IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 114

Suit No 1067 of 2015

Between

Poh Lian Construction (Pte.) Ltd (*in liquidation)*

… *Plaintiff*

And

(1) Lauw Wisanggeni
(2) Leong Chee Keng
(3) Ng Giok Beng

… *Defendants*

And

(1) Chia Quee Hock
(2) Peh Pit Tat
(3) Chan Kin

… *Third parties*

JUDGMENT

[Companies] — [Directors] — [Duties]

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Poh Lian Construction (Pte) Ltd (*in liquidation*)
v
Lauw Wisanggeni and others
(Chia Quee Hock and others, third parties)

[2019] SGHC 114

High Court — Suit No 1067 of 2015
Kannan Ramesh J
3–6, 16–20, 23–25, 30, 31 July, 1, 2, 6, 7 August, 1–3 October, 29 November 2018; 4 January, 20, 21 February 2019

3 May 2019 Judgment reserved.

Kannan Ramesh J:

Introduction

1 This is a suit brought by the plaintiff against its ex-directors and senior management for breaches of duty primarily in relation to the management of three construction projects, as well as the alleged concealment of the plaintiff's true financial position from the plaintiff's board of directors and the board of its parent company. Having heard the evidence of the witnesses and reviewed the parties' submissions, I now give my judgment.

Background facts

Dramatis personae

2 The plaintiff is a construction company whose portfolio of projects included at one time numerous large-scale public and private residential and commercial projects. At all material times, it was a wholly-owned subsidiary of United Fiber System Limited ("UFS"), a company listed on the Singapore Exchange ("SGX") that was primarily an investment holding company. It is not in dispute that the plaintiff was the only significant revenue-generating asset of UFS at all material times.

3 The plaintiff was placed under interim judicial management ("JM") on 7 March 2013. On 10 October 2014, the JM order was discharged and the plaintiff was placed in liquidation. In August 2017, Mr Lim Loo Khoon, who had been involved in the JM administration, was appointed as one of the liquidators.

4 The first defendant, Mr Lauw Wisanggeni, was appointed as the plaintiff's executive chairman and executive director in February or March 2009, with a starting salary of $50,000 per month. Prior to his appointment, the first defendant had provided consultancy services to UFS on forestry developments. This was unrelated to the construction business of the plaintiff.

5 The second defendant, Mr Leong Chee Keng, was appointed as the plaintiff's chief operating officer in June 2009, with a starting salary of $21,000 per month. He was appointed as a director in December 2009.

6 The third defendant, Mr Ng Giok Beng, was employed by the plaintiff from October 2009 as a senior project manager, with a starting salary of $9,500 per month.

7 The first third party, Mr Chia Quee Hock, founded the plaintiff in 1975 and was managing director of the plaintiff from around 1983. He was also appointed deputy chairman of UFS in 2001, and thereafter a non-executive director of UFS in 2009. The first third party does not read, speak or understand English.

8 The second third party, Mr Peh Pit Tat, and the third third party, Mr Chan Kin, are the vice-president and chief investment officer respectively of Argyle Street Management Limited, which is a fund management entity with an interest in UFS. The second and third third parties joined the UFS board as non-executive directors in June 2011 and May 2011 respectively. In July 2011, both the second and third third parties were appointed to the plaintiff's board as directors, without drawing a salary.

The Sophia project

9 The plaintiff was invited to submit a tender for the Sophia Residence project ("the Sophia project") in September 2009. It is not a matter of serious dispute that the plaintiff was keen to get this project, as it had at that point of time not obtained any construction projects for 18 months, since it was awarded the Green Meadows project in March 2008. There were concerns about the sustainability of the plaintiff's business as a result. The developer of the Sophia project was Sophia Residence Development Pte Ltd, which is a subsidiary of Guocoland (Singapore) Pte Ltd ("Guocoland"), a substantial developer and one that the first defendant was well acquainted with.

10 In early November 2009, the plaintiff's contracts manager prepared what the plaintiff characterised as a preliminary costing document, reflecting an "Estimated tender sum" of over $134m. On the same document, under "Performance Bond > assume contract sum", the same figure was struck out by hand and replaced with $120m. Shortly thereafter, a revised document was prepared, reflecting an estimated tender sum and assumed contract sum of $120m. The first defendant sought approval from the board of UFS to tender at $120m, reflecting a "margin of 6%". Approval was granted. The second defendant was eventually copied in this chain of correspondence.

