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Impact of COVID-19 on the Construction Industry (Part 1)

(The impact of COVID-19 on the construction industry will be dealt with in 2 parts. In part 1, we discuss the control measures taken by the Singapore Government, the relief measures that have been passed into law, as well as government assistance rendered to the construction industry. In Part 2, we will discuss the rights and obligation under the more popularly used standard forms in Singapore, especially where they relate to time and costs issues, including the legal principles in relation to force majeure and frustration.)

Introduction

The COVID-19 pandemic has wreaked havoc on the world. According to the BBC, as at 6 June 2020, there are more than 6.7 million confirmed cases in 188 countries with nearly 400,000 deaths. In an attempt to control the spread of the infection, whole cities and indeed countries have gone into lockdowns, disrupting supply chains and daily life, and suspending normal business activity.

In Singapore, the Prime Minister announced on Friday, 3 April 2020 that stricter social distancing measures would be implemented from 7 April 2020 to create a circuit breaker for the spread of the disease. The COVID-19 (Temporary Measures) Act (the "**Act**") was passed in Parliament on 7 April 2020 to provide, among other things:

(a) Control measures restricting the movement of people and the suspension of business activity except for essential services from 7 April to 4 May 2020, with extensions if necessary; and

(b) Temporary relief to parties who are unable to perform their contractual obligations as a result of the COVID-19 pandemic.

In the construction sector in Singapore, the BCA issued an advisory on 5 April that all building an construction works are to cease until 1 June 2020, except for essential services.

Leading up to the implementation of the circuit breaker control measures, the Singapore government announced a slew of support measures to provided assistance in:

(i) Manpower levies
(ii) Construction and supply contracts,
(iii) Business development and
(iv) Cashflow and business sustainability.

A comprehensive list of support measures can be found at https://www1.bca.gov.sg/COVID-19/support-measures-for-built-environment-sector-firms.

Following the cessation of the extended circuit breaker period from 2 June 2020, construction works have been allowed to resume in phases but in a safe and controlled manner. More information on the safe and controlled restart of the construction sector from 2 June 2020 can be found at https://www1.bca.gov.sg/COVID-19.

Temporary Relief for the Performance of Supply and Construction Contracts

The supply chain disruptions for materials, labour, plant and equipment have slowed down construction activity and the control measures from 7 April 2020 to 4 May 2020 have effectively brought construction activity to a halt. Re-opening will also take time. These clearly have time and cost implications for the construction industry, but many of the construction and supply contracts entered into prior to the outbreak of COVID-19 may not have envisaged a pandemic or adequately provided for one. How do the different parties then address the time and cost issues caused by the COVID-19 Pandemic? The Act goes some way to provide relief as well as limit the potential mushrooming of expensive litigation.

Application of the Act

The Act only applies to Scheduled Contracts entered into before 25 March 2020 in respect of obligations that had to be performed on or after 1 February 2020. Construction and supply contracts as defined in the Building and Construction Industry Security of Payment Act ("**SOPA**") are Scheduled Contracts, including those to which the government is a party.

What this means is that the Act will not affect any rights or obligations accruing in respect of delays or breaches prior to 1 February 2020. It also means that parties entering into contracts from 25 March 2020 must take steps to provide for the foreseeable implications of the COVID-19 pandemic in respect of the performance of the contract.

General Reliefs under the Act

Section 5 of the Act prohibits certain legal actions from being taken against a party to a Scheduled Contract ("**A**") who is unable to perform a contractual obligation to a material extent caused by a COVID-19 event (the "**subject inability**") and party A has served a notification to the counterparty to the contract ("**B**") for relief ("**Notification for Relief**"), and as may be applicable, other relevant parties.

The Act defines a "**COVID-19 event**" as:

(a) The epidemic or pandemic that is COVID-19; or

(b) The operation of or compliance with any law of Singapore or another country or territory, or an order or direction of the Government or any statutory body, or of the government or other public authority of another country or territory, being any law, order or direction that is made by reason of or in connection with COVID-19.

That the inability to perform must be caused to "a material extent" by a COVID-19 event suggests that relief may not be available to a contractor who would not in any event have been able to perform had there not been a pandemic.

B cannot take legal action until:

(a) After the Prescribed Period ends, or

(b) A withdraws the Notification for Relief, or

(c) An assessor determines that the case does not fall within section 5 of the Act.

The Prescribed Period commenced on 20 April 2020 and will end on 19 October 2020.

The legal actions that are prohibited are:

(a) The commencement or continuation of court action, or arbitration proceedings under the Arbitration Act, against A or A's guarantor or surety;

(b) The enforcement of security over immovable property, or movable property used for purpose of trade, business or profession;

(c) Applications for a s210 scheme of arrangement, judicial management order, winding up or bankruptcy of A or A's guarantor or surety or the appointment of a receiver over the property or undertaking of A or A's guarantor or surety;

(d) The commencement or levying of execution, distress or other legal process against any property of A or A's guarantor or surety;

(e) The repossession of any goods under any chattels leasing agreement, hire-purchase agreement or retention of title agreement, being goods used for the purpose of a trade, business or profession (e.g. plant and equipment);

(f) Termination of a scheduled contract (being a lease or license of immovable property) whether the subject inability is the non-payment of rent or other moneys, or the exercise of a right of re-entry or forfeiture;

(g) Enforcement against A or A's guarantor or surety of any judgment, arbitral award under the Arbitration Act, or adjudication determination under SOPA; and

(h) Any other action that may be prescribed.

Additional Reliefs under the Act for the Construction Industry

In the case of construction and supply contracts, the further additional reliefs are:

(a) "B" may not make a call on a performance bond in relation to the subject inability for which A has given Notification for Relief until 7 days before the date of expiry of the performance bond or such extended date.

(b) Where A makes an application to the issuer of the performance bond not less than 7 days before the expiry date to extend the term of the performance bond and serves a notice of the application on B at the same time, the term of the performance bond shall be extended to a date that is 7 days after the end of the Prescribed Period of relief or such other date as may be agreed between A, B and the issuer.

(c) A freeze on liquidated damages or other delay damages arising as a result of the subject inability occurring on or after 1 February 2020 but before the expiry of the Prescribed Period of relief.

"A" has to activate the right to relief by a Notification for Relief

The relief measures under the Act do not operate automatically as parties who intend to seek relief are required to serve a Notification for Relief on the relevant parties within the period specified in regulations. Any party to the contract in question may then apply for an assessor's determination.

The appointed assessor may take into account, among other factors, the ability and financial capacity of the party concerned to perform the obligation and must seek to achieve an outcome that is just and equitable in the circumstances of the case. It will thus be a case-by-case analysis when it comes to the question of whether these new measures are applicable to each individual.

An assessor's determination is binding on all parties to the application and all parties claiming under or through them and may be enforced in the same manner as a judgement or an order of the court to the same effect with the leave of court. No appeal lies from an assessor's determination. There is no right of legal representation before the assessor, and each party has to bear his own costs of the proceedings before the assessor.

SOPA proceedings

The Act does not prohibit the submission of payment claims for the purpose of SOPA. Hence, it is important that respondents submit their payment responses in time. Similarly, the Act does not prohibit the lodging of adjudication applications, and respondents will have to ensure that adjudication responses are submitted within the 7-day deadline.

It should however be noted that where the Act applies, adjudication determinations may not be enforced against A. This prohibition however should not apply to obligations arising before 1 February 2020 or in respect of contracts made or renewed from 25 March 2020. In addition, A must have given a Notification for Relief.

Conclusion

It is hoped that with the above control measures taken by the government, the COVID-19 pandemic can be quickly brought under control, and that with the financial assistance and temporary relief measures, the adverse legal and financial implications for participants in the construction industry may be mitigated.

Key Amendments to the Building and Construction Industry Security of Payment Act ("SOPA")

The Building and Construction Industry Security of Payment (Amendment) Act 2018 was commenced on 15 December 2019. The key amendments to SOPA fall into 3 broad categories as set out below:

A) Expanding and clarifying scope of application of the SOPA

- **Contracts for prefabrication works are covered:**
  - SOPA now applies to prefabrication works done (whether in or outside Singapore) for projects in Singapore.
  - However, prefabrication works that are carried out in Singapore for projects overseas will not be covered where any one of the parties to the contract is not incorporated or registered in Singapore.
- **Pre-termination claims are valid:**
  - Claims for work done or goods supplied before contract termination are now valid.
- **Documentary evidence to be adduced in adjudication:**
  - An adjudicator is to disregard any part of a payment claim or a payment response related to damage, loss or expense that is not supported by a document showing agreement between the parties on the quantum of that part of the payment claim or the payment response, or a certificate or other document that is required to be issued under the contract.
  - This is to address the issue of lengthy adjudication processes.

B) Refining the requirements on handling of payment claims and responses

- **New limitation period for the service of a payment claim:**
  - E.g. Not later than 30 months after the date on which the goods and services to which the amount in the payment claim relates were last supplied.
- **Payment claim valid even if served before stipulated date:**
  - A payment claim will be valid even if it is served before the date, or the last day of a period, specified in the contract.
  - This will address the current concern that a premature payment claim will be invalidated.
- **Time allowed for service of a payment response is increased:**
  - Where it is not stipulated in contract, a payment response is to be served to the claimant within 14 days (previously 7 days) after the payment claim is served.
- **Objections to a payment claim in relation to a supply contract must be raised in writing**
- **Accepting a payment response in writing:**
  - A claimant is considered to dispute a payment response if the claimant does not in writing accept the payment response.
- **Repeat payment claims are allowed:**
  - A claimant may repeat a payment claim for which full payment has not been received even without additional work done or goods or services supplied.
  - This preserves a claimant's entitlement to seek payment through adjudication.

