan requested 13 June 2013 for the Second TOP Inspection, the BCA fixed it on 18 June 2013. It is noteworthy that after the bungalows failed the Second TOP Inspection, there was a long delay. This could not have been caused by the rectification works in relation to the RC Roof issue or the Landscape Step issue:

(a) In Mr Chan's submissions below, he submitted that the RC Roof issue was rectified in a matter of days; this sounds reasonable as it was not an involved nor difficult construction.[167] We note in Mr Dennis Tan's

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164 ROA Vol IV(U) at p 138, para 287.

165 ROA Vol IV(N) at pp 97–98, at para 130.

166 ACB Vol II(B) at p 141.

167 ROA Vol IV(U) at p 137, para 283, citing ROA Vol V(AZ) at p 293 and ROA Vol V(BD) at pp 43–46.

AEIC at para 54(b), he deposes that the RC Roof issue was rectified in two days after the Second TOP Inspection, *ie*, 20 June 2013.[168]

(b) Similarly, the Landscape Step issue was something that could be rectified in a day or, at most, two. Mr Yong in his AEIC deposes that the error in the riser at the Landscape Step of Unit 12A was rectified by 19 June 2013, the day after the Second TOP Inspection,[169] and we have no reason to disbelieve that claim.

Mr Chan only applied for another TOP Inspection on 6 September 2013[170] and sent the BCA a letter of the same date with detailed information and evidence by way of drawings and photographs of the relevant rectification works as directed by the BCA pursuant to the First and Second TOP Inspections.[171] This led to the issue of the TOP on 16 September 2013 without a further BCA TOP inspection. This delay after the bungalows failed the Second TOP Inspection comprised a period of 89 days (from 19 June 2013 to TOP on 16 September 2013).

170 What had therefore occurred in fact was that GTMS was in delay up to 28 May 2013, but at the same time, sometime soon after 30 April 2013, and certainly by 15 May 2013 when Ms Wan sent her email to Mr Wilson Cheung (see [148] above), Mr Chan must have instructed or otherwise required GTMS to obtain and install the railing at Unit 12B and to install the invisible grille in an attempt to meet BCA's requirements and later the higher glass barrier/parapet, at Unit 12A pavilion (indeed, Mr Yong said as much in his

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168 ROA Vol III(L) at p 206, para 54(b) and ROA Vol IV(N) at p 98, paras 131–132.

169 ROA Vol III(AN) at p 240, para 193 and ROA Vol IV(N) at p 97, paras 129–130.

170 ACB Vol II(B) at p 147.

171 ACB Vol II(B) at p 150.

AEIC).[172] Something similar must also have happened after the Second TOP Inspection on 18 June 2013, where, according to Mr Yong, GTMS proceeded to carry out the rectification works in respect of the RC Roof issue and the Landscape Step issue.[173] These facts raise the issue of concurrent delays when the architect issues instructions or requires additional works, during a period of the Contractor's delay. We note that this issue was not raised in the pleadings and there was only a very brief mention in parties' submissions to the Judge on the law in relation to concurrent delays and the respective liabilities therefor. GTMS admitted in its closing submissions that there were construction errors which caused the failure of the First TOP Inspection, but said that the Second TOP Inspection would have passed if not for "non-construction errors" for which GTMS was not responsible; in particular, GTMS submitted that the overriding issue that caused the delay was the Parapet Walls at the Pavilion issue (or glass barrier, as referred to in the evidence below), at the pavilion in Unit 12A.[174] We pause to note that in Mr Dennis Tan's AEIC, at para 71(ii)(b), he explains, convincingly, that GTMS did not apply for any EOT in respect of these design errors or omissions by Mr Chan which surfaced during the TOP Inspections because the CC was already issued on 15 May 2013 certifying CC as of 17 April 2013.[175] In his reply submissions, Mr Ser denied that GTMS was entitled to any EOT due to "concurrent delay" caused by CSYA's failure to design any barriers at the Unit 12A pavilion.[176] There was no reference to cl 24(3) of the SIA Conditions in any of the parties' pleadings.

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172 ROA Vol III(AN) at pp 240–242, paras 197–199.

173 ROA Vol III(AN) at pp 239–240, paras 192–193.

174 ROA Vol IV(N) at p 101, para 143–p 103, para 145.

175 ROA Vol III(L) at p 221, para 71(ii)(b).

176 ROA Vol IV(AE) at p 152, para 50–p 153, para 53.

171 Concurrent delay is defined as a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency (see *Adyard Abu Dhabi v SD Marine Services* [2011] EWHC 848 (Comm); *Keating on Construction Contracts* (Sweet & Maxwell, 10th Ed, 2016) at paras 8-026 to 8-028 ("*Keating")* and for a more detailed treatment, see *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 14th Ed, 2021) ("*Hudson's*") at para. 6-058 to 6-063). For present purposes, the general principle as stated in *Keating* at para 8-026 will suffice: "It is now generally accepted that under the Standard Form of Building Contracts and similar contracts a contractor is entitled to an extension of time where delay is caused by matters falling within the [EOT] clause notwithstanding the matter relied upon by the contractor is not the dominant cause of delay, provided only that it has at least equal "causative potency" with all other matters causing delay." Put in another way, if during a period of culpable delay by the contractor, a variation is given, then the contractor is entitled to an extension of time for the period of delay caused by the variation even if it is concurrent with a period of culpable delay by the contractor, see *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [1999] 70 Con LR 32 at [13]; *Royal Brompton Hospital National Health Trust v Hammond (No. 6)*, 18 December 2000, 2000 WL 1841725; *Walter Lilly & Co Ltd v Giles Patrick Cyril Mackay and another* [2012] EWHC 1773 (TCC), [2012] BLR 503, per Akenhead J at [370]. The extension to the contractor would only be for the 'net' delay caused by the variation which would not include the 'gross' period up to the variation, see *Balfour Beatty Building Ltd v Chestermount Properties Ltd* [1993] 32 Con LR 139 at 158–164. There should have been more detailed submissions made on the legal position as none of the other key texts or cases like *City Inn Ltd v Shepherd Construction Ltd* [2010] BLR 473 or the more recent case of *North Midland Building Limited v Cyden*

Homes Ltd [2018] EWCA Civ 1744 have been dealt with by Singapore courts. Most importantly cl 24(3) of the SIA Conditions should have been invoked to stop liquidated damages from running against GTMS.

172 The following should have been pleaded, explored at trial and made the subject of findings of fact and consequent rulings on application of the law:

(a) The starting point is that a Delay Certificate under cl 24(1) should have been issued certifying delays in completion of the works as from 18 April 2013.

(b) After the bungalows failed the First TOP Inspection, a detailed assessment of the facts should have been carried out on the causes for the failure and the remedial works carried out:

(i) each item requiring rectification should have a start date and end date thereby plotting the time taken for the rectification;

(ii) an assessment should then have been carried out as to the causal potency of each item, how much each item impacted on the further and other delays and having analysed the relative causative potency of each item, come to an overall cause and effect conclusion for the total delay;

(iii) if variation works (whether additional works or omission, and therefore demolition and making good) were required, then consideration would have to be given to cl 24(3), the principles in relation to concurrent delays and EOT within a period of delay and whether a Termination of Delay Certificate should be issued; and

(iv) whether, if applicable, a Further Delay Certificate should have been issued under cl 24(3)(c); and

(v) the effect of the above Certificates, if issued, on liquidated damages.

(c) A similar exercise should have been carried out on the causes for the bungalows failing the Second TOP Inspection;

(d) Parties should have considered the effect, if any, of the above mentioned certificates on the liquidated damages accumulating against GTMS.

173 This is a most unsatisfactory state of affairs, for which counsel must take some responsibility. These points were not covered in the pleadings or in the evidence and were, as mentioned above, referred to in the submissions in a less than cursory fashion upon which a trial judge cannot be expected to make the necessary findings and rulings. If this had been done, and in the circumstances of this case, we need only set out two of the following possible outcomes that would have altered, fairly substantially, the parties' positions on delay in completion of the Works, liability therefor and liquidated damages or general damages:

(a) A Termination of Delay Certificate should have been issued as a result of the additional works to rectify the Landscape Railings issue and this would have affected the liquidated damages that would have been running against GTMS as of 18 April 2013; we can conclude that this item was in all probability rectified by 31 May 2013 (when Mr Chan applied for the Second TOP Inspection) and certainly by the time the Second TOP Inspection took place on 18 June 2013.

(b) The Parapet Walls at the Pavilion issue would also have been the basis for the issue of a Termination of Delay Certificate and depending on the date when GTMS were told to remove the installed barrier and replace it with first, the invisible grille and its subsequent removal and replacement with a higher glass barrier and the QP submission therefor; the rectification of this error would, in all probability, have covered most, if not all, of the delay period after the bungalows failed the First TOP Inspection to the grant of the TOP.

174 In the circumstances, despite the foregoing analysis of how this dispute should have been resolved, we are constrained by the way the parties ran their respective cases below, and as a result thereof, to accept the Judge's limited findings of fact. As found by the Judge, GTMS completed remedying their construction errors by 28 May 2013 (Judgment at [334]) and therefore liquidated damages against GTMS would run from 18 April 2013 to 28 May 2013. We find that on the facts, the responsibility, and therefore the liability, for the delays after 28 May 2013 in obtaining the TOP were attributable to Mr Chan's errors and omissions. As for the Landscape Step issue and RC Roof issue, Mr Yong's unchallenged evidence was that the former was completed in one day, *ie*, by 19 June 2013, and according to the unchallenged evidence of Mr Dennis Tan, the latter was completed in two days, *ie*, by 20 June 2013. We accept their evidence on these facts. These relatively minor non-compliant items cannot explain nor be the cause of TOP only being obtained on 16 September 2013. On the facts, the cause of delay after 28 May 2013 was attributable to the Parapet Walls at the Pavilion issue.

175 We therefore find and hold as follows:

(a) Mr Chan should have issued a Delay Certificate on or as reasonably soon after 18 April 2013 as GTMS was in delay as of that date and liquidated damages ran from that date.

(b) Mr Chan was negligent in issuing IC 25 and/or IC 26 without affording Mr Ser the opportunity to decide if he would deduct the accrued liquidated damages from these payments due to GTMS.

(c) We cannot fully agree with the Judge that the construction errors of GTMS were the dominant and effective cause of the bungalows failing the First TOP Inspection. However, as set out above, we are constrained to accept that GTMS continued to be in delay and liquidated damages would have continued to run.

(d) As of 28 May 2013, when GTMS completed rectifying their construction errors, GTMS could no longer be considered to be in delay, but the CC could not have been issued since TOP had not been obtained in accordance with the terms of the Contract. In these circumstances, especially since GTMS had been asked by Mr Chan to install the steel railings and the invisible grille as a result of his omission and errors in design, Mr Chan should have issued a Termination of Delay Certificate under cl 24(3)(a) of the SIA Conditions on or as soon as possible after 29 May 2013. Under cl 24(3)(b), liquidated damages should then have stopped running against GTMS. All operative delays after 28 May 2013 were not caused by GTMS but by Mr Chan. Liquidated damages against GTMS would therefore run from 18 April 2013 to 28 May 2013; this would amount to $147,600 (41 days x $3,600).

(e) The reasons for issuing the Termination of Delay Certificate under cl 24(3) should continue to hold good through to the date TOP

was obtained, whereupon Mr Chan should have issued the CC. The DLP would then have started to run, and all else being satisfactorily complied with, DLP would have ended on 15 September 2014 with the issue of the Maintenance Certificate.

176 We deal with Mr Chan's liability to Mr Ser below.

Item 72(b)

177 The requirements of Item 72 of the Preliminaries are conjunctive. Having found that Item 72(a) of the Preliminaries was not duly satisfied, it is strictly speaking, unnecessary for us to go further as the CC would have been improperly and prematurely issued. However, in deference to the parties having spent considerable time and resources on the remaining provisions of Item 72, as well as the care with which the Judge made his detailed findings and rulings thereon, we shall proceed to consider Item 72(b) of the Preliminaries briefly. Item 72(b) states that the CC shall not be issued until "[a]ll services are tested, commissioned and operating satisfactorily as specified in the Contract … including handing over all test certificates, operating instructions and warranties".

178 The Judge was satisfied that Item 72(b) of the Preliminaries had been duly fulfilled by 17 April 2013, for the following reasons:

(a) **Testing and commissioning ("T&C") for gas services**: The Judge found that Mr Ser was estopped from insisting that the T&C for gas services be completed before the CC could be issued. This was because Mr Ser had himself agreed that the T&C for the gas services shall be conducted only *after* the TOP was issued. In addition, the T&C for the gas was done by the gas supplier, GTMS and some

subcontractors prior to, at the time of, and after gas turn-on (Judgment at [338]–[343]).

(b) **T&C for electrical services:** There was no dispute that T&C for electrical services were done *prior to* electrical turn-on. As to T&C *after* turn-on, while there was no formal documentation, the Judge accepted the evidence of Mr Chan's staff and CCA, who testified that the necessary T&C had been duly carried out. While GTMS's director had testified that no T&C after turn-on was carried out, the Judge did not prefer his evidence, since the director would not have been directly managing the Works at the material time (Judgment at [346]–[351]).

(c) **T&C for air conditioning and mechanical ventilation ("ACMV") works:** The Judge was satisfied that the T&C for ACMV works was done around 1 and 2 April 2013, prior to the electrical turn-on, as well as from 10 to 12 April 2013, after the electrical turn-on. The Judge accepted the testimony of a staff worker of CCA, as the M&E consultant, that she had personally conducted the testing so that the Certificate of Supervision could be released for the TOP application. Further, GTMS and its subcontractor also signed off on the ACMV works for the bungalows at the latest by 12 April 2013. Additionally, there was a further round of T&C for the air-conditioning equipment on 8 July 2013, which was an *additional* T&C requested by Mr Ser (Judgment at [352]–[357]).

(d) **Handover of documents**: Mr Ser complained that while Item 72(b) of the Preliminaries required GTMS to hand over all testing documentation, no such documents were ever furnished. The Judge found that this handover requirement was *de minimis*, in that non-

compliance would not prevent Mr Chan from validly issuing the CC (Judgment at [366]–[382]).

179 In sum, the Judge found that the T&C had been duly carried out for all relevant services with the exception of the gas services by 17 April 2013, *ie,* at the end of the contractual completion date following the grant of EOT 3 from a practical perspective, the handover of the documents could be done on another day. Therefore, Item 72(b) was satisfied by 17 April 2013. For the reasons that follow, we do not consider that there is sufficient basis to disturb the Judge's findings on Item 72(b) in relation to Mr Ser's complaints thereon, save that we do not, with respect, agree with the Judge's *de minimis* approach to the requirement to hand over all test certificates, operating instructions and warranties in Item 72(b).

T&C for gas services

180 It is undisputed that as at 17 April 2013, the T&C for the gas services was not completed (Judgment at [338]). The Judge however, accepted Mr Chan's argument that Mr Ser was estopped from strict reliance on Item 72(b) of the Preliminaries because first, it was represented to all parties that for safety reasons, the T&C for gas services would be done *after* the Works were completed and second, all the parties consented to this arrangement. He found that Mr Ser's M&E Consultant, CCA, had conveyed this concern to the relevant parties involved, such as Mr Ser himself as well as his assistants, Mr Wilson Cheung and Mr Chow Kum Wai. There was no objection to this representation, which was relied on by Mr Chan and GTMS (Judgment at [338]–[343]).

181 On appeal, Mr Ser claims that the Judge erred in his finding because he did not agree to the T&C for gas services "being done after completion" but "merely agreed to postpone the *gas service connection (i.e. gas turn-on)* until

after TOP" [emphasis in original]. Put differently, he says he did not agree that GTMS need not conduct T&C for gas services at all, nor agree that this could be done after the issuance of the CC.[177]

182 It has never been the respondents' case that the T&C for the gas service was *not* required; this is a mischaracterisation. This was never in dispute, and the minutes of Site Meeting No 28 on 27 July 2012 as well as Site Meeting No 47 on 23 April 2013 records that for the "Gas Turn-On", "testing is required".[178] Their case, and the Judge's finding, is simply that there was a representation that was relied on by the Contractor, that the T&C for the gas services be done *after* the TOP. Mr Ser had agreed to this and is thus estopped from insisting on Item 72(b) of the Preliminaries as a bar to completion. Yet, Mr Ser fails to address what was crucially recorded in the minutes of Site Meeting No 41 on 21 January 2013 at Item 7.4, which was circulated to all parties present at the meeting by the Architect on 30 January 2013:[179]

> Regarding to Gas Turn-on, GTMS informed that gas stoves have already been installed. *However, Gas turn-on will be done after TOP.*

CCA's representative, Ms Chua, confirmed in cross-examination that such an arrangement existed and was not objected to by Mr Ser (Judgment at [341]). No such objections were raised at the following Site Meeting No 42. It follows, in our view, that in the light of the agreement to delay the gas turn-on until after the TOP, Mr Ser had waived the requirement that the gas turn-on had to occur before the CC could be issued and agreed to the T&C of the gas services being conducted after TOP as well. The evidence, viewed in its totality, shows that

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177 AC at para 48.

178 ACB Vol II(C) at pp 37 and 50.

179 ACB Vol II(C) at p 46.

when the CC was issued (albeit prematurely), neither Mr Ser nor his assistants raised any objections to the issuance of the CC notwithstanding that the T&C for gas services were yet completed. This clearly supports the Judge's finding on estoppel.

183 But that is not the end of Mr Ser's argument. He also asserts that there is "no evidence that T&C for gas was ever done at all" and that there was no T&C of gas services after the gas turn-on on 6 August 2013.[180] The Judge, however, found that T&C was eventually conducted by City Gas, as well as by GTMS and its subcontractors, both prior to, at the time of, and after gas turn-on (Judgment at [343]).

184 In our view, the Judge's finding is entirely supported by Ms Chua's testimony at trial (Judgment at [343]), as well as the Certificate of Final Pressure Test, which confirms that the gas installations were tested, passed the tests and were compliant with the relevant regulatory regime.[181] Clearly, what Mr Ser is trying to do on appeal is to distance himself from the evidence of his own M&E consultant, CCA. Mr Ser further claims that the Certificate of Final Pressure Test or Certificate of Proof Test was signed off only by CCA even though some emails suggest that Mr Ser had to affix his signature on it as well.[182] However, this elides the fact that Mr Ser's presence was not contractually mandated. The Judge considered the evidence and made a finding that the certificates, together with Ms Chua's and Mr Chew Beng Wah's testimonies, were sufficient to find that the T&C for gas services were adequately carried out. In addition, as GTMS points out, Mr Ser's allegations in his Appellant's Case that there are two

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180 AC at para 51.

181 ACB Vol II(B) at pp 122–123.

182 AC at paras 52–53.

different versions of the Certificate of Final Pressure Test in evidence (one version dated 18 July 2013 and the other version undated), and that both Mr Ser and CCA did not sign the Certificate of Final Pressure Test, are entirely belated; these were not pursued at trial and not put to CCA's representative, Ms Chua.[183] Ultimately, the Certificate of Final Pressure Test was signed by the Qualified Person.

185 Hence, it is apparent that Mr Ser has merely cited his own oral evidence in support of his argument on appeal and hardly ventured any challenge to the Judge's reasoning. This bare assertion is insufficient. It cannot be said that the Judge's finding was plainly against the weight of the evidence.

T&C for electrical services

186 In respect of the T&C for electrical services, Mr Ser contends there is no or insufficient evidence that the T&C for electrical services for the Project was carried out before 17 April 2013 or at all.[184] He takes aim at both T&C for electrical services *prior* to and *after* electrical turn-on.

187 As to T&C for electrical services *prior* to electrical turn-on, the Judge found that the contemporaneous documents demonstrate that the electrical services of the Project had undergone T&C before 17 April 2013 (Judgment at [346]). The Judge also accepted the testimony of Mr Ser's own expert electrical witness, Mr Lee, 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 (Judgment at [346]). These documents are clearly a written record of T&C for electrical

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183 AC at para 53; 1st RC at para 48.

184 AC at para 58.

services. Mr Ser has not challenged this aspect of the Judge's finding and there is no basis to interfere with this finding.

188 As to T&C for electrical services *after* electrical turn-on, the Judge accepted Mr Yong's evidence that as regards such T&C for electrical services, those might not necessarily be accompanied by formal documentation (Judgment at [347]). However, Mr Ser says that there was no formal documentation provided and hence no objective evidence that the T&C was done at all. He relies on the minutes of Site Meeting No. 46 on 1 April 2013 and Site Meeting No. 47 on 15 April 2013.[185] In our view, this is untenable. The Minutes of the Site Meetings, contrary to what Mr Ser contends, do not state that the T&C for electrical works were incomplete or not done at all. Both merely mentioned requests for a schedule for the T&C for *all* M&E items.[186] Mr Ser also overlooks Ms Chua's (as CCA's representative and Mr Ser's own M&E consultant) evidence that the Contractor had in fact carried out the T&C works for the electrical services even after the electrical turn-on (Judgment at [349]).

189 Furthermore, Mr Ser points to the evidence of GTMS's director, Mr Dennis Tan. Mr Dennis Tan testified that GTMS, as contractor, did not perform T&C for electrical services after permanent service connection (Judgment at [350]). This, Mr Ser contends, ought to be "conclusive of the issue".[187] However, Mr Ser fails to point out that this evidence was considered by the Judge, who observed that it ought to be borne in mind that Mr Dennis Tan was GTMS's director and was not directly managing the Project. The Judge preferred the evidence of Mr Yong and Ms Chua over that of Mr Dennis Tan,

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185 AC at para 58.

186 ACB Vol II(C) at p 49; ACB Vol II(F) at p 49.

187 AC at para 60.

as they were more closely involved in the construction of the Project (Judgment at [351]). We find this reasoning to be adequately supported. Mr Ser has not done anything other than to repeat his argument below and we see no basis to disturb the Judge's finding on this point.

190 Finally, Mr Ser argues that the contemporaneous evidence discloses that GTMS *refused* to perform the T&C for electrical services despite knowing of the problems in the electrical supply because it considered this to be beyond the scope of work.[188] In support of this argument, Mr Ser relies on an email dated 30 September 2013 sent to him by Mr Dennis Tan. This is with respect, unsustainable. Mr Dennis Tan's email does not say that GTMS was of the view that T&C was beyond the scope of their works, but merely that for "[e]lectrical power tripping: the issue of overloading the MCB due to the 150 Amps cap is not under our jurisdiction or responsibility".[189] GTMS submits that the issue of overloading was a design issue, and that, against CCA's advice that "150 Amps cap" might be too low for the Project, Mr Ser had nonetheless insisted on settling for this electricity load. As such, GTMS could not be faulted for Mr Ser's choice of a low electrical supply load when it had constructed the electrical works based on Mr Ser's design.[190] In this regard, Mr Chan's representative, Mr Yong, gave unchallenged evidence in his AEIC that the Contractor had constructed and undertaken the electrical works based on Mr Ser's own design, which stipulated an electricity supply of 150A for the Project, and that this was the cause of the "frequent tripping".[191] Mr Ser's contention must thus fail.

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188 AC at para 61.

189 ACB Vol II(B) at p 209.

190 1st RC at para 53(b).

191 ROA Vol III(AN) at p 259, para 269; see also ROA Vol III(AT) at pp 83–85 (Summary of Estimated Electrical Load for the Project).