11 On 10 November 2009, the plaintiff submitted a tender of $115.84m for the Sophia project, which tender was signed by the first and second defendants. This tender was accepted by the developer, with a contract period of 30 months from 1 March 2010 to 31 August 2012. UFS was obliged to announce the award of the tender at the contract price of $115.84m through the SGX, which it did. The first third party together with the second defendant signed the Conditions of Contract for the Sophia project.

12 For reasons which are disputed, the Sophia project faced considerable delay. In an attempt to address the issues, in January 2013, the plaintiff entered into a tripartite agreement with the developer and Kimly Construction Pte Ltd ("Kimly"), for Kimly to be engaged as the construction manager to complete the Sophia project. However, this effort was unsuccessful.

13 In March 2013, the developer gave notice to terminate the plaintiff as the main contractor for the Sophia project, noting the plaintiff's failure to proceed with the contracted works "with diligence and due expedition", as well as the plaintiff's filing of an application for JM a few days prior.

The Bishopsgate project

14 In January 2010, the plaintiff received an invitation to tender for the Bishopsgate Residences project ("the Bishopsgate project") by Prime Residential Development Pte Ltd ("Prime"), which was a wholly-owned subsidiary of Kajima Overseas Asia Ltd ("Kajima"), another substantial developer.

15 On 11 March 2010, a representative of CCM Industrial Pte Ltd ("CCM") submitted to the plaintiff (via email to the third defendant) a tender for $50,998,000.00, stated to be for the "design and construction of condominium housing development at Bishopsgate for Prime". In this tender, CCM offered and undertook to "design and provide working/construction drawings for all architectural and structural works and mechanical and electrical services, complete and maintain the whole of the Works", with a completion period of 22 months.

16 The plaintiff subsequently submitted a tender for the Bishopsgate project at a contract sum of approximately $58.5m, which was accepted by Prime on 15 May 2010. The Conditions of Contract for the Bishopsgate project included the following cl 2.3.1:

> The Contractor shall not, without the prior Written consent of the Employer, assign this Contract or any part thereof, or any benefit or interest therein or thereunder. The Contractor shall not sub-contract the whole of the design and construction of the Works without the prior consent of the Employer.

17 On 20 May 2010, the plaintiff issued a letter of award to CCM, confirming "acceptance of [the] company as the Sub-Contractor to design, carry out, bring to [completion] & maintain the proposed condominium housing development … for the sub-contract sum of $51,343,900.00". According to Mr

Lim Soon Hock, the plaintiff's contracts manager, the difference between the subcontract sum of approximately $51m and the tender price of $58.5m represented the plaintiff's "profit margin and the costs for providing our management staff and other expenses required for the successful completion of the project."

18 On 2 July 2010, Mr Gen Yasuda of Kajima ("Mr Yasuda") sent a letter to the second defendant, reiterating that the plaintiff was not allowed to subcontract the whole of the works for the Bishopsgate project, referring to the aforementioned cl 2.3.1 (see [16] above). This letter was prompted by a prospectus that CCM had lodged with the Monetary Authority of Singapore and SGX, and released to the general public for the purpose of its proposed listing, which Mr Yasuda described as "written in such a manner that everybody would be made to believe CCM is the main contractor of our project". Mr Yasuda said that the "impression of letting our main contractor sub-contract the whole of the Works is detrimental to our business in terms of reputation and sales, amongst other aspects". Mr Yasuda went on to say that "the only way to stop the rumours and control the damage is to totally disconnect CCM from the project", and requested the plaintiff to "remove CCM from the project altogether".

19 It was recorded in the minutes of a subsequent site meeting in July 2010 that the plaintiff would progressively phase out CCM's involvement in the Bishopsgate project, and Mr Lim Soon Hock was recorded as agreeing to do so by end of July 2010. It is not in dispute that this was not done until one year later. It should be noted that there was no attempt by the first to third defendants or CCM to convince Mr Yasuda that his view that the plaintiff had contracted the whole of the Works to CCM was inaccurate.