C) Improving the adjudication processes

- **Claimants (previously just the respondents) are now allowed to apply for an adjudication review:**
  - This is under the condition that the claimed amount exceeds the adjudicated amount by the prescribed amount or more.
- **Non-compliance with the prescribed formalities by claimants in an adjudication application may be disregarded:**
  - An adjudicator is allowed to disregard specific circumstances where claimants have failed to provide certain documents or information in adjudication applications, so long as the respondents were not materially prejudiced.
- **Belated objections by respondents (i.e. not included in the adjudication response) will be disregarded by adjudicators:**
  - This is unless the respondents can prove that their objection could not have been made known earlier or only arose after the adjudication response was lodged.

Summary of Cases

SOPA Cases

A) Entitlement to claim for payment

i. Entitlement to claim for materials which had not been delivered or installed

In *Chuang Long Engineering Pte Ltd v Nan Huat Aluminium & Glass Pte Ltd* [2019] SGHC 55, the issue of the proper interpretation of Section 7(2)(c) SOPA, i.e. whether one is entitled to claim for materials which had not been delivered or installed, was raised before the courts for the first time.

The respondent subcontractor filed a payment claim for unpaid works, including the value of materials which, while fabricated by the respondent for the purposes of the project, had not been delivered nor installed by the respondent ("the uninstalled materials"). During adjudication, it was determined that the respondent was entitled to the claim for the uninstalled materials. In arriving at the determination, the adjudicator relied on s7(2)(c) SOPA which provided for the valuation of "materials or components that are to form part of any building, structure or works arising from the construction work ... that ... on payment, will become the property of the party for whom the construction work is being carried out".

The applicant argued that the value of the materials cannot be claimed unless property in the goods had passed, that is, only materials that had been incorporated in or affixed to a building. However, this runs contrary to s7(2)(c) SOPA which states that valuation of materials is possible as long as they are materials that will, "on payment, become the property" of the payor.

Notably, the Singapore High Court ("**HC**") held that under s7(2)(c) SOPA, "materials could be subject to valuation even if they have neither been delivered nor affixed to the building/ structure, as long as they were fabricated for the construction contract". That said, it ought to be noted that the principles of valuation under s7(2) SOPA only operate when the contract contains no terms that govern the valuation of materials.

ii. No submission of payment claim after issuance of a final certificate

In *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] SGCA 36, the Singapore Court of Appeal ("**CA**") clarified that the SOPA did not apply to payment claims submitted after the issuance of a valid final certificate under the Singapore Institute of Architects Articles and Conditions of Building Contract (Measurement Contract), (7th Edition, April 2005), (the "SIA Articles of Contract" and the "**SIA Conditions of Contract**" respectively, collectively the "SIA Form of Contract"); and that there is no waiver of a respondent's right to object where no payment response is submitted if the payment claim is not a valid payment claim under SOPA.

The main contractor was engaged by the developer pursuant to a Letter of Award, which incorporated with amendments the SIA Form of Contract. Under the SIA Conditions of Contract, the main contractor was to submit its final claim to the architect before the end of the maintenance period, which lasted from 6 May 2014 to 5 August 2015. On 4 August 2017, the architect issued a maintenance certificate (the "**Maintenance Certificate**"). On 23 August 2017, the main contractor submitted payment claim number 73 ("**PC 73**"). The architect then issued a final certificate (the "**Final Certificate**") on 5 September 2017, certifying the final balance payable from the developer to the main contractor. On 12 September 2017, the developer issued a payment response to PC 73, entitled "Payment Response Reference Number 73 (Final)".

Notwithstanding the issuance of the Final Certificate, the main contractor submitted yet another payment claim; payment claim number 74 ("**PC 74**") on 24 October 2017. The developer did not issue a payment response to PC 74. The architect instead wrote to inform the main contractor that since the final payment claim had to be submitted before the end of the maintenance period but the main contractor had failed to do so, the architect had proceeded to issue the Final Certificate in accordance with the SIA Conditions of Contract. Despite this letter, the main contractor submitted a further payment claim; payment claim 75 ("**PC 75**") on 24 November 2017, which was exactly the same as PC 74 save for the difference in the dates. Again, the developer did not issue a payment response.

Thereafter, on 27 December 2017, the main contractor lodged an adjudication application in relation to PC 75. The developer then filed its adjudication response on 5 January 2018. Its main objection was that PC 75 was submitted after the issuance of the final payment claim and/or the Final Certificate and was therefore invalid for failing to comply with the SIA Conditions of Contract and s 10(2)(a) of the SOPA. However, the adjudicator agreed with the main contractor and decided that because the developer had not raised this objection in a payment response, he was "prohibited" from considering the objection pursuant to s 15(3) of the SOPA, following the CA's decision in in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("***Audi Construction***").

The developer then applied to the HC for the adjudication determination to be set aside. Relying on Audi Construction, the HC expressly rejected the developer's argument that it was not obligated to file a payment response if the payment claim was invalid due to it falling outside the SOPA from the outset. The HC further held that to allow the architect to unilaterally treat PC 73 as the final payment claim and to issue a final certificate on that basis would result in injustice to the main contractor. On appeal, however, the CA disagreed with the HC and the adjudication determination was set aside.

In summary, the CA held, *inter alia*, that:

- When dealing with a construction contract that incorporates the SIA Form of Contract, any payment claim which is submitted after the architect has issued the final certificate is outside the ambit of the SOPA. This is because under s 2 of the SOPA, a progress payment is defined as "a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, "*under a contract*". In other words, the entitlement to submit progress claims under the SOPA stems from the underlying contract itself. Given that it is *mandatory* for the architect to issue an interim certificate in response to a payment claim under the SIA Form of Contract, any such entitlement to submit payment claims under the SOPA is lost once the architect has issued the final certificate. This is because his role under the contract then comes to an end and he becomes *functus officio*. As such, he loses his capacity to issue certificates, a "condition precedent" to the contractor's right to receive payment.
- The holding in *Audi Construction* with respect to the respondent's duty to speak was never intended to apply to a situation where the payment claim fell outside the scope of the SOPA. Where the payment claim is one which did not entitle the contractor to commence adjudication under the SOPA in the first place, there would be no corresponding duty to speak.
- In any case, the developer will be entitled to set aside the adjudication determination notwithstanding its lack of a payment response because PC 75 constituted a patent error. It should have been patently clear to the adjudicator based on the contract, the Final Certificate and PC 75 itself, that by the time PC 75 was submitted, the architect had become *functus officio* and any payment claims submitted thereafter would fall outside the scope of the SOPA.

This case illustrates the importance of submitting all payment claims before the issuance of the final certificate, and the significance of the final certificate under the SIA Form of Contract and probably other similar standard forms, if it were properly issued (even if not signed off by the contractor). The payment claim and certification process for the purpose of SOPA comes to an end, and recourse for any further claims would have to be through the Courts or arbitration, as the case may be.

iii. No submission of payment claim after termination of contract for works done prior to termination where the terms of the contract provide to the contrary

In *Stargood Construction Pte Ltd v Shimizu Corporation* [2019] SGHC 261, the HC held that a contractor can serve its payment claim under SOPA for works done prior to the termination of its employment under the contract.

The defendant is the main contractor of a project at 79 Robinson Road, and the plaintiff was one of the defendant's subcontractors. Subsequently, by way of a notice of termination, the defendant terminated the plaintiff's employment under the subcontract ("**Subcontract**").

Following certain alleged breaches of the Subcontract on the part of the plaintiff, the defendant issued a notice of default followed by an exercise of its termination rights under clause 33.2 of the Subcontract.

Clause 33.2 reads:

> At any time after the Project Director is satisfied that the Sub-Contractor has defaulted in respect of any of the grounds set out under Clause 33.1, the Project Director shall issue a Notice of Default to the Sub-Contractor specifying the default, and stating the Contractor's intention to terminate the Sub-Contract unless the default is rectified within 7 days from the date of the said notice. If the Sub-Contractor fails to rectify the specified default within 7 days from the receipt of the Notice of Default, the Contractor shall be entitled, without any further notice to the Sub-Contractor, to terminate the employment of the Sub-Contractor by issuing to the Sub-Contractor a Notice of Termination of [the] Sub-Contract.

Clause 33.4 reads:

> *"Upon termination of the [Subcontract] under Clauses 33.2 or 33.3 hereof:*
>
> *(a) [Shimizu] shall be entitled to damages on the same basis as if [Stargood] had wrongfully repudiated the Sub-Contract…"*

Clause 33.5 provides:

> *Unless the termination* of the Main Contract *was caused by or arose from any default or breach of contract by* [*Stargood*] (in which event [Stargood] shall be liable [Shimizu] on the same basis as provided for in Clause 33.4 hereof), [*Stargood*] shall in that event be entitled to payment for work done and materials supplied by him on the [Subcontract] Prices and Rates … [emphasis added].