T&C for ACMV works

191 Next, Mr Ser argues that the T&C for ACMV works was only *partially* completed on 8 July 2013 and some parts remained incomplete as of the date of the issuance of the CC.

192 The Judge found that 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). The T&C of the ACMV works was completed and signed off by GTMS and its subcontractor for Units 12, 12A and 12B on 10 April 2013, 11 April 2013 and 12 April 2013 respectively (Judgment at [352]). The Judge accepted Ms Chua's evidence that CCA had to conduct the T&C before it could release the Certificate of Supervision required for the TOP application (Judgment at [353]).

193 Mr Ser does not challenge the authenticity of these documents, but claims that these were "incomplete partial tests as they were not witnessed by RTO Leong".[192] In our view, Mr Ser is unable to explain why these documents are not sufficient proof of the T&C for the ACMV works having been conducted. It is true that Ms Chua did testify that such tests may only be considered proper T&C if they were witnessed by RTO Leong. However, as counsel for GTMS stated at trial, the basis on which this question was put was not made clear, and certainly, Mr Ser has not pointed to any contractual requirement stating that it is mandatory for the RTO to witness all the testing and commissioning of the M&E services under the Contract before such T&C may be considered valid.[193] This, to our mind, is sufficient to dispose of Mr Ser's contention.

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192 AC at para 64.

193 ACB Vol II(E) at p 260.

194 Mr Ser also claims that the "relevant test reports show … that T&C for ACMV works was performed on 8 July 2013", something which the Judge accepted.[194] This is mischievous as it suggests that the T&C was done only on this date. Mr Ser omits to point out that this T&C of the air-conditioning equipment referred to in the schedule of minor works attached to the CC was an *additional* T&C carried out at Mr Ser's own request, as he wanted the ACMV works to be tested on both sunny and rainy days. This was the unchallenged evidence of Ms Chua, Mr Yong and Mr Chan's representative, Ms Wan (Judgment at [354]–[357]). In essence, this additional T&C pertained to ascertaining whether CCA's *design* for the ACMV works was performing according to purpose, rather than whether they were in accordance with CCA's design (Judgment at [357]). In our view, Mr Ser has proffered no satisfactory reason for us to depart from the Judge's findings in this respect.

Handover of documents

195 For completeness, we also consider Mr Ser's argument that Item 72(b) of the Preliminaries was not complied with because there was no complete handover of test certificates, operating instructions and warranties (the "Documents") prior to the issuance of the CC on 15 May 2013.[195] It was undisputed between the parties that the operating instructions and warranties were only handed over to Mr Ser on or about 22 June 2014, though Mr Ser submitted below that the test certificates had not been handed over to him even up till today; however, the Judge found that "…the Documents were in fact ready earlier than 22 June 2014 as [GTMS] and [Mr Chan] wanted to hand over the Project to [Mr Ser] soon after the TOP was obtained, specifically, on or

194 AC at para 63.

195 AC at paras 43, 45.

around 25 September 2013, but [Mr Ser] refused to take over the Project" (Judgment at [366]). On appeal before us, Mr Ser does not dispute that the operating instructions and warranties were handed over to him on 22 June 2014, but maintains that the test certificates (with the exception of ACMV) have not been given to him at all.[196]

196 The Judge accepted Mr Chan's argument that a "practical approach" was warranted, such that the handing over of these Documents was a *de minimis* issue that had no impact on the practicality of completion and the preparation of the Documents could be done during the maintenance period instead (Judgment at [367]). The Judge undertook an analysis of Item 72(b) of the Preliminaries, alongside cl 31(13) of the SIA Conditions, and in applying a contextual approach to interpretation, considered the critical issue of Item 72(b) of the Preliminaries to be whether the T&C requirement had been fulfilled. In his view, the handover requirement was a *subset* of the T&C requirement, and thus subsidiary to the primary focus of Item 72(b), which is the T&C requirement. This interpretation of *de minimis,* he concluded, would accord with commercial common sense and be consistent with the business purpose of the clause and the Contract as a whole (Judgment at [369]–[380]). As such, Item 72(b) of the Preliminaries would be fulfilled as long as the services are "tested, commissioned, and operating to the [Architect's] satisfaction as specified in the Contract and subcontracts" (Judgment at [381]).

197 Whilst we can agree with the Judge that the main and important requirement of Item 72(b) is that all services are tested, commissioned and operating satisfactorily, with respect, we do not think there is any room to imply a *de minimis* approach to Item 72(b). On a true construction, Item 72(b) has also

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196 AC at para 46.

to be complied with before the CC can be issued. Consequently, Item 72(b) requires the handing over of all test certificates (unless waived or modified by agreement of the parties), operating instructions and warranties before the issue of the CC. However, we think the Judge was correct in his view that these "Documents" (Judgement at [366] and referenced at [195] above) were in fact ready earlier than 22 June 2014 but Mr Ser refused to take over the Project soon after TOP. If Mr Ser refused to take over the Project, including the Documents, then he is in no position to contend that this requirement of Item 72(b) was not complied with. The Judge noted that GTMS and CSYA wanted to hand over the Project to Mr Ser soon after the TOP was obtained, specifically, on or around 25 September 2013, but Mr Ser refused to take over the Project (Judgment at [366]). The Judge referred to Mr Dennis Tan's evidence under cross-examination, where, in gist, Mr Dennis Tan testified that the Documents were ready to be handed over to Mr Ser around 25 September 2013, but "the owner [Mr Ser] refused to accept it because he has not accept taking over the property".[197] In cross-examination, Mr Dennis Tan was referred to an email he had received from Ms Wan on 27 August 2013 asking him to "prepare all necessary documents and actions" in preparation for "handover".[198] Subsequently, on 18 September 2013, another email was sent by Ms Wan to Mr Ser, copying GTMS, where she informed Mr Ser that the "site is ready for handover" and that they would "arrange for handover on next Monday, 23 Sep or Tuesday, 24 Sep in the afternoon *and as-built drawings and OMM [operating manuals] will be handover the following week*" [emphasis added].[199] Two days later, on 20 September 2013, Ms Wan sent another email to GTMS, stating that

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197 ROA Vol III(CD) at p 30, line 24–p 42, line 4 (12 November 2018); *see* p 39, line 12–p 40, line 3 and p 41, lines 8–20.

198 ROA Vol V(BC) at p 45.

199 ROA Vol V(BD) at p 202.

"[a]s informed by Mr Ser, he does not accept handover with proper documents; As-built drawings, OMM" [emphasis added].[200] Consistent with this, we note that in Mr Chan's AEIC, he said the Documents were "being prepared progressively" for handover to Mr Ser from as early as 28 September 2012, and were ready to be submitted to Mr Ser *on or around 7 September 2013*, but Mr Ser refused to accept them until around 26 June 2014.[201] Mr Yong said the same thing in his AEIC.[202] In our view, the evidence shows that GTMS and CSYA did attempt to handover the Documents to Mr Ser around 18 September 2013, but he had refused to accept them. Mr Ser has also not addressed the Judge's finding that he had refused to accept the handover of the Documents in his Appellant's Case. Mr Ser therefore has no basis to submit there was a non-compliance with Item 72(b) on this score. The Judge has found that this was fulfilled, and we agree with that conclusion.

Item 72(c)

198 Item 72(c) of the Preliminaries requires that the CC be issued only when the works under the Contract, including any rectifications, were done "to the completion and standards acceptable to [Mr Chan]". If in Mr Chan's honest professional opinion, the rectification was effected and completed to a standard satisfactory to him, that would be the end of the matter. Item 72(c) would have been fulfilled. If Mr Ser disagreed, he was entitled to take GTMS to arbitration and he was at liberty to sue Mr Chan if he thought otherwise. Whether Mr Ser would succeed would depend on the facts. The Judge was correct to say that Item 72(c) would be satisfied when in Mr Chan's honest professional opinion, there was "practical completion", *ie*, when there remained only *minor* defects

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200 ROA Vol V(BD) at p 293.

201 ROA Vol III(AI) at p 211, para 108(c).

202 ROA Vol III(AN) at p 235, para 175.

with the bungalows (Judgment at [384]–[386]). Mr Ser thus must also show that the defects were *substantial* and/or that Mr Chan did not or could not have held the honest opinion and/or was negligent in certifying that the works and any required rectification thereto was completed to his satisfaction, in order to succeed in his claim that Item 72(c) was not satisfied.

199 In this regard, the Judge accepted that there were some defects with the bungalows, but found that they did not affect the date on which the Works could be deemed as completed for the purposes of the CC (*ie*, 28 May 2013). On appeal, Mr Ser insists on his laundry list of complaints in relations to the Works. In brief, our position is that his complaints regarding the defects in the bungalows are without merit, *save for* that relating to the intumescent paint.

200 Moreover, given our earlier finding that the CC could have only been issued at the earliest on *16 September 2013, when the TOP was issued*, we are of the view that Item 72(c) only needed to have been satisfied by *16 September 2013*. This is a pertinent point because, as we shall see below, some of the requirements under Item 72(c) could not be said to have been satisfied by 28 May 2013 (*ie*, the date found by the Judge).

Preliminary observation on the burden of proof

201 We make a preliminary observation on the burden of proof. Mr Ser is the one who alleges that there are *substantial* defects with the Project which remain unrectified. The burden of proof thus falls on him to prove that first, there were defects which were substantial and secondly, that these defects remain unrectified. As will be evident from our analysis below, this burden would prove fatal to many of Mr Ser's claims of defective works, since many of these claims are supported solely by assertions on his part, or on the part of his expert, Mr Chin. The Judge considered the evidence before him and

observed Mr Chin, and other witnesses, under cross-examination. He found Mr Chin to be partial and lacking in the requisite expertise (Judgment at [130]). We see no reason to disagree with that finding.

Loamy soil

202 Pursuant to Architect's Instruction No. 26 ("AI 26") dated 4 January 2013, GTMS had to supply and backfill the project with loamy soil. The Judge made a finding, which is not disputed before us, that loamy soil is made of clay, silt and sand in equal parts and with a small proportion of humus (Judgment at [563]). Mr Ser alleges the backfill was not loamy soil.[203] He relies on his expert, Mr Daniel Tay ("Mr Tay") to make good this allegation. Mr Daniel Tay says the backfill was clayey subsoil.

203 The Judge heard Mr Tay's evidence and found it unconvincing. First, the Judge stated that his conclusions were based on mere visual observations, something which Mr Tay admitted during cross-examination. Secondly, Mr Tay admitted it was important to ascertain the percentage of the four components to ascertain if what was being backfilled was not loamy soil, but he did not do that and he accepted that his opinion was based on rather cursory visual examination (Judgment at [562]–[563]). We see no reason to differ from the Judge's finding on the reliability of Mr Tay's evidence, let alone overturn it.

204 GTMS and Mr Chan do not dispute that the Units were not backfilled with loamy soil.[204] They contend that the backfill was an approved soil mixture ("ASM") containing loamy soil and was of a better quality than loamy soil. GTMS and Mr Chan contend that NParks requires any external roadside

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203 AC at para 138.

204 1st RC at para 102; 2nd and 3rd RC at para 77.

planting to be backfilled with an ASM containing loamy soil, compost and washed sand in the ratio of 3:2:1 respectively. Since the backfill used for the roadside planting was acceptable to NParks, it must also have meant that the backfill for Units No. 12, No. 12A and No. 12B must have been that same ASM containing loamy soil. GTMS and Mr Chan retained an expert, Mr Leong Lian Chuan ("Mr Leong"), who, based on photographs provided to him by GTMS, opined that the soil used was loamy soil as it matched the ratio of clay, sand and silt contained in loamy soil. There were also laboratory reports from the Agri-Food and Veterinary Authority of Singapore ("AVA") that the soil used was an ASM which contained loamy soil (Judgment at [565]). Mr Leong, however, conceded that the photographs he viewed did not provide conclusive evidence that the backfill was loamy soil. He also agreed with Mr Ser's counsel that the photographs were consistent with Mr Tay's evidence that loamy soil was merely applied to the Project by way of "top-dressing" rather than backfilled (Judgment at [566]).

205 The foregoing shows that the evidence led below was based on visual or inadequate investigation, making the respective "conclusions" of the experts on what kind of soil was used for backfill unreliable. In addition, the parties were often making submissions at cross-purposes. Different terms, like "top soil", "normal top soil", "ASM with loamy soil", and "loamy soil" were tossed about without any precision as to what they mean. Proper details, accurate description of soil types and, as here, relative proportions are necessary when discussing the soil types that have been specified and supplied.

206 To return to our analysis, Mr Ser also contends that the bungalows were not backfilled with ASM but with something called "normal top soil" as evidenced by an email dated 28 April 2014 from the nominated subcontractor for the landscape works, Creideas Design Pte Ltd.

207 An examination of Creideas Design Pte Ltd's email of 28 April 2014 will illustrate our point at [205] above. With respect, both the Judge's and Mr Ser's interpretation of this email is incorrect. This email from the subcontractor to GTMS (sent at 8.32am) (the "28 April 2014 Creideas Email") reads as follows:[205]

> Hi denis [GTMS's director]
>
> Refer to the report from landscape konsortium pte ltd [*ie*, the expert engaged by Mr Ser for the soil issue]
>
> Please refer to our reply as follow
>
> …
>
> 2. As per discussion with [a staff of Mr Chan], as per owner request loamy soil were request to repkace with nomal soil mix as propose.
>
> Due to my professional view, instead of normal soil as proposed by [Mr Chan]
>
> We replaced the soil with normal top soil which is better quality and cost affective
>
> We hope that the explanatio have clear your doubt.
>
> …
>
> [all errors in original]

208 The proposal from Mr Chan's staff can be seen in an email dated 3 October 2012 which contained a request from Mr Chan seeking advice from the soil supplier on whether "normal mix soil can be used instead of recycle compost to save cost".[206] In the bill of quantities attached to this email, Mr Chan's query was whether it was possible to "change to normal soil mix" in relation to the trees and specific areas of the bungalows labelled (A), (B) and

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205 ACB Vol II(F) at p 52; ROA Vol III(AI) at p 160.

206 ROA Vol IV(M) at p 272.

(C).[207] The bulk of the turfing for the bungalows were still meant to be done using loamy soil.[208] In the same vein, when Mr Dennis Tan forwarded the 28 April 2014 Creideas Email to Ms Wan at 12.56pm on 28 April 2014, asking her to "verify' whether the "loamy soil was changed to normal soil mix as proposed",[209] Ms Wan clarified in her email reply that CSYA's proposal for "normal soil" pertained to the "plant at planter and where trees are planted".[210]

209 The soil supplier's reference to the "normal top soil" in its email dated 28 April 2014 thus concerned the soil used *for the limited purpose of filling in the areas for trees and the planters*, as suggested by Mr Chan in the email, and not the whole of the backfill for the bungalows. Therefore, Mr Ser and the Judge were incorrect (Judgment at [564]) to say that "normal top soil" was used to backfill *the lot in general*. Nor was the Judge correct to say that this "normal top soil" was the ASM (Judgment at [567]), since no reference to the ASM could be found in either the supplier or Mr Chan's staff's emails.

210 Mr Ser also claims that GTMS's expert conceded that ASM was only provided as a "top-dressing" (*ie*, to be used as a top layer of soil), and not to backfill the lot.[211] However, Mr Ser does not point to any extract of the transcripts which support his claim. In contrast, the Judge found that GTMS's expert conceded that *loamy soil* (as opposed to ASM) was only provided as a

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207 ROA Vol IV(M) at pp 275–278 (see the column labelled "Note" with the comment "can change to normal soil mix?").

208 ROA Vol IV(M) at pp 275–278.

209 ROA Vol IV(M) at p 270.

210 ROA Vol IV(M) at p 270.

211 AC at para 139.

top dressing (Judgment at [566]). We consider it apposite to set out the transcript with the relevant evidence of GTMS's expert, Mr Leong, in full:[212]

> Q: Mr Leong can I bring you back to your AEIC. If you go to page 14 of your AEIC -- before I bring you to a specific paragraph, just back to top-dressing again. Would top-dressing improve the soil conditions for grass growth?
>
> A: Depending on the material for top-dressing, the soil type. If it is a better grade, of course it would improve the existing soil condition. But if it is the same grade that means they are the same.
>
> …
>
> Ct: When you say better grade, you are comparing with better grade than the?
>
> A: Normally in landscaping, better grade soil means we introduce more organic materials, like compost mix. That means we have a higher nutrients value and things like porosity and aeration. But if you are using the same type of soil that is already backfilled already, that means it is the same thing, there is really no improvement.
>
> [Q]: But if it is a better quality soil, it will improve the grass condition. Right, Mr Leong?
>
> A: Yes.
>
> …
>
> Q: Let's go back to the photographs. You agreed with me earlier that if you top-dress the turf with proper soil, better quality soil, in your words, that would improve turf condition. Right?
>
> A: Yes.
>
> Q: So if there was some top-dressing in March of 2014 by GTMS, that would improve the condition of the turf. Right?
>
> A: Yes.
>
> Q: So what you see in the photographs from page 19 to 22 of your AEIC could be a result of the top-dressing, right, Mr Leong?
>
> A: Yes.

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212 ROA Vol III(CJ) at p 85, line 17–p 89, line 21.

> Q: In fact, I will suggest to you that it is probably the result of the top-dressing in March of 2014. Right, Mr Leong?
>
> A: Yes.
>
> …

211 In our view, the expert was merely saying that the soil used for the top layer was *probably* of a better quality than the soil used to backfill the lots. This top layer was not clarified to be either loamy soil or ASM.

212 However, notwithstanding the Judge's misinterpretation of the email from the soil supplier, and of the testimony from GTMS's expert, we remain of the view that the Judge was entitled to find that the lots were backfilled with ASM for three reasons. First, the soil in the lots was described in the test report from the AVA as "Approved Soil Mix" [*ie*, ASM].[213] While Mr Ser argued at first instance that there was no proof that the sample submitted to AVA actually came from the soil in the lots,[214] GTMS gave evidence of the soil sample being collected from the lots.[215] Significantly, Mr Ser does not have any argument against the AVA report on appeal. Secondly, Mr Chan's staff gave evidence that the soil used for the lots was the same as the soil used for the external roadside planters, and the latter was accepted by NParks as being ASM and satisfactory (Judgment at [565]).[216] Mr Ser has no reply to this argument, either at first instance or on appeal. Thirdly, although Mr Ser's expert testified that the soil backfilled in the lots was *not* ASM,[217] the Judge found the expert's examination of the soil not credible, the examination being merely visual in nature (Judgment

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213 ROA Vol V(BS) at pp 162–163.

214 ROA Vol IV(P) at p 115, para 423.

215 ROA Vol IV(D) at pp 75–80.

216 ROA Vol III(AN) at pp 256–257, paras 258–259.

217 ROA Vol III(DV) at p 291, lines 5–10.

at [562]–[563]). Mr Ser does not address the Judge's criticism of his expert on appeal.

213 The true issue is this – contractually, AI 26 called for the backfill to be loamy soil. There was no further AI to amend or revoke AI 26 or make any substitution for the soil. The parties do not dispute that the backfill was not loamy soil. The Judge found that ASM was used instead. Given the state of the evidence, there is no reason to intervene in that finding. Technically, therefore, there was a breach of contract. However, Mr Ser's own expert accepted that ASM was better than loamy soil (Judgment at [567]), and Mr Ser does not offer any evidence as to why it was important for him to have loamy soil and how or why he would suffer damages if the backfill was not loamy soil. In the absence of proper evidence, Mr Ser would not be entitled to damages and certainly not to demand a complete replacement of the soil.

214 In the same vein, this breach cannot be said to be a *substantial* defect which would lead to the non-fulfilment of Item 72(c).

Intumescent paint

215 Mr Ser complains about two aspects of the intumescent paint: first, that it was only fire-proof for one, instead of two, hours; and secondly, that it was painted on only three, as opposed to all four sides of the trellis beams. We are of the view that both aspects of his complaint are valid.

Fire-proof rating

216 The three relevant provisions in relation to the fire-proofing of the steel beams are: cll 3.8 and 7.1 of the Contract Drawing No. WEB325/GN.01 (the "drawing"), and cl 7(1) of the SIA Conditions. Cl 3.8 of the drawing states that

"all steelworks are to be fire-proofed for minimum two hours protection". Cl 7.1 of the drawing states that "[a]ll structural steelwork [are] to receive adequate/appropriate fire protection in line with the prescribed fire resistance periods",[218] and cl 7(1) of the SIA Conditions require the Contractor to comply with the relevant statutory requirements in force at the material time. The statutory requirements stipulate one hour of fire protection (Judgment at [543]–[544], [546]).

217 The Judge found that cl 7.1 of the drawing, by using the word "prescribed", was referring to the statutory requirement. To that extent, both cl 7.1 of the drawing and cl 7(1) of the SIA Conditions contradicted cl 3.8 of the drawing (Judgment at [544]). With respect, we disagree; there is no contradiction in these three provisions.

218 The statutory requirement of one-hour fire proofing is a prescribed *minimum*. This is not a prohibition against a fire-proof rating of *more than one hour*; and any building construction which stipulates a two-hour fire rating would still be compliant with the statutory requirement. It is not the case that the paint must be fire-proof for *only one hour and no more*, although certainly, no less. Therefore, the three provisions can be read harmoniously, so as to impose a requirement that the paint has a fire-proof rating of *two hours* (*Yamashita Tetsuo v See Hup Seng Ltd* [2009] 2 SLR(R) 265 at [18]; see also the CA Judgment at [64]). Consistent with this principle of construction, in Article 7 of the Articles of Contract, it is provided that the Contract Documents should be read and construed as a whole and that no special priority, other than that accorded by law, shall apply to any one document or group of documents. Furthermore, even if cll 3.8 and 7.1 are construed as being discrepant or

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[218] ROA Vol V(C) at p 112.

divergent, cl 14 of the SIA Conditions places an obligation on the contractor to give notice of the same, *viz*, "… he shall *immediately give notice in writing* of the same to the Architect so that a direction or instruction may be given as to the work in fact required by the Architect …",[219] [emphasis added] and it is not open to the contractor to follow any particular requirement at his convenience and otherwise remain silent. We note that there has been no reference to any such notice in writing in the Judgment or in the submissions before us. Clause 14 does not empower the Architect to change the specifications without seeking the approval or agreement of the Employer.

219 Turning to the question of liability, the Judge found that Mr Chan, as the architect and agent of Mr Ser, had agreed with GTMS on or around 20 December 2012 that it sufficed for the intumescent paint to have a fire resistance of one hour (Judgment at [546]). In this regard, the Judge referred to paragraph 232 of Mr Yong's AEIC[220] where Mr Yong (CSYA's representative) rather cryptically said:

> 232. As such, on or around 20 December 2012, CSYA confirmed that intumescent paint of 1-hour fire-rating for the Project was sufficient in line with the Fire Code.

220 Mr Yong, however, did not explain when he confirmed this with GTMS, or to whom. We also note that Mr Yong stated in paragraph 231 of his AEIC[221] that cl 14 of the SIA Conditions made clear that CSYA was to decide on how any discrepancies should be interpreted and/or managed, but Mr Yong did not explain when GTMS gave him written notice of the discrepancies, pursuant to

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219 ACB Vol II(A) at p 107.

