RHTLaw Asia

RHTLaw Asia Building & Construction Law

Annual Review 2021

ONE across Asia

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FOREWORD

Challenges faced in 2021

2021 has been an extremely challenging year for the construction industry and the broader Built Environment Sector. Although construction works had restarted in Singapore by the start of 2021, manpower shortages, adoption of robust Safe Management Measures to mitigate the spread of COVID-19 infections, supply chain disruptions and delays in ongoing projects have resulted in significant productivity losses, which contractors either did not or have found difficult to track and document. Coupled with prolongation costs from delays and rising manpower and material costs, it is inevitable that many projects have blown their time and costs budgets, and many balance sheets have taken a significant beating.

COTMA and Government Measures to alleviate challenges

The government has proactively implemented several measures that have gone some way to alleviate the challenges faced by the construction industry. Financial assistance from the government implemented in 2020 and continued into 2021 included the $1.36 billion Construction Support Package, Foreign Worker Levy waivers and rebates, and wage subsidies for local employees under the Jobs Support Scheme. The COVID-19 (Temporary Measures) Act 2020 ("**COTMA**"), which was very timely implemented in April 2020 to provide a moratorium on legal action and enforcement, including calls on performance bonds, and to excuse delays caused by COVID-19 if a Notice of Relief is given, was extended into the whole of 2021 for the construction industry. Subsequent amendments to COTMA under Parts 8A, 8B and 10A provided for automatic extensions of time, facilitation of costs sharing between developers and contractors, and assessment for revisions to the contract price for increase in foreign manpower costs if negotiations between parties fail. As set out in in our COTMA

Update, most of these have expired or are due to expire as at the date of this publication. In anticipation of the expiry of COTMA, we spent some time last year talking to our clients about preparing for that eventuality and consequent lifting of the moratorium on legal action and enforcement.

COVID-19 is likely to impact how construction industry evolves

COVID-19 has impacted the way we live and work and is likely to impact the way the construction industry evolves in Singapore. COVID-19 has shown up the potential disadvantages of over-reliance on foreign manpower, the possibility of working collaboratively and finding a better balance in allocating risks to those who can control or sustain those risks, and the importance of protecting the environment. In this regard, the sector has not rested on its laurels. The Building and Construction Authority ("**BCA**") has been driving the adoption of Design for Manufacturing and Assembly (or DfMA) and Integrated Digital Delivery (or IDD), which will help increase productivity and also reduce reliance on foreign manpower. The Public Service Sector Conditions of Contract (PSSCOC) were amended last year to allow claims for Extensions of Time and Loss and Expense arising from a pandemic and to provide for provisional sums for cost items anticipated in a pandemic. Collaborative contracting has also been adopted for pilot projects using the Option Module E for collaborative contracting under

the PSSCOC. As for protection of the environment, the latest edition of the Singapore Green Building Masterplan was launched in early 2021, setting ambitious targets to accelerate transition to a low-carbon Built Environment. In that connection, the refreshed Green Mark Scheme was also launched, raising standards in energy performance and emphasizing sustainability outcomes such as designing for maintainability, reducing carbon footprint, using smart technologies, enhancing building resilience to climate change and creating healthier environments for building users. These changes have been reflected under the Legislation Update section.

Review of Cases in 2021

In this review, we first set out an update of the changes to COTMA and other significant legislative changes that occurred in 2021. This is followed by a review of all published cases in the Singapore High Court and its Appellate Division and Court of Appeal relating to issues arising from the Security of Payment Act ("**SOP Act**"), construction contracts and performance bonds. Some of these cases clarify the law, while others illustrate the type of factual issues that are frequently encountered by parties to a construction contract or the pitfalls when a potential dispute is not approached or managed correctly.

To highlight a few notable cases, in respect of the SOP Act, the High Court clarified in *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* that a clause providing for the suspension of payments following a termination is not enforceable if it runs foul of a "pay when paid" prohibition under s9 SOP Act, notwithstanding s4(2)(c) SOP Act. In *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd*, the Court of Appeal clarified the circumstances when a winding up may be stayed where the adjudication determination debtor has a cross-claim. The Court of Appeal also clarified the legal nature of a performance bond, and what is required for a call of a conditional bond that is in the nature of an indemnity in *AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd*. The long running case of *GTMS Construction Pte Ltd v Ser Kim Koi* is a useful illustration of the issues that can arise when seeking EOT, obtaining practical completion, and enforcing a liquidated damages clause.

We also kept an eye out for UK cases that may be of relevance and persuasive authority. This year, we highlight the UK Supreme Court case of *Triple Point Technology Inc v PTT Public Company Ltd* relating to the interpretation of liquidated damages clauses in the event of termination, and *Ecoworld Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd* which illustrates the importance of a liquidated damages clause being clear, certain, operable and not running foul of the penalty test where the contract permits for partial handover; and when a cap on liquidated damages can apply as a general cap on damages for delay. On the facts, *Ecoworld* may be reconcilable with the Singapore High Court decision of *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd*, which held that a liquidated damages clause, which is unenforceable as a result of an act of prevention, does not in and of itself operate as a cap on general damages.

Concluding Remarks

2022 is likely to present a carry-over of the challenges that presented in 2020 and 2021 as a result of the pandemic, with new challenges caused by higher energy and material costs and the general threat of inflation. As we all know, with challenges come new opportunities and approaches. I hope you will find the review a useful reference as you navigate these challenges.

Best wishes,

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COTMA UPDATE

Since the COTMA was passed on 7 April 2020, the Act has provided much help and support to businesses and individuals who have been affected by the COVID-19 pandemic in the past 2 years. Amongst the various measures provided for in the Act, Parts 2, 8A, 8B and 10A have been of particular relevance to the building and construction industry and will be the subject of our brief commentary herein (as of May 2022).

S/N	Part of COTMA	Expiry of Relief Period	Comment(s)
1	**Part 2:** Temporary relief for inability to perform contracts	28 Feb 2022* (expired)	While the relief period under Part 2 has ended, the following 2 reliefs will continue to apply to applicable contracts beyond the expiry of the prescribed period so long as a Notification for Relief was served by 28 February 2022: ■ Defence against claims for breach of contract in respect of the inability to supply goods or services, occurring within the prescribed period and which was to a material extent caused by a COVID-19 event ■ Any period, falling within the prescribed period, during which a contractual obligation is unable to be performed will be disregarded in calculating liquidated damages or other delay damages
2	**Part 8A:** Universal extension of time ("**EOT**")	–	All eligible construction contracts would be granted a universal EOT of 122 days to address delays which arose between 7 April 2020 and 6 August 2020. No application will be required as this EOT relief applies automatically.
3	**Part 8B:** Temporary measures for cost-sharing in construction contracts	28 Feb 2022* (expired)	Contractors of eligible construction contracts who wish to claim cost-sharing of non-manpower-related qualifying costs incurred between 7 April 2020 and 28 February 2022, which arose due to delays caused by COVID-19, will need to include such claim(s) in their regular payment claims to their customers or clients. The co-sharing percentage between parties is 50% of the qualifying costs, subject to a monthly cap of 0.2% of the contract sum and an overall cap of 1.8% of the contract sum.
4	**Part 10A:** Reliefs for construction contracts affected by increase in foreign manpower salary costs	30 June 2022 (extended)	In light of the recent extension of relief period for Part 10A, contractors of eligible construction contracts may continue to apply for an adjustment to the contract sum for the increase in manpower costs (in respect of Work Permit Holders) due to COVID-19 during the period of 1 October 2020 to 30 June 2022, if no amicable resolution can be reached between contracting parties. An application for an Assessor's determination shall be submitted up to 2 months after the end of the relief period, i.e. **latest by 31 August 2022**. Further information on Part 10A is available here.

**For more details, the circular dated 17 February 2022 issued by BCA regarding the end of relief period under Part 2 and Part 8B of the Act can be found here.*

As for Public Sector Construction Contracts ("**PSCCs**") which are eligible, BCA had previously announced (in its circular dated 10 November 2021 which is available here) that an **ex-gratia EOT of 34 days** would be granted for delay due to COVID-19 related events for the period from 1 January 2021 to 30 June 2021. More recently, BCA has further announced (in its circular dated 3 March 2022 which is available here) that government agencies will grant an **ex-gratia EOT of 33 days** (or part thereof) for delay due to loss of productivity for the period from 1 July 2021 to 28 February 2022. This is stated to be the final broad-based grant of ex-gratia EOT for PSSCs arising from COVID-related delay. That said, for the period after 28 February 2022 up until 31 December 2022, contractors of eligible construction contracts may still request for EOT due to COVID-19 events by providing detailed substantiation of their claim to their respective government agency clients.

It should be noted that the aforementioned grants of ex-gratia EOT are over and above the 122 days of universal EOT granted for the period between 7 April 2020 and 6 April 2020 (under Part 8A of the Act), and the 49 days of ex-gratia EOT granted for the period between 7 August 2020 to 31 December 2020.

As regards the approach for PSCCs under Part 10A of COTMA, BCA announced (in its circular dated 18 August 2021 which is available here) that the public sector will offer a base 1.3% of monthly progress payment ("**1.3%-Adjustment**") to address foreign manpower salary costs increase for the period of 1 October 2020 to 30 April 2021. In addition, it was announced that there would be no increase in progress payment for the period of 1 May 2021 to 30 September 2021, and that BCA would continue to monitor and review the impact of the increased foreign manpower salary cost. BCA further clarified (in its circular dated 27 October 2021 which is available here) that the 1.3%-Adjustment is a base amount which may be increased if contractors are able to provide substantiation for a higher amount. Contractors would also be given only one opportunity to submit their request to the government agency for each applicable period and should therefore properly determine the applicable period in which such costs have been incurred and submit their substantiations supported with documentary proof on a best effort basis. Notwithstanding that the relief period for Part 10A has since been extended a couple of times to 30 June 2022 (as of May 2022), BCA has not made any further announcements regarding the co-sharing of manpower costs increase by government agencies for the period of 1 October 2021 to 30 June 2022.