After the Subcontract was terminated, the plaintiff served payment claim 12 ("**PC 12**"). As no payment response was served by the defendant, the plaintiff proceeded to lodge adjudication application SOP/AA 203 of 2019 ("**AA 203**").

The adjudicator dismissed AA 203 on the basis that PC 12 was improperly served on the defendant and that the plaintiff was not entitled to serve PC 12 after termination of the Subcontract as the project director was *functus officio*.

Before the adjudication determination for AA 203 was issued, the plaintiff served payment claim 13 ("**PC 13**") for the same amount claimed in PC 12. The defendant then served a payment response with a "nil" response amount. As the plaintiff took the position that the adjudicator in AA 203 dismissed the application purely on jurisdictional grounds and not on the substantive merits, it proceeded to lodge a second adjudication application SOP/AA 245 of 2019 ("**AA 245**").

The adjudicator in AA 245 also dismissed the application as he determined that the plaintiff was bound by the adjudicator's determination in AA 203, in particular, that the plaintiff was not entitled to submit any further payment claim under the Subcontract under SOPA.

The plaintiff then applied to set aside both the adjudication determinations in AA 203 and AA 245, and further sought a declaration to serve a further payment claim on the defendant.

In allowing the plaintiff's application, the HC held that as the defendant had only terminated the plaintiff's employment, rather than the entire Subcontract, the plaintiff could continue to rely on the payment certification process. Further, a contractor who has carried out works under a construction contract can "*continue to claim for such works even after its employment under the contract has been terminated … because the contractor has an accrued statutory entitlement to payment, which necessarily survives the termination*". In other words, the SOPA gave an independent statutory right to progress payments even if the entire Subcontract had been terminated. The judge distinguished *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189) ("***FES***"), which has been discussed above. Unlike in FES where the issue was *"whether the plaintiff is entitled to serve a payment claim after the final certificate has been issued"*, the key issue in this case was *"whether the plaintiff can serve a payment claim and have its claim adjudicated after the termination of its employment under the Sub-Contract"*.

The HC was overturned by the CA on 21 April 2020. The CA held that:

- The SOPA did not provide an independent right to continue to serve payment claims for works completed regardless of the provisions of the underlying contract. Whether a party can continue to serve a payment claim after termination will depend on the terms of the contract. There is thus no separate statutory entitlement to a progress payment where a contract already makes provisions for such payments. The SOPA regime only applies where the statutory conditions are satisfied, and one such statutory condition is when the contract does not contain the relevant provision. There is no "dual railroad track system" for progress payments. Similarly, the amendments to the SOPA in 2018 ("2018 amendments") on whether claimants can apply for adjudication upon contract termination do not have any impact where the contract itself contains provisions relating to the amount and valuation of progress payments as well as payment certification. The 2018 amendments only affect contracts which are silent as to the payment certification process. The 2018 amendments merely provide that the SOPA can in principle apply to progress payment claims after termination. It is not intended to override the terms of the contract which provide to the contrary.

- That on the facts of the case, under the terms of the Subcontract, the Plaintiff was not entitled to serve payment claims following its termination.

The important takeaway from this case is that it is important for parties entering into contracts to be clear about when the right to make SOPA claims come to an end. It should be noted that when the right to submit SOPA claims come to an end, it does not mean that there is no further recourse for the aggrieved party. The aggrieved party can still seek a remedy through the courts or arbitration.

iv. No submission of payment claim to recover monies paid out under a performance bond

In *China Railway No 5 Engineering Group Co Ltd Singapore Branch v Zhao Yang Geotechnic Pte Ltd* [2019] SGHC 130, the HC dealt with one key issue of whether adjudication under the SOPA is the proper forum to canvass construction disputes that arise purely in relation to performance bond proceeds.

The plaintiff main contractor engaged the defendant sub-contractor to carry out certain construction works. An on-demand performance bond was "procured by the sub-contractor to serve as "a deposit or security for the due performance and observance by the Sub-Contractor of all stipulations, terms and conditions contained in the Sub-Contract". On 20 December 2018, the plaintiff called on the performance bond for the sum of $281,441.95.

On 25 December 2018, the defendant served Payment Claim 36 ("**PC 36**") on the plaintiff for a sum that is the value of the performance bond which had been called, plus 7% GST. In its payment response, the plaintiff disputed the validity of PC 36 by arguing that it was a repeat claim with no claim for any new works, and that it was not even a claim for construction work under the SOPA. The matter was then referred to adjudication. During adjudication, the adjudicator found that he had the jurisdiction to adjudicate on PC 36 which "relatedly solely to the proceeds of the performance bond", and determined that the plaintiff was to pay the defendant the sum of $281,441.95, excluding GST (the "**AD**"). Dissatisfied with the AD, the plaintiff applied for it to be set aside.

In setting aside the AD in its entirety, the HC first found that s 10(1) SOPA, which prescribes the scope of a valid payment claim, is a mandatory provision. The HC then went on to consider whether PC 36, being a claim for performance bond proceeds only, is a valid payment claim within the scope of s 10(1) SOPA. In this regard, the HC held that:

> "While the performance bond relates to the construction works, a call on the performance bond resulting in the main contractor receiving the bond proceeds cannot be considered as works done by the sub-contractor ... On the contrary, the performance bond is usually called as a result of some alleged breach of the contract ... It is therefore an allegation on the main contractor's part that construction works have not been done satisfactorily, or that goods or services have not been supplied in accordance with the contract. Allowing the subcontractor to issue a payment claim for such negative work thus verges on the nonsensical."

The HC further held that deeming PC 36 as valid would negate the efficacy of the performance bond, thereby defeating the bargain struck between the parties and contravening s 36(4) SOPA. This was in view of the fact that under the contract, it is clear that the performance bond was issued as a deposit or security, and "does not have to be used to offset any liquidated damages, back-charges or other sums owed by the sub-contractor to the main contractor".

This case clarifies that a payment claim cannot be made to recover under SOPA monies paid out under a performance bond.

B) Importance of raising timely objections

i. Waiver of right to raise jurisdictional objections in the absence of a payment response

It is now well-established that a failure to file a payment response prevents a respondent from raising any objections, including jurisdictional ones, during both the adjudication and setting aside applications, save for arguments on patent errors.

Indeed, this has recently been reiterated in *Sito Construction Pte Ltd (trading as Afone International) v PBT Engineering Pte Ltd* [2019] SGHC 7, where the HC cited two earlier CA cases which held that:

- A respondent will be taken to have waived its right to raise jurisdictional objections if it failed to raise the objections at the earliest possible opportunity (i.e. in the payment response) *(Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317); and

- A respondent, who is looking to apply to set aside an adjudication determination, is nonetheless entitled to highlight patent errors in the adjudication determination to the reviewing court, in the absence of a payment or adjudication response *(Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979).

This principle that any objection, including jurisdictional objections, should be raised at the earliest opportunity in the payment response or adjudication response is now clearly spelt out in the BCI Security of Payment (Amendment) Act passed on 31 October 2018 unless:

- The circumstances of that objection only arose after the lodgement of the payment response or adjudication response, as the case may be, or

- The respondent could not reasonably have known of those circumstances when lodging the payment response or adjudication response, or

- The objection relates to a patent error.

ii. Objecting to a claim on the basis that the claim was not based on VOs but a separate contract

In *Tong Hai Yang Construction Pte Ltd v Little Swan Air-Conditioning & Engineering Pte Ltd* [2019] SGHC 188, the plaintiff main contractor engaged the defendant as its subcontractor for Air-Conditioning and Mechanical Ventilation, Electrical, Fire Prevention and Protection System, and Additional Optional Works. On 22 March 2019, the defendant served a payment claim on the plaintiff for works it had carried out pursuant to 21 Variation Orders ("**VOs**"). As no payment response was filed by the plaintiff, the defendant proceeded to lodge an adjudication application and eventually obtained an adjudication determination in its favour (the "**AD**").

The plaintiff then applied to the HC for the AD to be set aside, arguing in the main that the adjudicator had overlooked a material patent error as he had accepted the VOs as being part of the contract, when they were not. The plaintiff argued that the VOs were exclusively between the defendant and the employer's representative, EWC Engineers Pte Ltd ("**EWC**") given that, inter alia, the quotations for the VOs were addressed directly to EWC and similarly, they were accepted and approved by EWC only.

In dismissing the plaintiff's setting aside application, the HC agreed with the adjudicator that the plaintiff had been put on notice of the VOs. Particularly, it was observed that after the adjudication application was lodged, the plaintiff issued a letter to the defendant, stating that the defendant had in a meeting accepted that some of the VO items were invalid. The appendix to the plaintiff's letter also reflected the "Amount Approved", which included the amounts asserted by the defendant pursuant to the VOs. As such, the Court held that "the Plaintiff's letter, which was not made without prejudice and which refers to the VOs, amounts to a concession that *only some*, but *not all*, of the VOs were disputed". Accordingly, it was found that the plaintiff had waived its right to object to the VOs on the basis that they fell outside of the contract.

The HC also found that the adjudicator had not failed to recognise a patent error as regards the VOs. This is because the adjudicator had properly considered the materials before him and had found that although the VOs were drawn to the plaintiff's attention, the plaintiff did not seek to clarify whether the VOs fell outside the scope of the contract. It was further held that it is not within the scope of the Court's remit to re-assess the merits of the adjudicator's determination.