220 ROA Vol III(AN) at p 251, para 232.

221 ROA Vol III(AN) at pp 250–251, para 231.

its obligation under cl 14. A similar cryptic paragraph appears in paragraph 189 of Ms Wan's AEIC:[222]

> 188. In any case, I also know that the Architect has the final decision on how discrepancies in the Contract documents should be resolved (see Clause 14 of the SIA Conditions and Item 5 of the Preliminaries).
>
> *189. Based on this, CYSA confirmed to GTMS on or around 20 December 2012 that intumescent paint of 1-hour fire-rating for the Project was enough.*
>
> [emphasis added]

221 In this regard, we note the following:

(a) In Mr Ser's AEIC, Mr Ser adduced an email from one Kumar (from GTMS) dated 20 December 2012 (timestamp 12.01am) to the specialist contractor responsible for applying the intumescent paint.[223] The email stated that Kumar had "already cheeked [*sic*] with architect and they confirmed that 1 hr fire proof is sufficient".[224] Mr Ser stated in his AEIC that he had never authorised any such change to the contractual specifications.[225]

(b) In Mr Dennis Tan's AEIC, Mr Dennis Tan said that the application of intumescent paint was "subject to the approval of the consultants", and in this regard, "the consultants approved the specialist contractor's proposed system of application for a '1 hour' fire-rating".[226] Under cross-examination, Mr Dennis Tan said that "we have proposed

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222 ROA Vol III(BA) at p 255, para 189.

223 ROA Vol III(AG) at p 56, para 127.

224 ROA Vol III(AI) at p 5.

225 ROA Vol III(AG) at p 57, para 129.

226 ROA Vol III(L) at p 235, para 99(c).

one hour … when we submit our proposal that to do it in one hour to the engineer, I believe this is in the purview of Web Structures, so this was accepted".[227] This answer implied that the proposal and approval came from Web. Mr Dennis Tan's evidence, however, did not address the question of whether Mr Yong or another representative of Mr Chan (not Web), had confirmed to GTMS that a one-hour fire-rating was acceptable.

(c) In the cross-examination of Mr Yong on the issue of the intumescent paint,[228] Mr Yong was not *specifically* asked about paragraph 232 of his AEIC. Mr Yong, did, however, state: "I think we [*ie* the architects] are the one who actually instructed for a one-hour fire rating."[229] Mr Yong later stated that "we have given an instruction to do it at one hour on 20 December",[230] to which counsel responded "[c]orrect" and proceeded to suggest to Mr Yong that he should not have given that instruction to GTMS.[231] In a subsequent objection to this question by Mr Chan's counsel, Mr Chan's counsel stated that the only pleading by Mr Ser in this regard was that no architect's instructions or directions had been issued to regularise this change in the fire-rating.[232] Consistent with this, Mr Ser stated in cross-examination that he did not

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227 ROA Vol III(CE) at p 135, lines 6–11 (14 November 2018).

228 ROA Vol III(DH) at pp 223–271 (3 April 2020) and ROA Vol III(DJ) at pp 58–73 (3 June 2020).

229 ROA Vol III(DH) at p 224, line 19–p 225, line 2 (3 April 2020).

230 ROA Vol III(DH) at p 232, lines 23–24 (3 April 2020).

231 ROA Vol III(DH) at p 233, lines 1–3 (3 April 2020).

232 ROA Vol III(DH) at p 235, lines 7–19. *See* ROA Vol II(A) at pp 228–229, para 29(b) (Defendant's Consolidated Third Party Statement of Claim (Amendment No. 2) dated 11 October 2018 and ROA Vol II(B) at p 115, para 40(b) (Defendant's Consolidated Defence and Counterclaim (Amendment No. 3) dated 12 October 2018.

recall "seeing architect instruction or direction to change it to one hour".[233] For completeness, Mr Chan and CYSA did not state in their pleadings that they had given GTMS any such instruction or direction.[234]

(d) Mr Chan was asked in cross-examination whether he knew that Mr Yong had instructed GTMS to apply the intumescent paint based on a one-hour rather than a two-hour rating, to which Mr Chan said he "can't remember exactly".[235]

(e) In oral closing submissions before the Judge, Mr Ser's counsel stated that the architects "actually said okay to the contractors providing a one-hour instead of a two-hour fire rating", but acknowledged that this had only emerged in one of the AEICs and not in the pleadings.[236] Mr Chan's counsel stated that the charge or the claim against the architect was that they should not have allowed the one-hour fire-rating[237] and made unauthorised changes to the project.[238]

(f) In written closing submissions before the Judge, Mr Ser alleged that CSYA was liable for unauthorised changes to the Project pursuant to cl 1.1(3) of the MOA. This clause stipulates that the Architects are not to make any material alteration to, addition to or omission from the

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233 ROA Vol III(CN) at p 104, lines 6–7 (18 January 2019).

234 ROA Vol II(B) at p 203 (Third Parties' Consolidated Defence and Counterclaim (Amendment No. 2) to Consolidated Defence & Counterclaim (Amendment No. 3) dated 12 October 2018; ROA Vol II(C) at pp 59–60, paras 32(b)–(d) (Third Parties' Consolidated Defence and Counterclaim (Amendment No. 2) to Consolidated Third Party Statement of Claim (Amendment No. 2) dated 12 October 2018.

235 ROA Vol III(DM) at p 222, line 18–p 223, line 10 (10 June 2020).

236 ROA Vol III(DW) at p 101, line 23–p 102, line 11 (27 October 2020).

237 ROA Vol III(DW) at p 107, lines 15–24 (27 October 2020).

238 ROA Vol III(DX) at p 177, line 22–p 178, line 2; p 274, lines 17–25 (29 October 2020).

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". Mr Ser submitted that CSYA had breached cl 1.1(3) by instructing GTMS (through Mr Yong) to proceed with the one-hour fire-rating despite the Contract stipulating otherwise.[239] Mr Ser then submitted that GTMS and CYSA should be jointly and severally liable for a total of $153,700 for the cost of stripping and reapplying intumescent paint with a two-hour fire rating. This was quantified by Mr Ser's expert, Mr See Choo Lip, at $90,556 for the steel staircase and $63,144 for the remaining steelworks at the Project.[240] In Mr Chan's reply submissions, Mr Chan denied liability, claiming that the intumescent paint requirements were in Web's scope of work and it should be Web that was responsible.[241]

(g) For completeness, we note that the point concerning CYSA's instruction to GTMS to proceed with a one-hour fire-rating was not explored in the parties' cases for this appeal, though GTMS mentioned briefly that the Judge "has correctly held that the Architects have correctly exercised its discretion to require only fire resistance of one-hour".[242]

(h) In the light of the above, we find that Mr Yong's evidence in paragraph 232 of his AEIC is unchallenged – *ie* Mr Yong *did* confirm to

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239 ROA Vol IV(P) at pp 163–164, paras 597–599 (Mr Ser's Closing Submissions).

240 ROA Vol IV(P) at p 84, para 306; p 111, para 410; p 164, para 600; p 170, para 625(c) (Mr Ser's Closing Submissions). *See also* ROA Vol IV(AG) at p 215, para 225(a) (Mr Ser's Skeletal Submissions) and ACB Vol II(F) at 53, para 1.5(a) and p 59, s/n 3 (the total of the numbers that are cancelled out).

241 ROA Vol IV(AG) at p 109, para 27–p 111, para 31 (Mr Chan's Reply Submissions).

242 1st RC at para 108.

> GTMS, on or around 20 December 2012, that the application of intumescent paint with a one-hour fire-rating was acceptable. The question then is whether CSYA and/or GTMS may be held liable for any damage suffered by Mr Ser due to the intumescent paint having a one-hour rather than a two-hour fire-rating. In this regard, Mr Ser raises the same argument on appeal that he did before the Judge (see [221(f)] above).[243]

222 As we noted at the oral hearing, there may be some difficulties with finding GTMS liable for following Mr Chan's directions.[244] In fact, this point was also made by GTMS's counsel in oral closing submissions before the Judge.[245] Before us, Mr Ser's counsel, Mr Kirindeep Singh ("Mr Singh"), did not contest this vigorously, submitting instead that if GTMS cannot be held liable, it would be Mr Chan who had to foot the bill.[246] We agree with Mr Singh. We think that the doctrine of *estoppel by representation* precludes Mr Ser from claiming against GTMS. Mr Ser must be taken to have represented to GTMS that Mr Chan, as the architect appointed under the Project, is his agent and authorised representative who therefore has the ability to vary the Contract (and this is expressly provided for under the SIA Conditions). GTMS has detrimentally relied on this representation by following Mr Chan's directions. We are further satisfied that this position better accords with the realities of the construction industry, see *Hudson's* at para 2-086. As we pointed out during the

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243 AC at paras 12–13, 204.

244 Transcript at p 96, lines 1–3; p 98, lines 15–20.

245 ROA Vol III(DW) at p 101, lines 11–22 (27 October 2020).

246 Transcript at p 98, lines 22–28.

oral hearing, it would be an "impossible situation"[247] if contractors are liable even though they were just following the architect's instructions in good faith.

223 It follows that only Mr Chan would be liable for the lowering of the fire rating of the intumescent paint to a one-hour rating without obtaining Mr Ser's consent to do so. We should note that whether GTMS was paid on the basis of a two-hour or one-hour rated intumescent paint does not appear to have surfaced below or before us. This follows from the fact that the Contract entered into between Mr Ser and GTMS stipulated a two-hour rated intumescent paint, that was priced accordingly by GTMS and accepted by Mr Ser; he was therefore contractually entitled to receive paint of that stipulated rating. Mr Chan could not unilaterally change that specification without getting Mr Ser's authorisation. This is a well-known principle in construction law and set out in the standard texts. First, in *Hudson's* at para 2-086 under the heading "Waiver of Contractual Requirements" it is stated:

> … But it cannot be too strongly emphasised that construction professionals (unless, as is less and less frequently the case at the present day, there is a contractual provision giving their opinion, decision or certificate finality [which is not applicable here]) will have no authority whatever to waive strict compliance with the contract or to bind the Employer.

Secondly, in *Keating*, it is stated at para 14-021:

> The architect has no implied authority to vary the works or to order extras, or to order as extras works impliedly included in the work for which the contract sum is payable. … An architect cannot, without the employer's knowledge or consent, bind the employer by a promise that a condition of the contract will be waived or vary the terms of the contract.

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247 Transcript at p 98, lines 8–9.

224 This requirement of strict compliance and not to make any material alteration, including additions or omissions from the approved design, is also reflected 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.

Subject therefore to any contractual provisions to the contrary (and there are none here), that principle holds good; that principle includes waiving or lowering contract specifications, (save for compliance with the law or regulations). But assuming the employer is prepared to accept a diminution in value (which is not Mr Ser's position), the very least that one would expect is for the cost difference to be passed on to the employer. Failing to obtain Mr Ser's consent to this change results in a claim by Mr Ser against Mr Chan and that claim would lie both in contract as well as tort. We note that in his Appellant's Case,[248] Mr Ser claims "… the sum of $63,144.00 being the cost of applying intumescent paint of a 2-hour rating on all the trellis beams". This appears to exclude the $90,556 that Mr Ser claimed below in respect of the cost of reapplying the intumescent paint at the steel staircases for the Project (see [221(f)] above). However, we note that in his Appellant's Case at [147], Mr Ser has claimed the sum of $90,556 for reapplying intumescent paint to the staircases under a separate heading, "Steps and risers of the staircases".[249] We hence deal with this later at [231] below.

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248 AC at para 146.

249 AC at para 147.

225 We will deal with the issue of damages in greater detail below. It suffices for us to say at this juncture that whilst Mr Ser did not plead that Mr Chan had breached cl 1.1(3) of the MOA, we think that this falls within the exception in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*") at [40] and we do not think that there is prejudice caused to Mr Chan or GTMS by considering this claim, given that this issue was explored in the AEICs,[250] in cross-examination during the trial and in parties' submissions.[251]

The trellis beams

226 It is not disputed that only three sides of the steel beams were coated with intumescent paint and that the fourth side of the steel beams upon which the trellis strips rested did not have that coating. Mr Ser complains that the top surface of the trellis beams should also have been painted with intumescent paint but were not. We pause here to note that in Mr Ser's AEIC, Mr Ser also stated that it was GTMS's Kumar who instructed their domestic subcontractor (Innovente) to paint on three sides instead of four sides via an email dated 20 December 2012.[252] However, no formal architect's instruction was issued.[253] This was consistent with Ms Wan's testimony at trial, where she said that GTMS had *not* asked CSYA if it was "ok" to apply the intumescent paint to three out of four surfaces.[254] In this regard, the Judge found that the only applicable provision was cl 7.1 of the drawing, which simply requires compliance with the statutory requirements. The statutory requirements, as

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250 ROA Vol III(AN) at p 251, para 232.

251 ROA Vol IV(P) at p 163, para 597.

252 ROA Vol III(AI) at p 7.

253 ROA Vol III(AG) at p 57, para 131.

254 ROA Vol III(DO) at p 124, line 13–p 125, line 3 (15 June 2020).

reflected in the SCDF Fire Code 2013, requires only "exposed faces" to be coated. The Judge accepted GTMS's explanation that the top of the beams was covered by the timber decking and thus not "exposed". The Judge further relied on the registered inspector's certification, in March 2013, that the paintwork on the trellis beams satisfied the relevant statutory requirements (Judgment at [548]).

227 With respect, we disagree with the Judge. Intumescent paint is a special paint which is applied to steel components, like steel beams, to protect them from high heat; when the heat exceeds a specified temperature, the paint will intumesce or expand to form a carbon layer which thermally insulates the steel or other material upon which it is painted for a specified period of time. It also slows down the spread of the fire. Much was made of the fact that Table 3.3A of the SCDF Fire Code 2013 only required "exposed faces" of the structural beam to be coated. The requirement that "exposed" faces must be coated cannot be given an unduly literal interpretation bearing in mind the purpose of using this kind of special fire protection or fire retardant paint. First, it is clear that the steel beams support a wooden trellis above a service yard and not, for example, a wooden deck. Therefore, the upper surfaces of the steel beams certainly had partially "exposed" surfaces. From the photographs submitted at trial,[255] there are gaps and exposed surfaces of the steel beam in between the pieces of wood comprising the trellis. This is not the kind of situation where the steel beam rests against concrete or plaster or within a wall so that there is no exposed surface. Secondly, and more importantly, the steel beams support a *wooden* trellis. There is no need for scientific literature to support the fact that wood catches fire more easily than brick, mortar and steel. Wood has been used as fuel to sustain a flame for various purposes from time immemorial. It is therefore fallacious to

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255 ACB Vol II(C) at p 245.

conclude that since one side of the beam is covered, or partly covered, with wood, (whether it is a trellis or wooden deck or floor), that means there is no need to coat it with the specified intumescent paint. If beams of this nature are used in this context, *ie*, as supports for a trellis above, and are required to be coated with intumescent paint, it does mean that *all four sides* of the beams are to be painted. As to the Judge's reliance on the certification by the registered inspector, the short answer is that such certification is not binding on this court, *a fortiori* if there is an error or omission on the part of the registered inspector; his certification may certainly be departed from when he has made an error or there are compelling reasons to do so. Furthermore, there is no contractual obligation to apply the coating to the satisfaction of the registered inspector.

228 We therefore find that all four sides of the trellis beams had to be coated with intumescent paint. This entitles Mr Ser to damages. As referenced above, in this appeal, Mr Ser claims the sum of $63,144 for the cost of applying intumescent paint of a two-hour rating on all the trellis beams. This is based on the evidence of Mr Ser's witness, quantity surveyor Mr See Choo Lip. Mr Singh confirmed at the hearing before us that this sum concerns the costs of using paint of two-hour fire-proof rating on all four sides.[256] Mr Singh also informed us that there was no agreement between the parties as to the quantification of $63,144.[257]

229 There is no breakdown as to whether this sum includes the cost of dismantling the wooden trellis, applying the two-hour rated intumescent paint and then re-assembling the wooden trellis. These are separate items. Indeed, Mr Singh admitted at the hearing before us that it was not very clear how Mr See

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256 Transcript at p 101, lines 6–9.

257 Transcript at p 117, lines 1–3.

Choo Lip had arrived at this figure.[258] Mr Ser has not stated whether this sum encompasses both the difference in the cost of the correct intumescent paint and the application of the intumescent paint on all four sides of the trellis beams, which will include dismantling of the wooden trellis, applying the two-hour intumescent paint and then re-assembling the wooden trellis. The former is an item of damage which Mr Chan should bear but the latter should be borne by GTMS as it pertains to their negligent workmanship in failing to paint the fourth side of the steel beams on which the wooden trellis rested. It cannot be laid at Mr Chan's doorstep as neither Mr Chan nor his subordinates authorised the painting on only three surfaces of the steel beams. However, there are no findings of fact, no submissions or any evidence to make a proper apportionment. This failure is another instance of inadequate assistance from counsel and their experts to the Judge below. Given the nature of intumescent paint with a two-hour rating, it cannot be equated to ordinary plaster or wood paint, and it may be more expensive by an appreciable margin. Further, the dismantling and re-assembly cost will also vary depending on whether scaffolding or scissor lifts are required. It would not be just or fair to put the whole cost on Mr Chan as GTMS were responsible for not coating all the surfaces. We therefore have to do the best we can in this sad state of affairs. We accordingly apportion the sum of $63,144 as follows. Mr Chan is liable to Mr Ser for $42,096 (together with interest thereon from the date of the writ), being two thirds of this claim and GTMS is liable to Mr Ser for $21,048 (together with interest thereon from the date of the writ), being one third of this claim.

230 Item 72(c) is in the nature of a "sweep-up" clause. It requires all works included in the Contract to be performed, including such rectification as may be required to bring the work to completion and standards acceptable to the

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258 Transcript at p 100, line 22–p 101, line 15.

Architect. Given the circumstances in which the two-hour fire rating was changed unilaterally by Mr Chan to a one-hour fire rating, which complied with the statutory fire protection requirements in force and the registered fire inspector passed the bungalows on 20 March 2013 (Judgment at [546]),[259] this cannot be said to have held up "contract completion" because the registered fire inspector had passed the same even though, strictly speaking, there was an exposed surface that was not coated with intumescent paint. Factually, as matters turned out, this was not an item that held up completion and achieving of the TOP and therefore was not a non-compliance with Item 72(c) *vis-à-vis* GTMS and Mr Ser.

Risers of the steps

231 Mr Ser complains that the risers of the steps are not compliant with either the contractual or the statutory requirements,[260] and thus claims for the costs of replacing the whole set of steps.

232 We note that Mr Ser's claim of non-compliance with the *contractual* requirements must fail *in limine*. He pleaded in his Defence and Counterclaim (Amendment No. 3) at para 40(e) that:[261]

> The risers of steps at various areas of the Project were in non-conformity with *statutory requirements*, and in fact, had contributed to the failures of the 1st and 2nd TOP inspections. To date they remain in non-compliance with the said statutory requirements and unrectified by GTMS …
>
> [emphasis added]

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259 ROA Vol III(AT) at p 31.

260 AC at para 147.

261 ROA Vol II(B) at p 41, para 40(e).

233 Mr Ser's pleaded claim was thus one relating *only* to the statutory requirements. We thus agree with Mr Chan[262] that Mr Ser cannot be allowed to now raise an unpleaded complaint with the *contractual* requirements.

234 Mr Ser's claim of non-compliance with the *statutory* requirements, while pleaded, is without merit. The statutory requirements are found in the BCA Regulations, which require the risers of the steps to be no more than 175mm in height (see Section E.3.4.1), with a tolerance of 5mm (see Note 1). The October 2013 amendments to the BCA Regulation states that the tolerance of 5mm applies between two *consecutive* steps (Judgment at [456]). We agree with Mr Ser[263] that the Judge erred in finding that the qualification of consecutiveness did not apply *before* October 2013. Section E.3.4.4 of the BCA Regulations already stated that the risers must be *uniform* in height, and the CA adopted the Owner's interpretation of the BCA Regulations (see CA Judgment at [54]).[264] Accordingly, the BCA Regulations require the risers to be no more than 175mm in height, *and* the risers shall be uniform, save for a tolerance of 5mm between two consecutive steps.

235 That said, even keeping in mind the more stringent requirements, the BCA had no complaints with the risers at the Second TOP Inspection in June 2013. The TOP was issued on 16 September 2013. If the BCA was satisfied with the steps, we see no basis on which Mr Ser can now claim non-compliance with the statutory requirements.

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262 2nd and 3rd RC at para 79.

263 AC at paras 33–34.

264 ACB Vol II(A) at p 25.

236 Mr Ser argues that the BCA's approval should not be given weight,[265] because BCA approved the steps merely through photographs of some of the steps being measured with tape measurements.[266] In contrast, Mr Ser has adduced measurements from Mr Chin, using both Vernier calipers and steel rulers.[267] We do not find any merit in his assertion. That the BCA's assessment differs from Mr Chin's does not mean that the BCA was wrong. Without any proof of impropriety or incompetence on the BCA's part, the Judge was clearly entitled to prefer the assessment of the BCA, the statutory authority tasked with ensuring compliance with the regulations, over the assessment of Mr Chin, a witness who the Judge found to be partial and lacking in credibility.

237 We note that Mr Ser also complains that the Judge should have neither admitted nor relied on the measurements of an ex-employee of GTMS[268] to find that the steps were satisfactorily rectified. This was because such measurements were merely a "drawing of the steps and risers with some numbers handwritten at each step" by an ex-employee who was not impartial, and who could not be called to the stand.[269] Whilst we can sympathise with Mr Ser's concerns, the fact remains that in the Second TOP Inspection carried out on 18 June 2013, the BCA had no more issues with the hitherto non-compliant steps.

238 For completeness, we have noted that the Judge has held that rectification was completed by 28 May 2013, *ie*, when the Judge found that Item 72(c) was satisfied. The evidence is that the BCA found the non-compliant steps

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265 AC at para 41.

266 ACB Vol II(B) at pp 166–172; ROA V(BD) at pp 30–36.

267 AC at paras 35–36.

268 ROA Vol IV(M) at pp 107–117.

269 AC at para 28.

had been rectified when the Second TOP Inspection was conducted on 18 June 2013 and no further complaints were raised in relation to the steps. By the time the TOP was issued, we accept that the steps were compliant, meaning that no concern with Item 72(c) would have persisted by that date.

Sliding glass doors

239 In the 2013 BAPL Report (which was prepared in December 2013), Mr Chin noted that the glass doors at one of the bungalows (*ie*, Unit 12B) could not be fully opened. In the 2014 BAPL Report (which was prepared in November 2014), Mr Chin found many more faults with the glass doors not just at Unit 12B, but also Units 12 and 12A. The Judge agreed with Mr Chan that the faults developed probably because the doors were not maintained properly, and not due to any defective works (Judgment at [570]). Mr Ser disagrees. The doors broke down within a year (*ie*, the time between the 2013 and 2014 BAPL Reports), and in his view, such rapid deterioration must be a result of defective design or installation, and not lack of maintenance.[270]

240 We are of the view that Mr Ser has failed to discharge his burden of proof. Mr Ser only had possession of the bungalows in July 2014. Prior to handover, it was arguably GTMS's responsibility to maintain the doors, since it had possession of the site.[271] Assuming GTMS did its maintenance work properly, the faults would have developed between July 2014 and November 2014, a period of four months. This suggests that there is a *prima facie* case that the faults could have developed due to defective design or installation.

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270 AC at para 153.