LEGISLATION UPDATE

Green Mark 2021

The BCA Green Mark 2021 ("**GM 2021**") was pilot launched in April 2021 and took effect from 1 November 2021. GM 2021 has 2 key shifts: (a) aggressively raising energy efficiency standard with the aim of mainstream delivery of Super Low Energy (SLE) buildings; and (b) aligning with the United Nation (UN) Sustainable Development Goals (SDGs) to cover key sustainability outcomes. Its criteria have been restructured into two broad categories of Energy Efficiency and Sustainability Sections, and the separate criteria which previously covered Non-Residential Buildings, Residential Buildings, and Existing Non-Residential Buildings have been streamlined into a single scheme. Details on GM 2021 can be found here.

Environmental Sustainability

The Environmental Sustainability requirements in the Code for Environmental Sustainability of Buildings (Edition 4.0) ("**ES 4.0**") and the Code on Environmental Sustainability Measures for Existing Buildings (Edition 3.0) ("**ESM 3.0**") were introduced to focus on building energy efficiency and carbon reduction measures. The ES 4.0 will apply to submissions from 1 December 2021 onwards, while the ESM 3.0 will apply to submissions from 1 June 2022.

One of the key changes to these requirements includes raising the minimum energy performance standards to ensure energy efficiency improvements of 50% over the 2005 baseline for new buildings and 40% over the 2005 baseline for existing buildings which have undergone major retrofit. A further key change will be the introduction of a new requirement to implement at least 2 of 7 sustainable construction practices.

As part of the efforts to streamline and reduce regulatory burden, BCA also exempted building works involving a GFA of less than 5000m^2 from the ES 4.0 through an amendment to regulation 3(1) of the Building Control (Environmental Sustainability) Regulations 2008 which came into operation on 1 December 2021. Further information on the changes to the sustainability requirements can be found in this BCA circular.

Building Control (Buildability and Productivity) Regulations

With COVID-19 accentuating the urgency for the built environment sector to transform and strengthen its resilience, particularly in reducing reliance on manpower, BCA on 1 March 2022 issued a circular to accelerate the adoption of Design for Manufacturing and Assembly (DfMA) for large developments through the following enhancements to the Code of Practice on Buildability and amendments to the Building Control (Buildability and Productivity) Regulations 2011 which took effect on 30 April 2022:

a. Higher minimum Buildable Design Scores (B-Scores) for large commercial, industrial and institutional projects with Gross Floor Area (GFA) ≥ 25,000m^2;

b. Enhanced outcome-based options for all large development types, in lieu of meeting the minimum B-Score;

c. Mandatory adoption of specific productive technologies for residential non-landed (RNL) projects; and

d. Requirement for Professional Engineers (PE) for Mechanical and Electrical Works to jointly declare B-Score submissions with Qualified Persons (QP) for Architectural and Structural Works.

BCA's circular on these enhancements and changes is available here.

CASE REVIEWS

Security of Payment Act

1. Section 4(2)(c) does not take primacy over Section 9 of the SOP Act

In ***Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] SGHC 72**, the Singapore High Court ("**HC**") had the opportunity to consider the interplay between s4(2)(c) and s9 of the SOP Act in determining whether "pay when paid" provisions in a construction contract would be rendered unenforceable where the contract has been terminated. The relevant parts of both provisions are reproduced as follows:

s4(2)(c):

"This Act does not apply to –

(c) any terminated contract to the extent that –

i. the terminated contract contains provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract; and

ii. that date has not passed or that event has not occurred"

s9:

"(1) A pay when paid provision of a contract is unenforceable and has no effect in relation to any payment for construction work carried out or undertaken to be carried out, or for goods or services supplied or undertaken to be supplied, under the contract."

Frontbuild Engineering & Construction Pte Ltd ("**Frontbuild**") was the main contractor for a project and had engaged JHJ Construction Pte Ltd ("**JHJ**"), as its sub-contractor for certain subcontract works pursuant to a letter of award ("**Subcontract**"). The Subcontract included a termination clause ("**Clause 9**") which provided that Frontbuild may terminate the Subcontract on certain grounds, and upon such termination, "*[n]o further payment shall be made to [JHJ] until the whole of the Main Contract Works has been completed*".

Disputes arose sometime in February 2020 and about a month later, Frontbuild issued JHJ a notice of termination of the Subcontract pursuant to Clause 9. On 31 March 2020, JHJ issued and served on Frontbuild a payment claim for work done for the period ending 31 March 2020. No payment response was submitted by Frontbuild and the claim was subsequently referred to adjudication, where the adjudicator decided in favour of JHJ. Frontbuild then applied to set aside the AD and argued, *inter alia*, that the adjudicator ought to have found pursuant to s4(2)(c) that the SOP Act did not apply to the Subcontract given that it was terminated and JHJ would thereby be precluded from making any progress claim.

In dismissing Frontbuild's setting aside application, the HC held that s4(2)(c) does not take primacy over s9. In other words, when s4(2)(c) is construed to decide whether the SOP Act applies to a particular terminated construction contract, any termination and suspension of payment provisions

in that contract would be given effect only in the event that they do not fall foul of s9. On the facts, the HC found that Clause 9(b) of the Subcontract did, in substance, operate as a "pay when paid" provision as it had the effect of making the liability of Frontbuild to pay money contingent on the operation of another contract, and was therefore unenforceable pursuant to s9. Accordingly, the SOP Act was still applicable to the Subcontract notwithstanding that it was terminated and JHJ remained entitled to submit its payment claim.

Takeaway:

It is clear that a "pay when paid" clause is unenforceable under s9 SOP Act. S4(2)(c) was incorporated in the 2018 amendments to the SOP Act to allow contracts to specify timeliness different from those provided in SOP Act for the purpose of final payments to a contractor who is terminated. This case makes clear that such provision must not run afoul of s9 SOP Act, that is, it cannot make the liability to pay contingent on the operation of another contract.

2. Liquidated Damages can no longer be set-off in SOP Adjudications unless supported by documentary agreement on quantum or certificate required to be issued under the contract

In ***Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2021] SGCA 34**, the Singapore Court of Appeal ("**CA**") had to decide whether an adjudicator acted outside of his jurisdiction by allowing liquidated damages to be set off against a contractor's claim under the pre-amendment SOP Act.

The court found that the adjudicator had acted within his jurisdiction, which arose from s15(3) and s17(3) of the pre-amendment SOP Act, as liquidated damages had been raised by Goldbell Engineering Pte Ltd in its Payment Response.

S15(3)(a) stated that where an adjudication relates to a construction contract, the respondent may include in the adjudication response, and the adjudicator may consider, "*any reason for withholding any amount*, including but not limited to any cross-claim, counterclaim and *set-off*" as long as that reason was included in the relevant payment response. S17(3)(d) in turn provided that an adjudicator shall have regard to the payment response. Furthermore, s17(3)(b) required that an adjudicator have regard to the provisions of the contract, which in this case entitled Goldbell to deduct liquidated damages from any moneys due, or to become due, to Range Construction Pte Ltd.

However, the court noted that s15(3) has been amended to omit any reference to set-offs, and that the position has changed with s17(2A) of the current SOP Act requiring an adjudicator to disregard any part of a payment claim or payment response relating to damage, loss or expense save in select circumstances.

Takeaway:

Under the amended SOP Act presently in force, a respondent in an adjudication application would not be entitled to raise liquidated damages unless it is supported by documentary agreement on its quantum, or by any certificate or other document required to be issued under the contract.

3. Winding up petitions based on an Adjudication Determination may be stayed if there is a *prima facie* cross-claim which equals or exceeds the claim

In ***Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] SGCA 61**, the CA had to consider the interplay between the temporary finality of adjudication determinations ("**ADs**") and the finality of winding up a debtor which has *bona fide* cross-claims.

By a letter of award dated 7 November 2016, Zhong Kai Construction Co Pte Ltd ("**ZK**") engaged Diamond Glass Enterprise Pte Ltd ("**DG**") as its subcontractor for external façade cladding, blast/ballistic doors and windows, aluminum door and window works for a project at Changi Airport. DG secured an AD for $197,522.83, but ZK did not pay the adjudicated amounts and instead commenced court proceedings claiming liquidated damages of $501,800 for DG's alleged delay in completing its work and damages of $358,870.25 for rectification of work that was not properly carried out or not completed. DG sought to enforce the AD by serving a statutory demand and filing a winding up petition.

Allowing ZK's stay application, the CA held that it is not open to an adjudication determination judgment debtor ("**ADJ debtor**") to dispute the debt comprised in the AD before a winding up court because s21(1) of the SOP Act confers temporary finality on the AD. However, the ADJ debtor only needs to show, on a *prima facie* standard, the existence of a justiciable cross-claim that is likely to equal or exceed the claim against the debtor. Provided that the cross-claim is not being raised in an abuse of the court's process, it may seek an injunction or to stay or dismiss a winding-up petition.

The court rejected DG's argument that it was justified to stop work because of ZK's non-payment, as not every instance of non-payment will suffice to constitute repudiation. The court also found that ZK met the *prima facie* standard to resist a winding-up order as the documentary evidence, including a letter from the SO, supported the inference that there were delays on DG's part, and ZK's claims of delay and incomplete/defective works were raised well before DG served its payment claim.

The CA also observed that since a creditor serving a statutory demand utilizes a statutory presumption to prove that the company is unable to pay its debts, this route involves a presumption which can be rebutted by proof to the contrary. An example was the facts of *BNP Paribas v Jurong Shipyard Ltd* [2009] 2 SLR(R) 949, where the respondent's offer to place in escrow sufficient funds to meet any judgment obtained by the appellant bank confirmed that it was *not* insolvent, and the substantiality or insubstantiality of the dispute was no longer a consideration because the debtor was not unable to pay its debts. The filing of a winding up petition would thus have amounted to an abuse of process.