> This case illustrates the importance of objecting to a payment claim in a timely manner where the objection goes to the merits or validity of the payment claim within the context of SOPA. The failure to object in a timely manner as required by Audi Construction would preclude the respondent from raising the objection later.

C) Application of SOPA timelines

i. SOPA timelines apply notwithstanding termination of contract

In *CHL Construction Pte Ltd v Yangguang Group Pte Ltd* [2019] SGHC 62, the HC considered whether, with respect to SOPA claims, contractual provisions relating to SOPA timelines survive termination of the contract.

On 9 July 2018, the defendant subcontractor completed the works for the plaintiff main contractor, and a Certificate of Substantial Completion ("**CSC**") was received the next day. Shortly after, the parties' contract was terminated. The defendant then submitted its penultimate payment claim on 30 August 2018 for works done until completion and for half of the retention monies. However, it was stipulated in Clause 37 of the parties' contract that the defendant had to withhold its penultimate claim "until three months after the CSC has been received by" the plaintiff. The dispute therefore centred around whether the penultimate payment claim was served prematurely, in contravention of s 10(2)(a) SOPA.

During adjudication, the adjudicator determined that given the termination of the contract, parties no longer had to perform their remaining obligations therein and as such, clause 37 (a remaining obligation on timeline for payment claim) was no longer applicable. Contrary to the adjudicator's determination, the HC held that the "termination of contract subsequent to the point of time the statutory entitlement to payment had arisen and accrued does not alter the timeline for service of a SOPA payment claim that applies to that contractor's accrued statutory entitlement to payment". In other words, since the defendant was claiming for works done before the termination, its *statutory* entitlement to payment had already arisen

and the contractual timeline would continue to apply pursuant to s 10(2)(a) SOPA. The adjudication determination was thus set aside.

This case makes clear that even if the contract has been terminated, contractual timelines must still be adhered to for payment claims under SOPA for work done prior to termination.

D) Adjudication process

i. Construing the contractual clause to determine the operative date of a payment claim for the purpose of lodging an adjudication application

In *Lendlease Singapore Pte Ltd v M & S Management & Contracts Services Pte Ltd* [2019] SGHC 139, the sole issue before the HC was whether the adjudication application ("**AA**") was lodged out of time in breach of s 13(3)(a) of the SOPA.

The plaintiff main contractor engaged the defendant to supply general labour for a project pursuant to a contract. Under the contract, payment claims were to be made on the 20th day of each month. The contract also provided that if the 20th day was on a non-business day, the payment claim was to be served on the preceding business day.

On 18 January, the defendant served a payment claim ("**PC**") on the plaintiff as 20 January 2019 happened to fall on a Sunday. The PC was nonetheless post-dated to 20 January 2019. The plaintiff then served its payment response on 8 February 2019, on the basis that the operative date of the payment claim was 18 January 2019 rather than 20 January 2019. Subsequently, the defendant served its notice of intention to apply for adjudication and proceeded to lodge its AA on 25 February 2019, counting from the operative date of the payment claim as 20 January 2019. An adjudication response was filed, where the plaintiff argued that the AA was lodged out of time. During adjudication, the adjudicator dismissed the plaintiff's jurisdictional objection and determined that the AA was lodged within time.

The main issue of contention was therefore whether the operative date of the PC was 18 January 2019 or 20 January 2019. The Court found that the PC in the present case was served in accordance with the contractual terms, which specifically provided for the circumstances where the date of service of a payment claim falls on a Sunday. As such, it was held that the act of post-dating the payment claim did not have "any effect on the operative date of the payment claim". On this basis, the HC found that the operative date of the PC was the date when the PC was served, i.e.18 January 2019. Given that the time for lodging the AA should run from 18 January 2019, the AA was lodged out of time. Accordingly, the adjudication determination was set aside.

It is noteworthy that the HC distinguished this case from Audi Construction. In Audi Construction, the contract provided for payment claims to be served on the 20th day of each month. Similarly, the payment claim was served on 18 November 2016 but post-dated to 20 November 2016, which was then held by the CA to be the operative date of the payment claim. Notwithstanding that, the HC clarified that the act of post-dating the payment claim in Audi Construction had an effect on the operative date of the payment claim because "there was no express contractual provision for the situation where the date for serving a payment claim falls on a Sunday".

This case therefore emphasizes the importance of construing the contractual clause in question to determine the operative date of a payment claim. Where the contract specifically provides for the service date of a payment claim as well as its substitute in the event that the service date falls on a non-business day, the operative date of a payment claim will be the date of its service, regardless of any act of post-dating.

ii. No enforcement of a prior Adjudication Determination (AD) superseded by a subsequent AD

Can a prior AD still be enforced if it had effectively been superseded by a subsequent AD which took into account the prior AD? This was the question raised before the *HC in United Integrated Services Pte Ltd v Civil Tech Pte Ltd and another* [2019] SGHC 32.

On 23 October 2018, the respondent subcontractor obtained an AD in its favour ("**AD1**"), by which the applicant main contractor was to pay the respondent "$1,369,987.02 plus interests and costs". The respondent was subsequently granted leave to enforce AD1. However, shortly thereafter, before the respondent could successfully enforce AD1, a second AD ("**AD2**") determined that no amount

was payable by the applicant to the respondent as the adjudicated amount was "a negative sum of $1,176,050.67". In arriving at his determination, the adjudicator had not only adopted the valuation in AD1, but also considered the claims for work done, liquidated damages and back-charges which were not before the adjudicator in AD1.

In granting the applicant a stay of enforcement of AD1, the Court held that "each adjudicator would have considered the decision of the prior adjudicator, and hence the final AD would be the cumulative result of all prior ADs". Furthermore, a situation where the subcontractor could enforce each AD independently at its choosing is likely unintended by the drafters of SOPA.

This case thus highlights the importance of enforcing an AD before making another adjudication application, especially where the payment response contains back-charges that could potentially be adjudicated in favour of the respondent. As the Court rightly articulated, "if the prior AD had been successfully enforced, there would simply be no enforcement of such prior AD to be stayed".

Practical Completion

A) Meaning of practical completion

The UK Court of Appeal ("**EWCA**") in *Mears Limited v Costplan Services (South East) Limited, Plymouth (Notte Street) Limited, J.R. Pickstock Limited* [2019] EWCA Civ 502 considered the meaning of practical completion and when a breach of contract can prevent practical completion.

Pursuant to an Agreement for Lease ("**AFL**") dated 20 May 2016, Mears, which was in the business of providing managed student accommodation, contracted with Plymouth ("**Developer**") to take a long lease of 2 blocks of student accommodation constructed by Pickstock after certification of practical completion. Under the JCT building contract, Pickstock was required to complete the construction of the works in conformity with the Developer's obligations under the AFL. In this regard, the AFL did not contain a contractual definition of "Practical Completion" and Clause 6 of the AFL provided that the Developer shall not make any material variations to the size, layout or appearance, and a reduction of the size of any distinct area by more than 3% shall be deemed material. As it turned out, 56 of the rooms were more than 3% smaller than planned in the drawings. Mears thus sought, inter alia, a declaration that practical completion could not be achieved as there were known defects which were "material or substantial". On 22 August 2018, Mears was granted an interlocutory injunction restraining the certification.

The UK High Court ("**EWHC**") subsequently declined the declaration and adopted a more flexible approach: defects which were not "de minimis" (i.e. trifling) may or may not prevent practical completion "depending on the nature and extent of [them] and the intended purpose of the building". Mears then appealed to the EWCA.

The EWCA upheld the decision at first instance and dismissed the appeal. In the judgment, the Court summarized the law on practical completion as follows:

- Practical completion is easier to recognise than define: Keating, 10th ed 20-169; There are no hard and fast rules with regards to practical completion: Bailey para 5.117 footnote 349.
- The existence of a latent defect cannot prevent practical completion: *Jarvis & Sons Ltd v Westminster Corporation*.
- In relation to patent defects, there is no difference between an item of work not yet completed and one that has been completed but is defective and requires remedy.
- The existence of patent defects will be sufficient to prevent practical completion, save where they are trifling in nature.
- Whether or not an item is trifling is a matter of fact and degree, to be measured against "the purpose of allowing the employers to take possession of the works and to use them as intended. However, such an ability does not necessarily mean that the works are practically complete.
- The mere fact that a defect is irremediable does not mean the works are not practically complete.

The Court held that while the failure to stay within the tolerance of 3% was a breach of contract, whether any particular departure from a contractual drawing was trifling was a matter of fact and degree. On the facts, as the contract did not define practical completion, it was left as a discretion for the certifier. Whether the certifier would be correct in certifying completion was not a question before the Court. Nonetheless, the mere fact that the property is habitable as student accommodation also does not, by itself, mean that the property is practically complete.

This case is useful in that it clarifies what amounts to practical completion. The EWCA however noted that there is no authority on the interplay between practical completion and irremediable nature of outstanding work items. What is clear is that trifling defects that are irremediable does not prevent practical completion.

Delay in Completion

A) Claim for liquidated damages

i. No claim for liquidated damages in the absence of an extension of time clause

In *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4, the HC dealt with the issue of delay caused by an employer's act of prevention, particularly in the context of a construction contract that did not contain an extension of time ("**EOT**") clause. In this case, the plaintiff property developer employed the defendant contractor for the construction of a business park. The signed Letter of Intent, which both parties agreed to be legally binding on them, contained a clause specifying the date of completion and a liquidated damages clause but did not include an EOT clause. When the project was certified to be completed after the specified completion date, the plaintiff sued the defendant for, *inter alia*, liquidated damages for the delay in completion. The defendant, in its defence, argued that since the plaintiff was responsible for the delays and there was no EOT clause, time was at-large and it only needed to complete its works within a reasonable time.