271 AC at para 156.

241 That being said, four months of no maintenance, while certainly not a long period, also *cannot* be said to be insubstantial. Further, the Contractor gave evidence that the faults could have occurred due to the doors being unused.[272] More importantly, as of December 2013, the 2013 BAPL Report only showed one fault with the doors (Judgment at [570]). Most of the faults thus occurred between December 2013 and November 2014. If the faults were due to defective design or installation, one would have expected more faults to have occurred earlier, *ie*, between April 2013 (when the Architect conducted an inspection of the doors) and December 2013.

242 For completeness, Mr Ser points to the testimony of Mr Dennis Tan, GTMS's director, that the doors were "heavy and difficult to operate due to sagging", and that this was a "design issue". We find this to be an inaccurate representation of the evidence. The transcript reads:[273]

> Q: … Mr Tan, if you look at page 75 at paragraph 116c. If you look at (ii) you deal with the aluminium window and door, right, being heavy and difficult to operate due to sagging. Right?
>
> A: Yes.
>
> Q: You accept that there is this sagging problem?
>
> A: I have seen the sagging problem. Yes.
>
> …
>
> Q: Do you agree with that problem identified by Mr Chin?
>
> A: I find the proposed remedial works kind of strange. So if you were to -- we know that there is an issue with the operation of the doors, and the suggestion is to replace them. So we will come back to square one, isn't it, even if you replace them, if the issue is with the design of the door.

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272 ROA Vol III(CF) at p 75, line 25–p 76, line 9.

273 ROA Vol III(CF) at p 62, lines 4–12 and p 70, line 19–p 71, line 6.

> Q: Well, your assumption is with the design of the door. But what if it is a construction issue, Mr Tan?
>
> A: Based on what I read, it seems like it is an issue with the design.

In our view, GTMS's director was merely *suggesting*, and not *admitting*, that the faults lay with the design of the doors. In any event, the director also raised concerns with the lack of maintenance and usage of the doors, which he found were also possible reasons behind the faults with the doors.

243 In sum, in our view the Judge was entitled to find that the faults with the doors was not due to defective design or workmanship.

244 In any event, even if the defects with the doors were due to defective design or installation, this would not affect the issuance of the CC. The 2013 BAPL Report noted that as at December 2013, there was only one fault with the doors. The presence of one fault cannot be said to be substantial enough to preclude the issuance of the CC. Further, Mr Ser's claim of *replacing all the sliding glass doors* cannot be considered reasonable. There may be more reasonable mitigation steps which could be done, such as fine-tuning the hinges and the guide rails (which GTMS did do),[274] or by maintaining the doors now by oiling the hinges and joints.[275]

245 For completeness, there is a possibility that GTMS had not been doing its maintenance work properly up until the handover date of July 2014, which could have contributed to the faults developing with the door. However, the fact remains that Mr Ser himself failed to maintain the door between July and

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274 ROA Vol III(CF) at p 74, line 22–p 75, line 7.

275 ROA Vol III(CF) at p 67, lines 2–5.

November 2014. Given the lack of evidence in this regard, we see no reason to disturb the Judge's finding that GTMS should not be held responsible.

Volakas marble flooring

There were no defects

246 Mr Ser complains of defects with the supply *and* the installation of the Volakas marble. In our view, his complaints are not made out.

247 We begin with the supply of the marble. Mr Ser complains that the Volakas marble supplied does not comply with cl 11 of the SIA Conditions, which states that "all materials, goods and workmanship comprised in the Works shall, save where otherwise expressly stated or required, be the best of their described kinds". This is because the Volakas marble actually supplied is only of Grade C, while the highest grade for marble is Grade A.[276]

248 We are not persuaded by this argument. Clause 11(1) of the SIA Conditions requires the marble to "save where otherwise expressly stated … be the best of their described kinds". However, in this case, Mr Ser had expressly chosen the Volakas marble to be supplied (Judgment at [425]). It would defy common and commercial sense for someone to choose a marble type, pay the price therefor and contend that because of cl 11(1) of the SIA Conditions, the contractor has to supply a better grade of marble.

249 Mr Ser criticises the Judge's finding that he is bound to accept the Volakas marble because he has chosen it.[277] This criticism is in our view unfounded. First, he argues that he only chose an "example" of what he wanted,

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276 AC at paras 157–158.

277 AC at para 159.

and did not view every single marble slab to be used. He appears to be saying that he must have chosen each and every single marble slab before he can be bound to his choice. This is not a realistic position. Secondly, Mr Ser says that he is only a layman, and cannot be expected to identify the flaws in the marble slabs he has selected – and GTMS's expert also gave evidence to this effect.[278] His claim directly contradicts the Judge's finding, which is not disputed on appeal, that he and his wife had met Mr Chan's staff to be briefed about the Volakas marble. At that meeting, he was briefed about, *inter alia*, "tonality, stain, grain and veins, which was often only appreciated by marble connoisseurs" (Judgment at [429]). Whatever layman ignorance Mr Ser may have harboured would have been dispelled after his meeting. In any event, this is not a case where he left the eventual selection to Mr Chan or GTMS. Thirdly, Mr Ser asserts that there is no proof that the Volakas marble supplied was that which he selected. He misapprehends the burden of proof. If he wishes to assert that GTMS did not supply what he had selected, the onus is on him to show that that was the case.

250 Mr Ser then points to the evidence of GTMS's expert, that GTMS should have rejected the Volakas marble when it arrived on site. We set out the transcript in full:[279]

> Q: Yes. Mr Tong [*ie*, the Contractor's expert], can we go back to page 36 of your report. I took you to this table earlier at paragraph 2.3.1. Can I suggest – and you let me know whether you agree or disagree – when you have marble with this extent of imperfections arriving on site, the contractor should have rejected the marble in the first place. Would you agree or disagree?
>
> A: Agree. Totally.

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278 AC at para 159.

279 ACB Vol II(E) at p 124, lines 6–20; ROA Vol III(CJ) at p 148.

> Q: Or the contractor could have engaged the owner and asked the owner if this was acceptable and if the owner said "yes", then the owner bears the risk. It would be prudent for a contractor to raise this extent of imperfections with the owner. Do you agree with me, Mr Tong?
>
> A: Agree.

251 The expert's testimony must be read in context. We are of the view that the expert was just making a *general observation* on the appropriate courses of action that a *hypothetical contractor* should take upon receiving the marble supplied. Put differently, the expert was of the view that he would have rejected Grade 3 marble because of its inherent imperfections. But this has no bearing on the current case, for the simple reason that *Mr Ser himself selected the marble*. This point was raised in both the expert's report,[280] and in the expert's cross-examination,[281] which Mr Ser conveniently ignores. This point is also alluded to in the question posed to the expert at [250] above, *ie* that Mr Ser could decide to accept imperfect marble. Also, in relation to this point about acceptance, the Judge found, and Mr Ser does not contest, that the marble was installed in January 2013 and he only complained about the marble in October 2013. Mr Ser had nine months to study the marble, and yet chose to say nothing (Judgment at [431]). This, in our view, justifies the Judge's finding (Judgment at [429]) that Mr Ser "ought to lie in the bed that he had made for himself".

252 Another argument raised by Mr Ser in relation to the supply of the marble pertains to the dry lay (or lack thereof). The Judge found that Mr Ser agreed not to choose to dry lay the marble before installation. Had the dry lay been carried out, Mr Ser would have realised that the marble was unsightly, and requested for changes (Judgment at [430]). On appeal, Mr Ser says that he

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280 ROA Vol III(I) at pp 113–114.

281 ROA Vol III(CJ) at pp 128–130.

cannot be faulted for agreeing to forego the dry lay. During the oral hearing before us, Mr Singh insists that it was GTMS and Mr Chan that "discouraged"[282] Mr Ser from conducting the dry lay, and therefore Mr Ser should not be faulted in this regard. We are unable to accept this contention. While GTMS did tell Mr Ser that there were space constraints at the site, the dry lay could have been done *at the warehouse of the marble supplier*. Further, and more fundamentally, GTMS and Mr Chan, as the Judge found, *explained to Mr Ser the pros and cons* of forgoing the dry lay, and it was an "informed" choice on Mr Ser's part to agree with the recommendations given to him. Therefore, insofar as Mr Singh was suggesting that Mr Ser was improperly influenced by GTMS and Mr Chan, we find this suggestion to be baseless. Mr Ser should not be allowed to escape the consequences of his decision.

253 The above suffices to dispose of Mr Ser's complaints as regards the supply of marble. We turn now to the installation of the marble. In this regard, Mr Ser asserts that both GTMS's expert and Mr Chan's staff gave evidence that the workmanship was defective. We disagree.

254 We begin with the evidence of GTMS's expert that about half of the Volakas marble tiles had "existing imperfections" or were undergoing "site repair".[283] We do not think that this evidence supports Mr Ser's contention that the installation works were defective. The "existing imperfections" with the Volakas marble more likely than not referred to the natural features typical of Grade C marble which Mr Ser personally selected, and not to any defective works. In the same vein, the need for "site repair" likely arose from the natural features typical of the Grade C marble and not from any defects with the

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282 Transcript at p 111, lines 5–22.

283 AC at para 161.

installation. In any event, Mr Singh also conceded in the oral hearing before us that GTMS's expert was not cross-examined on the quality of the installation works.[284]

255 Turning to the evidence of Mr Chan's staff, we again find that such evidence does not take Mr Ser very far:[285]

> Q: Let's go on to paragraph 256 of your AEIC. You said: "… GTMS informed CSYA that it had conducted at least three (3) rounds of rectification works to the Volakas marble for the Project."
>
> A: Yes.
>
> Q: Were these repair works checked and personally approved by you?
>
> A: I did check and verify, but I'm not sure that – how many rounds. I cannot remember exactly how many rounds.
>
> Q: Ms Wan, do you agree that the floors [*sic*] that [Mr Ser] has alleged, that these allegations of marks, these marks are actually natural and cannot be due to workmanship?
>
> A: You mean the Volakas marble floor?
>
> Q: Yes.
>
> A: I think it partially can be also the material itself and partially from the workmanship.

The staff was merely *speculating*, and not *admitting*, that there was defective workmanship. The staff also clearly suggested that the faults could have been the result of the material itself, for which GTMS cannot be held responsible.

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284 Transcript at p 106, line 25–p 107, line 4.

285 ACB Vol II(E) at p 234, line 14–p 235, line 7; ROA Vol III(DO) at pp 183–184.

In any event, rectification was done

256 In any event, even assuming that there *were* defects with the Volakas marble, the Contractor has nevertheless satisfactorily rectified these defects. The Judge found that after the 2013 BAPL Report was made, the Contractor sent people to fix the marble on a goodwill basis. This was confirmed by GTMS's expert (see [254] above) and Mr Chan's staff (see [255] above). In the same vein, the Architect's Direction No 1, which pertained to Mr Chan's concern that there was no proper protection of the installed works, was deemed satisfactory after Mr Chan accepted GTMS's "explanation that protective measures were only necessary on-site when the finishing works were complete" (Judgment at [417], [432]–[435]). Mr Ser himself accepts that the Architect's Direction No 1 was eventually complied with.[286]

257 In response, Mr Ser relies on Mr Chin's 2014 BAPL Report to say that the rectification work carried out by the Contractor, on a goodwill basis, was not adequate.[287] In the oral hearing before us, Mr Singh argued that Mr Chin's evidence was not given enough weight by the Judge.[288] This is not convincing. We have pointed out to Mr Singh that he had an "uphill task",[289] given the Judge's assessment that Mr Chin was partial, and lacking in expertise with *Volakas marble* (Judgment at [417]). Further, the 2014 BAPL Report was contradicted by GTMS's expert, which stated that the repair works were satisfactory (Judgment at [422]). We therefore find no reason to disturb the Judge's findings in this regard.

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286 AC at para 162.

287 AC at para 163.

288 Transcript at p 111, lines 23–27.

289 Transcript at p 111, lines 28–30.

Ironwood timber decking

258 Mr Ser has two complaints with the ironwood used for the outdoors timber decking. First, he mounts another argument based on cl 11(1) of the SIA Conditions, which requires the ironwood to be the "best of their described kinds". Here, the ironwood timber supplied was only of "standard and better" grade, and not "prime" grade.[290] The argument again fails because the Judge found (Judgment at [392]), and Mr Ser does not contest,[291] that he had agreed to and selected the ironwood used. Given Mr Ser's express choice, it follows that either the "described kinds" of ironwood were only "standard or better", or that the parties have expressly agreed to derogate from the need to get the best timber.

259 Mr Ser responds by saying that he was only shown a small sample at an early stage, and did not personally see or select the actual wood used.[292] We find this contention misguided. Mr Ser appears to be saying that he must have personally seen and chosen each and every piece of ironwood in order to be bound. Again, this is unrealistic and cannot be sustained. Insofar as Mr Ser is alleging that the Contractor did not get the ironwood similar to the samples which he had selected, Mr Ser has produced no evidence to substantiate that claim.

260 Secondly, Mr Ser complains about the excessive splitting of the ironwood. He complains about the Judge's finding that the splitting of the ironwood was a natural occurrence, and not due to any breach.[293] We agree with

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290 AC at para 165.

291 AC at para 168.

292 AC at para 168.

293 AC at paras 166–167.

Mr Ser. The Judge was satisfied that the splitting occurred naturally because the outdoor decks were left unmaintained between April 2013 and November 2014, *ie*, 19 months (Judgment at [440]). However, the bungalows were only handed over to Mr Ser in July 2014. Therefore, GTMS bore the responsibility of maintaining the ironwood decking up to July 2014. Assuming the Contractor did maintain the ironwood properly, it follows that the ironwood split within four months. That is in our view not satisfactory for ironwood meant for *outdoor* timber decking.

261 GTMS is thus in our view responsible for the splitting of the ironwood. However, this is not sufficient for Mr Ser. The Judge found that in any event, GTMS had carried out rectification works on the outdoor timber decking in January and April 2014, which Mr Chan was satisfied with (Judgment at [442]). Mr Ser disagrees because the 2014 BAPL Report still shows many outstanding defects with the timber decking.[294] We are of the view that the Judge was entitled to prefer Mr Chan's evidence over the 2014 BAPL Report. The Judge had noted that Mr Chin was a partial witness who *did not have expertise with ironwood* (Judgment at [130]), which Mr Ser does not dispute on appeal. To that extent, there is to us no compelling reason to disturb the Judge's assessment of the evidence.

262 For completeness, there is a possibility that GTMS has not been doing its maintenance work properly up until the handover date of July 2014, which could have contributed to the faults developing with the ironwood. However, the fact remains that Mr Ser himself failed to maintain the ironwood between July and November 2014. Given the lack of evidence in this regard, we see no

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294 AC at para 170.

reason to disturb the Judge's finding that GTMS should not be held responsible, especially since GTMS had in any event done rectification works.

Punctured gas pipe

263 To recapitulate, Mr Ser's pleaded case in relation to the gas pipe is as follows (Judgment at [393]):

> (a) In relation to the claim of defective works:
>
> 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; …
>
> (b) In relation to the claim of conspiracy:
>
> To date, [Mr Ser] 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.

264 Mr Ser thus pleaded two issues: first, the gas pipe at Unit 12A was either dented or punctured; and secondly, the gas pipe had not been replaced in accordance with the engineer's directions.

265 The Judge found, and Mr Ser does not dispute, that the licensed gas worker had to drill into the gas pipe and the gas pipe sleeve to investigate Mr Ser's complaint about *the gas pressure*.[295] The licensed gas worker found no issues with the gas pressure and proceeded to *plug the gas pipe with a steel plug,*

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295 ROA Vol III(CL) at p 7, lines 11–14 (29 November 2018); ROA Vol III(CS) at p 153, line 17–p 154, line 7 (18 February 2020); ROA Vol III(AG) at p 46, para 94.

and seal the gas pipe sleeve with a semi-circular iron structure (Judgment at [407]). In relation to the gas pipe *sleeve*, while the sleeve was in fact dented, this was a separate and distinct issue and the dented gas pipe sleeve *was replaced* by the Contractor in November 2013 (Judgment at [415]). Nevertheless, Mr Ser still insists that the *gas pipe* suffers from defects which are yet to be rectified.[296]

266 We find this complaint without merit. The only possible defect with the gas pipe would be the puncture caused when the licensed gas worker drilled into the gas pipe. However, the drilling was done *because of Mr Ser's complaint about the gas pressure, which in turn was caused by external works by a third party*. In the absence of any evidence that there was another method to check the gas pressure,[297] save for the evidence of the licensed gas worker as to *where* the gas pipe should be tapped or drilled into,[298] we see no reason to disturb the findings of the Judge (Judgment at [408]) that any defect with the gas pipe would be a product of *Mr Ser's* own doing, and GTMS cannot be held responsible for any breach. In any event, the licensed gas worker had already plugged up the hole in the gas pipe with a steel plug.

267 In relation to the steel plug, Mr Ser complains that this method of sealing the hole in the gas pipe was unsafe, relying on the evidence of his own expert.[299] This is, to us, a rehash of his complaint before the Judge, which was rejected by the Judge after he heard all the evidence. The Judge found, and Mr Ser does not dispute, that the use of the steel plug was not in contravention of any applicable

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296 AC at para 172.

297 ROA Vol III(CL) at p 10, line 14–p 13, line 1 and p 39, lines 10–12 (29 November 2018).

298 ROA Vol III(CL) at p 24, lines 5–16 (29 November 2018).

299 AC at para 173.

regulations or codes (Judgment at [413]). On that basis, the licensed gas worker's methodology cannot be said to be inappropriate. As Mr Ser does not challenge the expertise of the licensed gas worker, the Judge was entitled to prefer the gas worker's methodology over that of Mr Ser's expert.

268 For completeness, however, we are not satisfied that the *M&E consultant* approved of the steel plug as the Judge found[300] (Judgment at [414]). The correspondence between the M&E consultant and GTMS pertained to the *gas pipe sleeve which was rectified in November 2013*, and not the *gas pipe* (see [370]–[371] below). That being said, this is immaterial, as the steel plug was necessitated again by *Mr Ser's insistence at having the gas pipe checked*, and we see no reason to disturb the Judge's finding that the use of the steel plug to plug the hole was appropriate. Indeed, the evidence of the licensed gas worker who carried out the checks was that this was common industry practice.[301]

Summary

269 In summary, almost all of Mr Ser's complaints in relation to continuing defects with the Project are without merit. The only defect which still persists with the Project is the intumescent paint, and even then this defect was not sufficiently serious so as to preclude the certification of the Works as substantially complete for the purposes of Item 72(c).

Conclusion on the CC

270 In our judgment, Mr Chan had improperly (and prematurely) issued the CC on 15 May 2013, certifying completion as of 17 April 2013. He was not

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300 AC at para 174.

301 ROA Vol III(CL) at p 40, lines 8–19 (29 November 2018).

entitled to do so, as a matter of fact and law, prior to the issuance of the TOP, because of the strictures set out in Item 72 of the Preliminaries. With respect, the Judge erred in finding that the Works could be deemed to have been completed (and the CC thus validly issued) as of 28 May 2013. In the absence of any other evidence, the *earliest* that the CC could have been issued was on 16 September 2013, *ie,* the date that the TOP was issued.

Issue 3: Whether IC 25, IC 26 and FC were properly issued

271 We now turn to the Payment Certificates pursuant to which GTMS claimed against Mr Ser. These are, namely, IC 25, IC 26 and the FC (see [11] above).

Deductions for delays and defects

272 Mr Ser contends that he should be entitled to make deductions from the Payment Certificates for the delays and defective works on the part of GTMS.[302]

273 We begin with the delays, which is the more contentious area. Liquidated damages are a *contractually provided* remedy, the grant of which must therefore comply with the provisions of the Contract. Clause 24(2) of the SIA Conditions requires a Delay Certificate to have been issued before there is a right to liquidated damages and the concomitant right to start deducting liquidated damages from any sums due to the contractor under the contract. Since Mr Chan did not issue any Delay Certificate, Mr Ser was not able to start deducting liquidated damages from any monies that fell due to GTMS under the Contract. However, the parties have now submitted all their disputes to the court for final resolution and at this stage, Mr Ser is not entirely without recourse, as

302 AC at paras 110–112.

we will explain later (see [316] below). Litigation can sometimes give rise to strange bedfellows. As we shall see, both Mr Ser and Mr Chan submit that this court can and should reopen or review Mr Chan's failure to issue the Delay Certificate under the SIA Conditions, in particular, cl 37.

274 Turning to the deductions for the defective works, we have earlier found that the intumescent paint applied on the trellis beam did not meet contractual specifications in two aspects, namely, that (a) the paint should have had a two-hour fire-proof rating and not one-hour rating, and (b) all four sides of the trellis beams should have been painted instead of just three. However, we have found that the issue of the fire-proof rating (a) is something for which *Mr Chan alone* should bear liability, since he (*via* his representative) was the one who authorised GTMS to change the paint to one with a one-hour fire-proof rating without obtaining Mr Ser's consent. This was a change in the specified fire-proof rating without authorisation from the owner (see [224] above). We have also found that GTMS is only liable for the omission to paint the additional side of the trellis beams, for which a deduction in favour of Mr Ser should be made (see [228] above).

The two moieties of retention money

275 Mr Ser submits that Mr Chan should not have certified the release of the two moieties of retention money under IC 25 and under FC.[303] However, that rests upon his own view as to when completion took place.

276 Under cl 31(9) of the SIA Conditions, the first moiety of the retention monies is to be certified due and released to the contractor upon the issue of the CC. Cl 31(9) empowers the architect to retain a reasonable sum to cover the cost

303 AC at paras 113–114.

of any minor outstanding works as described under cl 24(5). As referenced above, Mr Chan issued the CC erroneously, on 15 May 2013 and backdated the date of Completion to 17 April 2013. Mr Chan only certified the first moiety due under IC 25, dated 3 September 2013. We have found that the earliest date on which the CC could have been issued is 16 September 2013 (see [270] above). Technically, based on our finding in relation to the CC, the first moiety of retention money should not have been released until or shortly after 16 September 2013. However, Mr Ser has not proved or shown what loss or damage he has suffered as a result of certification of its release of the first moiety some 13 days prematurely. In so saying, we have not forgotten Mr Ser's position that the Project was not completed until at least July 2014 when he took possession and that there were many defects and errors still extant as of that date – this is a contention which, as mentioned above, we do not accept.

277 Since practical completion should have been certified only on 16 September 2013, it follows that the maintenance period would only have commenced on 16 September 2013 under cl 26(2)(b) and ended on 15 September 2014, provided the conditions in cl 27(5) have been complied with. Putting to one side all the disputes over the defects in the Works, the MC thus could have been issued only from 16 September 2014 onwards. The second moiety could only have been released from 16 September 2014. The FC was issued only on 22 June 2015 and in the absence of evidence that the FC was issued too early, Mr Ser cannot have any valid complaint over the certification of the release of the second moiety under the FC. The Judge has dismissed all of Mr Ser's allegations in relation to the alleged defective Works and, with one exception in relation to the intumescent paint, we have dismissed Mr Ser's appeals on these alleged defective Works.

278 We accordingly dismiss Mr Ser's appeal in relation to the wrongful certification and release of the moieties of the retention sums.

Proof of payment

279 Mr Ser's appeal on this score relates to the work and payments of the nominated subcontractors ("NSCs") and nominated suppliers ("NSs") under cl 28.