20 In August 2011, the second defendant emailed the first defendant stating the following:

> We were awarded the Bishopsgate Residence project … in May 2010 for S$58.5M by Prime … As we were short-handed during the tendering time, we had invited CCM Industrial Pte Ltd to work on the tender by agreeing to subcontract out majority of the project to them on back-to-back basis if we were awarded.
>
> […]
>
> Basing on the current progress on site and with the CONQUAS score of 99.2 on structure, [the plaintiff does] not have a valid reason to initiate an early termination of CCM's contract. However, through some in depth negotiations and persuasions, we managed to bring down their expectation and egotism to accept our proposed final settlement as follows:
>
> Valuation of Work Done upto [*sic*] Certificate 13 (Final)
>
> S$16,052,901.58
>
> | | |
> |---|---|
> | Less retention | S$(1,605,290.17) |
> | Less Previous Payment | S$(12,223,214.14) |
> | Value of Work Done Payable in this Certificate | **S$2,224,397.37** |
> | Deduct Cost Deduction | S$(1,977,750.87) |
> | Release of Retention | S$1,605,290.17 |
> | Deduct Sub-con's Retention | S$(350,070.84) |
> | Compensation/Ex-gratia payment for cessation of complete Site execution and operation as requested by the Client, Inclusive of surrendering all site establishments and loss of Profit and etc. | S$498,134.17 |
> | **Final Net Amount Payable** | **S$2,000,000.00** |
>
> The Management wishes to ensure the Board that we are capable of completing the remaining works of the project within the budgetary cost and this incident will not hit our bottom line of this project. In actual fact, it may be more advantageous to [the plaintiff] that we take over the project at this stage to

> maintain our good relationship with our Client as well as our market reputation in product quality.
>
> Therefore, we seek the Board's approval to allow [the plaintiff] to enter into this settlement arrangement with CCM soonest possible as the Client has informed [the plaintiff] that we will not get our this month progress payment until they receive this letter of undertaking from us.

The first defendant, and the second and third third parties gave their approval for the settlement with CCM proposed in the email. As evident from the above, this settlement was for the sum of $2m, which included outstanding payment for work done and retention sums, as well as a "compensation/ex-gratia payment for cessation of complete Site execution and operation" of $498,134.17. CCM's involvement with the Bishopsgate project ceased in or around August 2011 after the settlement sum of $2m was paid.

21 In March 2013, Prime gave notice to terminate the plaintiff's employment as main contractor for the Bishopsgate project.

The Goodwood project

22 In December 2009, the plaintiff tendered for the condominium project at Goodwood Residences ("the Goodwood project") at a price of $191.93m. The tender was signed by the first and second defendants. The developer accepted the tender in the same month. The developer of the Goodwood project was Goodwood Residences Pte Ltd, a subsidiary of Guocoland. The contract period for the completion of the project was 30 months.

23 By December 2011, it was clear that the project was in severe delay, as the completion date was merely six months away and much of the contract works had yet to be completed. The plaintiff had up to that point made progress claims amounting to only 30 percent of the total contract sum. It should be noted

the plaintiff does not allege that the first and second defendants were responsible for this delay.

24 In an attempt to resolve the issue, in March 2012, the third defendant was appointed as the project manager of the Goodwood project with the responsibility of overseeing the daily operations of the project. With the approval of the first and second defendants, the third defendant engaged Reinforced Concrete ("RC") subcontractors to provide casual labourers and supervisors for the Goodwood project at an hourly rate of $12 per hour for each labourer and $15 per hour for each supervisor.

The first defendant's unit in Goodwood Residences

25 In April 2010, the first defendant entered into an option to purchase a unit in Goodwood Residences ("the Goodwood unit") for a purchase price of $8.68m. In July 2013, the first defendant sold the property at a price of $10.6m. On the plaintiff's case, the purchase of the Goodwood unit was not disclosed to the plaintiff's board at any time, whereas it is the first defendant's pleaded case that this purchase was disclosed to Mr M Rajaram, UFS's non-executive Chairman, and Mr Hoshi Deboo, a UFS director.

JM and subsequent events

26 In March 2013, the second third party made an application to court for the plaintiff to be placed under JM. According to the second defendant, the second third party had called him from the airport and asked him to shut the gates on the Goodwood project without disclosing the application for JM. The second defendant said that the news of the application came as a surprise to him.

27 In the affidavit filed in support of the application, the second third party opined that the plaintiff was or would be unable to pay its debts and was cash flow insolvent, and that placing the plaintiff under JM would promote its survival as a going concern and/or achieve a more advantageous realisation of its assets than in a winding up.