In deciding whether a conditional stay ought to be granted, the CA considered that under s27(5) of the SOP Act, an ADJ debtor who applies to set aside an AD must pay into court the unpaid portion of the adjudicated amount as security. The court decided, on analogy to s27(5), that it was appropriate to require ZK to pay the adjudicated amounts into court since the amount was not inordinately high or crippling and, upon ZK paying it into court, there could be no justification to presume that ZK was insolvent on the basis that it is unable to pay its debts.

However, the court highlighted that it was not appropriate to lay down a general rule that parties in the position of ZK should pay the adjudicated amounts into court for a stay. For example, such an order would be unjust where the project is at an end, in the defects liability phase, or has been terminated, and the payment claim is in effect the final accounts for the project. To make an ADJ debtor pay the adjudicated amount into court in such circumstances may cause great financial stress and could result in tying up large sums of money whilst the matter is arbitrated or litigated.

Takeaway:

This case provides clarity on the balance to be struck between the competing policies of ensuring cashflow and the draconian effects of winding up an ADJ debtor which has cross-claims. The court decided that although an ADJ debtor cannot dispute an AD, it may obtain a stay or dismissal of the winding up if it can establish a *prima facie* cross-claim likely to equal or exceed the claim. Of course, the cross-claim cannot be raised as an abuse of process, and should therefore be supported by documentary evidence showing that the dispute was *bona fide* and not an after-thought or raised tactically. The decision also provides debtors a clear and simple option to avoid a winding up premised on an AD, that is to offer to secure the amount by placing it in escrow or paying it into court, although that is not always necessary and is not a general rule of application.

4. Setting aside of an adjudication determination on the ground of fraud and stay of enforcement pending arbitration

In ***Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd* [2021] SGHC 239**, the HC considered, *inter alia*, whether an adjudication determination should be set aside on the ground of fraud and whether a stay of enforcement ought to be granted pending arbitration proceedings.

By way of a subcontract dated 1 September 2019, Dongah Geological Engineering Co Ltd ("**Dongah**") engaged Jungwoo E&C Pte Ltd ("**Jungwoo**") as its subcontractor for a project. Sometime in 2021, Jungwoo alleged that Dongah owed it monies for the aggregate progress payments for construction works that it had performed, and consequently served on Dongah a payment claim on 20 April 2021.

Shortly after, Jungwoo commenced an adjudication application against Dongah and on 15 July 2021, the adjudicator rendered his adjudication determination ("**AD**"), where he found that Dongah was liable to pay Jungwoo the sum of $2,428,690.04. While the adjudication proceedings were ongoing, Dongah commenced arbitration proceedings against Jungwoo in the Singapore International Arbitration Centre ("**ARB 210**").

Of the AD sum of $2,428,690.04, $2,154,410.43 related to variation work, namely, light grouting work where cement dosage was 60kg/m^3. Clause 11.9 for valuing variation work was as follows:

> *"In case new items which are not listed, or listed but have no defined unit rate in the Bill of Quantities occur during the performance of Subcontract Works, the unit rate for these items shall be calculated at i) similar Unit Prices and Rates in the Bill of Quantities, ii) if there are no similar Unit Prices and Rates to be applicable, then at the reasonable then-current market rate to be agreed by the Parties, or iii) in the event of disagreement, at such rate as the Contractor shall determine as appropriate, in his opinion, which shall be used to settle both Interim Final Account and Final Account hereof. For the avoidance of doubt, this paragraph shall be applied to the determination for the new items for Change In Works."*

Jungwoo argued that the applicable rate for light grouting work was similar to a separately agreed rate of $18.90/m^3 in respect of trench grouting where the cement dosage was 150 kg/m^3. In reply submissions submitted 4 days before the adjudication conference, Jungwoo also tendered 2 quotations from 2 other contractors which quoted $21.50/m^3 and $23.50/m^3 for the same light grouting work that had been completed by Jungwoo.

The adjudicator decided in the AD:

> *"In my view, while there appeared to be some possible correlation between the cement dosage and/or grouting capacity of the various types of grouting works as well as applicable rate, it is unclear to me if such a simplistic calculation of the applicable rate for the light grouting works should be adopted, in particular, because the cement dosage (and/or grouting capacity) and the applicable rate may not be linearly correlated. Instead, I am satisfied that there is sufficient similarity between the trench grouting works and the light grouting works for them to be assessed at the same rate, in accordance with limb (i) of Article 11.9 of the Agreement."*

Concurrently, Dongah terminated the contract on the ground that Jungwoo refused to return to the project site to resume work by 15 April 2021, despite notice to resume work being given by 16 March 2021.

Later, Dongah discovered that (a) the 2 contractors were micro-companies that were not qualified or capable to do the works, and (b) at the same time that Jungwoo submitted its payment claim, Jungwoo had quoted for $5/m^3 for light grouting work for another project. The main contractor, GS Engineering & Construction Corporation, had in July 2021 agreed with Dongah to a rate of $10/m^3 for the light grouting work.

Dongah also discovered that one of two DSM machines that Jungwoo had was no longer at the project site or at the yard, that Jungwoo was operating out of a virtual office, and that one of its two foreign shareholders had left the country. Dongah's new solicitors then wrote to Jungwoo asking for its financial documents and evidence of its ongoing projects. Jungwoo refused to give the documents to them. It was subsequently revealed that while Jungwoo had submitted quotes since April 2021 for new projects, it did not have any ongoing projects.

Dongah filed an application to set aside the AD on the ground of fraud, in that, Jungwoo misrepresented that the two quotations reflected market rates for light grouting works when it knew them to be false, and in the alternative, that the AD be stayed on the ground that Jungwoo was insolvent or that if the stay were not granted, the monies paid to Jungwoo would not ultimately be recovered if the dispute between the parties were finally resolved in Dongah's favour in ARB 210.

On the issue of setting aside the AD on the ground of fraud, the HC applied the two-step test in the CA's decision of *Façade Solution Pte Ltd v Mero Asia Pacific Ltd* [2020] 2 SLR 1125, and found on the facts that Dongah had failed to meet the high threshold of adducing "compelling evidence" of fraud by Jungwoo. The court also held that the adjudicator did not rely primarily on the quotations from the 2 other contractors in deciding that the light grouting variation work was sufficiently similar to trench grouting work for the same rate to apply pursuant to Clause 11.9 of the Subcontract.

In determining the issue of a stay of enforcement, the HC first reiterated the test set out in the CA's decision in *W Y Steel Construction v Osko Pte Ltd* [2013] 3 ALR 380 ("***W Y Steel***"), and further noted that it has been clarified in *CEQ v CER* [2020] SGHC 192 that the two limbs in the test are disjunctive. The two limbs of the test are:

> *"(a) there is clear and objective evidence of the successful claimant's actual present insolvency; or*
> *(b) where the court is satisfied on a balance of probabilities that if the stay were not granted, the monies paid to the claimant would not ultimately be recovered if the*

dispute between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body."

On the facts of the case, the HC found that it would be appropriate to grant a stay of enforcement as it was satisfied that if the stay was not granted, the monies paid to Jungwoo would not ultimately be recovered if the dispute in ARB 210 was finally resolved in Dongah's favour. In coming to its decision, the HC took into account, *inter alia*, the following facts:

a. Jungwoo refused to provide Dongah with its bank account statements.

b. Jungwoo did not have fresh construction projects and was therefore without a steady stream of income.

c. There was evidence that Jungwoo was selling its remaining equipment, which raised the suspicion that Jungwoo was liquidating its assets to raise funds due to its poor cash flow.

d. Jungwoo is a foreign company with two Korean shareholders and one of them had returned to Korea with no plans of returning. There was thus a real risk that the remaining shareholder might also leave Singapore after receiving the AD sum and then wind up Jungwoo subsequently.

Takeaway:

This case illustrates the challenges of setting aside an AD on the ground of fraud as the evidence for fraud must be compelling. It would be particularly difficult if the facts alleged to be false cannot be objectively ascertained, for example. that the quotations were contrived and did not reflect market rates. In relation to the stay of an AD, this case is a good illustration of when the courts will grant a stay on the second ground of *W Y Steel*, for example, when there are no-ongoing projects and evidence of dissipation of assets or winding down of the business.

Variations

5. No payment for variation works that had been instructed or requested orally

In ***Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63**, the plaintiff sub-subcontractor, Vim Engineering Pte Ltd ("**Vim**"), brought a claim against the defendant subcontractor, Deluge Fire Protection (SEA) Pte Ltd ("**Deluge**"), for balance payment due to it, including variation works which were allegedly instructed by Deluge verbally.

Vim's variation claims were dismissed as the HC found on the facts that:

a. There were no written instructions from Deluge, even though the contract between both parties expressly stipulated that variation works shall be carried out *only* with written instructions from Deluge's project manager; and

b. There was no waiver or estoppel of the requirement for written instructions as there was no evidence that Deluge or the main contractor had approved or accepted Vim's variation works. For instance, Vim relied on Deluge's project manager's and his subordinate's signatures on various purported variation works invoices to argue that Deluge had accepted the works and would therefore pay for them. The HC rejected this and instead accepted that those signatures were mere acknowledgement that the works had been performed as Deluge's project manager had added a comment on all the acknowledgement pages signed by him stating that the claims would be submitted to the main contractor for approval.

The HC also dismissed Vim's *quantum meruit* claim on the basis that there was no evidence that Deluge had received any additional payment from the main contractor for the variation works claimed by Vim. On the facts and considering the contractual requirement for written instructions, the HC found that Deluge was not unjustly enriched and if Vim had in fact carried out any variation works, it did so contrary to the contractual clause.

Takeaway:

This case illustrates the importance of carrying out variation works strictly in accordance with the terms of the contract or keeping contemporaneous written confirmation of the verbal instructions, otherwise contractors run the risk of not receiving payment even if the variation works have been performed.

6. Parties may orally depart from a No Oral Modification Clause only if such agreement is express or necessarily implied

In ***Charles Lim Teng Siang v Hong Choon Hau* [2021] SGCA 43**, the CA dealt with the issue of whether an oral agreement to rescind a contract

was invalid because of a No Oral Modification ("**NOM**") clause.