280 The bottom line of this issue is Mr Ser's submission that Mr Chan could not have certified the sums claimed by GTMS under IC 25 and IC 26 if GTMS did not adduce any proof that it had *actually paid* the NSCs and NSs.[304]

281 In the oral hearing before us, Mr Singh referred us to cll 28(5) and 31(11)(a) of the SIA Conditions, which provide that the sums due to GTMS, in respect of the NSCs and NSs, shall be determined by reference to the "accounts" of such subcontractors and suppliers. Mr Singh argued that these "accounts" must refer to "the actual sums that were paid [by GTMS] to [the NSCs and NSs]",[305] and not merely the invoices and quotations submitted from these subcontractors and suppliers to GTMS.

282 Mr Singh's construction is not apparent on a plain reading of cl 28(5) which sets out the methodology for payment to the Main Contractor in respect of its payment liability to the NSCs and NSs. The stated methodology is to deduct the relevant P.C. Item or Provisional or Contingency Sum and "… by substituting therefore [*sic*] the amount of the relevant *Sub-Contractor's or Supplier's* ***accounts*** **showing the sub-contract value of the work carried out**

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304 AC at paras 116, 118.

305 Transcript at p 72, line 17–p 73, line 24.

by them, together with any sums by way of profit or attendance …" [emphasis in italics and bold added] that is priced in the Schedule of Rates or elsewhere in the Contract Documents. Under cl 31(11)(a), the sub-clause for "Final Account Documents", a similar phrase is used: "… including *documents relating to the accounts* of the Designated or Nominated Sub-contractors or Suppliers …" [emphasis added]. The phrases "[the NSC or NS's] accounts showing the sub-contract value of the work carried out by them" and "documents relating to the accounts of the [NSCs or NSs]" does not necessarily mean the actual sums paid to them.

283 For historical context, we can do no better than turn to the *Commentary on SIA Standard Form*, where the learned author, Chow Kok Fong, states at para 28.26:

> Clause 28(5) re-states the approach commonly adopted by quantity surveyors in dealing with valuation and payments to [NSCs and NSs]. The practice described here has been adopted in the industry in the UK and Singapore since the advent of the modern standard forms in the 1950s but interestingly until the Wallace SIA Form, there has been no attempt to include it as an express term in a standard form of construction contract.

After the amount inserted in the Contract, typically the Bills of Quantities ("BQ"), as the relevant sum is deducted from the Contract Sum, the learned author describes the second step as: "… the relevant [NSC or NS's] account (an amount consisting of the Contract Sum of the subcontract or supply contract together with any adjustments for variations as provided in the subcontract) is then added to the Contract Sum."

284 In Chow Kok Fong, *Law and Practice of Construction Contracts* vol 2 (Sweet & Maxwell, 5th Ed, 2018) at para 23.604, the learned author opines that the relevant sub-contractor's or supplier's "account" means the contract sum of the subcontract or supply contract together with any adjustments for variations

as provided in the subcontract. He accepts that the provision could have been stated more clearly but the intended effect is to substitute the amount deducted under the first step *with the actual value of the relevant subcontract*. There is no suggestion in these passages that the addition, after the deduction of the sum inserted in the Contract, means not just the actual value of the relevant subcontract but must also include proof of the actual amounts paid.

285 Mr Singh also referred to the Schedule of Prices at Section F.[306] In Section F – Schedule of Prices, at Section No. 2 – Prime Cost & Provisional Sums,[307] it is stated that: "The term Prime Cost (PC) Sum shall mean a sum provided for works or for costs, which may be executed by Nominated Sub-contractors, Nominated Suppliers … to be carried out under the direction of the Contractor." It also states that the PC Sum shall only be adjusted through a variation arising from the Architect's written instructions. Under the heading "Expenditure of Prime Cost (PC) Sums", it is provided that:

> The total amount of all PC Sums items stated in this Section may be omitted wholly or in part from the Contract Sum, and in place, *the actual amount of PC Sums expended by the Contractor to the Nominated Sub-contractors, Nominated Suppliers … shall be added to Contract Sum* through Architect's instructions.
>
> [emphasis added]

Mr Singh emphasised that under the heading "Profit and Attendance",[308] it is provided that the Contractor shall insert a percentage (%) as Profit for every item of the PC Sums and the Contractor's profit will be adjusted proportionately based on the percentage (%) inserted against the PC Sums' items for the *actual*

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306 Transcript at p 73, line 26–p 74, line 14.

307 ACB Vol II(A) at p 165.

308 ROA Vol III(BT) at p 286.

amount expended. Further, the Contractor shall insert the amount he wishes to include for Attendance, where applicable, as defined, on PC Sums where indicated thereafter (in the BQ). Such attendance is to be included as a lump sum and no adjustment shall be made to any such lump sum for Attendance. We note the phrase used in this preamble is "the actual amount of PC Sums *expended by* the Contractor"[309] [emphasis added] to the NSCs and NSs.

286 Whilst cl 28(5) only refers to the "accounts showing the sub-contract value of the work [to be] carried out" which points to the value of the Contractor's sub-contract with the NSC or NS, *ie*, the subcontract sum, and the Preambles to the schedule of prices and the specification on the scope of work refers to the "actual amount of PC Sums expended by the Contractor to the [NSCs and/or NSs]", neither wording is entirely clear as to what is required.

287 However, where we find Mr Singh's arguments unpersuasive is that it necessarily means that the Contractor has to pay the NSC or NS before they can make their claim to be, in effect, reimbursed. There was evidence that the reality of the construction industry is that quantity surveyors do not require contractors to *first pay the subcontractors and suppliers* before they can be reimbursed.[310] In fact, it is usually the *opposite*, since a contractor often procures goods and services on credit, and it pays its subcontractors and suppliers only upon receiving money from the owner. As we have put to Mr Singh during the oral hearing, his argument here is essentially that the *contractor* would be funding *the owner* in the construction process.[311] This cannot be correct. In our view, all that is necessary is for the quantity surveyors to ascertain what the subcontract

309 ROA Vol III(BT) at p 285.

310 Transcript at p 75, lines 1–3.

311 Transcript at p 83, lines 22–28.

sum or value was and that the NSCs or NSs have provided the requisite services and goods, which would be evidenced through the invoices which GTMS did in fact submit. That would be evidence of the amount expended or to be expended for that piece of work or supply of work, material or goods. It should be noted that quantity surveyors are the experts dealing with the prices and values of such items as are found in BQs, including the PC Items or Sums or Provisional or Contingency Sums on a daily basis. They are current with the range of prices in the various cost items. They are involved in the preparation of cost estimates (this includes a discussion and agreement between Mr Chan and F+G on the PC Sum and PC Rate items, even before the calling of the tender, so that they can be included in the tender),[312] compilation of the tender documents which includes estimating the prime cost items and rates as well as the provisional sums, evaluating the tenders and advise the architect and owners on the tenders submitted.[313] If any of the items are outside the range of expected cost, they will advise the architect and owner and will attend the tender interviews to ascertain the reason for an item being too high or too low. The project quantity surveyors, F+G, were Mr Chan's consultants. Mr Ng Pak Khuen, who was formerly employed by F+G and was the quantity surveyor dealing with the Project, gave evidence under subpoena. He deposed that he and the F+G team went through the documents submitted by GTMS and recommended the amounts for payment in IC 25, IC 26 and the FC.

288 In response, Mr Singh insisted that his position was correct as a matter of contractual interpretation. With respect, we disagree. Clause 28(5) of the SIA Conditions refers merely to the "accounts". Clause 31(11)(a) merely requires that the "accounts" be substantiated with "supporting documents". Nothing can

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312 See AEIC of Ng Pak Khuen at ROA Vol III(BP) at p 92, para 121.

313 See AEIC of Ng Pak Khuen at ROA Vol III(BP) at pp 59–60, paras 23–25.

be read from the text of these clauses which requires GTMS to first pay the NSCs and NSs before it can be reimbursed. Mr Singh's reliance on the phrase "the actual amount expended" by the main contractor to the NSC or NS does not stand on firm ground as it can also refer to the subcontract sum which, as referenced above, is consistent with Mr Chow Kok Fong's view. It is noteworthy that Mr Chow is a quantity surveyor by training and profession and has been intimately involved with the construction industry; he has lived with these various standard forms like the previous standard form contracts used by the Singapore statutory boards or semi-government bodies (*eg*, the PUB form, the JTC form of standard contract), those issued by the bodies like the RIBA, JCT, FIDIC and ICE, their various editions and amendments, as well as witnessed the birth of the SIA and PSSCOC forms.

289 The above suffices to dispose of Mr Ser's argument that GTMS needed to prove the sums it paid the NSCs and NSs first before it can make payment claims.[314] GTMS submitted the invoices and quotations from the NSCs and NSs in support of its payment claims. These invoices and quotations would show how much GTMS needs to pay the NSCs and NSs (and, in turn, can claim from Mr Ser). The payment claims were accepted by the quantity surveyors, who were engaged by Mr Ser as *his* consultants, as well as Mr Chan.

290 However, this is not the end of the matter. Mr Ser also made a further, and different, allegation, *viz*, that GTMS was overcharging him for the work done by NSCs and NSs. He relies on credit notes issued by various NSs and NSCs to GTMS, which made references to "discounts". These credit notes were issued on the same day as the invoices on which GTMS rely to make the

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314 AC at para 118.

payment claims.[315] Under the Contract, GTMS is required to pass any discounts from the NSCs and NSs to Mr Ser. Mr Ser relies on this to allege that GTMS had an arrangement with the subcontractors and suppliers to conceal the discount from him.

291 We have to reject this allegation. Mr Ser has only picked upon a few documents[316] to support the allegation. This is insufficient to discharge Mr Ser's burden of proof. By certifying the payment claims, Mr Chan (with the assistance of the quantity surveyor) has confirmed that the sums claimed were legitimate. Therefore, if Mr Ser is saying that there were irregularities, the onus lies on *him* to prove such irregularities. We also note that Mr Ser's allegation cannot apply to a number of NSC or NS items of work as the necessary AI would, for example, direct GTMS to accept a named entity, like LuxLight Pte Ltd, as NS for the supply and delivery of light fittings and accessories at a stated price, $194,800.59, together with a quotation. If for any reason GTMS was able to obtain a discount from LuxLight Pte Ltd for that supply subcontract, for reasons unrelated to Mr Ser or because of past dealings where LuxLight was indebted to GTMS, that has nothing to do with Mr Ser or is GTMS's good fortune and they do not have to account for that further discount to Mr Ser.[317] Mr Ng Pak Khuen has also identified a number of PC Rate Items relating to the items like the supply of various types of marble, granite, homogenous tiles, glazed ceramic mosaic and Indian Rosewood and natural ironwood.[318]

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315 AC at paras 122–124.

316 See AC at paras 122 and 123 (7 invoices from 2 companies).

317 See AEIC of Ng Pak Khuen, AI dated 14 August 2012 exhibited at ROA Vol III(BP) at p 237.

318 See AEIC of Ng Pak Khuen at ROA Vol III(BP) at p 91, para 117.

292 To that extent, the reference to "discount" in the credit notes may certainly be discounts in the sense commonly understood where GTMS gets to procure certain goods or services at less than market price, and which GTMS was required to pass on to Mr Ser. But that was not the only meaning for the word "discount"; as explained by the quantity surveyor, it could have referred simply to a *refund*, where the Contractor *returns unused items or faulty items* (Judgment at [649]). We do not think Mr Ser has proved that the reference to "discount" in the credit notes *necessarily* means that he was overcharged. For example, in his Appellant's Case, Mr Ser referred to a credit note issued by Oriental Stone LLP on 24 September 2012, reflecting a "Discount" of $2,257.14 (10% of Invoice No. 121150 dated 9 September 2012).[319] But all the credit note dated 24 September 2012 shows is that there was a "Discount" – there is nothing in the document to explain what this "Discount" actually was, and there is nothing to support Mr Ser's argument beyond Mr Ser's bare assertion that he was overcharged. Further, the questions posed to Mr Ng Pak Khuen (the quantity surveyor from F+G) in cross-examination concerning this credit note and Invoice No. 121150 do not lend support to Mr Ser's allegation of overcharging either. All Mr Ng Pak Khuen said was that he did not recall GTMS providing him with a copy of this credit note,[320] that a quantity surveyor would generally rely on a contractor to "submit what they are supposed to be paid" and he "usually [did] not have concern" over whether the invoices provided by the contractor actually reflected what was being paid.[321] But none of this evidence actually showed that, *for this particular Project*, the credit notes and the invoices adduced definitively showed that Mr Ser had been overcharged. More

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319 AC at para 122(a); ACB Vol II(C) at pp 118 (Invoice No. 121150 dated 9 September 2012) and 120 (Credit Note dated 24 September 2012).

320 ROA Vol III(DR) at p 266, line 17–p 267, line 17 (23 June 2020).

321 ROA Vol III(DR) at p 270, line 11–p 272, line 1 (23 June 2020).

importantly, as we explain below, we think the quantity surveyor would have picked up on any of such discounts (see [293] below). Finally, as the Judge recognised, and as we noted in the oral hearing,[322] these suppliers and subcontractors who were supposedly hiding discounts *were nominated by Mr Ser* (Judgment at [650]). It was thus always open to Mr Ser to call the suppliers and subcontractors to the stand for evidence, and his failure to do so would mean that he has failed to discharge his burden of proof. This is a serious allegation because Mr Ser is alleging that GTMS is putting forward false or misleading invoices because they did not reflect the true amount of the subcontract works.

293 For completeness, we address two further evidential arguments raised by Mr Ser in his written arguments. The first argument was that GTMS's director admitted to hiding discounts when he said that *his own quantity surveyor may hide discounts*.[323] But we agree with the Judge that Mr Ser misinterprets the director's evidence (Judgment at [650]):

> Q: And it's up to GTMS [*ie*, the Contractor] 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 [*ie*, the Contractor's director]?
>
> A: Yes, but at the end of the day there is a lot of discussion between my QS [*ie,* quantity surveyor] and F+G [*ie*, the quantity surveyor *working with the Architect on the Project*]. 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.

322 Transcript at p 80, lines 18–22.

323 AC at para 125.

> 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.
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> A: No, no, I didn't say that.
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> 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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> …
>
> 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.

We see no reason to disturb the Judge's assessment of the exchange, that the director was simply making the point that that "any attempt to conceal discounts would have been discovered by [Mr Ser's appointed quantity surveyor]" (Judgment at [651]).

294 The other argument raised by Mr Ser is that an adverse inference should be drawn against GTMS because the latter refused to make full disclosure of the payments made.[324] We disagree. An adverse inference cannot operate to reverse the burden of proof (*Prest v Petrodel* [2013] UKSC 34 at [45]), and in any event there are potentially valid reasons for non-disclosure. For instance, the works could have taken place over such a long period of time that it is difficult to find evidence of all the relevant payments.

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[324] AC at para 124.

Valuation method of PC Rate items

295 Mr Ser also challenges the Judge's interpretation of cl 28(5) of the SIA Conditions, which deals with the quantification of the amount that GTMS can claim from Mr Ser in relation to PC Rate items (*ie*, items where the quantities, at the point of contracting, cannot be precisely determined). The methodology set out in cl 28(5) of the SIA Conditions is as follows: from the contract sum, the "relevant" sum of the PC Rate item would be deducted, and the value of the actual work done would be added. The value of the actual work done was not disputed, and was calculated by multiplying the area in the contractual drawings with the actual unit rate of the PC Rate items. The actual unit rate would be quoted by the NSC or NS (Judgment at [635]) and confirmed by way of Architect's Instructions[325] (see [291] above).

296 The dispute lies with the "relevant" sum to be deducted from the contract sum. Mr Ser argues that the "relevant" sum refers to the "tender breakdown prices", which were the budgeted sums handwritten by GTMS in the Preliminaries section of the Schedule of Prices in the tender documents for the Project.[326] GTMS argues that the "relevant" sum refers to the "contract allowance", which were the PC Rates provided by Mr Chan multiplied by the area in the contract drawings (Judgment at [636]).[327]

297 These concepts are technical, and we think some elaboration would be helpful at this juncture. Both the tender breakdown price and the contract allowance are derived from Section F of Volume 1B of the contract

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325 ROA Vol III(BP) at p 94, para 127; ROA Vol III(DT) at p 96, line 13–p 97, line 25.

326 AC at para 129.

327 1st RC at para 89.

documents.[328] Volume 1B is the tender from GTMS which was accepted by Mr Ser.[329] Section F, in turn, dealt with the Schedule of Prices.[330] The Schedule of Prices contained a breakdown of the PC Rate items which constituted the final tender sum. For example, see Item 5.7 of Unit 12:[331]

Item	Description	Unit	Amount	
			$	C
5.7	25mm thick solid white oak tread and 15mm thick teak riser with coloured stained to architect's selection (**PC supply and install rate $300/m2**) on screed backing **Profit and Attendance=10%** **Wastage=10%**	Sum	**49,896**	**00**

298 Here, the tender breakdown price refers to the **bold and underlined** amount, or **49,896.00**.[332] The contract allowance is calculated by multiplying the **bold** amount of $**360/m2** (which is 300$/m2[333] plus 10% profits and 10% wastage)[334] with the area as described in the appropriate contract drawing.

299 We are of the view that Mr Ser's argument in favour of the tender breakdown price is without merit. To begin with, this point was *not* pleaded in

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328 ROA Vol III(BY) at pp 204–205, para 11; ROA Vol III(DT) at p 90, line 15–p 91, line 6 and p 105, line 21–p 106, line 16.

329 ROA Vol V(K) at pp 50–236.

330 ROA Vol V(K) at p 50.

331 ROA Vol V(K) at p 128.

332 ROA Vol IV(P) at pp 68–69, paras 248–249.

333 ROA Vol III(BY) at pp 204–205, para 11; ROA Vol III(CB)at pp 148–153.

334 See, for example, ROA Vol III(BV) at p 11, Item 72.

Mr Ser's defence and counterclaim. This argument therefore ought to fail *in limine*. In any event, Mr Ser's interpretation of what constitutes the "relevant" sum is *unreasonable*. During the course of oral submissions, it was pointed out to Mr Singh that his submission converts what is a PC rate in the BQ into a lumpsum where the rate becomes irrelevant and he really had no answer to that.[335]

300 Put briefly, Mr Ser's interpretation of the "relevant" sum renders the contract drawings redundant and his methodology ignores what is stated in the Contract and has nothing to do with the *per unit price*, which is the crux of calculations pertaining to PC Rate items. What Mr Ser has done is to confuse a PC Rate item for supply with a PC Sum item. As explained by the Judge, a "PC Sum" item refers to items in the Project that are based on a lump sum, for example, built-in wardrobes and cabinets (Judgment at [610(a)]. As noted in *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2009) at para 30.261, a PC Sum "stipulates a unit rate for the supply of that item and the contractor's price for that item (that is, covering labour and supply) is taken to have been tendered on the basis of this rate". However, PC Rate items constitute those that are calculated in the Project based on a rate of measurement, for example, per square metre for marble and tiles (Judgment at [610(b)]; see also *Poh Lian Development Pte Ltd v Hok Mee Property Pte Ltd and Others* [2009] SGHC 153 at [18]).

Summary

301 In summary, the Payment Certificates were validly issued and, with the exception of the intumescent paint on the steel beams (see [228] above), the judgment entered in respect of the Payment Certificates at $1,103,915.48 stands

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335 Transcript at p 90, line 19–p 91, line 31.

(Judgment at [749(a)]). We will address the issue of liquidated damages as between Mr Ser and GTMS from [303] below.

302 For the reasons set out above (see [228] and [229] above), Mr Ser is not entitled to deduct the full sum of $63,144 for the cost of applying intumescent paint of a two-hour rating on all the trellis beams from the payment due to GTMS as Mr Chan had the ostensible authority *vis-à-vis* GTMS to vary the specification to a one-hour rating. Mr Ser's claim in respect of two thirds of this sum, $42,096 (together with interest thereon from the date of the writ), lies against Mr Chan for the unauthorised change in the specifications of the intumescent paint and one third of this sum, $21,048 (together with interest thereon from the date of the writ), from GTMS for failing to paint all four sides of the steel beams.

Issue 4: The remedies available as between Mr Ser and GTMS, as well as between Mr Ser and Mr Chan

As between Mr Ser and GTMS

303 We now turn to the issue of Mr Ser's claim for liquidated damages against GTMS, following from our discussion at [175(d)] above.

Liquidated damages

304 We have found that the CC could only have been issued, at the earliest, on 16 September 2013 when TOP was attained. However, the contractual completion date, after taking into account the EOTs, was extended to 17 April 2013. It follows that there was a delay from 18 April to 16 September 2013. However, as we have explained earlier (see [175(d)] above), GTMS is only liable for liquidated damages from 18 April 2013 to 28 May 2013.

305 The Judge found that the liquidated damages clause was inoperable because the *prevention principle* applied (Judgment at [661]). Further, assuming that the liquidated damages clause was operable, there is the further issue of the absence of a Delay Certificate under cl 24 as Mr Chan did not issue the same. On appeal, Mr Singh contends that the delay entitles Mr Ser to liquidated damages as against GTMS.[336] We now turn to consider whether the Judge was right that the liquidated damages clause was inoperable.

Prevention principle

306 The Judge had found that Mr Chan, as Mr Ser's agent, instructed GTMS not to commence rectification of the steps and risers until after TOP Inspection 1. This constituted an act of prevention which rendered the liquidated damages clause (*ie*, cl 24(2) of the SIA Conditions) inoperable as against GTMS (Judgment at [661]).

307 On appeal, Mr Ser argues that the Judge was not entitled to make this finding, as GTMS did not plead this act of prevention in its Defence to Counterclaim.[337] We agree. It is trite law that a claim, or a defence, which is unpleaded cannot be relied upon: *V Nithia* at [38]. We note for completeness that there is a narrow exception where the court may permit an unpleaded point to be raised if no injustice or irreparable prejudice (that cannot be compensated by costs) will be occasioned to the other party, if the evidence given at trial can, where appropriate, overcome defects in the pleadings provided that the other party is not taken by surprise or irreparably prejudiced, or where it would be clearly unjust for the court not to do so (*V Nithia* at [40]; *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18]). The rationale of disallowing

336 AC at para 180.

337 AC at para 182.

a claim, or a defence, that is not pleaded, is to prevent injustice from being occasioned to the party who did not have a chance to respond to the unpleaded claim or defence (see *Ma Hongjin v SCP Holdings Pte Ltd* [2021] 1 SLR 304 at [34]–[35]). In the context of this case, the operation of the prevention principle is very fact sensitive. With respect, we are therefore of the view that the Judge erred in relying on Mr Chan's instructions in relation to the steps and risers as that would be prejudicial to Mr Ser since GTMS never pleaded this as an act of a prevention in its Defence to Counterclaim. We note that GTMS did plead an act of prevention but *only* with respect to the construction of the pavilion. Therefore, the obvious inference is that there was no other act of prevention being relied upon. More significantly, GTMS did not argue that Mr Chan's instructions in relation to the steps and risers was an act of prevention *even in its written submissions before the Judge*.[338] During the oral submissions before us, GTMS's counsel, Mr S Thulasidas ("Mr Thulasidas"), conceded that at first instance, GTMS did not rely on Mr Chan's instructions on the steps and risers as an act of prevention.[339] We therefore allow the appeal on this issue.

When an architect has failed to issue a Delay Certificate under cl 24(1) SIA Conditions, can an arbitral tribunal or the court rectify the omission to do so?