Pertinently, the Court held that where an EOT clause is absent, and the employer commits an act of prevention:

- The contractor is no longer bound by the original contractual completion date;
- Any liquidated damages clauses entered into between the parties is rendered inoperative; and
- The contractor is under an obligation to complete the project within reasonable time and failure to do so will render the contractor liable for general damages.

In deciding the reasonable time for completion by the contractor, the Court applied the following principles in *Fongsoon Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd* [2011] SGHC 82:

- What constitutes a reasonable time is a question of fact;
- When determining reasonable time, the court must strike an appropriate balance between not allowing the employer to take advantage of its own fault and not giving the contractor any other additional time other than that caused by the employer's delay; and
- The method of determining reasonable time by simply adding the employer's delay to the contractual completion time is merely a guide on calculating reasonable time which meets the above two considerations.

This case therefore elucidates the importance for EOT clauses to be properly drafted and included in construction contracts so as to ensure that, in the event an employer commits any act of prevention, (1) a new date may be set for completion and (2) the employer's right to liquidated damages will be preserved. Otherwise, the employer will only be entitled to claim for general damages, and this is so only if the contractor fails to complete the project within reasonable time.

ii. Liquidated damages not recoverable where contract terminated prior to completion

In *Triple Point Technology, Inc v PTT Public Company Ltd* [2019] EWCA Civ 230, the EWCA addressed the question of whether an employer was entitled to liquidated damages where the contract had been terminated prior to the contractor completing the work.

PTT had engaged Triple Point to supply a new commodity trading software system. Payment was by milestone or specified dates. The project was to be completed in stages with a completion date for each stage. Triple Point's work progress was slow. The first two stages of phase 1 were to be completed by 31 October 2013 but were completed late on 19 March 2014. That only the first two stages of phase 1 were completed was not disputed by Triple Point. On 27 May 2014, Triple Point suspended work and left the site. The last stage completion date was 11 June 2014. On 15 February 2015, PTT terminated the contract.

On the question of liquidated damages ("**LD**"), the EWCA held that PTT was entitled to LD for late completion of stages 1 and 2 of phase 1, but not from the contract completion date of each uncompleted stage to date of termination on 15 February 2015.

The LD clause in question 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% of undelivered work per day from the due date for delivery up to the date PTT accepts such work…*" After reviewing the authorities, the EWCA observed that there have been 3 different approaches to liquidated damages clauses in prior case law where a contractor failed to complete and a second contractor stepped in:-

- The clause did not apply[1];
- The clause only applied up to termination of the contract[2]; and
- The clause continued to apply until completion was achieved by the replacement contractor[3].

Applying the principle in *British Glanzstoff Manufacturing Co. Ltd v General Accident, Fire and Life Assurance* Co Ltd 1912 SC 1913 ("**Glanzstoff**"), the EWCA held that whether an LD clause in a case (a) ceases to apply or (b) continues to apply up to termination/abandonment, or even conceivably beyond that date, must depend on the wording of the clause itself.

On the facts, the EWCA found that the LD clause did not make provision where the contractor never hands over completed work to the employer. The clause was focused on delay between the contractual completion date and the date when Triple Point achieved completion. The CA reasoned that it would be artificial and inconsistent with the parties' agreement to categories the employer's losses on a fixed sum per day up to a certain date and then general damages thereafter. It may be more logical and more consonant with the parties' bargain to assess the employer's total losses flowing from the abandonment or termination, applying the ordinary rules of assessment of damages.

The EWCA opined that there was no reason why a distinction should be made between a termination before the contract completion date and a termination after the contract completion date. The CA also doubted the correctness of allowing LD until actual completion by a replacement contractor as the employer and second contractor can control the period for which LD will run.

Interestingly, in its review of the authorities, the EWCA considered the Singapore High Court decision of *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477 ("**LW Infrastructure**") where the Honourable Justice Judith Prakash distinguished *Glanzstoff* and allowed recovery of liquidated damages up to the termination of the contract. The EWCA observed from a reading of the report decision that Prakash J may not have had sight of the full decision of *Glanzstoff*.

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[1] *British Glanzstoff Manufacturing Co. Ltd v General Accident, Fire and Life Assurance Co Ltd* 1912 SC 1913*; Chanthall Investments Ltd v F.G. Minter Ltd* 1976 SC 73*;* and *Gibbs v Tomlinson* (1992) 35 Con LR 86.

[2] *Greenore Port Ltd v Technical & General Guarantee Company Ltd* [2006] EWHC 3119; *Shaw v MFP Foundations and Pilings Ltd* [2010] EWHC 1839; *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477; and *Bluewater Energy Services BV v Mercon Steel Structures BV* [2014] EWHC 2132.

[3] *Hall v Van Der Heiden (No 2)* [2010] EWHC 586; *Crestdream v Potter Interior Design (2013)* HCCT 32/2013; and *GPP Big Field LLP v Solar EPC Solutions SL* [2018] EWHC 2866.

What is noteworthy in *LW Infrastructure*, however, is that the Singapore Court opined in dicta that LD provisions in standard forms widely used in Singapore such as the PSSCOC and SIA Contract survive termination because there is express contractual provision to that effect.[4] Essentially, where the contract expressly provides for it, there seems to be no reason why such LD provisions will not survive termination. This is in fact consistent with the decision in *Triple Point* which is to the effect that whether or not a LD provision survives termination turns on the proper interpretation of the provision itself.

The question that remains is, in the absence of such an express clause, will the entitlement to LD still exist where the contract has been terminated without practical completion by the contractor? In this regard, it remains to be seen whether the Singapore Courts will follow the EWCA's lead, notwithstanding the decision in *LW Infrastructure*.

Moving forward, employers should weigh both the legal and commercial considerations before deciding whether to terminate a contract, and whether termination would prevent it from claiming LD, if that is its preferred course. In some instances, employer's may in fact want to terminate the contract and claim general damages as the damages that it suffers from non-performance of the contractor may outweigh what it may recover under the LD clause.

B) Entitlement to additional time for work

i. Claims for refunds for double payments have to be specifically pleaded, and contractor not entitled to additional time for work contemplated at the time the contract was made

The CA decision in *Jurong Primewide Pte Ltd v Crescendas Bionics Pte Ltd and another appeal* [2019] SGCA 63 concerns the cross-appeals against the earlier HC decision in *Crescendas Bionics Pte Ltd v Jurong Primewide Ltd* [2019] SGHC 4 ("**HC judgment**"), which has been discussed above.

The contract had an 18-month duration with a liquidated damages clause but no extension of time clause. The HC found that the contractor, Jurong Primewide Pte Ltd ("**Jurong Primewide**") was responsible for 133 days of delay (subsequently corrected to 136 days on appeal by agreement of the parties) and that the property developer, *Crescendas Bionics Pte Ltd* ("**Crescendas**") was responsible for 173 days of delays. Given that Crescendas had engaged in acts of preventions, time for completion was set at large in the absence of an extension of time clause. The HC also found that that the Preliminaries Sum was a fixed sum and not a tentative figure to be negotiated within 4 weeks of the Letter of Intent ("**LOI**"), but that any double payment made by Crescendas to Jurong Primewide and trade contractors for the same preliminaries must be refunded to Crescendas.

On the HC's decision that any double payments had to be refunded, Crescendas conceded at the appeal that the alternate claim for refund of double payments for preliminaries had not been pleaded.

Jurong Primewide's appeal was thus allowed on the basis that the claim for a refund of double payments of preliminaries had not been specifically pleaded by Crescendas. The CA noted the importance, "*especially in building and construction cases, for such averments to be specifically pleaded and with sufficient particulars so that the other party knows what case it has to meet" and "enabled these alleged double payments to have been properly canvassed during the trial given that it was an issue of liability*."

On the issue relating to the time taken for the capping beams work, the CA disagreed with the HC's finding that the additional 25 days for the capping beams work should be taken into consideration when deciding what the reasonable time for completion was. Jurong Primewide conceded that it was aware of the need for the capping beams work when it agreed to an 18-month contract completion period. When Crescendas commented by email on the master programme (shortly after it was submitted by Jurong Primewide after the LOI was signed) that the time duration for certain structural works was optimistic given the need for capping of beams work, Jurong Primewide's response several weeks later was that adequate time had been provided for the pile caps. The earlier versions of the master programmes did not contain itemized activities for the capping beams work, which were only incorporated subsequently in a revised master programme.

[4] See Clause 31.3(a) of the PSSCOC and Clause 32(8)(g)(i) of the SIA Contract.

The CA held that Jurong Primewide's mistaken assessment of the time taken for capping beams work was an error that lay at its doorstep and was not a fault or act of prevention that could be attributed to Crescendas. Jurong Primewide should therefore not be given the benefit of an additional 25 days for the capping beams work in computing a reasonable time within which the Project should be completed.