28 Mr Tam Chee Chong and Mr Andrew Grimmett were appointed as joint and several interim judicial managers following the second third party's application, and thereafter joint and several judicial managers in April 2013. Subsequently, on the direction of this court in June 2014, the judicial managers called a meeting of creditors to put to vote a resolution on whether legal proceedings should be commenced against the first to third defendants. The vote was carried, resulting in the present proceedings.

29 On 10 October 2014, the JM order was discharged and the plaintiff was placed in liquidation.

Parties' cases

The plaintiff's case

The Sophia project

30 The plaintiff's case in relation to the Sophia project suffers from the difficulty that the pleaded case, the case pursued at trial, and the case put forth in closing submissions do not appear to be entirely consistent. On a narrower view, the plaintiff's primary complaint appears to be that the first and second defendants had caused the plaintiff to tender for the Sophia project at a price of $115.84m "in blatant disregard of the approval obtained" from the UFS board for the tender price of $120m. In short, the alleged breach arises because the

first and second defendants acted contrary to the express approval of the UFS board, or at least failed to secure the necessary approval for the actual bid price which was submitted.

31 On a more expansive view, the plaintiff's case is that the first and second defendants by "arbitrarily reducing the tender price", caused the plaintiff to submit a bid that was *below the cost of construction* and without consideration of the profit margin or risks inherent in a construction project. This appears to be the emphasis of the plaintiff's case in its closing submissions. I should say that on a careful reading of the plaintiff's pleadings, the narrower view is the more sustainable interpretation. Indeed, in oral submissions, counsel for the plaintiff, Mr Tan Chuan Thye SC, fairly accepted the difficulties posed by the pleadings in running the case based on the more expansive view.

32 On the plaintiff's more expansive case, the defendants made "irrational and reckless reductions to the tender price" in arriving at a tender that was below cost. According to the evidence of the plaintiff's construction expert Mr Derek Nelson ("Mr Nelson"), a reasonable estimate of the construction cost of the Sophia project would have been in excess of $143m. Such recklessness was, according to the plaintiff, "motivated by a desperation to secure the Sophia Project", given that the plaintiff had failed to secure a new project in over 18 months. Obviously, on the narrower view of the plaintiff's pleadings, Mr Nelson's evidence in this regard is of little relevance as the approved tender price of $120m was already well below his estimation. The only issue, then, would be whether there was approval to bid at $115.84m.

33 Relatedly, the plaintiff asserts that the first and second defendants caused it to submit the tender without calling for the necessary quotations from its subcontractors. In this regard, the plaintiff relies on the testimony of Mr

Nelson, who apparently reviewed documents disclosed in the proceedings and did not find quotations sought for work items such as concrete works or wet trades.

34 In closing submissions, the plaintiff also asserts that the first and second defendants failed to "lock in" the prices of materials and labour by awarding subcontracts shortly after the plaintiff was awarded the Sophia project, with the result that the cost estimates upon which the tender price was based were subject to market fluctuations. This, however, is not found in the pleaded case.

The Bishopsgate project

35 The plaintiff alleges that the defendants caused or authorised the plaintiff to tender for the Bishopsgate project with the intention that if the plaintiff succeeded in its bid, it would subcontract the entire contract works to CCM, in breach of cl 2.3.1 of the Conditions of Contract. The plaintiff submits that it is evident from the documents that it had engaged CCM to prepare a tender, and that the second defendant simply added a profit margin to CCM's tender price and submitted that tender as the plaintiff's own bid for the Bishopsgate project. The plaintiff also points to section 8 of the plaintiff's letter of award to CCM, which required CCM subcontractors to purchase and wear the plaintiff's work uniforms whilst on site, as evidence of the defendants being clearly aware that subterfuge was needed in the carrying out of CCM's works. The first and second defendants knew or had notice of cl 2.3.1 as they were the authorised signatories for the Bishopsgate project, and the third defendant must have been familiar with the tender documents as he was responsible for liaising with CCM. However, by the end of the trial, the plaintiff appeared to have abandoned the claim against the *third defendant* in this regard, and Mr Tan Chuan Thye SC confirmed this in his oral submissions.