The appellants entered into a Sale and Purchase Agreement ("**SPA**") to sell to the respondents 35 million shares in PSL Holdings Ltd for $10.5 million. Clause 8.1 of the SPA provided that:

> *"No variation, supplement, deletion or replacement of or from this Agreement or any of its terms shall be effective unless made in writing and signed by or on behalf of each Party."*

The appellants claimed damages for the respondent's alleged breach of the SPA by wrongfully failing to complete the sale. The claim was dismissed as it was found at trial that during a telephone call on 31 October 2014 between Charles Lim and Hong Choon Hau, the SPA was rescinded by mutual agreement.

On appeal, the appellants raised a new argument that the oral rescission was invalid because it was in contravention of clause 8.1. The CA rejected this argument on the basis that it was patently clear that clause 8.1 did not apply to recission, since the common denominator underlying the four forms of modifications which had to be made in writing under the clause was that the SPA would continue to remain valid and in force. Recission clearly did not fall within the meaning of any of those four terms.

Although this was sufficient to dispose of the case, since a five-judge coram had been specially convened, the court ventured to make provisional observations regarding the legal effect of NOM clauses such as clause 8.1. The CA observed that there are at least 3 schools of thought:

a. A NOM clause will be given full effect such that any subsequent modification will be deemed invalid unless it complies with the formalities stipulated ("**Sumpton approach**");

b. Where parties orally agree to depart from a NOM clause, such agreement will be treated as valid. Such oral agreement can be express or by necessary implication but should not be lightly inferred in a situation where parties merely agree to an oral variation without express reference to the NOM clause. A strict test should be applied before the court finds that parties had, by necessary implication, agreed to depart ("**Briggs approach**"); and

c. A NOM clause merely raises a rebuttable presumption that in the absence of an agreement in writing, there would be no variation ("**Comfort Management approach**").

The CA disagreed with the Sumpton approach taken by the majority of the UK Supreme Court in *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] 4 All ER 21, opining that this conflated parties' *individual* autonomy with their collective autonomy and erroneously suggested that once parties have agreed to a certain set of rules, they cannot *together* agree to change those rules.

The court instead found that the Briggs approach accorded with their view, as it respects and upholds parties' collective autonomy to depart from NOM clauses if they decide to do so. However, the court preferred a wider test as to when it can be necessarily implied, namely "*whether at the point when parties agreed on the oral variation, they would necessarily have agreed to depart from the NOM clause had they addressed their mind to the question, regardless of whether they had actually considered the question or not.*"

Although the CA concluded that it maintained a preference for the Comfort Management approach, it clarified that the only difference with the Briggs approach was that in order for the court to infer that parties had by necessary implication agreed to depart from a NOM clause, it should not be strictly required for the parties to have specifically addressed their minds to dispense with the NOM clause when agreeing to an oral variation.

For completeness, the CA also observed that even if the oral rescission was deemed invalid by operation of clause 8.1, the appellants would in any event have been estopped from enforcing the SPA. The oral agreement to rescind constituted a clear and unequivocal representation that they would not enforce the SPA, which the respondents relied on by deciding not to complete the SPA. This caused them detriment as the publicly listed share price of PSL shares on 3 May 2018 had substantially plummeted such that it would be inequitable to now enforce the SPA.

Takeaway:

The facts of this case show that a NOM clause must be drafted clearly to set out all events parties intend for it to apply to, including for example rescission or termination. The decision on the legal effect of NOM clauses is also highly significant as it departs from the position of the UK Supreme Court, and instead adopts the approach that parties are entitled to orally depart from a NOM clause either by express or implied agreement. It also signals a subtle shift away from the Comfort Management approach, which the CA itself recognized "*may be construed as treating a NOM clause as having no real effect*".

7. Whether an alleged agreement with its concomitant terms existed

The dispute in ***Taishi-Tech (S) Pte Ltd v Hyundai Engineering & Construction Co Ltd* [2021] SGHC 208** centred on the specific terms of an oral agreement which was entered into between both parties.

In September 2013, the main contractor of a residential and commercial development

("**Watertown Project**"), Hyundai Engineering & Construction Co Ltd ("**Hyundai**"), engaged J-Plan Associates Pte Ltd ("**J-Plan**") as its subcontractor, which in turn subcontracted a further part of the works to Taishi-Tech (S) Pte Ltd ("**Taishi**"). Taishi claimed that throughout the course of their engagement, J-Plan often failed to make timely payment, claiming financial difficulty. As a result, Taishi ceased work and stopped delivering materials for the Watertown Project in November 2016.

Subsequently, Hyundai and Taishi entered into some agreement for the latter to receive direct payment from the former for work done under the sub-subcontracts. While parties did not dispute the existence of an agreement, they were in disagreement as regards the *terms* of such agreement.

In particular, Taishi alleged that Hyundai agreed to pay it directly for *all* works done in respect of the Watertown Project so as to ensure that the works would be completed on time ("**Alleged Direct Deal Agreement**"). On the other hand, it was Hyundai's case that the agreement was entered into with J-Plan, instead of Taishi, and that the terms of the agreement provided that such direct payments to Taishi would be made only out of sums due to J-Plan, specifically for the work to be performed by Taishi pursuant to its subcontract with J-Plan.

In determining whether Taishi could prove that the Alleged Direct Deal Agreement was formed with its concomitant terms, the HC first set out the CA's position in *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 4 SLR 1206, stating that "*the first port of call of any court in determining the existence of an alleged contract and/or its terms would be the relevant documentary evidence*".

On the facts, the HC held that there was insufficient evidence to show that the Alleged Direct Deal Agreement existed. Instead, the court was satisfied by the extensive documentary evidence adduced that the agreement was only for Hyundai to pay Taishi directly for the sums the former owed J-Plan, for J-Plan's work in the project. For instance, the HC accepted one of the emails adduced as evidence to show that Taishi accepted that payment by J-Plan to it was to be on a back-to-back basis, i.e. following payment from Hyundai to J-Plan. Accordingly, the HC found that the terms of the agreement were different as compared to those under the Alleged Direct Deal Agreement and Taishi's claim against Hyundai was thereby dismissed.

Takeaway:

This case is a very useful illustration of the pitfalls that can arise when a sub-sub-contractor tries to negotiate payment directly from the main contractor. It is generally recommended that any negotiations be reduced into an agreement in writing. An agreement in writing can be a formal written agreement or by way of exchange of correspondence where all the negotiated terms are collated, clarified and reduced into writing. This will help avoid ambiguity or uncertainty of terms for any number of reasons. It is also important, when making an agreement, to be clear who the obligor is, whether the obligor is a party to the agreement, and to whom the obligation is owed. The manner of how that obligation is to be discharged is also important. For example, in this case, that payment is made by Hyundai directly to Taishi for the work that the latter did is very different from Hyundai paying J-Plan for the work that Taishi did, which runs the risk of insolvency of J-Plan or what is actually paid if Hyundai and J-Plan have a running account with each other so that only net payment after set-off is made.

Extension of Time, Certification of Completion & Liquidated Damages

8. Force majeure clause is not unenforceable for lack of definition, and an act of prevention renders a liquidated damages clause inoperable

The case of ***GTMS Construction Pte Ltd v Ser Kim Koi (Chan Sau Yan and another, third parties)* [2021] SGHC 9** concerns a long-standing dispute between an employer and a contractor and architect, where the HC examined thoroughly the former's allegations of conspiracy against the latter two. Intertwined within the multitude of allegations were numerous issues relating to, *inter alia*, the following which would be the focus of this summary:

a. Whether the specific delay event could be classified as a force majeure event under the terms of the contract for the purpose of granting an extension of time; and

b. Whether the contractor was liable to pay liquidated damages.

Briefly, the dispute relates to the construction of three good class bungalows ("**Project**") which is owned by Mr Ser Kim Koi ("**Project Owner**"). GTMS Construction Pte Ltd was appointed as the main contractor for the Project ("**Main Contractor**") and the first third party, Chan Sau Yan Associates, was engaged as the architect ("**Architect**"). One of the documents comprising the contract between the Project Owner and the Main Contractor was the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) (9th Ed, September 2010) ("**SIA Conditions 2010**").

The suit was first commenced by the Main Contractor claiming against the Project owner for unpaid sums arising from two interim payment claims and the final payment claim. The Project Owner refused to make payment and instead counterclaimed, *inter alia*, against the Main Contractor for liquidated damages and costs of rectifying defective works.

One of the issues considered by the HC was whether the Main Contractor was entitled to an extension of time ("**EOT**") as a result of SP PowerGrid Ltd's ("**SPPG**") delay in power connection and late notice of the requirement to install an overground distribution box. Both the Main Contractor and Architect argued, *inter alia*, that Clause 23(1)(a) of the SIA Conditions 2010, which stipulates that delay caused by "force majeure" (which was not defined) is a delay event entitling an EOT, was applicable on the facts.

In finding on the facts that SPPG's delay was a force majeure event that fell within the ambit of Clause 23(1)(a), the HC held that the scope of force majeure in the said clause "*has a wider and more general application extending beyond these common instances of force majeure*" (e.g. fire, storm, war, riots) and that the "*common thread underlying all the delay events set out therein is that when the delaying events are not attributable to the contractor*".

Notably, the HC said that "*it should be slow to find the force majeure clause unenforceable on the basis that it is not defined in the Contract*". In the absence of a contractual definition, it would be appropriate to construe a force majeure clause as "*an event that impedes or obstructs the performance of the contract, which was out of the parties' control and occurred without the fault of either party... The element of unforeseeability is not strictly necessary.*"

In granting an extension of time, the HC also considered two other requirements for granting an EOT under the SIA Conditions 2010. Firstly, whether the Main Contractor's failure to exercise due diligence contributed to the delay and secondly, whether the Main Contractor took reasonable steps to mitigate the delay.