Takeaways:

- All heads of claim, including alternate heads of claim, have to be specifically pleaded so that the defendant knows the case it has to meet and all issues and evidence can be canvassed at the trial.
- A contractor would not be entitled to additional time if it was an activity that it was aware of at the time the contract was made. Any mistaken assessment of the time required would lie at the doorstep of the contractor even where time for completing the works was set at large.

Performance Bond

A) Contractual exclusion of the unconscionability exception, in the context of a performance bond, in a separate contract

In the recent decision of *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2019] SGCA 39, the CA upheld a contractual exclusion clause that excluded the right of a subcontractor to rely on the unconscionability exception to prevent the main contractor from calling on the performance guarantee.

The respondent main contractor was appointed by the Employer for a project to upgrade the Suntec City Convention Center. The appellant was then appointed as the project's M&E subcontractor under a Letter of Acceptance dated 3 December 2012 ("**LOA**"). Pursuant to the LOA, the subcontractor provided a banker's guarantee ("**BG**"), which was payable on demand in writing.

Disputes arose as to whether the subcontractor was liable for delays in its work between March 2014 and December 2015. On 27 January 2016, the main contractor rejected all of the subcontractor's requests for extension of time and computed the delays in the subcontract works. However, it did not raise any claim for liquidated damages in the Payment Responses it served between February 2017 and May 2017.

In July 2017 shortly after the subcontractor commenced an adjudication application for the release of the first half of retention monies amounting to about $2.1m, the main contractor informed the subcontractor that it was issuing a delay certificate and claimed that it was entitled to recover liquidated damages. Even then, the main contractor only called on the performance bond on 28 August 2017 which was the same day the subcontractor filed an Originating Summons in court for leave to enforce the Adjudication Determination it had by then obtained in its favor.

The subcontractor then took out an ex *parte* application and obtained an interim injunction restraining the main contractor from calling on the BG. Subsequently, the main contractor applied for the discharge of the interim injunction, and the HC granted the application and discharged the interim injunction. Dissatisfied with the HC's decision, the subcontractor appealed against the discharge of the interim injunction.

In dismissing the appeal, the CA held, *inter alia*, that:

- Contrary to the HC judge's holding, it was the main contractor, as the party seeking to rely on the unconscionability exception exclusion, who bore the burden of proving that the subcontractor's right to rely on the unconscionability exception was contractually excluded. On the facts, notwithstanding that the exclusion clause was contained in a separate document, the exclusion clause was incorporated by reference. In the absence of fraud or misrepresentation, if a term in a signed contract incorporated some or all the terms of a separate document by making reference to those terms, the parties to the contract would be bound by those separate terms even if they did not have knowledge of what those terms were at the time of contracting.
- The subcontractor was left with fraud as the only ground for the interim injunction. On the facts, the subcontractor had failed to establish a strong *prima facie* case of fraud on the main contractor's call on the BG.

- The HC judge erred and should have found it sufficient to discharge the interim injunction on the basis that the subcontractor had failed to make full and frank disclosure of all material facts at the ex *parte* application. A party seeking an *ex parte* interlocutory injunction has a duty to make full and frank disclosure of all material facts. On the facts, it was found that the subcontractor should have been conscious of the significance of the exclusion clause since the issue of incorporation was a live issue during adjudication. As such, the subcontractor's failure to provide full and frank disclosure of the existence of the exclusion clause was sufficient to discharge the interim injunction.

This case is therefore a timely reminder that the Court will enforce terms expressly incorporated by reference even if they were never read or made available to the counterparty. Parties to a contract should therefore be mindful of reviewing a counterparty's document expressly incorporated by reference into a contract as its terms may modify the scope of the agreement or a party's rights or obligations under the main contract or contain exclusion clauses excluding or limiting liability.

B) No calling on performance bonds unrelated to the contract which the dispute has arisen from

In *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd and another and another matter* [2019] SGHC 11, the Court considered whether a performance bond could extend to a contract or project other than the contract or project pursuant to which the performance bond was given.

The plaintiff subcontractor was engaged by the defendant main contractor for three different construction projects, for which a total of four subcontracts were entered into between the parties. Under each of the subcontracts, performance bonds had to be furnished. Although there was a dispute in only one of the subcontracts, the defendant sought to call on all four of the performance bonds. The plaintiff then applied for an injunction to restrain the calls on the grounds of fraud and unconscionability. The defendant, on the other hand, argued that it had a contractual right to call on the other performance bonds to set off against any moneys due to the plaintiff by relying extensively on Clause 17.1 of the underlying subcontracts, which provided as follows:

> **17. Right of Set-off**
>
> 17.1 The Main Contractor shall notwithstanding anything contained in this Sub-Contract Agreement be entitled to deduct from or *set-off against any monies due or become due to the Sub-Contractor under the Sub-Contract* (including without limitation any Retention Sum) or under any other contract whatsoever between the Main Contractor and the Sub-Contractor for *any sum or damage..., charges, expense..., liability, debt or financial loss suffered by the Main Contractor* due to or arising from the negligence, default, breach or omission of the Sub-Contractor arose [*sic*] under the Sub-Contract or any other contract whatsoever between the Main Contractor and the Sub-Contractor.

In granting the injunction, the HC held that "a prior crucial issue which had to be resolved before one even considered the question of unconscionability ... was whether the performance bonds in question were engaged in the first place". In this regard, it was held that "where a performance bond arises expressly out of a particular contractual relationship, calls made on the basis of other contractual relationships would clearly fall outside of the scope of the performance bond", unless the terms specifically allowed for it. Turning its attention to the terms of the performance bonds in question, the Court concluded that it was clear from the terms that the performance bonds could only be called for matters arising out of the corresponding underlying contract.

The Court then proceeded to consider the defendant's reliance on Clause 17.1 and held that "there was no room to expand the scope of those performance bonds by reference to cl 17.1 or other provisions in the underlying subcontracts" since the performance bonds were not ambiguous. Further, Clause 17.1 would not even be applicable as it is not a set-off of moneys due from defendant to the plaintiff. In fact, the defendant was the beneficiary of the performance bonds, and not the plaintiff.

The key takeaway from this case is therefore that a performance bond can only be called under the terms within the four corners of the performance bond. The terms in the underlying contracts will also have no effect on the scope and applicability of the performance bonds, unless parties have clearly and expressly included any such terms within the performance bond.

Interpretation of Contract

A) Implying a fitness for purpose term in a professional services contract

In *Global Switch (Property) Singapore Pte Ltd v Arup Singapore Pte Ltd* [2019] SGHC 122, one of the main issues that the HC considered was whether 'fitness for purpose' was an implied term in a data centre construction contract.

Sometime around 2008, the plaintiff embarked on its project to construct an extension (the "**Extension**") to its existing data centre facility and engaged the defendant as its mechanical and electrical ("**M&E**") consultant. In May 2013, the plaintiff complained, *inter alia*, that the utility mains power supply experienced disturbances, which in turn resulted in overloading of the back-up systems and failure of the plaintiff's tenants' IT equipment. The plaintiff then sued the defendant for breach of contract. Particularly, the plaintiff claimed that there was an implied term in the contract that the defendant needed to ensure that its designs for the M&E systems would "meet the needs of the operation of a data centre and … be fit for their intended purposes".

As a preliminary point, the HC noted that it was not clear whether the plaintiff was seeking to argue that the fitness for purpose term should be implied "as a matter of law, or as a matter of fact". A review of the authorities cited by the plaintiff led the HC to the observation, *inter alia*, that there is a general reluctance to extend the implied obligation of contractors to designers or M&E consultants, such as the defendant. Accordingly, the HC declined to find an implied term in law as the threshold for such an implication is high and neither party had sufficiently addressed the court on this issue.

The HC also found that there was no such implied term in fact. In approaching this point, the HC considered two questions: 1) Fit for what purpose? and 2) Fit to what standard? It was held that while the first question had been dealt with by identifying the purpose as use as a data centre, the plaintiff had failed to address the second question. This was crucial given that, in the context of designing a data centre, there are "numerous levels of quality and standards". As such, in the absence of sufficient particularisation of the applicable standard, the HC declined to find an implied term in fact as it was "too vague and ambiguous to succeed".

In any event, the HC found that the test for implying a term in fact as set out in *Semborp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 was not satisfied. In particular, it was held that an implied term for fitness for purpose would have been unnecessary for business efficacy since the defendant would already be "under a duty to use reasonable care and skill in performing its contractual obligations".

While the court did not definitively rule on the possibility of implying a fitness for purpose term in law or in fact, the case demonstrates the difficulty of doing so. The employer should therefore consider carefully whether fitness for purpose is a necessary standard it expects of the consultant or if the standard of due care and skill is sufficient. If the fitness for purpose standard is required, then it is advisable to expressly incorporate this into the contract. In doing so, it is also essential to express clearly that the deliverables are to be fit for what purpose and for what performance standards.

B) Importance of properly defining the scope of work in sub-contracts

In *Yew San Construction Pte Ltd v Ley Choon Constructions and Engineering* [2019] SGHC 285, the court had to decide whether the Plaintiff earthworks subcontractor had undertaken the obligation to compact the soil that it supplied and delivered to the Defendant main contractor.