36 The plaintiff argues that the subcontract to CCM was a total subcontract (as opposed to a partial or substantial subcontract) in breach of cl 2.3.1 and that this is evident from contemporaneous documents, including (a) CCM's prospectus stating that they had been awarded "another project in the main building works segment which involves the construction of a condominium housing development"; (b) a letter from CCM to the plaintiff dated 29 July 2010 indicating that the plaintiff had confirmed "acceptance of [CCM] to undertake the design and construction of the [Bishopsgate] development at a price of $51,343,900.00"; (c) the email from the second defendant to the first defendant referred to at [20] above; and (d) correspondence between Mr Lim Soon Hock and the plaintiff's former solicitors in which Mr Lim Soon Hock stated that the difference between the tender sum and CCM's subcontract sum represented the plaintiff's profit margin and costs of providing management staff (see [17] above).

37 In relation to the first defendant's assertion that he was not aware of the intention to subcontract works to CCM at the time the plaintiff submitted the tender for the Bishopsgate project, the plaintiff asserts that the first defendant would have known that the plaintiff was shorthanded at the time of the tender, as the first defendant was involved in operational matters of the plaintiff around the same time. Thus, "it is unlikely he did not know that CCM would be engaged to perform the majority of the works on the project".

38 The plaintiff claims that even after Kajima became aware of the subcontract to CCM, and directed CCM's removal from the project site, the defendants permitted CCM to continue work on the Bishopsgate project for more than one year against the instructions of Kajima, in further breach of cl 2.3.1. In particular, the second defendant authorised CCM's workers to wear the plaintiff's uniforms on site even after Kajima's instructions for CCM's removal,

and also gave instructions to CCM regarding the engagement of subcontractors for mechanical and engineering works in August 2010.

39 On the plaintiff's case, CCM's involvement in the Bishopsgate project necessitated its subsequent disengagement. This caused the wastage of management resources, delays and disruptions on site and the payment of an *ex gratia* sum of $498,134.17 under the settlement agreement. Thus, the plaintiff claims against the defendants for the *ex gratia* payment of $498,134.17 as well as the liquidated damages it incurred for the Bishopsgate project amounting to approximately $8.6m. In its closing submissions, the plaintiff further asserts that it would have avoided losses amounting to $12.973m in the Bishopsgate project but for the defendants' breaches, in that the defendants permitted the plaintiff to undertake the Bishopsgate project when it had no capacity to do so.

The Goodwood project

40 The plaintiff's complaint against the defendants in relation to the Goodwood project appears to be split into the following limbs:

(a) That the defendants authorised or caused the engagement of a large number of casual labourers—

(i) at excessive wages; and

(ii) without adequate supervision of their work; and

(b) That the defendants failed to ensure that the original labour subcontractors, which had failed to supply sufficient labour, were back charged for this default; and

(c) That the defendants failed to ensure that the plaintiff's extension of time ("EOT") claims were submitted on time and properly substantiated.

41 According to the plaintiff, it is standard industry practice that workers be engaged on a per unit basis, *ie*, for the value of work performed rather than for time spent doing the work. Hiring workers on an hourly rate was clearly unfavourable to the plaintiff because workers would not be incentivised to complete their work in a timely manner. Mr Nelson opined that payment of workers on a man-day basis would "only be common for small numbers engaged on ad-hoc duties for flexibility, not the delivery of substantial core works packages". Although the plaintiff referred to such hourly-rate workers as both "RC workers" and "casual labourers" in its pleaded case and at the trial, I shall refer to them uniformly as "casual labourers" for clarity.

42 As for the appropriate market rate, Mr Nelson was of the view that a reasonable rate for a skilled worker from the People's Republic of China ("PRC") would be $12 per hour, a PRC supervisor $11–$13 per hour, and a non-PRC worker $6.50 to $7.50 per hour.

43 According to the plaintiff, the failure to adequately supervise the work of the casual labourers was evident from the fact that various subcontractors had been billing the plaintiff for more workers than actually supplied. Mr Nelson was of the opinion that "extensive deployment of casual workers paid on an attendance-only basis brings with it additional challenges that would necessitate increased levels of supervision".

44 The plaintiff claims that the decision to employ casual labourers on an hourly basis and at higher than market rate, as well as the absence of adequate

supervision, led to the plaintiff exceeding its initial labour budget for the Goodwood project by more than $15m.

45 The plaintiff also claims that the defendants failed to take steps to reduce the plaintiff's losses. First, it claims that the defendants failed to ensure that its original labour subcontractors were back charged for abortive works, rectification works or delays, which prevented the plaintiff from recouping some of the costs in remedying these works. Second, it claims that the defendants failed to ensure that the plaintiff's EOT claims for the Goodwood project were made within the contractually stipulated time of 28 days and with proper substantiation.