The Project Owner argued that the Main Contractor's delay in installing the electrical meter compartments and doors, by reference to the master programme, meant that it was not proceeding with due diligence. In finding that the Main Contractor had exercised due diligence and was not responsible for the delay, the HC said that in assessing whether a contractor is acting with due diligence, the master programme is of evidential value but not conclusive. The master programme usually contained a float. The critical question is whether the Main Contractor was proceeding at a rate which was consistent with the completion date. On the facts, the HC found that although the Main Contractor was behind schedule for the installation of the electrical meter compartments and doors under the master programme, they did not cause delay to the completion date. The Court also found that the Main Contractor did take reasonable mitigation steps to reduce the delay due to SPPG.

The Architect decided to grant 40 days extension for SPPG's delay, and the question was whether it was improper. The M&E Consultant had only allowed for 15 days. In finding that the Architect's certification was proper, the HC said that it will not lightly disturb an architect's assessment as long as it was made fairly and rationally, and cited *Liew Ter Kwang v Hurry General Contractor Pte Ltd* [2004] 3 SLR(R) 59 where Prakash J explain that "*whilst the assessment of a fair and reasonable extension involves an exercise of judgment, that judgment must be fairly and rationally based*". This means that the third party must:

> *"(a) carry out a logical analysis in a methodical way of the impact that the relevant matters the plaintiff put forward had on the delay to the Project;*
>
> *(b) make a calculated assessment of time which it thought was reasonable for the various items individually and overall, rather than an impressionistic assessment;*
>
> *(c) apply the provisions of the Contract correctly; and*
>
> *(d) in allowing time based on the grounds listed in the provisions of the Contract, ensure that the allowance made bears a logical and reasonable relation to the delay caused."*

On the question of whether the completion certificate was issued prematurely and without basis, the HC examined this question in relation to the terms of the contract, in particular, Item 72 of the preliminaries, which specified certain conditions that must be satisfied. One of the conditions (Item 72(a)) was that that "*all parts of the Works are in the Architect's opinion ready for occupation and for use*". Obtaining TOP was not expressly specified as a condition of the contract. The question was whether a completion certificate could be issued even when TOP had not been issued. The HC considered the CA's decision between the parties in 2015 where the CA said:

> *"The meaning of the phrase in Item 72 para (a), 'All parts of the Works are ... ready for occupation and for use ...' ... is clear. It means, in no uncertain terms, that the employer can go into occupation of and use the premises. It is difficult to understand how the Architect could have issued the Completion Certificate on 15 May 2013, certifying contract completion on 17 April 2013, when just two weeks prior to his issue of that Completion Certificate, the Buildings had failed the first TOP inspection on 30 April 2013."*

The HC said that while it generally agreed with the CA, it was not an "*absolute proposition that a [completion certificate] can never be issued if the TOP is not obtained*" and that "*a more nuanced inquiry is needed*". The HC held as follows:

> *"324 Next, the court has to identify the reasons for the failure of the TOP inspections. Were any of these reasons due to construction-related issues that were within the scope of the plaintiff's Works? If the failure of the TOP inspections was due to defects that were wholly beyond the plaintiff's [Main Contractor's] control and not within its contractual responsibility, it would be difficult for the third party [Architect] not to issue the CC [completion certificate] since the plaintiff can be considered to have completed its contractual obligations. In these circumstances, it would be justifiable for the third party to issue the CC notwithstanding that the TOP has not been obtained. This is especially so having regard to the purpose of the CC which, inter alia, is to determine the plaintiff's liability for delay and determine the commencement of the maintenance period (see Ser Kim Koi (Court of Appeal) at [69])."*

The HC thus concluded on the facts that while the failure of the first TOP was due to the Main Contractor, the failure of the second TOP was not, and since the rectification works for the first TOP had been completed by 28 May 2013, the condition in Item 72(a) was satisfied on that date.

As regards the Project Owner's claim against the Main Contractor for liquidated damages ("**LD**"), the HC found on the facts that the latter was not liable to pay LD. Essentially, the HC found that the Architect, in its capacity as the Project Owner's agent, was the one who had instructed the Main Contractor not to commence rectification of the steps and risers until after the first TOP inspection. However, no EOT was granted by the Architect. Instead of allowing for EOT, the HC found that the instruction constituted an act of prevention which rendered the LD clause inoperable against the Main Contractor, even if the Main Contractor would itself probably also be in delay. In this regard, the HC defined an act of prevention as an event that "*operates to prevent, impede or otherwise make it more difficult for a contractor to complete the works by the date stipulated in the contract*" and has the effect of setting time at large.

Takeaway:

1. While the case makes clear that a force majeure clause will not be rendered unenforceable for lack of definition, it remains advisable for such a clause to be properly defined in the contract so as to reduce potential disputes as regards whether a delay event constitutes a force majeure. Also, a formal definition can provide whether a foreseeable event can constitute a force majeure event.
2. To obtain EOT, apart from the delay event falling within the definitions for the events giving rise to EOT, there must be compliance with all other aspects of the EOT clause. This includes carrying out the works with due diligence and mitigating the effects of the delay event, not to mention the important requirement of giving notice timeously.
3. The court would be reluctant to interfere with the certifier's evaluation of EOT if it is fair and rational.
4. In deciding whether practical completion was achieved, it will apply the terms of the contract. TOP will not necessarily be a pre-requisite unless expressly stipulated in the contract.
5. It is unclear *albeit* unlikely that the Court was in this case establishing a general proposition that a failure to award EOT or to administer the EOT framework will amount to an act of prevention setting time at large. However, it serves as a reminder of the importance of granting EOTs in a timely, fair and rational manner to ensure that a LD clause remains enforceable as against the contractor.

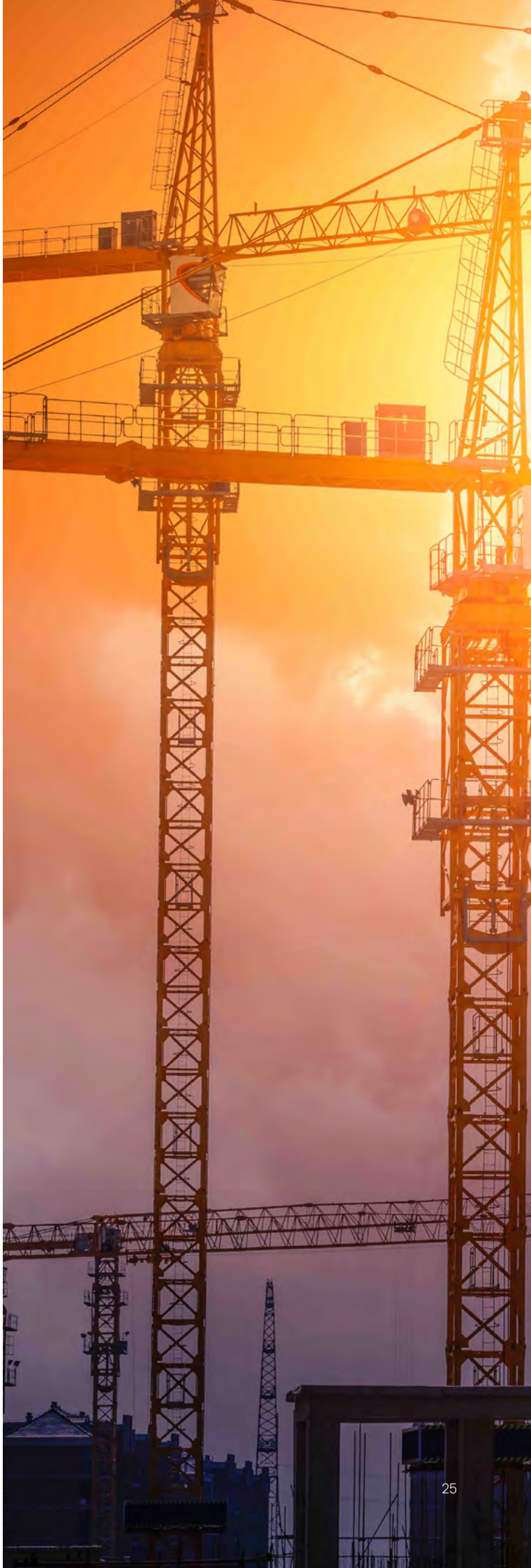
9. Liquidated damages do not form a cap on general damages for delay where the LD clause is unenforceable

The HC in ***Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2021] SGHC 189** dealt with the issue of whether the amount of general damages recoverable should be capped by the liquidated damages ("**LD**") that would have accrued if the LD clause were enforceable.

Crescendas Bionics Pte Ltd ("**Crescendas**") and Jurong Primewide Pte Ltd ("**JP**") signed a Letter of Intent ("**LOI**") under which JP was engaged as the management contractor to build Biopolis 3, a seven storey business park development positioned as a research and development hub for biomedical sciences institutes and organisations. At the trial on liability, the Judge found (as varied on appeal) that Crescendas was responsible for acts of prevention which caused 173 days of delay, while JP was responsible for 161 days of delay.

As Crescendas had committed acts of prevention, its right to claim LD under the LOI no longer applied. It accordingly claimed general damages for delay, which included an apportioned part of the net rental loss, holding costs comprising land rent of $2,122,123.87 paid to JTC Corporation and property tax of $217,978.50, as well as $284,142.14 for the salaries of site staff comprising Resident Engineers and Resident Technical Officers.

The court declined to follow a Canadian Supreme Court decision which held that "*an agreed sum payable on breach represents the maximum amount recoverable whether the sum is a penalty or a valid liquidated damages clause*", noting that the editors of Hudson's Building and Engineering Contracts (Sweet & Maxwell, 14th Ed, 2020) acknowledged that "*the point may be open and a more precise statement of its rationale in construction cases is still awaited*".



The Judge decided that the amount of general damages recoverable should not be capped by the amount of LD that Crescendas would have been entitled to under the LD clause had it not committed the various acts of prevention, as general damages and LD are underpinned by different considerations and there is no principled reason for capping the amount of general damages recoverable by Crescendas at $8,050,000. He disagreed that this would amount to allowing Crescendas to benefit from its own breach of contract which rendered LDs unenforceable, as the contractor was already given a reasonable extension of time to complete the works for the delay caused by acts of prevention. The contractor having still failed to do so, it would not be inequitable for the employer to recover whatever he can prove to be his actual loss.