The Defendant had secured a contract from the Changi Airport Group (Singapore) Pte Ltd ("**CAG**") as the main contractor for the construction of an aircraft parking apron, associated taxiways and ancillary works for Seletar Airport. The Defendant then subcontracted various earthworks to the Plaintiff under a lump sum contract for $2,280,000. The scope of works and services provided that the Plaintiff was required to "... *supply, deliver and fill CAG-approved earth/soil from [Yew San's] own sources or earth/soil excavated within the site, in layers of 250mm each...*"

Disputes arose between the parties after the Defendant paid the Plaintiff $959,000, with the Plaintiff claiming the $1,321,000 outstanding and the Defendant counterclaiming for costs incurred in completing the Plaintiff's incomplete work as well as an indemnity for liquidated damages imposed by CAG.

The HC found that, on a proper construction of the subcontract, the compaction works were not part of the Plaintiff's scope of work for the following reasons:

- The plain text of the agreement did not include the words "compact" or "compaction";
- The opinion of the Defendant's earthworks expert that the word "fill" is a term of art in the construction industry which would obviously encompass compaction was based only on his general observations of such contracts in his experience, and was otherwise unsubstantiated;
- The Specifications to the main contract which was incorporated into the subcontract specifically provide, in addition to the words "filling" and "fill", for "*compaction in layers*" and that "*the fill shall be compacted by vibratory rollers*" which the Defendant could have simply mirrored if they wanted to include compaction in the subcontract; and
- For the entire duration of the project, the Defendant supplied the requisite machinery and manpower and undertook the compaction works without protest.

With regards to the Defendant's conduct during the project, the court re-emphasized that subsequent conduct is not an orthodox tool in the interpretation of contracts, and that courts should exercise caution when dealing with evidence of subsequent conduct although this does not mean that it should always be disregarded. In this case, the parties' subsequent conduct was relevant, not as an aid to interpretation of the scope of works, but as confirmation of the conclusion the court already reached.

This case illustrates the importance of properly defining the scope of works. While industry practice and subsequent conduct are relevant where a dispute arises, the former may be challenging to prove in court while the latter is not an orthodox tool in interpretation and cut either way. Special attention should therefore be placed on expressly providing for all aspects of work expected to be carried out by subcontractors.

Liability or Obligation of Related Parties

A) Building owner liable for fire damage to neighbouring property caused by contractor

In the recent decision of *PEX International Pte Ltd v Lim Seng Chye and another and another appeal* [2019] SGCA 82, the CA clarified the role of foreseeability in the tort of private nuisance and the importance of distinguishing between foreseeability of the risk of harm and foreseeability of the type of harm in finding that the building owner was liable in nuisance for the fire caused by its contractor.

PEX International Pte Ltd ("**PEX**") owned a building located at 17 Link Road ("**No 17**") and Lim Seng Chye ("**Lim**") owned an adjoining property located at 15 Link Road ("**No 15**"). Formcraft Pte Ltd ("**Formcraft**") was engaged by PEX as the contractor to carry out addition & alternation ("**A&A**") works. On 30 April 2013, a fire occurred

during construction when hot works were being carried out at No 17, which caused extensive damage to No 15. Lim then brought a claim in the tort of negligence, private nuisance and the rule in *John Rylands and Jehu Horrocks v Thomas Fletcher* (1868) LR 3 HL 330 ("***Rylands v Fletcher***") against PEX.

In the court below, the HC dismissed Lim's claim in negligence but allowed the claim in private nuisance and the rule in Rylands v Fletcher. Both Lim and PEX appealed against the HC's findings.

On appeal, both appeals were dismissed. In relation to the HC decision on the tort of negligence, the CA agreed that Lim's claim in negligence against PEX was not made out for the reasons given by the HC judge in that:

- PEX was not negligent in the selection of Formcraft as its independent contractor. It was not disputed that Formcraft was duly licensed to carry out the works.
- There was reasonable basis for PEX to believe that Formcraft and the consultant would be liaising and communicating with each other in relation to the commencement and execution of the A&A works at No 17.
- Although Formcraft was negligent in carrying out the A&A works in the manner that it did, Pex was not liable for Formcraft as Formcraft was an independent contractor and there was no basis to find that PEX owed a non-delegable duty to Lim to ensure that Formcraft took reasonable care in the execution of the A&A works at No 17.

As regards Lim's claim in private nuisance and the rule in Rylands v Fletcher, the CA was of the opinion that while the correct outcome was reached, there were aspects of the HC decision which merited further clarification.

The role of foreseeability in private nuisance

Having reviewed the line of English and local cases on private nuisance, the CA concluded that there were two competing approaches in relation to the proper role of foreseeability in the tort of private nuisance:

> ***"The first approach is that foreseeability of the risk of harm is generally relevant in determining whether liability in nuisance is established."***

> ***"The second approach is that foreseeability of the risk of harm is not generally relevant in establishing liability. Instead, the relevant control mechanism is the principle that the use of land must be reasonable. Foreseeability of the type of harm, however, is relevant in determining whether a type of loss is too remote to be claimed."***

The following facts in and English case of *Spicer v Smee* illustrate how the above two approaches can result in different outcomes:

> ***There were 2 adjoining bungalows. A fire originating from the defendant's bungalow almost completely destroyed the plaintiff's bungalow and its contents. The cause of the fire was the negligent workmanship of an independent contractor hired by the defendant some nine years before the fire. The contractor had installed electric wiring in the defendant's bungalow without adequately protecting part of the live wire. This was unknown to the defendant. Eventually, this portion of the wire was exposed came into contact with wet wood and resulted in the fire, which destroyed the plaintiff's bungalow.***

If the first approach was taken, the defendant would not be liable in nuisance because it was not foreseeable that a fire would arise from the contractor's electrical works nine years later. On the other hand, if the second approach was adopted, then having an electrical installation where the live wiring did not have adequate protection and can result in fire was an unreasonable use of the land.

The CA adopted the second approach because in the law of nuisance, the focus was not on the conduct of the defendant or persons he was responsible for, as in the case of the tort of negligence, but on the vindication of the plaintiff's interests and rights over his land. The CA summarised the principles in the tort of nuisance as follows:

- ***"Foreseeability of the risk of harm is not generally necessary to mount a successful action in nuisance, even where the source of the nuisance is the independent contractor of the defendant. The relevant control mechanism is the principle that any use of land that interfered with the plaintiff's use and enjoyment of his neighbouring land must be reasonable.***

- ***Foreseeability of the risk of harm is relevant only where the acts which created the nuisance were not authorised by the defendant, such as where the relevant acts originated from a trespasser. This exception was founded on the basis that the defendant needs to have "used" the land in an unreasonable manner in order to be liable in nuisance. Acts of a trespasser unknown to the owner of the land cannot possibly constitute "use" by the owner of the land.***

- ***Nevertheless, foreseeability of the type of harm is relevant in determining whether the claim satisfies the requirement of remoteness of damage. Causation and remoteness of damage are essential elements in supporting a claim in nuisance because the tort is only actionable on proof of damage."***

On the facts, the CA agreed with the HC judge that there was unreasonable use of land. The hot works were done at the perimeter between No 15 and No 17 in the presence of strong winds, in close proximity to the flammable mattresses stored at the backyard of No 15 and significantly, without any proper supervision of the workers. Damage by fire to No 15 was foreseeable (type of harm) and not too remote.

The rule in Rylands v Fletcher

The rule in *Rylands v Fletcher* is a sub-species of the tort of nuisance, and foreseeability of the risk of harm is not relevant in establishing liability under the rule. In taking the second approach, the CA decided to leave the rule in *Rylands v Fletcher* as a sub-species of nuisance and defer the question of whether it should be subsumed entirely with the tort of nuisance to a more appropriate case in the future.

On the facts, the CA agreed with the HC judge that there was non-natural use of the land and there was an escape of a dangerous object onto Lim's property, which caused damage by fire that was not too remote.

This case amply demonstrates that while an owner may not be liable for its contractor's negligence in causing damage to a neighbouring property, he/she may still be found liable under the tort of private nuisance where there is unreasonable use of land and where the damage is not too remote or is a type of harm that is foreseeable. That the defendant owner did not know or could not foresee the risk of harm is not a good defense unless the nuisance was caused by a trespasser to his/her land.

B) Whether a developer is liable for defects in the architect's design

In *Orion-One Development Pte Ltd (in liquidation) v MCST Plan No. 3556* [2019] SGCA 66, the MCST of a commercial building ("**Building**"), who also represented the subsidiary proprietors ("**SP**"), sued the developer and contractor for various defects, which the MCST claimed was a result of a the failure to build "*in a good and workmanlike manner*".

The defects cause by defective design included:

- Lack of flashings, projections, drainage tracks or canopies installed at the building's openings, which caused rainwater ingress and led to corrosion and staining;

- Kerbs which encouraged rainwater ingress as they were constructed outside of doors, instead of inside; and

- Failure to employ design and detailing techniques to limit cracking of the reinforced concrete driveway, such as by compacting the base of the driveway properly before the top layer was applied.

The defects alleged to be caused by poor workmanship included debonded or debonding plaster, paintwork, water ponding and floor slabs.

A key question was whether the developer was liable for defects caused by design defects.

The sale and purchase agreements ("**SPAs**") with the SPs were made pursuant to the Sale of Commercial Properties Rules (Cap 281, R1, 1999 Rev Ed). Clause 10.1 of the SPAs provided that: "The Vendor must as soon as possible *build the Unit, together with all common property of the Building, in a good and workmanlike manner according to the Specifications and the plans* approved by the Commissioner of Building Control and other relevant authorities." Clause 1.1.1 on the definition of defects was: "any fault in the Unit which due to defective workmanship or materials or to the Unit, the Building or the common property, as the case may be, not having been constructed according to the Specifications".