The concealment issue

46 The plaintiff further claims that the first and second defendants concealed or authorised the concealment of the losses incurred by the plaintiff on the Sophia, Goodwood and Bishopsgate projects, as well as the increasing risk of the plaintiff being subject to liquidated damages as a result of the delays. On the plaintiff's case, from August 2011 to September 2012, the first and second defendants were aware of the significant cost overruns and delays, but concealed these from the plaintiff's other directors and UFS. Instead of alerting UFS, the first and second defendants caused or permitted the circulation of management statements which painted a misleading picture of the three projects being profitable or generating positive cash flows.

47 In closing submissions, however, the plaintiff takes an expanded view of its case on this point. It submits that the first and second defendants:

(a) Failed to inform the plaintiff's board that the Sophia and Goodwood projects presented a serious cash flow problem for the plaintiff;

(b) Failed to inform the plaintiff's board that the Sophia and Goodwood projects were in substantial delay, and that the plaintiff was likely to incur substantial liquidated damages as the developer had rejected the plaintiff's EOT claims; and

(c) In so doing, presented a "false picture of financial health" to the plaintiff's board on or about 27 February 2012.

Loss and damage

48 The concealment of the losses only came to light after UFS's auditor, Ernst & Young LLP ("EY") examined the plaintiff's management statements in August 2012 in connection with a proposed reverse takeover of UFS. As a result of the delay and the manner in which the projects had been tendered for and managed, the plaintiff was unable to remedy the damage that had been done. Thus, the plaintiff claims that the defendants' breaches of duty caused it to suffer loss and damage, and that the plaintiff "lost the chance to avoid the eventual substantial losses incurred in relation to the Projects, which caused it to be propelled into insolvency".

49 On the plaintiff's case, had the plaintiff's board or the UFS board been properly apprised of the plaintiff's true financial position at an earlier time, steps could have been taken to avoid the eventual losses, such as by obtaining third party assistance to manage the projects, negotiating with developers and subcontractors to reduce or delay the amounts payable by the plaintiff, obtaining financing to better equip the plaintiff to address project management issues and

sourcing for an investor to purchase or restructure the plaintiff. In closing submissions, the plaintiff argues that if the UFS board had the necessary information in early 2012, it could have done earlier what it eventually did in November 2012 and with greater success – this would have involved, amongst others, the efforts of the second and third third parties to bring the three projects to completion, to engage external legal counsel to handle the plaintiff's applications for variation orders and file EOT claims, and to engage Guocoland to find solutions. These efforts would have enabled the plaintiff to possibly avoid insolvency if they had been undertaken in early 2012 rather than in late 2012, given that the plaintiff had a healthier cash buffer at that point in time.

50 Although the plaintiff's pleaded case in relation to EOT claims only alleged that the defendants had failed to properly file EOT claims in relation to the Goodwood project, in its closing submissions the plaintiff extends its attack on the EOT claims to all three projects. However, in its pleaded case, the plaintiff sought to recover *damages* from the defendants in respect of the EOT claims for the Goodwood project. Conversely, in its closing submissions, the plaintiff's allegations in respect of the EOT claims for all three projects merely serve to *rebut* the defendants' arguments that even if they were liable for losses, those losses ought to be reduced to account for EOT claims which would have been submitted and approved.

51 As of February 2013, the plaintiff estimates a total loss of approximately $83m in respect of the three projects. The plaintiff's creditors have filed proofs of debts in the liquidation in excess of $370m, and the plaintiff's employees have claimed approximately $0.5m.

The first defendant's Goodwood unit

52 The plaintiff claims that the first defendant had breached his duty to disclose that he had purchased the Goodwood unit, and that he had subsequently sold this for a profit of $1.92m. Through this acquisition and sale, the first defendant gained a secret profit from an opportunity obtained through his directorship with the plaintiff, which was a breach of his duty to the plaintiff ("the no-profit rule"). The first defendant had found out about the availability of the units from Ms Trina Loh of Guocoland during a lunch which he attended in his capacity as the plaintiff's Executive Chairman, and had purchased the Goodwood unit shortly thereafter. Even if the first defendant had disclosed this purchase to Mr M Rajaram and Mr Hoshi Deboo, this did not constitute disclosure to the UFS board.