In terms of the quantum of loss, the court agreed with JP that *post-completion* loss of net rental revenue (i.e. for the entire period until Biopolis 3 reached stabilized occupancy of 85-90%) was not recoverable as it was an indirect loss that was too remote. However, it rejected JP's arguments that the other heads of claim should also be rejected due to lack of causation and being too remote in view of Crescendas' acts of prevention. Apportioning JP's liability for 161 days of the total 334 days of delay, JP was found to be liable for $1,789,398.82 of loss of net rental revenue, $775,310.63 in respect of the holding costs (after accounting for a typical three-month rent-free period for tenants), and $128,864.46 in respect of site staff expenses.

Pertinently, the HC decided that a "multi-year model" of quantifying loss of rental revenue (which compares how long it would have taken for the property to achieve stabilized occupancy without the delay) was not appropriate, as it is highly speculative and depends on a multitude of variables that are outside the defendant's control. If the multi-year model had been applied instead, Crescendas' loss of net rental revenue would have been $4,641,300.23 instead of $1,789,398.82.

Takeaway:

This is the first local decision on whether an unenforceable liquidated damages clause alternatively constituted a cap on general damages for delay. The HC decided against such a proposition. This may be contrasted with the recent UK case of *Eco World – Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd* [2021] EWHC 2207, a case cited in this review, where the English court held that a liquidated damages clause as a matter of construction operated as a cap on the building contractor's liability as it provided that the maximum amount of LDs which may accrue was 7% of the final contract sum. Please see the Takeaway points under *Eco World* in this regard.

10. Impact that a partial handing over/taking over of a project can have on the operability and enforceability of a liquidated damages clause, and whether an unenforceable liquidated damages clause can amount to a cap on general damages for delay

Two issues arose in ***Eco World – Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd* [2021] EWHC 2207**: 1) Whether the failure to provide for a reduction in rate of liquidated damages where the employer takes over part of the works prior to practical completion renders the liquidated damages clause inoperable and/or penal and unenforceable; 2) If so, whether general damages are capped at the level of liquidated damages provided for under the liquidated damages clause.

Eco World ("**EWB**"), a property developer, entered into a construction management contract with Dobler UK Ltd ("**Dobler**"), a trade contractor, to carry out the design, supply and installation of the

façade and glazing works for 3 apartment blocks, A, B, and C ("**Works**") of Building A04 within the development. Dobler did not have exclusive possession of any part of the site when carrying out the Works.

The contract included the JCT 2011 Construction Management Trade Contract, subject to a schedule of modifications. The contract did not contain any provision for sectional completion or specify separate completion dates for each block but provided for EWB to take over part of the Works prior to practical completion.

The contract required Dobler to pay liquidated damages if it failed to complete the Works by the contract completion date where EWB has given valid notice that it required Dobler to pay liquidated damages at the rate stated in the Trade Contract Particulars, or "a lesser rate stated in the notice". The Trade Contract Particulars ("**Particulars**") provided as follows:

> *"Liquidated damages will apply … at the rate of £25,000 per week (or pro rata for part of a week) up to an aggregate maximum of 7% of the final trade contract sum"*

EWB subsequently took over blocks B and C on 15 June 2018 but did not issue a practical completion certificate in respect of those works. The Works were only certified as having achieved completion on 20 December 2018, after the revised completion date of 30 April 2018. A dispute thus arose between parties as to the amount of liquidated damages payable.

EWB adopted the position that the liquidated damages provision should be void or unenforceable as it did not provide for a mechanism to reduce the level of liquidated damages to reflect early possession. In this regard, they should be entitled to recover general damages for the delay in completion, and the liquidated damages clause did not cap the quantum of general damages recoverable.

Dobler argued that the liquidated damages provision was valid as the contract did indeed provide for a mechanism for liquidated damages to be reduced. Alternatively, if the provision was unenforceable, it nonetheless acted as a cap on general damages.

As a matter of construction, the Court found on the facts that Dobler was obliged to complete all the Works to achieve practical completion and was liable to liquidated damages at the rate stated in the Particulars should any part not be completed. The Court also found that the contract did not provide for a mechanism to reduce the amount of liquidated damages payable should there be partial takeover by EWB, prior to the date of practical completion. The right to impose the rate specified in the Particulars was an absolute contractual right.

On the first issue, the Court found that the liquidated damages provisions in this case were reasonably clear and certain. While there was no reduction in the rate of liquidated damages where the employer takes over part of the Works prior to practical completion, the provisions were capable of being operated. The issue that then arises is whether the liquidated damages provision, as construed above, is penal and unenforceable, in that the same rate of liquidated damages is used as compensation for late completion of any combination of Blocks A, B and/or C, despite the fact that different levels of loss could be envisaged.

The Court applied the test set out in *Cavendish Square* and held that the liquidated damages provision in this case was not unconscionable or extravagant so as to amount to a penalty. The *Cavendish Square* test is "*whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation*" (in this case, the obligation to complete the Works on time). The Court reasoned that parties had the benefit of legal advice from external lawyers in the process negotiations, and that EWB had a legitimate interest in requiring Dobler to complete

the Works by the agreed completion date as any delays would cause disruption to the project. There was no evidence to suggest that the level of damages set was unreasonable or disproportionate to the likely losses that would be incurred should there be a delay in the completion of works in any one or more of the blocks.

Pertaining to the second issue, the Court recognised that "*Cavendish Square provides persuasive support for the view that if a liquidated damages provision is void for uncertainty or as a penalty, it is wholly unenforceable and the employer's entitlement to general damages will not be subject to a cap. However, … even where a liquidated damages clause is found to be wholly unenforceable as a penalty, it may on a true construction be found to operate as a limitation of liability provision*".

On the facts, as a matter of construction, the Court, found that while "*a literal reading of the provision suggests that the 7% cap would apply only to the liquidated damages and not any general damages. However, the objective understanding of the parties in the commercial context of the Contract would be that the provision served two purposes: first, to provide for, and quantify, automatic liability for damages in the event of delay; second, to limit Dobler's overall liability for late completion to a specific percentage of the final contract sum. The clear intention of the parties was that Dobler's liability for delay damages would be so limited.*"

Takeaway:

1. A liquidated damages clause must be clear, certain and operable. Thus, where a contract allows for partial takeover, it must make clear how that impacts the rate of liquidated damages. The amount payable in the event of partial takeover must be clear, certain, capable of computation and therefore operable.
2. If the same rate was to apply regardless of what combination of partial handover/takeover occurs, such a liquidated damages clause runs the risk of being a penalty.
3. It should be noted that in the CA decision in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd*, the CA declined to follow the *Cavendish Square* test and held that the test first pronounced in 1914 by the UK House of Lords in *Dunlop Pneumatic Tyre Company, Ltd v New Garage and Motor Company, Limited* would continue to apply in Singapore, which briefly stated, is that the provision would be penal if the sum stipulated for is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach, and there is a rebuttable presumption that the provision would be penal if the sum stipulated for was payable on a number of events of varying gravity. In other words, whereas the UK *Cavendish Square* test is pegged to the legitimate commercial interests of the innocent party in the performance of the contract, the *Dunlop Pneumatic Tyre* test is referenced to compensatory damages only.
4. Providing for a single liquidated damages rate regardless whether there is full or partial handover or any combination of partial handover, where there is proof that the loss suffered as a result of the delay would vary materially depending on whether there is full or partial handover or combinations of partial handover, would give rise to a rebuttable presumption that such a provision is penal and unenforceable.

5. In *Crescendas Bionics*, a case referred to in this review, the HC held that an unenforceable liquidated damages clause would not generally, as a matter of principle concurrently operate as a cap on general damages. However, *Eco World* illustrates that in an appropriately worded clause, damages for delay may be capped even if the part of clause pre-estimating loss is found to be unenforceable, if the court construes that to be the objective intention of the parties.

6. It is advisable that if the parties intend a cap on damages for delay generally, regardless whether pre-estimated or not, that they expressly provide for it, independent of the liquidated damages clause.

11. Liquidated damages that have accrued can be recovered even when the contract has been terminated

In ***Triple Point Technology Inc v PTT Public Company Ltd* [2021] UKSC 29**, one of the main issues that had arisen was whether PTT Public Company Ltd ("**PTT**") was entitled under the contract to liquidated damages ("**LD**") for delay in respect of work which had not been completed before the contract was terminated. The UK Supreme Court ("**UKSC**") held, reverting to the orthodox interpretation of LD clauses, that unless the clause clearly provides otherwise, a LD clause will apply to any period of delay in completing the work up to, but not beyond, the date of termination of the contract, after which, the employer may be entitled to general damages arising from the termination.

PTT and Triple Point Technology Inc ("**Triple Point**") had entered into an agreement under English Law

for the provision by Triple Point of software systems for PTT's commodities trading business. The entire project was broken down into phases, with each phase further broken down into several stages, each having its own completion date and payment obligations. Triple Point completed stages 1 and 2 of Phase 1 of the project 149 days late but did not complete any of the further seven stages of Phase 1 nor any of Phase 2 by the due dates before PTT terminated the contract. Triple Point then sued PTT for the payments that had been left outstanding, while PTT commenced a counterclaim for a breach of contract, claiming LD for delay, wasted costs and costs of procuring a replacement system.

> The clause on LD read:
>
> *"If Contractor fails to deliver work within the time specified and the delay has not been introduced by PTT, Contractor shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work..."*

If (as PTT contended) liquidated damages were payable for the delay from the due date of delivery up to the date of termination (a total period of 3,220 days), the LD payable was US$3.46 million. On the hand, if LD was payable only for the delay of 149 days in completing that part of the work which Triple Point actually did complete (as Triple Point contended), the LD payable was US$154,662. In other words, Triple Point's argument was that based on the clause, no LD was payable for work that was not completed before the contract was terminated so that PTT's remedy would have to be in general damages only, which was hard to prove.