The HC, relying on the authority of *MCST Plan 2297 v Seasons Park Ltd* [2005] 2 SLR(R) 613 ("**Seasons Park**") held that "*it is irrelevant whether the lack of flashings, projections, drainage tracks or canopies is a design issue. [The developer] is liable under the SPAs for defects caused by lack of proper care and skill in the construction of the Building. This includes lack of proper care and skill on the part of the architects in designing the Building as noted by the Court of Appeal in Seasons Park*."

In *Seasons Park*, the CA held that "However, it does not thereby follow that a purchase of a unit has no remedy against the developer for faulty design… by the architect or engineer whom the developer has appointed. The claim will be in contract and in respect of such a claim, the developer cannot plead in defence that he has engaged competent professionals to design the project … This is because the developer has, by contract, agreed to deliver a unit, or building, **in accordance with the specifications, and if he should fail to do so**, he is liable for breach of contract."

On appeal, the CA held that:

- *Seasons Park* contemplated a situation where by reason of faulty design on the part of the engineers or architects, the unit or building was not delivered in accordance with the specifications. Hence, on the present case, the developer will only be liable if as a result of design defects, the building was not built "*in a good and workmanlike manner according to the Specification and the plans*".

- However, on the facts, it was not the MCST's case that the Building was not constructed in accordance with the Specifications or the approved plans. As the court found that the design defects relate to the developer's omission to install certain features, an omissions to construct because the feature was not included in the Specifications or the approved plans (ie, a pure omission) cannot be fairly said to fall under the developer's duty to construct in a good and workmanlike manner.

- Where the Specifications or the approved plans were deficient, it is not clear from the face of cl 10.1 that a developer (such as a developer on the facts) is liable for deficient Specifications or plans. Instead, clause 10.1 obliges the developer to construct in accordance with those requirements. In such a case, it is open to the SPs or MCST to claim against the architects or engineers for any shortcoming in the preparation of the Specification or plans.

- With regard to the defects alleged to be caused by poor workmanship, the CA affirmed the HC decision that the MCST had failed to prove that the defects were caused by poor workmanship.

Takeaways:

- In bringing a claim for defects, it is necessary to consider the nature of the defects, and whether they are due to poor workmanship or non-compliance with specifications or plans or defective design. This would influence the decision which party to claim against as a defendant.
- A developer or contractor may not be liable for design defects, depending on the terms of the contract. A developer or contractor will usually not be liable in tort for design defects if it was not within the scope of his responsibility and/or he had properly delegated that design responsibility to an appropriate qualified person, like and architect or engineer.
- It is not sufficient just to prove the existence of defects, it is usually necessary, depending on the terms of the contract, to show whether the defects are due to poor workmanship, or defective materials, or non-compliance with specifications and plans, or defective design.

C) Sub-subcontractor not entitled to enforce financing obligation of main contractor where main contractor is not a party to the contract

In *Winstech Engineering Pte Ltd v Shanghai Chong Kee Furniture & Construction Pte Ltd* [2019] SGHC 213, the HC considered the issue of whether a sub-subcontractor can claim against a main contractor in contract a financing obligation of the main contractor stated in the sub-subcontract, where the latter is not a party to the said contract.

Sometime in 2015, the defendant main contractor, Shanghai Chong Kee Furniture & Construction Pte Ltd engaged JDK Construction Pte Ltd ("**JDK**") as its main subcontractor for a hotel project. In March 2016, by way of a letter of award dated 23 March 2016 (the "**Contract**"), JDK sub-contracted the installation of mechanical and electrical engineering works to the plaintiff sub-subcontractor. There was no dispute that the Contract was only entered into between the plaintiff and JDK. The defendant was only mentioned in cl 1(2) of the Contract which provided that:

> *Supply of Airconditioning & Mechanical Ventilation, Electrical, Fire Protection and Plumbing, Sanitary and Gas works (Line of Credit to be issued by Shanghai Chong Kee Furniture & Construction Pte Ltd)" for the sum of $600,000.*

Subsequently, disputes arose when the plaintiff failed to obtain further financial assistance. In reliance of cl 1(2) of the Contract, the plaintiff sued the defendant for breach of contract due to the latter's failure to provide the full amount of the line of credit ("**LOC**"). The plaintiff further alleged that one of the defendant's directors had orally agreed that the defendant would provide the LOC to the plaintiff (the "**Alleged Oral Agreement**").

In dismissing the plaintiff's claims, the HC held, inter alia, that:

- The Contract binds only the parties to it. Given that the defendant was not a party to the Contract, it cannot be bound to provide the LOC to the plaintiff. The clause, "*at most, binds JDK to procure the LOC from the defendant*".
- As regards the Alleged Oral Agreement, the plaintiff was unable to clearly set out the relevant facts. More importantly, the position taken by the plaintiff in its response to the defendant's further and better particulars request and by the plaintiff's director in his affidavit of evidence-in-chief and during cross-examination was that the alleged "agreement was made in *writing*" and that there was "no oral contract between the parties".
- In any event, even if the defendant was obliged to provide the LOC, the plaintiff's claim "*should be for the damages sustained from the failure to provide the LOC*", and not the sum of the unpaid balance of the LOC.

Takeaways:

- Ensure that all obligations of third parties named in the contract are a party to the contract. If it is not practical that such third parties are made a party to the contract, ensure that there is a collateral contract.
- Collateral contracts should be in writing or evidenced in writing.

Concurrent Causes

A) Whether contractor is liable for loss and damage caused by more than one effective cause, one due to the contractor's breach and the other due to the employer's act or omission

In *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2019] SGHC 265, the court had the task of assessing the damages due to the Plaintiff employer by the Defendant fitting-out contractor due to 2 effective causes, one due to the contractor and the other due to the employer.

The Plaintiff dental company had contracted the Defendant to carry out interior design and fitting-out works for a clinic located at Suntec City Mall by 12 September 2013, before the grand opening of the refurbished mall. In breach of the agreement, the Defendant only completed the Works on 31 October 2013 (i.e. 50 days late). Furthermore, as a result of the Defendant's failure to design and execute the works in a manner fit for its purpose, 2 floods occurred in the clinic which resulted in the clinic closing from 17 January 2014 to 8 March 2014 (i.e. 51 days), and again from 29 July 2014 to 5 March 2015 (i.e. 220 days). The Plaintiff then decided to permanently close the clinic and did not resume business from 6 March 2015. Due to the Plaintiff's failure to pay rent and resume business, the landlord repossessed the clinic on 30 March 2015.

Under the lease, the landlord had granted a two-month rent-free fitting out period from 22 July 2013 to 21 September 2013 provided that the plaintiff did not breach the lease. The landlord subsequently charged the Plaintiff rent for the rent-free period. When the landlord sued the Plaintiff for unpaid rent, the landlord stated that the basis for its claim was (a) the Plaintiff's breach of the lease by ceasing to operate at the premises from 29 July 2014 (i.e. after the second flood) and (b) failing to pay the outstanding rents for the premises. A settlement was subsequently reached with the landlord so that rent was only charged until 29 March 2015 instead of the contractually stipulated end-date of 21 September 2016.

The court held that, of these two causes, only the failure to operate the clinic flowed directly from the Defendant's breach which caused the second flood. The failure to pay rent timeously appeared to be caused solely by the Plaintiff, as it had the financial capacity and sufficient cash flow from its other clinics to pay the rent timeously if it so wished. It was simply unpaid as the Plaintiff was negotiating for alternative premises with the landlord, and did not wish to pay such rent unless and until it was granted such alternative premises.

Nevertheless, the court found that the Defendant contractor was liable, inter-alia, for the forfeited rent free period, as well as the wasted depreciation expenses and wasted rent in arrears as the defendant's breach was an effective cause of the inability to operate the clinic. The court held that when the breach of a contract is one of two causes, the contract-breaker is liable so long as his breach was 'an' effective cause of the loss and both causes were of equal efficacy. The court need not choose which cause was the more effective one. Since the defendant's breach which caused the second flood and which led to the Plaintiff being unable to resume business at the clinic was an effective cause of the Plaintiff being charged rent (of what was otherwise a rent-free fitting out period), and incurring wasted expenditure, that was sufficient to render the Defendant liable.

On a separate note, the court also clarified that there are 2 alternative bases of assessing damages for loss suffered by a business, namely (a) "revenue" minus "variable expenses" or (b) "net profit" plus "fixed expenses". Both should achieve the same result and there would be no double counting provided both basis (a) and basis (b) are not claimed at the same time. The Judge said that "*The better basis to adopt in each case is the basis that enables a fairly reliable answer to be more easily arrived at.*"

On the facts, the court held that basis (a) was appropriate for assessing damages for the closure of the clinic up to 5 March 2015, while basis (b) was more appropriate for the remaining period of the lease as the clinic was treated as permanently closed and therefore no deemed patient revenue should be attributed. The plaintiff was therefore entitled to loss of deemed patient revenue less variable expenses for the period up to 5 March 2015 (basis (a)), and wasted depreciation expenses (from 6 March 2015 till the end of the lease on 21 September 2016) and wasted rent in arrears paid to the landlord (from 6 March 2015 till 29 March 2015).

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