308 Even though the Judge's finding on the prevention principle should be departed from, a question has been raised as to whether liquidated damages can be imposed on GTMS under the SIA Conditions when the architect has not issued a Delay Certificate.[340] Whilst there is little doubt that an arbitral tribunal or a court can open up, review and revise a certificate issued by the architect

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338 ROA Vol IV(N) at pp 39–202 (GTMS's Closing Submissions); ROA Vol IV(AD) at pp 101–135 (GTMS's Reply Submissions).

339 Transcript at p 123, lines 18–30.

340 Transcript at p 6, line 30–p 7, line 4.

under the SIA Conditions, doubts have been raised in certain quarters as to whether an arbitral tribunal or the court can remedy a situation where no certificate, like a Delay Certificate, had been issued in the first place. Can the arbitral tribunal or court rule that the Delay Certificate ought or should have been issued and proceed to adjudicate the disputes *as if* it had been issued?

309 In the Hong Kong case of *W Hing Construction Co Ltd v Boost Investments Ltd* [2009] HKCU 221 ("*W Hing*"), Deputy Judge Simon Westbrook SC ("Judge Westbrook SC") in the Hong Kong Court of First Instance held that the Court could not supply a Delay Certificate under the Hong Kong Building Contract containing the General Conditions of Contract ("GCC", a standard form used in Hong Kong) as this was a personal function of the architect and he could not be displaced from the performance of that function. The issue before the court was as follows (at [3]):

> Contra the plaintiff [the main contractor], who relies in particular on the absence of any certificate from the Architect as provided for in the liquidated and ascertained damages (LADs) clause (or the entitlement to one) certifying the architect's opinion that the works ought reasonably to have been completed by the Date of Completion. This issue *raises a novel point of construction, upon which there does not appear to be any direct authority. There is also an issue as to whether this Court has power to issue such a certificate itself, or waive the requirement for one.*
>
> [emphasis added]

Judge Westbrook SC's reasons are, in brief, as follows (see *W Hing* at [134], [139]–[142], [145] and [149]):

> 134. However what I am asked to do in this case, is not to open up and revise … some … interim certificate, or even to state entitlement to such a certificate where the Architect, on request, has failed or refused to issue one. *Instead, I am* ***invited to exercise the Architect's power for myself*** *and to decide whether, in my opinion, the works ought reasonably to have been completed by the Completion Date …*

> …
>
> 139. As for GCC 35(3), this is not a case of "ascertaining any sum which ought to have been the subject of or included in any certificate" since the certificate in question under GCC 22 does not ascertain any sum – it merely certifies that the works ought reasonably to have been completed by the Date for Completion.
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> 140. *As for the power to "open up, review and revise any certificate, opinion or decision",* ***there is, as yet, no certificate in existence*** *and also no evidence that the Architect has ever formed any opinion or made any decision,* ***so that there is nothing to open up, review or revise****.*
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> 141. In this context I note the observations of Mr Justice Hunter in *Hsin Chong Construction Co. Ltd. v. Hong Kong and Kowloon Wharf and Godown Do. Ltd.* HCA 283 of 1984 at paras. 7–9. In that case, the Architect failed, despite repeated requests by the Main Contractor, to issue his maintenance certificate. After several months, the Main Contractor referred the issue to arbitration, as to whether the maintenance certificate ought to have been issued by a particular date.
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> 142. At paragraph 9, Mr Justice Hunter held that ***this was a personal function of the Architect*** *and there was* ***no way he could be displaced*** *from the performance of that function.* He further held that a similar arbitration clause did not give the Arbitrator power to issue the certificate himself; the arbitrator could only decide the issue referred namely whether the maintenance certificate ought to have been issued by a certain date, but no more.
>
> …
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> 145. In this case, I do not even have the powers conferred by the arbitration clause, and I am at a loss to discern from where the power of a court to issue such a certificate is derived, or even to waive or ignore the requirement for one.
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> …
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> 149. I therefore hold that I have no such power and that the claim for LADs must fail in the absence of the GCC 22 certificate, which is a condition precedent to the Employer's right to levy or claim LADs.
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> [emphasis in italics and bold added]

For the reasons we have set out below, with respect, we take a different view.

310 It is settled law that liquidated damages, as a contractually provided remedy, can only be awarded strictly in accordance with the provisions of the contract. This is because liquidated damages clauses are inserted for the benefit of the employer who, *in lieu* of having to prove damages, can recover liquidated damages according to the rate specified in the contract and multiplied by the period of delay. Clause 24(1) provides that the architect *may*, at any time after the date or extended date for completion has passed, thereafter, up to and including the Final Certificate, issue a Delay Certificate certifying that the contractor is in default in not having completed the Works by the contract completion or extended completion date. Clause 24(2) states:

> ***Upon receipt*** of a Delay Certificate the ***Employer shall be entitled to recover*** from the Contractor ***liquidated damages*** calculated at the rate stated in the Appendix … ***from the date of default certified*** by the Architect for the period during which the Works shall remain incomplete, and ***may*** (but shall not be bound) to ***deduct such liquidated damages***, whether whole or in part ***from any monies due under the Contract at any time***.
>
> [emphasis in bold italics added]

311 Clause 24(2) of the SIA Conditions thus provides, in plain language, that it is only "[u]pon receipt" of the Delay Certificate, that the employer's entitlement to deduct liquidated damages arises. This clause has been read, correctly, to mean that the Delay Certificate is a prerequisite to the employer's right to liquidated damages and thereupon to exercise the right to deduct this from any sums due to the contractor. Without a Delay Certificate, "… there was no question of any liquidated damages arising …" and consequently no right to impose or deduct liquidated damages from the contractor: see *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 1 SLR(R) 591 ("*Tropicon*") per Thean J, as he then was, at [11]; see also *New Civilbuild Pte Ltd v Guobena Sdn Bhd and another* [2000] 1 SLR(R) 368 ("*New Civilbuild*") at [66].

312 There are also specialist texts on this issue:

(a) Delay Certificates issued under cl 24(1) of the SIA Conditions[341] are an example of a class of certificates which are "required, under the provisions of most contracts, to enable the Employer to recover or start to deduct liquidated damages for delay" (see *Hudson's* at para 4-006).

(b) These certificates operate as a *condition precedent* to the employer's right to claim liquidated damages (*Hudson* at para 4-015);

(c) See also *Keating on Construction Contracts* (Stephen Furst and Vivian Ramsey gen eds) (Sweet & Maxwell, 9th Ed, 2012) ("*Keating*") at para 10-037).

313 Mr Ser's counsel, Mr Singh, *and* Mr Chan's counsel, Mr Thio Shen Yi SC ("Mr Thio SC"), submit that this court can *reopen Mr Chan's refusal* to issue the Delay Certificate.[342] Their interests are aligned because if Mr Ser is unable to claim liquidated damages against GTMS due to a lack of a Delay Certificate, Mr Ser would look to Mr Chan for the loss due to the latter's supposed default or negligence in not issuing the same. If the lack of a Delay Certificate is not an impediment to the recovery of liquidated damages, then Mr Ser can recover those damages from GTMS. Mr Singh was also happy to argue that this court can reopen Mr Chan's refusal to issue a Delay Certificate, since Mr Ser will then be able, potentially, to claim against both GTMS and Mr Chan, as opposed to against Mr Chan alone.

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341 ACB Vol II(A) at p 114.

342 Transcript at p 114, lines 25–29 and p 161, lines 17–31.

314 Mr Thio SC's and Mr Singh's positions are premised on the arbitration clause, *viz*, cll 37(3) and 37(4) of the SIA Conditions, the material parts of which read as follows:[343]

> 37.(3) Such *arbitrator shall not* in making his final award *be bound* by any certificate, *refusal of certificate*, *ruling or decision* of the Architect under any of the terms of this Contract, but may disregard the same and substitute his own decision on the basis of the evidence before and facts found by him and in accordance with the true meaning and the terms of the Contract…
>
> …
>
> 37.(4) For the avoidance of doubt, in any case where for any reason the Courts and not an arbitrator are seised of a dispute between the parties, the Courts shall have the same powers as an arbitrator appointed under this clause.
>
> [emphasis added]

Their submission is based on a plain reading of cl 37(3) which they contend says in clear language that an arbitrator, in making his Final Award, is not bound by any certificate issued by the arbitrator but also any "*refusal*" of the architect to issue a certificate which he is empowered by the SIA Conditions to issue. Clause 37(4) provides that the courts shall have the same powers as an arbitrator. It follows that the courts are also not bound by any refusal of certificate on the part of the architect. During oral argument, Mr Thio SC, also relied on cl 37(3)(h) which provides as follows:

> (h) pursuant to Clause 31.(13) … temporary effect shall be given to all certificates … [subject to inapplicable exceptions] … until final award (or, where the courts may for any reason be seised of a dispute, until final judgment), save only that ***in cases where no ruling or decision has been made or certificate given*** *or refused by the Architect* … or in the case of a Cost of Termination or Termination Delay Certificate, *or of any matter in relation to which the Architect has no power to decide or certify under the terms of the Contract,* ***an arbitrator or***

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343 ACB Vol II(A) at pp 135–136.

> ***courts, as the case may be, may deal with a matter whether in interlocutory or by way of an Interim Award to in any other way****, before final award or judgment.*
>
> [emphasis added in italics and bold italics]

315 During the oral hearing, we queried both Mr Singh and Mr Thio SC on whether they had any authorities in support of their propositions. They were unable to offer any support for their position either as a matter of authority or specialist texts or principle, and based their submissions on the plain language of cll 37(3) and 37(4).[344]

316 In our judgment, the court or an arbitrator is empowered under the SIA Conditions and this Contract to come to a view and rule or find that a Delay Certificate *ought to or should* have been issued as of a particular date when an architect fails to do so. The court or an arbitrator can therefore proceed to award or find that liquidated damages are payable, based on that notional Delay Certificate which ought to or should have been issued.

317 We start with the contractual provisions. The scheme that underpins almost all standard form construction contracts in Singapore is that whilst the construction contract is ongoing, the architect (or his equivalent) is empowered to make various decisions which are aimed to keep the construction processes on track to completion. Thus, just to mention a few examples, the architect may issue variations (both additions and omission) to the works, and the architect (and his team of consultants, including the quantity surveyors) may certify interim payments to the contractor, clarify any issues in relation to the construction, certify extensions of time and certificates in relation to the usual, if applicable, stages of completion and rectification works. Over the years, various mechanisms have been incorporated to deal more effectively with

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344 Transcript at p 114, lines 4–31 and p 162, lines 7–21.

interim disputes, like the adjudication process under the Building And Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOPA") for interim payments, or dispute adjudication boards under contract forms like FIDIC, which give temporary finality. Temporary finality is also usually given to interim payment and other certificates issued by the architect, (see for example, cll 31(13) and 37(3)(h) in this case). However, *all* these interim disputes, decisions and rulings thereon, are only clothed with *temporary* finality. That temporary finality *ends* when they, and any other disputed issues in relation to the contract, are brought before an arbitrator or the courts for a *final resolution* if the parties are unable to settle their differences. It is invariably the case that the parties may raise any issues they have at this final stage of resolution and any certificates, rulings or decisions by the architect (save for some limited exceptions) can then be "opened up", *ie*, meaning reviewed, re-examined, tested and re-evaluated, before the arbitrator or the courts for final resolution (*Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] 3 SLR 124 at [33]).

318 The SIA Conditions also follow this scheme. The arbitration clause, cl 37 is extremely widely worded and detailed. The parties have the right, under cl 37(1)(a) to submit:

> ***Any dispute*** between the Employer and the Contractor as to any matter *arising under or out of or in connection with* this Contract or *under or out of or in connection with the carrying out of the Works* and whether in contract or tort, ***or as to any*** direction or instruction or ***certificate*** of the Architect or as to the contents of or granting ***or refusal of or reasons for any such*** direction, instruction or ***certificate shall be referred to the arbitration and final decision*** of … [an arbitrator].
>
> [emphasis in italics and bold italics added]

Clause 37(2) gives the arbitrator in an appropriate case express powers to rectify the Contract. As cited above (see [314]), cl 37(3) provides that the arbitrator

shall not, in making his final award, "*be bound by any certificate,* ***refusal of certificate****, ruling or decision of the Architect* under any terms of the Contract, but may disregard the same *and substitute his own decision* on the basis of the evidence before and facts found by him …" The same principle is set out in cl 31(13), which is the clause dealing with payment to the contractor and interim certificates:

> 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 … [the clause goes on to provide for temporary finality of interim payment certificates, enforceable by summary judgment but subject to the fraud or improper pressure or interference by any party] … until final judgment or award, as the case may be …

319 On a plain reading of these provisions, it is clear that the arbitrator or the court is conferred the widest powers to finally decide all issues in dispute between the parties. These provisions make clear that the arbitrator is not bound by any certificate, refusal of certificate, ruling or decision of the Architect and may substitute his own decision therefor. It is true that cl 37 excludes some issues from review or revision by the arbitrator, none of which are relevant to the facts of this case (for example, the inability of an arbitrator to review or revise an EOT given by the architect if the contractor has failed to comply with the condition precedent of giving due notice of a delaying event under cl 23(2) – although whether the contractor *has* complied with the condition precedent or not *is* an issue which the arbitrator can decide – or the inability to award claims for dayworks unless the contractor has complied with the condition precedent set out in cl 12(4)(e)).

320 An argument can be raised on the word "refusal" under cll 37(1)(a) and 37(3) to issue a certificate. The word "refuse" or "refusal" connotes, as a precursor, a request to do or grant something or some obligation to do

something. Hence the ordinary meaning of "refuse" or "refusal" is to decline to do so in such circumstances. Mr Chan cannot really be said to have refused to issue a Delay Certificate because Mr Chan took the mistaken view that the works were complete as of 17 April 2013 and that GTMS was entitled to EOTs up to that date. The issue of a Delay Certificate therefore never arose in his mind. Mr Thio SC submits that the word "refusal" in cll 37(1)(a) and 37(3) must include the lesser situation where there was a failure, for whatever reason, to issue a Delay Certificate.

321 As mentioned above, Mr Thio SC also relied on cl 37(3)(h), which provides for the temporary finality effect of certificates; cl 37(3)(h) also provides (see [314] above) that in cases where *no ruling or decision* has been made *or certificate given* (or refused) by the architect, the aggrieved party can apply to an arbitrator to deal with the matter whether in interlocutory proceedings or by way of an Interim Award or in any other way *before* final award or judgment. Whilst cl 37(3)(h) contains the phrase "no ruling or decision … or certificate given …" it also contains the phrase "or refused", which detracts somewhat from Mr Thio SC's submission that "refusal" must include failure to make a decision. Nonetheless, we are of the view that on a true construction, cl 37(3)(h) does support Mr Thio SC's submission. If a party who is aggrieved by the architect's failure to rule or decide on an issue or not to issue a certificate, which is of importance to that party, and that party is specifically allowed to proceed to arbitration to deal with the matter in interlocutory proceedings and/or to ask for an Interim Award or in any other way *before* a final award or judgment, then it must follow that the aggrieved party can also wait to put that in issue when the arbitration is commenced at the end of the project to finally resolve all disputes between the parties. This also accords with the practice of completing the project before starting an arbitration, as is provided for in some construction contracts.

322 As a matter of construction of the SIA Conditions and this Contract therefore, and in particular cl 37, an arbitrator (or the court) at the stage of final resolution of all the disputes between the parties, is entitled to take the view and decide, after considering the evidence and hearing the parties, that a Delay Certificate should have been issued as of a particular date and that will form the basis, together with a finding as to when completion took place, upon which an arbitrator (or the court) is entitled to make an award for liquidated damages accordingly. Clause 24(2) does not contradict this construction because cl 24(2) deals with a different stage of the construction contract where without a Delay Certificate, the employer has *no right* and is *not entitled to start* deducting liquidated damages from payments due to the contractor. However, cl 24(2) does not mean that the employer cannot seek relief from an arbitrator or court on the basis that a Delay Certificate should have been issued. In *Tropicon* and *New Civilbuild*, that was not the issue which the court was asked to address.

323 It is also important to remember that the SIA Conditions confer the power and discretion on the architect as to whether a Delay Certificate should be issued; cl 24(1) provides that the architect "may", not must, issue a Delay Certificate if the works are not completed by the contractual completion date. It is settled law that the courts *can set aside* a Delay Certificate wrongfully issued by an architect, see *Tropicon* at [25] (where a Delay Certificate was issued some two and a half years after the Date of Completion) and *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 3 SLR(R) 518 at [37] (where the Delay Certificate was issued one year and ten months after completion and the architect's conduct was also taken into consideration). It must follow, and it is clear, that if an architect took a mistaken view on the date upon which he issued a Delay Certificate, that Delay Certificate could, under cl 37, be corrected or revised by the arbitrator who could substitute his own decision upon receiving the evidence and hearing the parties (see *Samsung Corp v Chinese Chamber*

Realty Pte Ltd and others [2004] 1 SLR(R) 382 at [21], citing *Aoki Corp v Lippoland (Singapore) Pte Ltd* [1995] 1 SLR(R) 314 at [32]–[33]; see also *Liew Ter Kwang v Hurry General Contractor Pte Ltd* [2004] 3 SLR(R) 59 at [20]).

324 Having construed the relevant SIA Conditions, we think there is no such gap in the drafting and we hold that where an architect has failed to issue a Delay Certificate when he ought or should have done so, an arbitrator or the court seised with the power to resolve disputes between the parties, can rule or decide that a Delay Certificate should have been issued on a particular date thereby giving rise to liquidated damages and issue an award or entry of a judgment therefor. To hold otherwise would mean that an architect can render a liquidated damages clause inoperable and of no effect simply by his failure to issue a Delay Certificate.

325 We therefore turn to specialist texts to ascertain if there are any compelling countervailing views or considerations for or against such a construction. In *Commentary on SIA Standard Form* at para 37.23, the learned author states:

> However, in the situation where the Architect has not issued a certificate, ruling or decision on any matter which, under the terms of the Contract, is required to be dealt with by an Architect's certificate, Clause 37(3)(h) provides that the arbitrator may, on the Contractor's application, deal with this by way of interlocutory proceedings or an interim award. For example, the Contractor may raise before an arbitrator a complaint that the Architect should have issued a completion certificate pursuant to Clause 24(4) or ought to have granted an extension of time in respect of a particular delay event.

We agree, and in so saying, it is clear that cl 37(3)(h) is equally applicable to an employer in proceedings which are not interlocutory; the learned author was just giving an example and cl 37(3)(h) does not limit the remedies available to the contractor.

326 There are also statements from other specialist texts to the effect that the presence of an arbitration clause (in our case, cl 37(3) of the SIA Conditions), which provides for a review of the architect's decision, implies that the arbitrator himself can supply the certificate. I. N. Duncan Wallace, *Construction Contracts: Principles and Policies in Tort and Contract* (Sweet & Maxwell, 1986) sets out a historical perspective on the "open up, review and revise" wording introduced into arbitration clauses within building and construction contracts at para 17-11 where he recounts that "the principal early method of avoiding finality was to introduce an arbitration clause into the contract." At para 17-12, the learned author notes that short form arbitration clauses were met with the many references to the opinion or judgment of the architect in the contract in an effort to argue that the arbitrator was bound by such decisions. Although these failed in two cases mentioned below (see [327] below), the learned author stated:

> … It was anticipation of this, it may be surmised, which at the end of the nineteenth century produced the "open up review and revise" wording in the RIBA standard form arbitration clause, which was also adopted in the civil engineering standard forms, and has remained in both cases identical to the present day. … That wording, which it is desirable to set out in full, confers power on the arbitrator "*to* ***open up, review and revise*** *any certificate, opinion, decision, requisition or notice*, save in regard to the matter expressly excepted, and ***to determine all matters*** *in dispute … in the same manner* ***as if no such certificate, opinion, decision, requisition or notice had been given***."
>
> [emphasis in italics and bold italics added]

327 As pithily stated in *Hudson* (at paras 4-022 and 4-029), "the existence of an arbitration clause will normally mean that the absence of a certificate can be remedied". The same position was also taken by the English Court of Appeal in *Prestige v Brettell* (1938) 4 All ER 346 at 350 and 354–355:

> [Slesser LJ]:

> … I read *Brodie v. Cardiff Corpn.* …, where this matter was very fully considered, in substance to mean this. Where *an arbitrator* having jurisdiction *has to decide that something ought to have been done by the architect or engineer which was not done*, if the terms of reference are wide enough to enable him to deal with the matter, *he may by that decision himself supply the deficiency, and do that which ought to have been done*…
>
> …
>
> [Greer LJ]:
>
> … If there had been no authority to the contrary, I should have been of opinion that no arbitrator and no court had any power whatever to interfere with the express provisions of the contract between parties who were *sui juris*. There being no case made of duress or fraud, I think that the duty of the court would have been to enforce the contract in accordance with its express words. I read the contract as meaning that, as a condition precedent to liability to pay anything from time to time during the progress of the work, there must be, first, a certificate of the architect. Without that certificate, there is no legal liability established by the contract to pay any sum whatsoever.
>
> …
>
> However, I cannot avoid the consequences of the two decisions which have been referred to by Slesser LJ. I cannot read these as being other than decisions that there may be occasions on which the court may say that, notwithstanding the failure of the claimant to establish that conditions precedent to liability have happened, the court has power to make an order, in the absence of the performance of these conditions, for payment of money which, by the contract, is made dependent upon those conditions. It is because I am impressed with the effect of the two authorities which have been cited that I am able to agree with the view which has been expressed by my brethren. I cannot read either *Brodie v. Cardiff Corpn.* … or *Neale v. Richardson* … except as expressing the view that, in the opinion of the House of Lords in *Brodie's* case … and in the opinion of this court in *Neale v. Richardson* … an arbitrator to whom a matter is remitted in the form in which it was in this case has the power to dispense with the conditions precedent, and to order that, notwithstanding the non-performance of those conditions precedent, a liability may be established on which money may be ordered to be paid. It is because of the decisions in those two cases that I am constrained to concur with the judgment given by my brethren. …
>
> [emphasis added]

328 In considering the Hong Kong decision in *W Hing*, we first make the point that the learned Judge voiced the following precaution, at [108]:

> One of the principal complexities of construction law is that previously decided case law is rarely determinative, even of an identical issue for the simple reason that the conditions of contract are rarely identical; and increasingly so, in modern times, where the various standard form contracts are almost invariably heavily amended by the [special conditions of contract] for each particular contract.

329 With respect, we agree. However, we depart from the decision for the following reasons:

(a) Judge Westbrook SC's decision was premised on his concern that the court is being asked, essentially, to exercise the architect's power, which appears incongruous with the fact that the power of certification is something which is contractually conferred onto the architect alone. However, this concern is directly addressed by the plain text of cl 37(3) of the SIA Conditions, which expressly provides that the arbitrator is empowered to "*substitute his own decision* on the basis of the evidence before and facts found by him and in accordance with the true meaning and the terms of the Contract" [emphasis added].

(b) Judge Westbrook SC further pointed out that it was odd for the employer to sue the contractor for something that the architect, *as the employer's agent*, failed to do. With respect, this overlooks the architect's dual role and function in a construction contract like the SIA Conditions. As mentioned above, in addition to acting as the employer's agent under cl 1.1(2), cl 1.1(10)(a) provides that the architect *also acts* as a certifier and is duty bound to the employer and the contractor to do so fairly and impartially; further the MOA expressly provides that the employer shall not interfere in the architect's certification duties. When

acting as the certifier, the architect is *not* acting as agent of the employer. Whilst the architect may be liable to the employer for any breaches of his contractual or tortious duties owed to the employer, this does not change the fact that if the contractor is in delay, the architect should, acting as a certifier under the contract, issue a Delay Certificate, thereby triggering the right of the employer to liquidated damages.