The UK Court of Appeal ("**UKCA**") held that PTT was not entitled to LD where the contract was terminated prior to completion. In arriving at this conclusion, the UKCA differentiated between three categories of precedent cases: (1) the clause did not apply; (2) the clause applied up to the termination of the contract; and (3) the clause continued to apply until completion was achieved by the replacement contractor. The UKCA applied what it viewed as a principle of law in *British Glanzstoff Manufacturing Co Ltd v General Accident, Fire and Life Assurance Corpn Ltd* [1913] AC 143 ("***British Glanzstoff***") that whether LD was payable depended on the phrasing of the clause. On the facts, the UKCA held that the words "*up to the date PTT accepts such work*" meant that the LD clause in question had no application in a situation where the contractor never completed the works, and by definition, the employer never accepted them. In other words, it should not be assumed that the LD clause had any operation beyond the precise event for which it expressly provided. The UKCA did not follow the Singapore HC decision of *LW Infrastructure Pte Ltd v Lim Chan San Contractors Pte Ltd* [2011] SGHC 163 ("***LW Infrastructure***"), which held on the facts of that case that the LD clause for delay operated up to the termination of the contract, distinguishing the decision in *British Glanzstoff* on the basis that in *British Glanzstoff*, the contract was abandoned by the contractor before the contract completion date.

The UKSC was unanimously of the view that the approach taken by the UKCA was, per Lady Arden at [35], "*inconsistent with commercial reality and the accepted function of liquidated damages.... Parties must be taken to know the general law, namely that the accrual of liquidated damages comes to an end on termination of the contract (see Photo Production Ltd v Securicor Transport Ltd [1980 AC 827, 844 and 849]. After that event, the parties' contract is at an end and the parties must seek damages for breach of contract under general law.... Parties do not have to provide specifically for the effect of the termination of the contract. They can take that consequence as read.*" In other words, in the absence of clear words to the contrary, any accrued LD would be payable up to termination if the event giving rise to LD, as provided in the LD clause, has arisen.

Explaining the LD clause in question, Lady Arden was of the view that the words "*up to the date PTT accepts such work*" merely indicated the point at

which the calculation of LD was to stop, rather than a condition for LD to accrue. In the LD clause in question, the event that would cause LD to accrue was delay in completing the relevant stage/phase by the contract due dates that was not caused by PTT. Further, Lord Leggatt was of the opinion that the UKCA's interpretation of the LD clause would give rise to an unusual situation that gives "*a contractor who badly overruns the time specified for completion an incentive not to complete the work in order to avoid paying liquidated damages for the delay which its breach of contract has caused*". The UKSC also held that the decision in *British Glanzstoff* turned on its own facts.

As such, the UKSC overturned the UKCA's decision and allowed PTT to claim for LD up to the point of termination.

Takeaway:

The UKSC's decision on *Triple Point* brings clarity back to the law on the interpretation of LD clauses and confirms that, subject to clear words to the contrary, LD that have accrued will be payable up to termination even if the contract has not been completed. This is in line with the HC's holding in *LW Infrastructure*. Further, since accrued LD would cease upon termination, a party would only be entitled to claim general damages after termination, unless the LD clause clearly provides for LD beyond termination. It is also not necessary to expressly provide for the right to claim accrued LD in the event of termination or abandonment. This decision is welcome insofar as it reflects industry understanding and practice.

Performance Bonds

12. Determination by court or tribunal is not required for a valid call on an indemnity bond

The CA in ***AXA Insurance Pte Ltd v Chiu Teng Construction Co Pte Ltd* [2021] SGCA 62** rejected a challenge, by the issuer of a performance bond, against a call on the bond where the account party had been wound up and did not participate in proceedings.

Chiu Teng Construction Co Pte Ltd ("**CTC**") was the main contractor for a project for upgrading and refurbishment works at the Nanyang Technological University. QBH Pte Ltd ("**QBH**") was engaged by CTC as a subcontractor. At QBH's request, AXA Insurance Pte Ltd ("**AXA**") issued a Performance Bond in favour of CTC which provided:

> *"1 In the event of the Sub-Contractor failing to fulfil any of the terms and conditions of the said contract, we shall indemnify [CTC] against all losses, damages, costs, expenses or otherwise sustained by [CTC] thereby up to the sum of Singapore Dollars Three Hundred Ninety Seven Thousand Six Hundred Eighty Seven and Cents Fifty Only (S$ 397,687.50) (the 'Guaranteed Sum') upon receiving your written notice of claim for payment made pursuant to Clause 4 hereof.*
>
> *4 This guarantee is conditional upon a claim or direction as specified herein being made by you by way of a notice in writing addressed to us and the same being received by us at 8 Shenton Way #27-01, AXA Tower, Singapore 068811 within 90 days from the expiry of this guarantee. Thereafter this guarantee shall become null and void notwithstanding that this guarantee is not returned to us for cancellation except for any claim(s) or direction submitted to us in writing not later than 90 days from the expiry of this guarantee.*
>
> *5 We shall be obliged to effect the payment required under such a claim or direction within 30 business days of our receipt thereof. We shall be under no duty to inquire into the reasons, circumstances or authenticity of the grounds for such claim or direction and shall be entitled to rely upon any written notice thereof received by us (within the period specified in Clause 4 hereof) as final and conclusive."*

On 23 April 2019, QBH was put into liquidation by an unrelated creditor. On 18 February 2020, CTC wrote to QBH's liquidators claiming losses of $484,108.28 because QBH failed to complete its works and/or had carried out defective works. QBH's liquidators did not reply, and CTC proceeded to write to AXA to call on the Bond on the basis of the claims stated in the 18 February letter.

AXA replied that the call was defective and that it was not obliged to make payment. Its main arguments in court were that:

a. an admission or a determination by a court or tribunal was required for a valid call to be made on the bond; and

b. CTC's documents were "untested", and that financial institutions which grant performance bonds face practical difficulty in understanding the technical and engineering requirements

of the underlying contracts and do not have the means to monitor the account party's performance of their contracts or check the facts.

The CA held that AXA was liable to pay on the call because, in the absence of a condition precedent in the bond itself requiring an admission or determination for a valid call to be made, it was not for the court to rewrite the terms of the bond simply because certain risks which ought to have been anticipated have materialised. Pursuant to clause 1 it would suffice for CTC to establish that QBH had failed to fulfil any of the terms of the subcontract and that CTC thereby sustained losses. There was no reference anywhere in the bond to a determination by a court or tribunal or an admission from QBH. Furthermore, clause 5 enabled AXA to pay on the Bond without inquiring into the facts of breach and loss alleged by CTC. This clause ensured that AXA's recourse against QBH would remain unaffected even if AXA did not undertake an independent evaluation of the facts underlying the call on the Bond and accepted a written notice from CTC as final and conclusive, and precluded AXA from relying on its arguments as to practical difficulties.

The court was also of the view that AXA's complaint, that it was not in a position to dispute CTC's claim, may well be exaggerated. There are other instances where one party has to deal with factual issues in court which it did not have anything to do with at the time, for example, in cases involving subrogation of claims. AXA could also have provided for conditions precedent requiring certain forms of proof, or provided for rights against QBH or its directors to require their assistance in making the necessary assessments of the facts or in resolving any difficulties with any call on the bond. Not having done so, the alleged practical difficulties could not justify the court intervening to rewrite the bargain between parties.

On the facts, CTC had established QBH's breach of the subcontract and losses of such a quantum as to justify the call on the Bond for $397,687.50. There was enough objective evidence, including payment vouchers and invoices, which gave rise to a *prima facie* case that QBH had caused CTC to suffer loss of an amount that exceeded the sum secured by the Bond. Since AXA offered no response, it had not met the evidential burden which had shifted to it and CTC's claim against AXA was established.

The court also observed that the term "performance bond" does not say anything about the legal character of a bond, and it may be more helpful to shed the language of "performance" bonds. The CA then summarized the authorities as follows:

a. Both indemnity and on-demand performance bonds, in contrast to guarantees, give rise to primary liability on the issuer to pay the sums under the bonds.

b. A beneficiary under an on-demand performance bond is entitled to "*immediate payment from the bank, subject only to a compliant demand being made on it*" and the issuer will generally not be concerned with the merits of the underlying dispute between the beneficiary and account party. Hence, the issuer's obligation is independent of those facts. By contrast, for an indemnity performance bond, the merits of the underlying dispute become relevant, and there may be a requirement to consider the underlying facts to assess the validity of the call. As a result, an indemnity performance bond "*diminishes the effectiveness of the traditional on demand performance bond as a cash equivalent*".

c. An on-demand performance bond is conditioned on "*documents or upon a mere demand*" whereas an indemnity performance bond is "*conditioned upon facts*". For the latter, the payment under the bond responds to the fact of breach and loss, whereas for the former, the payment responds to the presentation of compliant documents and/or demand.

Takeaway:

This decision clarifies that performance bonds should be mainly characterized as either "on-demand" or "conditional" bonds (whether they are guarantees or indemnities). In the case of conditional indemnity bonds, the beneficiary does not need to obtain an admission or a determination by a court or tribunal before calling on the bond unless the terms of the bond expressly provide so, even if the account party is wound up. Bond issuers should also review its template conditional bonds to heed the court's caution that AXA could have provided for "*conditions precedent requiring certain forms of proof, or provided for rights against QBH or its directors to require their assistance in making the necessary assessments of the facts or in resolving any difficulties with any call on the bond.*"

13. Insurer's right of subrogation extends to the right to call on a performance bond

The case of ***Sompo Insurance Singapore Pte Ltd v Royal & Sun Alliance Insurance plc* [2021] SGHC 152** deals with the issue of whether an insurer's right of subrogation extends to the right to call upon a performance bond provided to the insured by a third party, to which the HC answered in the affirmative.