(c) The arbitration clause that Judge Westbrook SC construed is set out in his judgment at [137] and although it may not be the clause in its entirety, we set out the same as it appears in the judgment for completeness:

> (1) Provided always that *in case* ***any dispute or difference shall arise*** between the Employer or the architect on his behalf and the main contractor … ***as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including*** *any matter or thing left by this Contract to the discretion of the architect* ***or the withholding by the architect of any certificate to which the main contractor may claim to be entitled*** …) then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties …
>
> (2) Subject to the provisions of cls.2(2) and 30(7) of these Conditions, the Arbitrator shall, without prejudice to the generality of his powers, *have power to … ascertain and award any sum which ought to have been the subject of or included in any certificate and* ***to open up, review and revise any certificate, opinion, decision, requirement or notice*** *and to determine all matters in dispute which shall be submitted to him* ***in the same manner as if no such certificate, opinion, decision requirement or notice had been given.***
>
> [emphasis in italics and bold italics added]

330 Whilst we agree that any construction dispute has to be decided on the terms and conditions of the relevant contract (and we have not had the benefit of seeing the full contract provisions in *W Hing*), we pause nonetheless to point

out the similarity of the arbitration clause as it is reported in *W Hing* with cl 37(3). As a matter of general principle, we cannot, with respect, agree with the reasons set out in *W Hing* in relation to the personal function of certification bestowed on an architect and from which he cannot be displaced. Where a construction contract has a general scheme of temporary finality of decisions or rulings of an architect subject to a final resolution of all matters before an arbitrator (or the court), and if the architect fails to issue a certificate or make a ruling when he ought to have done so under the contract, an arbitrator or the court seised with that issue must be able to remedy that omission. This is clear from the provisions as set out at [329(c)]: "…or the withholding by the architect of any certificate to which the main contractor may claim to be entitled …". That being said, although we have noted at [329(b)] above that an architect who fails to issue a Delay Certificate may be liable to the owner for any breaches of his contractual or tortious duties owned to the owner, it is not always satisfactory to say that an owner may claim against an architect for his failure to issue a Delay Certificate. First, the level of damages may be beyond the ability of the architect to pay or above the limit of the architect's professional indemnity insurance. Secondly, this would be an onerous burden on architects if the employer has no recourse to the contractor who should be primarily responsible for delay.

331 We add that since the arbitrator or court may find a contractor liable for delay notwithstanding the absence of a Delay Certificate, it may also decide when the delay ends in the absence of a Termination of Delay Certificate.

332 In summary, we are of the view that cll 37(3) and 37(4) of the SIA Conditions, read together, empowers the court to disregard the absence of a Delay Certificate. The arbitrator or court, as the final arbiter of all the disputes between the parties in this case, is entitled to find and hold that Mr Chan should

or ought to have issued the Delay Certificate under cl 24(2) certifying that the Works ought to have been completed by 17 April 2013. Liquidated damages therefore started running from 18 April 2013. Mr Chan should then have issued the Termination of Delay Certificate on 28 May 2013 and the CC on 16 September 2013 when the bungalows obtained the TOP. It follows that GTMS is liable to pay Mr Ser liquidated damages from 18 April 2013 to 28 May 2013 and this amounts to $147,600 (41 days x $3,600) together with interest thereon from the date of the writ. Mr Ser is therefore entitled, as against GTMS, to deduct the sum of $147,600 (together with interest thereon from the date of the writ) from the $1,103,915.48 due under the Payment Certificates.

333 Aside from the contractual provisions, we do not think it is incongruous for an arbitrator or court to be empowered to act in the circumstances mentioned. If it can vary an architect's decision on the period of delay even though that is in the province of an architect to decide, there is no reason why it cannot act when no Delay Certificate or Termination of Delay Certificate is issued. The idea must be to allow the arbitrator or court to review an architect's decision, unless there is good reason otherwise.

As between Mr Ser and Mr Chan

Liability for negligence

334 There is no dispute that Mr Chan, as the project architect under this Contract, owed Mr Ser contractual obligations under the MOA and a duty of care in tort in the performance of his functions and contractual duties. Mr Chan, as a practising architect, in common with all professionals, will (unless exceptionally, it is provided to the contrary in his contract of engagement), be under an implied duty to carry out his services and functions with the skill and

care reasonably to be expected of competent members of the profession they belong to.

335 There can be little doubt that one of the core standards of care and skill of an architect is that he should know the salient and more important provisions of the contract he is supervising and administering and carrying out certification functions. There may well be complex or unexpected questions of law or law applied to facts of a construction contract which an architect cannot be faulted for not appreciating. It is one thing to fail to appreciate that there is a complex latent legal issue within some provisions; it is quite another not to even know what is in the contract. An architect is expected to know the terms and conditions on which the contract is entered into, the specifications in the contract, the drawings (including any notes thereon and those drawings issued by allied professionals in connection with the building project) and the bills of quantities. These provisions involve the very core of the architect's expected competencies and form an integral part of his special knowledge and skill that he professes to possess as an architect. In particular, (since Mr Chan attempted, albeit rather tentatively, to suggest that that he expected F+G, advise him on the "legal" aspects of the relevant contract provisions to enable him to carry out his administrative and certifying duties), the architect should be familiar, within the bounds of reasonableness in relation to specialist areas, with the matters stated above. Architects should disabuse themselves of the notion that it is the duty of allied professionals to carry out any of the architect's duties under a construction contract like the SIA Conditions. For example, it cannot be an answer for an architect not to know the contents of the specifications because it was put together by the quantity surveyor. Again, the quantity surveyor may well be there to carry out an evaluation of a contractor's submission for interim payment and arrive at a valuation of a payment due to the contractor but it is incumbent on the architect to exercise his own judgment, after due checking of the quantity

surveyor's evaluation and calling for substantiation if the architect has any doubts on any items before issuing the interim certificate of payment. If there are any areas of doubt and they involve other allied professional disciplines, for example in specialised areas like structural or geotechnical engineering, it is incumbent on the architect to proactively raise this with those allied professionals. If it were otherwise, we cannot see how the architect will be able to competently carry out his duties, including the important function of certification, under the SIA Conditions.

336 On appeal, Mr Ser's focus is on:

(a) Mr Chan's premature grant of the CC with effect from 17 April 2013;

(b) wrongful grants of EOT 2 and EOT 3;

(c) premature issue of the MC;

(d) wrongful certification in IC 25, IC 26, the FC and wrongful release of retention monies; and

(e) Mr Chan's supervision of GTMS.[345]

337 We have dealt with the grants of EOT 2 and EOT 3 at length above. For the reasons set out above, Mr Ser's appeal in this respect is dismissed.

338 We have also dealt with Mr Ser's appeal against the issue of IC 25, IC 26 and the FC above. The Judge carefully evaluated the evidence before him and found that IC 25, IC 26 and the FC were validly issued with full reasons

345 AC at paras 189, 191.

being given in his Judgment. Save for the issue of the intumescent paint (see [301] above) and the issue of liquidated damages (see [332] above), we agree with the Judge's findings and see no ground for appellate intervention. Apart from that, Mr Ser's appeals on the issues relating to IC 26, IC 26 and FC are without merit and are dismissed.

339 Similarly, Mr Ser's appeal against the Judge's exoneration of Mr Chan's supervision of GTMS is without basis. This was dealt with comprehensively by the Judge after hearing and considering the evidence (Judgment at [688]–[693]) and again we see no ground for appellate intervention. The appeal on this issue is similarly dismissed.

340 We now deal with Mr Ser's appeal in relation to Mr Chan's premature issue of the CC with effect from 17 April 2013, the wrongful issue of the MC, the failure to issue the Delay Certificate and the premature releases of the retention monies.

341 In the CA Judgment, the CA found, at the summary judgment stage, that Mr Chan had issued the CC improperly, without belief in the truth of the certification and/or recklessly, without caring whether it was true or false. Now that the full trial has been held, the CA's view at the summary judgment stage is confirmed. At the trial, Mr Chan and Mr Yong admitted under cross-examination that they had not read or realised the existence of Item 72 until this action.[346] Mr Chan can have no excuse for not having read the Contract. His professional behaviour in doing so was reckless and if Mr Chan issued certificates, like the CC, without having read the contract, then he was clearly certifying matters under the SIA Conditions recklessly, without caring whether

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346 ROA Vol III(DK) at p 83, line 6–p 84, line 1; p 85, line 14–p 86, line 3 and p 88, line 7–p 91, line 10 (4 June 2020) and ROA Vol III(DL) at p 296, lines 4–8 (9 June 2020).

it was true or false. We find that Mr Chan was grossly negligent in failing to read the Contract he was administering, and under which he had certification functions. Mr Chan was grossly negligent in not being aware of the existence of an important provision like Item 72 in carrying out his supervision and certification duties. As we shall examine and conclude below, Mr Chan was grossly negligent in carrying out his certification duties, not only in relation to the issue of the CC, but to subsequent events for which he can have no excuse as they involved the standard conditions of the SIA Conditions; Mr Chan should have been familiar with these provisions, as they were in a standard form contract drafted in 1979 under the auspices of his own professional body, the SIA. His concession of not being aware of Item 72 until this suit was brought is fatal to any defence that he honestly and in good faith believed that there was no delay. There was absolutely no basis for such a view. We note Mr Chan admitted under cross-examination that he had not done his job as an architect "[i]n this aspect" by "not reading prelim 72".[347] We also note that under cross-examination, Mr Chan's subordinates gave evidence to the same effect. Mr Yong said that he did not "look at" Item 72 when he spoke with Chan on 17 April 2013 and "check whether all the requirements had been satisfied", and that he only knew about Item 72 because of this action.[348] Ms Wan likewise said that she, Mr Chan and Mr Yong did not consider Item 72 in the pre-TOP inspections.[349]

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347 ROA Vol III(DK) at p 133, line 1–p 135, line 3 (4 June 2020).

348 ROA Vol III(DF) at p 272, lines 3–8 and p 275, lines 4–20 (31 March 2020); ROA Vol III(DG) at p 276, lines 13–25 (2 April 2020); ROA Vol III(DH) at p 10, lines 18–21, p 12, lines 18–25 and p 38, lines 8–25 (2 April 2020).

349 ROA Vol III(DN) at p 270, line 1–p 271, line 8 (12 June 2020); ROA Vol III(DO) at p 140, lines 8–14.

342 Even if we put Mr Chan's admission of not being aware of Item 72 to one side, we seriously question his issue of the CC in the way he did. The bungalows had failed the First TOP Inspection. The BCA issued a letter setting out the reasons for not achieving TOP on that same day. There was no question that the non-compliant items of the constructed bungalows, involving very basic safety issues, *had* to be rectified before the bungalows could be said to be completed and handed over to Mr Ser. It is of significance that in Mr Chan's own application to the BCA for the TOP Inspection on 23 April 2013, one of the boxes he had to tick off contained the reminder:

> NO OCCUPATION OF BUILDING
>
> The building must not be occupied before a TOP/CSC has been issued as provided for under Section 12(1) of the Act.

There could have been no basis whatsoever to issue the CC under cl 24(4) in the circumstances of this case as the Works were clearly not compliant with the Contract in all respects, as they were not compliant with the Building Control provisions and regulations in relation to safety. Clause 2.1 of the MOA covers the five stages of the "Basic Services" provided by the architect to the client; cl 2.(5)(a), which deals with the "Final Completion" stage of the contract construction, provides:

> Doing such work as may be required on behalf of the Client and instructing the building contractor *to carry out such work as may be required to comply with all requirements of the relevant authorities*.
>
> [emphasis added]

There is no dispute that Mr Chan was aware that the steps and risers needed rectification on 17 April 2013. These non-compliant items were not minor or unimportant items; they were non-compliant major safety structures, see the CA Judgment at [54]. Yet Mr Chan saw fit to issue the CC 15 days after the bungalows failed their TOP Inspection, on 15 May 2013, certifying and ante-

dating completion to 17 April 2013. We agree with the Judge below that Mr Chan was wrong to do so.

343 Since there were no outstanding applications by GTMS for further Extensions of Time beyond 17 April 2013, once that date had passed, Mr Chan should have issued or considered issuing a Delay Certificate certifying that GTMS was in delay as of 18 April 2013. But Mr Chan failed to do so. This was not a case where Mr Chan had a reason to delay issuing the Delay Certificate. Mr Chan states in his AEIC that GTMS was not in delay and he did not see any reason to certify liquidated damages.[350] Under cross-examination Mr Chan said that there was no need to do so as there was no delay.[351] We find it inexplicable that Mr Chan, knowing of all the issues in the tread and risers in all the staircases, would think that the BCA inspectors would overlook this basic safety issue.

344 Following the First TOP Inspection, Mr Chan failed to properly assess the reasons for the failure and to fairly attribute the reasons for the failure to the relevant parties, including himself, and to assess the relative time taken for rectification of each item. We are drawn to the ineluctable conclusion that he did so as a matter of self-preservation. We find that his issuing of the AI No. 34 and AI No. 39 with the dates 26 August 2013 and 23 September 2013 respectively, is completely inconsistent with the facts, (see *eg*, Ms Wan's email of 15 May 2013 at [148] and also [346] below). Mr Chan *must have known* the insertion of those dates, representing dates when the AIs were issued, were false and misleading as the request or instructions to GTMS in respect of these two items were given much earlier. This is clearly reflected in Ms Wan's 15 May

350 ROA Vol III(AI) at p 210, para 105.

351 ROA Vol III(DL) at p 147, line 20–p 148, line 9.

2013 email after the First TOP Inspection where, in addition to writing what rectification was going to be done, she clearly stated: "We are still waiting for GTMS to submit rectification works schedules for the re-inspection.",[352] *ie* since this email was sent on 15 May 2013, which is before the dates of 26 August 2013 and 23 September 2013, CSYA must have asked GTMS to rectify these items *before* the dates of 26 August 2013 and 23 September 2013. We have examined at length (from [146]–[176] above), the reasons for the bungalows' failing the First TOP Inspection and the parties responsible therefor. That assessment was clearly required of Mr Chan under the SIA Conditions; it should have been, but was not, done. That assessment would have triggered the issue of various certificates under the SIA Conditions. We find it hard to believe that Mr Chan was unaware of cl 24 and was unaware that he bore the responsibility for the delays caused by his errors and omissions. There were clearly serious basic contractual principles, rights and obligations that were completely ignored by Mr Chan in his duties of supervision and certification following upon that First TOP Inspection.

345 It bears repeating that GTMS was responsible for three out of the five non-compliant items (the Steps and Risers, the Parapet Walls at the Roof and the Gap issues). As explained above, we have accepted the Judge's finding that these non-compliant items would have been rectified by 28 May 2013. On the other hand, Mr Chan was responsible, due to his negligence and design errors for the two important safety lapses: first, the absence of a railing at the landscaped area to prevent persons from falling over a drop of 1 meter or more (the Landscape Railings issue, see [148(b)] above), and secondly the Parapet Walls at the Pavilion issue (see [148(c)(ii)] above). It is not in dispute that *both* these lapses *had* to be rectified and were rectified by GTMS in accordance with

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352 ROA Vol V(AY) at p 200.

Mr Chan's instructions or requests; GTMS did not rectify these items on their own volition. However, unfortunately, because of the way the parties ran their respective cases, there are no specific findings by the Judge as to how Mr Chan asked or told GTMS to rectify these two items.

346 In Ms Wan's email of 15 May 2013 (see [148] above), Ms Wan euphemistically states that GTMS "was asked to add steel railings" to remedy the Landscape Railings omission. In our view, on balance, and unless GTMS agreed to do this gratis and without any EOT, they were entitled to an EOT pursuant to an AI that should have been issued. As referenced above, such an AI, AI No. 39, was issued, but it was dated 23 September 2013, seven days *after* TOP was attained. We also know that this was rectified by the Second TOP Inspection. This request to carry out additional work during a period of delay was exactly the kind of situation catered for under cl 24(3) to ensure an act of prevention did not occur and invalidate the right to impose liquidated damages. The time taken for Mr Chan to issue a drawing, for GTMS to fabricate and then install the railing had to be set against the overall delay by GTMS that was continuing to run as of 30 April 2013 to 28 May 2013. In such a situation, as mentioned above, Mr Chan should have issued a Termination of Delay Certificate to GTMS from the date that Mr Chan "asked" GTMS to remedy his own error and/or omission to provide for this railing. LD would then have stopped accruing against GTMS.

347 As for the Parapet Walls at the Pavilion issue, there was again no specific findings on an equivalent analysis as set out in the foregoing paragraph. What evidence there is indicates that Mr Chan asked GTMS, first to install invisible grilles in an effort to comply with the BCA's directions. This is evidenced in Ms Wan's email of 15 May 2013 (see [148] above), where it is noted that GTMS were asked by CSYA to add an invisible grille at the Unit 12A

pavilion at the area above the built-in concrete bench. There is no finding on, for example, the date when that request was made, in what form it was made or when the invisible grille was installed (see also [162(d)(vi)] above). This initial remedial action was rejected by the BCA on 19 July 2013. It appears that Mr Chan asked or instructed GTMS to measure and install a taller glass barrier on 1 August 2013. AI No. 34 was issued on 26 August 2013 and the taller glass barrier was installed on 30 August 2013. BCA approval therefor was given on 6 September 2013, after which Mr Chan wrote in for another TOP Inspection. Given this state of affairs, we are in no position to make findings on the relevant dates so as to conclude exactly *when* a Termination of Delay Certificate should have been issued for this item (though, as we have previously stated at [173(b)] above, we are of the view that the Parapet Walls at the Pavilion issue would have been the basis for the issue of a Termination of Delay Certificate) and whether any Further Delay Certificate should have been issued. However it is clear that Mr Chan "ordered" additional works by the installation of the invisible grille, then had GTMS dismantle and remove the same and thereafter issued an AI to install a taller glass barrier first within the period of GTMS's delay from 18 April to 28 May 2013, and then beyond that period from 29 May 2013 to at least 30 August 2013.

348 We have our grave doubts whether these clear omissions by Mr Chan to properly assess the position under the SIA Conditions *vis-à-vis* Mr Ser and GTMS were mere carelessness. If Mr Chan had acted as he should have, in fulfilment of his certification duties, it may well be that GTMS would not have been liable for much liquidated damages given that Mr Chan's errors and omissions in design overlapped with GTMS's delays and properly issued AIs would have reduced the liquidated damages payable by GTMS and by the same token exposed Mr Chan to an action in negligence by Mr Ser. Mr Chan's most egregious failure was his turning a blind eye to the causes of delay that were

attributable to his own negligent design or omissions which caused the bungalows to fail the TOP Inspections and the reasons therefor and his failure to do his duty under the SIA Conditions as well as his obligations owed to Mr Ser in contract and in tort.

349 The position we therefore reach is that based on the facts as found by the Judge, Mr Chan should have:

(a) issued a Delay Certificate, certifying GTMS was in delay as of 18 April 2013;

(b) issued a Termination of Delay Certificate on 28 May 2013 as GTMS had completed rectification of defects caused by them;

(c) the CC ought to have been issued on or with effect from 16 September 2013, the date when TOP was obtained.

(d) We have found and held above that the non-provision of test certificates, the operating manuals and the warranties did not prevent the fulfilment of Item 72(b) of the Preliminaries.

(e) We are also satisfied that Mr Ser's refusal to take over the bungalows until 21 July 2014 was, as found by the Judge, unreasonable and could not be justified.

(f) We find that on the evidence Mr Ser could have taken over the bungalows on or shortly after 16 September 2013 – under cross-examination, he accepted that TOP was obtained on 16 September 2013 (though he insisted that the issues arising from the First TOP Inspection had not been rectified by then, contrary to his earlier position in the

summary judgment application).[353] What repairs or rectification remained to be carried out could have been carried out within the ensuing maintenance or DLP.

350 Mr Chan's failure to properly carry out his certification duties may suggest that the imposition of liquidated damages upon GTMS from 18 April 2013 to 28 May 2013 is unfair. But, like the Judge below, we are constrained by how the parties chose to plead and run their cases below and before us. Consequently, there is no evidence, let alone exploration of relevant evidence upon which we can say when the Termination of Delay Certificate should have been issued any more than we can find when and how Mr Chan requested GTMS to carry out the rectification works to remedy Mr Chan's own errors and omissions in his design. However, what we can say, with confidence, is that the purported issuing of AI No. 34 and AI No. 39 by Mr Chan was at best negligent and at worst dishonest. It appears to us that on the whole, Mr Chan was attempting to shield himself from the consequences of his own errors and omission and was done in clear and flagrant breach of his duties and certifying functions under the Contract.

351 We now turn to Mr Ser's claim against Mr Chan. Mr Ser's pleaded claims in damages against Mr Chan[354] are for

(a) the liquidated damages that Mr Ser has failed to recover from GTMS pursuant to cl 24(2);

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353 ROA Vol III(CS) at p 213, line 14–218, line 2.

354 ROA Vol II(A) at p 247, para 39D and p 249, para 39H (Mr Ser's Third Party Statement of Claim (Amendment No. 2); ROA Vol II(B) at p 74, para 80 (Mr Ser's Consolidated Defence and Counterclaim (Amendment No. 3).

(b) the amount Mr Ser has failed to recover as a deduction for the unrectified defects and/or arising out of the improper certification of the outstanding works; and

(c) the cost of the rectification works required.

Except for Mr Ser's claim for the intumescent paint, we have dismissed his claims under (b) and (c).

352 The Judge found Mr Chan negligent for prematurely issuing the CC. However, the Judge only awarded Mr Ser nominal damages. The Judge rejected Mr Ser's argument that Mr Chan's negligent certification of contract completion prevented Mr Ser from claiming liquidated damages. The Judge reasoned that the liquidated damages clause was part of the Contract between *Mr Ser, as owner of the Project, and GTMS, as contractor for the Project*. To that extent, any claim in liquidated damages can only be pursued against GTMS, and not Mr Chan himself (Judgment at [697]). With respect, we do not wholly agree with the learned Judge's analysis and conclusions on this.

353 If GTMS failed to complete the Works by the extended Completion Date, due to reasons attributable to GTMS, then it must follow that they are in delay. But for the failure of Mr Chan to issue the Delay Certificate, liquidated damages would have started to accrue and Mr Ser would have been entitled to deduct those liquidated damages from any monies due to GTMS under the Contract. For the reasons set out above, we have awarded Mr Ser liquidated damages against GTMS from 18 April 2013 to 28 May 2013. IC 25 was issued on 3 September 2013 for some $390,000 and Mr Ser could have deducted the liquidated damages of $147,600 therefrom.

354 Apart from the pleadings, the real question on this issue is whether Mr Ser has suffered any loss as a result of this omission by Mr Chan to issue a Delay Certificate. Although a claim for liquidated damages is separate in nature and quite different from a claim against an architect for breach of contract or tort for not issuing a Delay Certificate, a claim against a contractor for liquidated damages (when properly certified) and a claim for damages against the architect for breach of contract and duty in not issuing a Delay Certificate can intersect when, for example, the employer cannot recover those liquidated damages from the contractor because of the contractor's intervening insolvency. In such an event, the employer's loss and damage will (subject to the facts of each case) include the liquidated damages he could not deduct from the interim or final payments, which is now beyond his reach due to the contractor's subsequent insolvency. As matters stand before us, there is a sum owing to GTMS by Mr Ser under IC 25, IC 26 and the FC (subject to a deduction in respect of the rectification of applying the two-hour rated intumescent paint on all sides of the steel beams), and the liquidated damages as ascertained by this court can be set off against that sum. No loss has as yet arisen unlike the aforesaid hypothetical situation posed. Further, we note that this sum has not been paid by Mr Ser because there was a consent order for a stay of execution pending appeal.

355 We agree with the Judge that a liquidated damages claim against GTMS is based on the contract between GTMS and Mr Ser (Judgment at [697]). It is a contractually agreed pre-estimate of the loss Mr Ser would suffer for each day of delay caused by GTMS. Mr Ser cannot, without more, transplant that agreed pre-estimate of the loss from his contract with GTMS to his contract with Mr Chan. There is no liquidated damages clause in the MOA or provision agreeing to that agreed pre-estimate of loss per day of delay as between Mr Chan and Mr Ser. Mr Ser's pleaded claim for recovery of any liquidated damages from Mr

Chan that Mr Ser cannot recover from GTMS[355] must therefore fail. In his submissions before us, Mr Ser also contends that GTMS and Mr Chan are jointly and severally liable to him for liquidated damages.[356] This argument must fail for two reasons. First (save for an exception like the hypothetical given in [354] of intervening insolvency of a contractor), there is no true joint and several liability for this sum because the basis of assessment and recovery of this sum rests on very different legal principles. In the case of GTMS, it is founded on a specific contractual liquidated damages clause and in the case of Mr Chan, it is founded on a breach of a different contract and/or tort where damages are not derived from a calculation based on a pre-agreed estimate of the loss but on principles upon which damages for a breach of contract and/or damages n tort are assessed. Damages for any delay caused by Mr Chan, unlike damages for any delay caused by GTMS, simply cannot be assessed on the basis of the liquidated damages clause that is in the Contract (between GTMS and Mr Ser), as the MOA (between CSYA and Mr Ser) is a different kind of contract and importantly, without any liquidated damages clause. Secondly, there can be no true joint and several liability where the injury caused is divisible, *ie* it is possible to attribute different parts of the injury to different causes. Three possible permutations for liability will illustrate this. (a) For the reasons set out above, GTMS is responsible for delays from 18 April 2013 (the date when the Delay Certificate ought to have been issued) to 30 April 2013 (the date of the First TOP Inspection); for this period Mr Chan is not liable. (b) For the period from 30 April 2013 to 28 May 2013 (when GTMS completed its rectification works), depending on findings that might have been made, both GTMS and Mr Chan may be liable as GTMS was responsible for defective construction work which had to be rectified and Mr Chan was responsible for the Landscape

355 ROA Vol II(A) at p 247, para 39D.

356 AC at paras 201–203.

Railings Issue and the Parapet Walls at the Pavilion Issue as Mr Chan asked for rectification work to be put in hand for his errors and omissions. On that basis, this would be a case of concurrent delays. GTMS will be relieved of liability for liquidated damages as it was entitled to an EOT for these additional works during a period of concurrent delay and Mr Chan should have issued a Termination of Delay Certificate from the time he asked GTMS to carry out rectification works in relation to his, *ie* Mr Chan's, errors and omissions. (c) On the facts as found in this case, after 28 May 2013, all delays up to 16 September 2013 (TOP) would be the liability of Mr Chan. In the above permutations, GTMS is responsible for (a) and Mr Chan is responsible for (b) and (c). It therefore could not be said that GTMS and Mr Chan have caused the same and indivisible damage to Mr Ser (*Crest Capital Asia Pte Ltd and others v OUE Lippo Healthcare Ltd (formerly known as International Healthway Corp Ltd) and another and other appeals* [2021] 1 SLR 1337 at [178]–[183]).

356 Nonetheless, in his claim for professional negligence against Mr Chan, Mr Ser is entitled to claim, and prove, any loss and damage he sustained as a result of Mr Chan's breach of contract and breach of duty. As for the tortious requirement of suffering damage, there can be no doubt that Mr Ser has suffered damage as a result of Mr Ser's negligence. Mr Ser has spent a large sum of money constructing three good class bungalows, *viz*, a relatively small number of top category bungalows, found only within prestigious areas designated by the Urban Renewal Authority and which must have special characteristics, including a minimum land area of 1,400 square meters or 15,070 square feet. Mr Ser was entitled to have them completed within a certain time period under the SIA Conditions. As referenced above, there were delays in obtaining TOP and Mr Chan was responsible for that part of the delay. It did not matter whether Mr Ser intended to use the bungalows for himself or his family or otherwise or to rent them out. He must have suffered some loss and/or damage as a result of

these delays. The problem for Mr Ser is how he pleaded his claims for damages against Mr Chan.

357 Mr Ser has claimed, but has not given any evidence of, loss or damage as a result of the premature issue of the MC, the premature release of the moieties of retention monies nor of the incorrect certification of the maintenance or defects liability period. This has not been addressed on appeal. We have partially touched upon those issues above but as Mr Ser has not been able to prove any loss or damage arising from these matters, we need make no awards on these claims.

358 It is convenient at this juncture to deal with Mr Singh's statement before us that Mr Ser has not dropped his claim for loss and damage due to his inability to rent out any of the bungalows.[357] We are quite surprised. During the trial, under cross-examination, Mr Ser withdrew this claim.[358] There was no re-examination or retraction of this withdrawal then. During the course of the third tranche of the trial, after Mr Ser had been extensively cross-examined in the earlier tranche, Mr Ser attempted to amend his Further and Better Particulars to re-introduce his claim for loss of rental revenue. This was roundly, and we might add rightly, rejected by the Judge: see Judgment at [729]–[748]. In our judgment, Mr Ser cannot resurrect this claim before us.

359 As noted above, Mr Ser has not pleaded any other alternative general or special damages suffered as a result of Mr Chan's breaches of contract and grossly negligent acts. This trial was not bifurcated. The Judge was therefore correct in awarding Mr Ser nominal damages of $1,000.

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357 Transcript at p 116, lines 12–28.

358 ROA Vol III(CN) at p 245, lines 22–25 (22 January 2019).

Costs of the summary judgment proceeding

360 For completeness, Mr Ser also claims against Mr Chan out-of-pocket expenses for the summary judgment application, appeals and related interlocutory proceedings (see [3] above), quantified at some $649,082.63 (Judgment at [718]). This sum was the balance he had allegedly incurred after recovering costs from GTMS. Mr Ser's argument appears to be that but for Mr Chan's negligent certification, Mr Ser would not have had to defend himself against GTMS's claims in the summary judgment proceedings.[359]

361 We find this argument without merit. First, we agree with the Judge that having failed to plead this claim for costs of the summary judgment proceedings, no recovery can be allowed for Mr Ser (Judgment at [719]). Mr Ser claims that there is no prejudice to Mr Chan because Mr Chan had the opportunity to address this claim. We think it does not lie in Mr Ser's mouth to now say that there is no prejudice, considering that the claim for costs of the summary judgment proceedings was not added to his consolidated Defence and Counterclaim, even after *three* rounds of amendments. Secondly, the summary judgment application concerned IC 25, IC 26 and FC. However, we have found the sums certified under these Payment Certificates to be largely correct (see [301] above). The only certificate tainted with negligence is the CC. Thirdly, we have concerns with *remoteness* – it is not readily apparent to us that the claim for costs of the summary judgment proceedings would be costs within the reasonable contemplation of either Mr Ser or Mr Chan, either as a matter of tort (see *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388) or contract (see *Hadley v Baxendale* (1854) 156 ER 145).

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359 AC at para 208.

362 For completeness, Mr Chan argues that the claim for costs should not be allowed because the CA had had an opportunity to consider the costs of the summary judgment proceedings, and chose not to order costs against him.[360] We do not find this argument convincing, for the simple reason that Mr Chan was not party to the summary judgment proceedings which were between Mr Ser and GTMS.

Costs

363 We lastly turn to address the Judge's costs orders for the proceedings at first instance. As costs are entirely at the discretion of the Judge (*Teh Guek Ngor Engelin née Tan and others v Chia Ee Lin Evelyn and another* [2005] 3 SLR(R) 22 at [25]), such discretion should only be interfered with on limited grounds (*Goh Chok Tong v Jeyaretnam Joshua Benjamin and another action* [1998] 2 SLR(R) 971 at [60]).

Mr Ser and GTMS

364 To recapitulate, the Judge ordered Mr Ser to pay costs to GTMS on a standard basis from 13 January 2014 (*ie*, the date the writ was filed) up until the date of the commencement of the trial on 8 November 2018, with costs payable on an indemnity basis thereafter (Costs Judgment at [15]). The Judge placed significance on three factors (Costs Judgment at [16]–[19]): (a) Mr Ser indulged in speculative claims and allegations that were completely without basis; (b) the claims made by Mr Ser were highly unreasonable and exaggerated; and (c) in the course of the trial, Mr Ser raised new evidence and new allegations that had not been set out in his pleadings or in his AEICs.

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360 2nd and 3rd RC at para 114.

365 On the first factor, Mr Ser argues that his allegations of fraud and bribery which the Judge criticised were responses to questions asked of him by Mr Chan's counsel. Therefore, the Judge erred in allowing these allegations to be ventilated.[361] In our view, this argument is unmeritorious. Mr Ser appears to be *blaming the Judge for not stopping him*. In the first place, it is *Mr Ser's responsibility to avoid making spurious allegations*. Moreover, given the seriousness of the allegation, the Judge was certainly entitled to allow Mr Ser to give evidence on this matter.[362] It does not lie in Mr Ser's mouth to now say, upon belated realising that his allegation was absolutely unmeritorious, that the Judge should have stopped him.

366 Mr Ser also argues that the Judge erred in focusing on the issue of dishonesty, since dishonesty is irrelevant to a claim in contract or negligence.[363] This is to us another unmeritorious argument. Mr Ser also claimed that there was an *unlawful conspiracy* against him, which is premised on an agreement to do unlawful acts. To that extent, any dishonesty on the part of GTMS or Mr Chan would have been certainly relevant in inferring an agreement to do unlawful acts.

367 On the second factor, Mr Ser argues that he should be entitled to "total and absolute rectification".[364] He is not. The law of damages subjects a claim in cost of cure to the threshold of reasonableness (see *Family Food Court* at [53]–[54]). Nor was his insistence on absolute rectification supported by the

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361 AC at para 222.

362 ROA Vol III(CM) at p 156, lines 3–23 and p 160, line 3–p 161, line 12 (17 January 2019).

363 AC at para 223.

364 AC at para 224.

"reasoned evidence of experts" as he claims.[365] His expert, Mr Chin, has been roundly criticised by the Judge as lacking in both partiality and expertise.

368 Furthermore, Mr Ser argues that his failure to mitigate his losses did not waste any time or costs. We find this argument unconvincing. Mr Ser did not attempt rectification work up to the date of the Judgment (Judgment at [140]).

369 On the third factor, Mr Ser argues that, specifically in relation to the punctured gas pipe, he had to introduce evidence belatedly because of GTMS's *volte face*. We find it noteworthy to set out Mr Ser's position verbatim:[366]

> Tan J's criticism of [Mr Ser's] late introduction of video evidence is also uncalled for. It is GTMS/CSY [the latter being Mr Chan's firm] who changed their case at trial. Mr Dennis Tan [*ie*, GTMS's director] originally asserted that only the gas pipe sleeve was damaged – not the gas pipe. GTMS further claimed in their pleadings not to know of any requirement to replace the gas pipe. CSY aligned himself with GTMS in his pleadings. It was only after Mr Tan admitted on 14 November 2018 that the photographs he had earlier sent CCA were not photographs of the punctured pipe and therefore did not prove rectification, that he asserted that he had nevertheless complied with **ED 1 [*ie*, the engineer's directions requiring the gas pipe to be rectified]** and that there was no basis to SKK's concerns of a leak. SKK had been prepared to proceed with his claim on the basis that GTMS failed to produce satisfactory evidence to prove rectification, but Tan J seemed dissatisfied that there was no objective evidence as to whether or not the pipe was repaired. Hence, SKK decided to break the ground and expose the pipes to settle the issue once and for all. This is why SKK applied to introduce the video evidence 'late', after trial had commenced. This new evidence proved conclusively that GTMS did not replace the pipe sleeve as they claimed. It also disproved their earlier claim that the gas pipe itself was intact. It was only after this video was produced that GTMS and CSYA [*ie*, the Firm] finally admitted on 28 and 29 November 2018 respectively that the gas pipe was punctured and the evidence which Tan J relied on at [the Judgment at] [407] emerged in the course of trial on 29 November 2018.

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365 AC at para 224.

366 AC at para 176.

[emphasis added in bold]

370 Mr Ser's position appears to be as follows. He sued GTMS for defects with the gas pipe, and GTMS first replied that there were no defects with the gas pipe. There were instead only defects with the *gas pipe sleeve*, which GTMS rectified in November 2013. However, the November 2013 rectification focussed only on the *gas pipe sleeve*, and that left open the possibility that the *gas pipe* also had defects. Further, by asserting that ED 1 (*ie*, the engineer's direction dated 24 March 2014 requiring replacement of the *gas pipe*)[367] was complied with, GTMS *subsequently changed its position*. This was because ED 1 presupposed that there were defects with the *gas pipe*,[368] and not the gas pipe sleeve. Therefore, by asserting that the ED 1 was complied with, GTMS must be taken to have impliedly accepted that there were also defects with the *gas pipe to begin with*. In the same vein, the email from the M&E consultant to GTMS on 7 March 2014 stating that "the dented gas pipes are required to be replace[d]" pertained to the *gas pipe*, and not the *gas pipe sleeve*, which suggests that there were also defects with the *gas pipe*.[369] However, and again, the evidence of the rectification work in November 2013 pertained to the *gas pipe sleeve*, and not the *gas pipe*. Therefore, as there was no evidence of problems with the *gas pipe itself*, Mr Ser found it necessary to get evidence pertaining to the *gas pipe* by himself.

371 We consider Mr Ser to have mischaracterised GTMS's position. Mr Ser assumes that by asserting that ED 1 was complied with, GTMS must be taken to have impliedly accepted that there were defects with the *gas pipe* itself. This is wrong. GTMS's director had explained in cross-examination that ED 1 was

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367 ACB Vol II(C) at p 261.

368 AC at para 174.

369 ROA Vol V(BO) at p 222.

satisfied *not because there were defects with the gas pipe which were rectified*; rather, *there were no faults with the gas pipe to begin with, but only the gas pipe sleeve, and therefore ED 1 was erroneously issued*.[370] In the same vein, while the email from the M&E consultant pertained to the *gas pipe*, GTMS's follow-up email *clarified that there were no defects with the gas pipe, but only the gas pipe sleeve*.[371] This was also recognised by the M&E consultant herself in her AEIC.[372]

372 Put differently, GTMS's case has been consistent – that *there were never any defects with the gas pipe, but only the gas pipe sleeve*. In that context, if Mr Ser wanted to expose defects with the *gas pipe*, he should have hacked open the ground *much earlier than when he actually did so (ie*, three weeks after the first tranche of trial commenced).

373 In any event, putting aside the belated introduction of evidence in relation to the gas pipe, there still exists Mr Ser's last-minute allegations of fraud and bribery and corruption (Costs Judgment at [18(b)]). Mr Ser justifies his conduct on the basis that he was "a 71 year old man who was deeply unhappy with the outcome of construction after paying over S$11 million to GTMS and S$1 million to [Mr Chan], and who had to endure [their] false claims and 14 days of relentless cross-examination".[373] Again, Mr Ser cannot seek to foist the blame for his actions onto the opposing parties (see [365] above).

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370 ROA Vol III(CE) at p 197, line 16–p 199, line 2; p 199, line 20–p 200, line 7 and p 201 lines 6–15.

371 ROA Vol III(BJ) at pp 249–251.

372 ROA Vol III(BI) at pp 223–224, paras 94–95.

373 AC at para 226.

374 In sum, the reasons offered by Mr Ser to resist the order for costs on an indemnity basis are unconvincing. We therefore see no reason to disturb the Judge's discretion to order indemnity costs against Mr Ser.

Mr Ser and Mr Chan

375 To recap, the Judge found that Mr Chan sent Mr Ser two letters containing offers to settle (Costs Judgment at [20]):

> (a) The first was a letter with an open offer to settle dated 22 February 2017. This letter offered that the Suit be settled on the basis that parties shall bear their own costs of the Suit, and Mr Chan shall pay Mr Ser's out-of-pocket expenses for the summary judgment proceedings.
>
> (b) The second was a Calderbank letter dated 5 July 2019, which provided that Mr Chan shall pay Mr Ser up to $100,000, and the parties were to bear their own costs for the Suit and HC/S 875/2015 (which was a related suit eventually consolidated with the Suit). Further, should Mr Chan accept this offer after 19 July 2019, Mr Ser was to bear Mr Chan's costs in relation to the Suit and HC/S 875/2015 on a standard basis up till 19 July 2019, and on an indemnity basis from 20 July 2019 up till the date of acceptance of the offer.

376 The Judge reasoned that while both offers to settle were not made in accordance with O 22A of the Rules of Court (2014 Rev Ed) ("Rules of Court") since they were not made in accordance with Form 33 of Appendix A to the Rules of Court (Costs Judgment at [21]), and thus did not fall under the statutory regime of offers to settle, they nevertheless should be taken into account by the court in awarding costs. The Judge also found that both offers to settle were

more favourable to Mr Ser than what he eventually received. On that basis, the Judge ordered Mr Ser to pay Mr Chan costs on a standard basis from 29 January 2014 (*ie*, the date of the third-party notice to join Mr Chan and CSYA to the Suit) up until 6 March 2017 (*ie*, the deadline for Mr Ser to accept the open offer to settle), with costs payable on an indemnity basis thereafter (Costs Judgment at [24]).

377 We agree with the Judge that Mr Chan's offers to settle, while not compliant with O 22A of the Rules of Court, may nevertheless be considered in ordering costs. The Judge's costs order proceeded on the premise that the two offers are more favourable to Mr Ser than what he ultimately received. This conclusion has not been altered by this appeal. The Judge's orders in relation to costs at [376] above stand.

Conclusion

378 Our conclusions and findings, and the reasons therefor, are set out above; in gist, they may be summarised as follows:

(a) On Issue 1, both EOT 2 and EOT 3 were correctly granted, such that the extended completion date is 17 April 2013 (see [114] above).

(b) On Issue 2, Mr Chan had prematurely and wrongly issued the CC on 15 May 2013, when Item 72(a) of the Preliminaries was not satisfied. It is therefore set aside and of no effect. In the absence of any other evidence and taking the earliest possible date, we hold that the CC should have been issued was on 16 September 2013, *ie* the date that the TOP was obtained (see [270] above).

(c) On Issue 3, the Payment Certificates were validly issued and the judgment entered in respect of the Payment Certificates at $1,103,915.48 stands (see [301] above), save that:

(i) Mr Ser is entitled, as against GTMS, to deduct $147,600 together with interest thereon from the date of the writ in respect of liquidated damages computed at $3,600 per day from 18 April 2013 to 28 May 2013 (a period of 41 days) from the $1,103,915.48 due under the Payment Certificates (see [332] above).

(ii) Mr Ser is entitled to deduct the sum of $21,048 together with interest thereon from the date of the writ as against GTMS, in respect of its failure to paint all four sides of the steel beams supporting the trellis (see [229] above).

(d) On Issue 4:

(i) **Remedies between Mr Ser and GTMS:** There being no outstanding applications for EOT and no other reasons not to do so, Mr Chan should have issued a Delay Certificate under cl 24(1) of the SIA Conditions. Liquidated damages against GTMS therefore commenced running from 18 April 2013 until 28 May 2013, when GTMS completed its rectification of non-compliant items of work after the First TOP Inspection, whereupon Mr Chan ought to and should have issued a Termination of Delay Certificate under cl 24(3)(a) as all further delays thereafter were not due to or caused by GTMS (see [332] above).

(ii) **Remedies between Mr Ser and Mr Chan:**

(A) Mr Ser's appeals in respect of the wrongful grants of EOT 2 and EOT 3 (see [337] above), the issuance of the Payment Certificates (see [338] above), and the Judge's exoneration of Mr Chan's supervision of GTMS (see [339] above) are dismissed, save for the issue of the intumescent paint, in respect of which we hold that Mr Chan is liable to Mr Ser for $42,096, together with interest thereon from the date of the writ (see [229], [302] above).

(B) Mr Chan should have issued a Delay Certificate pursuant to cl 24(1), as of 18 April 2013 to certify GTMS was in delay as of 18 April 2013, and issued a Termination of Delay Certificate pursuant to cl 24(3)(a) on 28 May 2013 as GTMS had completed its rectification of defects caused by GTMS (see [349] above). The delay in obtaining the TOP from 29 May 2013 to 16 September 2013 was due to errors and omissions in design committed by Mr Chan (see [174] above).

(C) However, Mr Ser has not shown that he suffered any other loss as a result of Mr Chan's omission to issue a Delay Certificate. As matters stand, there is a sum owing to GTMS by Mr Ser under the Payment Certificates (subject to a deduction in respect of the intumescent paint issue as held above at [378(c)(i)] and [378(c)(ii)]), which was subject to a stay of execution by consent of the parties pending this appeal, against which these liquidated damages can be set-off. Mr Ser's claim to an equivalent sum in liquidated damages from Mr

Chan is misconceived and dismissed and as Mr Ser has not pleaded any other alternative loss or damage as a result of Mr Chan's failures to issue a Delay Certificate under cl 24(1) and a Termination of Delay Certificate, the Judge was correct to award Mr Ser nominal damages of $1,000 as against Mr Chan (see [359] above). This award below stands and Mr Ser's appeal against the same is dismissed.

(D) No awards are made on Mr Ser's claims in professional negligence against Mr Chan for loss or damage as a result of the premature issue of the MC, the premature release of the moieties of retention monies nor of the incorrect certification of the maintenance or defects liability period (see [355] above).

(E) Mr Ser's claim against Mr Chan for the out-of-pocket expenses for the summary judgment proceedings fails (see [361] above).

(e) On costs:

(i) The costs order imposed by the Judge *viz* Mr Ser and GTMS stands.

(ii) The costs order imposed by the Judge *viz* Mr Ser and Mr Chan stands.

379 For the reasons above, we allow CA 20 in part and dismiss CA 36. As for costs of the appeals, each party is to file written submissions on costs, not exceeding 15 pages each within two weeks from the issue of this judgment. Except with leave there is no right to file reply submission on costs.

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

Chua Lee Ming
Judge of the High Court

Kirindeep Singh, Ajinderpal Singh, Thng Huilin Melissa and Toh Wei Qing Geraldine (Dentons Rodyk & Davidson LLP) for the appellant, Ser Kim Koi in Civil Appeal Nos 20 and 36 of 2021; Thulasidas s/o Rengasamy Suppramaniam and Ling Koon Hean David (Ling Das & Partners) for the first respondent, GTMS Construction Pte Ltd in Civil Appeal Nos 20 and 36 of 2021; Thio Shen Yi *SC* and Monisha Cheong (TSMP Law Corporation) for the second respondent, Chan Sau Yan (formerly known as trading as Chan Sau Yan Associates) and the third respondent, CSYA Pte Ltd in Civil Appeal Nos 20 and 36 of 2021.