In December 2013, the Government of Singapore (the "**Government**") entered into a contract with Geometra Worldwide Movers Pte Ltd ("**Geometra**") for the transport of certain military cargo in containers ("**Cargo**"). Clause 30.1 of the said contract obliges Geometra to provide an unconditional performance bond for 5% of the contract price ("**Performance Bond**"), which was subsequently issued by the appellant, Sompo Insurance Singapore Pte Ltd ("**Sompo**"), in favour of the Government. The respondent, Royal & Sun Alliance Insurance plc ("**RSA**"), is one of the underwriters of the Government in respect of the Cargo.

On or about 17 March 2015, one of the containers fell into the sea and some of the equipment within it was damaged, all of which happened while the Cargo was in Geometra's custody. The Government was subsequently indemnified by RSA for the full quantified loss.

A day before the expiry date of the Performance Bond, RSA's solicitors wrote to Sompo to make a demand on the Performance Bond in the sum of the insured loss "*on behalf of the Government of the Republic of Singapore*". Sompo refused the call and RSA commenced proceedings in the District Court, where it obtained judgment in its favour. Sompo then appealed the decision to the HC.

On the facts, the HC found that a valid call on the Performance Bond had been made and that RSA was subrogated to the Government's rights under the Performance Bond. Accordingly, in dismissing Sompo's appeal, the HC held *inter alia* as follows:

a. An insurer's right of subrogation to the rights and remedies of the insured in respect of the subject matter of the loss extends to the right to call upon a performance bond provided to the insured by a third party in connection with the insured's original contract with the party responsible for the insured loss.

b. Subrogation occurs automatically upon indemnification of the insured's loss and requires no other positive act from either the insured or the insurer.

Standard Form Contracts

14. Sale and Purchase Agreements under the Sale of Commercial Properties Rules should be construed as legislation to give effect to the legislative purpose of protecting purchasers

In ***Oxley Consortium Pte Ltd v Geetex Enterprises Singapore (Pte) Ltd* [2021] SGCA 71**, the CA had to decide whether the standard form contract under the Sale of Commercial Properties Rules should be interpreted as a private contract, or a statute which would mean it should give effect to the legislative intention of protecting purchasers.

Oxley Consortium Pte Ltd ("**Oxley**") was the developer of Oxley Tower, and Geetex Enterprises Singapore (Pte) Ltd ("**Geetex**") was the purchaser of two units of Oxley Tower (the "**Units**"). When Geetex's director had visited the showroom, he was handed a marketing brochure which made reference to a building plan submitted to BCA described as "A642-00006-2010-BP01 dated 6 March 2012" ("**2012 BCA Plan**"). BCA's Notice of Approval of the 2012 BCA Plan contained a notice that "*clearances from the technical departments as indicated below are outstanding*".

As required by the legislative scheme, the SPAs for the Units were based on a standard form contract prescribed in the Sale of Commercial Properties Rules. Clause 1.1.1 of both SPAs stated that the building plan for Oxley Tower had been approved under No "A0642-00006-2010-BP01".

When Oxley delivered possession of the Units, Geetex discovered several changes to the design which were made to meet FSSD's required maximum occupant load. The final approved plans submitted to BCA and FSSD had the following differences from the 2012 BCA Plan: (a) the physical features such as concrete paths and walls ("**hardscape**") were reduced by about 21%; (b) the soil and vegetation areas ("**softscape**") were increased by about 12%; (c) the occupant load of unit 2 had been reduced; and (d) the softscape areas were elevated by around 300mm to 450mm.

Geetex sought to terminate the SPAs and claim a refund of all moneys paid to Oxley and third parties, relying on cl 15.4 (identical in both SPAs) which provided:

> *"If the final approved building plans for the Unit and the Building differ substantially from the plans and specifications approved by the Purchaser at the date of this Agreement, the Purchaser has the right to terminate this Agreement; and if this happens :-*
>
> *(a) the Vendor must refund all moneys paid by the Purchaser with interest calculated at the rate of 10% per annum; and*
>
> *(b) upon such payment, neither party will have any claim against the other."*

Geetex obtained an arbitral award in its favour which decided that:

a. "*plans and specifications approved by the Purchaser at the date of this Agreement*"

referred to the 2012 BCA Plan, subject to changing the use from gym/spa to restaurant and converting the swimming pool to outdoor garden ("**Changes**").

b. The 2012 BCA Plan (subject to the Changes) "*differ[ed] substantially*" from the final approved plans.

c. "*refund all moneys paid by the Purchaser with interest*" referred not only to sums paid by Geetex to Oxley, but also included moneys paid to third parties.

d. The SPAs were validly terminated and Oxley was to refund all progress payments, maintenance charges, property tax and stamp duties paid by Geetex.

In considering various questions of law posed by Oxley, the CA decided as a preliminary issue that the terms of the standard form Sale and Purchase Agreements in the Schedule to the Sale of Commercial Properties Rules have to be construed as legislation rather than as contracts. Not doing so would mean that the parties could subjectively defeat the legislative intent underlying these mandatory terms and would render it pointless for Parliament to have required these terms to be included.

The CA then found that the "*clearances from the technical departments*" which the 2012 BCA Plan was subject to were not part of the plans and specifications "*approved by the purchaser at the date of the agreement*", since the purchaser cannot be deemed to have approved changes that were not yet in existence at the time of the SPA. The effect of such a caveat is simply that changes could be made to the plans and specifications as a result of complying with the technical departments and authorities' requirements, and clause 15.4 was inserted precisely to deal with these kinds of changes. The court observed that as the purpose of the legislative scheme is to protect purchasers against developers conducting sales of commercial units in an inequitable manner, clause 15 is a form of positive purchaser protection which positively allocates to the developer the full risk of a cost increase arising from a change in the specifications and plans, while allocating to the purchaser the full benefit of a cost reduction arising from such a change.

However, the CA reversed the tribunal's finding that Oxley was liable to "refund" payments by Geetex to third parties. The phrase "*refund all moneys paid by the purchaser*" refers only to moneys paid to the vendor as clause 15.4 was not a breach or damages clause, but a risk allocation clause. Substantial differences between the approved plans and as-built plans were not necessarily due to any fault of either party but could happen, for example, due to the need to comply with regulations imposed by authorities. Since clause 15.4 is a no-fault clause, the concept underlying it is that of rescission and restitution and there was thus no basis for holding that the developer should be liable to insure or indemnify the purchaser from all losses, including payments to third parties.

Takeaway:

This case clarifies the policy rationale behind clause 15.4 of the standard SPAs for commercial properties and the scope of relief that may be obtained under this provision. The decision that the SPAs should be interpreted as statutes, to give effect to the legislative purpose of protecting purchasers, would be persuasive for other statutorily prescribed contracts, including the Option to Purchase and SPA under the Housing Developer Rules.

15. No limitation period applicable to a vendor's claim to stakeholding monies held by SAL where Rule 7 of the Stakeholding Rules is engaged

In ***Lau Soon & another v UOL Development (Dakota) Pte Ltd & another appeal* [2021] SGHC 195**, the issue concerning the nature of stakeholding monies held by the Singapore Academy of Law ("**SAL**") was dealt with by the courts for the first time.

By way of a sale and purchase agreement ("**SPA**"), the appellants ("**Purchasers**") purchased a condominium unit from the respondent developer, UOL Development (Dakota) Pte Ltd ("**UOL**"). Pursuant to the SPA, the Purchasers paid 5% of the purchase price to SAL to hold as a stakeholder ("**Stakeholding Sum**"), which was to be released to UOL on the "**Final Payment Date**".

However, three months prior to the Final Payment Date, SAL was instructed by the Purchasers to deduct the full amount of the Stakeholding Sum as a result of some dispute relating to alleged defects in the unit. UOL disputed the attempted deduction and served its objection in a proper form on SAL on 20 March 2014.

More than six years later, UOL took out an application seeking an order that the Purchasers authorize SAL to pay out the Stakeholding Sum to them. The District Judge ordered SAL to release the Stakeholding Sum and the Purchasers appealed against the decision.

One of the main issues decided by the HC was whether UOL's claim was time-barred pursuant to s6(1)(a) of the Limitation Act (1996 Rev Ed). In this regard, the HC held as follows:

a. There was a tripartite contract in this case between the Purchasers, UOL and SAL for SAL to retain the Stakeholding Sum pending a triggering event, terms of which must be consistent with the SAL (Stakeholding) Rules (1998 Ed) ("**Stakeholding Rules**") in force at the time into which the SPA was entered, and such rules would constitute the main parameters of the tripartite contract.

b. Considering that the Purchasers had filed a Notice of Deduction and UOL had filed a Notice of Dispute in response, Rule 7 of the Stakeholding Rules ("**Rule 7**") would be engaged as it specifically and exactly provided for the mechanisms for managing such disputes. Notably, the said rule does not contemplate a limit to the period of extension of the stakeholding period and provides for payment out only upon the occurrence of two triggering events.

c. Given that the terms of the tripartite contract must be consistent with Rule 7, it is implied that the Purchasers and UOL had "*contracted out of any limitation period that would apply to either party commencing an action under the tripartite contract, specifically for a court order on the final apportionment of the Stakeholding Sum*".

d. Therefore, notwithstanding that the claim by UOL against SAL was founded on contract, that is the tripartite contract, there could be no limitation period applicable to UOL's claim to the Stakeholding Sum, including that under s 6(1)(a) of the Limitation Act.

The HC also went on to find that the Purchasers' right to sue UOL for breach of the SPA on the basis of the latter's alleged failure and/or refusal to rectify defects was time-barred as the application was filed more than six years after its cause of action arose.

Accordingly, the HC dismissed the Purchaser's appeal and ordered SAL to release the stakeholding monies to UOL.

Takeaway:

Where the Stakeholding Rules are involved, this decision is useful as it demonstrates the importance of filing a notice of dispute (in the prescribed form within the stipulated timeline) in response to a purchaser's notice of deduction. In so doing, Rule 7 would come into play and thereby prevent the vendor's / developer's claim to the stakeholding monies held by SAL from being time-barred. This case is also a good reminder for buyers to not sit on their contractual claims (e.g. breach of contract for defects) in the belief that they have already given notice of deduction as their claims will be time-barred if not pursued within 6 years.

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