53 The plaintiff further argues in closing submissions that the first defendant placed himself in a position of conflict by virtue of his acquisition of the Goodwood unit, as he would have stood to benefit as an owner of the unit from liquidated damages for delayed delivery of vacant possession of the unit. This was in conflict with his duty to minimise delays of the Goodwood project as the plaintiff's Executive Chairman ("the no-conflict rule"). However, in oral submissions, Mr Tan Chuan Thye SC stated that the plaintiff is no longer pursuing this argument.

The defendants' case

54 The first to third defendants' cases are more or less aligned, although not in relation to all the claims. Nonetheless, they can be summarised together for simplicity.

The circumstances of the defendants' employment

55 The defendants are united in their portrayal of the circumstances leading up to their employment with the plaintiff and/or their involvement in the three projects, namely that the plaintiff was in a precarious financial position since 2008 due to the weak economy and construction industry, and had recently suffered from mass resignations across various departments. The first and second defendants were thus engaged by the plaintiff to manage the crisis and do damage control, and the third defendant was subsequently brought on board the Goodwood project for a similar purpose. The first defendant further highlights that he did not have prior experience in the construction industry, and that his employment was to allow the plaintiff to leverage on his relationships and connections with developers and financial institutions. In other words, the first defendant was engaged to play the role of a rain-maker. The first defendant thus relied on the second defendant and other senior management to manage the day-to-day operations of the plaintiff. In fact, the first defendant asserts that this was a condition he insisted on for his employment with the plaintiff. Notably, this is not challenged by the plaintiff.

The Sophia project

56 On the defendants' case, the plaintiff submitted a competitive bid for the Sophia project because it had failed to procure a new project since 2008, and thus faced an urgent need to secure new projects to meet its fixed overhead costs. The plaintiff had submitted various bids for different projects during this period, but had failed to secure any projects, sometimes missing out by a small margin. There was the added consideration of wanting to establish a working relationship with Guocoland. This was important as Guocoland, being a well-

known high-end private property developer, could be the source of future business opportunities for the plaintiff.

57 Even though the bid of $115.84m was a competitive one, the defendants claim that they still expected it to be profitable. The defendants had initially estimated that a bid of $120m would generate a profit margin of 6%, which meant that a bid of $115.84m would still generate around $3m in profits. The defendants disagree with the plaintiff's assertion that the figure of $134m (see [10] above) represented the true cost of the Sophia project, as this was merely an estimation used for the purposes of working out the premiums payable for the performance bond and insurance. This was also the evidence of the plaintiff's ex-Quantity Surveyor Ms Gao Lisha ("Ms Gao"), who emphasised that this figure was not derived from her calculations or the calculations of the tender team. On the defendants' case, the true cost estimate of the Sophia project on which the bid was made was approximately $111m. The evidence of Mr Nelson that the real estimated cost of the Sophia project was around $143m (see [32] above) was clearly misconceived as he based his cost of construction on the mistaken assumption that the Sophia project was a "luxury condominium", which the defendants say it was not.

58 Further, the first defendant says that he had informed the UFS board over the phone of the tender price of $115.84m and had explained the basis for the decision. In any case, the UFS board would have been aware of the same given the announcement through the SGX that UFS was required to make upon the plaintiff being awarded the Sophia project.

59 The increase in costs of the Sophia project was due to the change in design following objections by the BCA. In particular, BCA directed that the super-structure had to be de-linked from the retention wall, which required

deeper excavation works and resulted in considerable delays to the project. Further delays were caused by the late delivery of the consultant's drawings, and also because the piling works had hit underground rocks. All of these were events which entitled the plaintiff to a substantial amount of EOT and prolongation costs.

The Bishopsgate project

60 The first and second defendants deny that there was a total subcontract of the Bishopsgate project to CCM, or that there was any resultant breach of cl 2.3.1. CCM was only subcontracted to perform the structural works of the Bishopsgate project, and the plaintiff retained overall management control of the project operations through its site management staff and administrators. Even though Kajima had instructed the plaintiff to remove CCM from the Bishopsgate project, this was not because of any perceived breach of cl 2.3.1, but rather because CCM had misrepresented, in its prospectus, that it was the main contractor for the Bishopsgate project.

61 In any case, the first defendant claims not to have been aware of CCM or its involvement in the Bishopsgate project when he signed the contract which contained cl 2.3.1. The first defendant only became aware of CCM's involvement in the Bishopsgate project after the second defendant informed him orally that Kajima wanted the plaintiff to remove CCM from the project.

62 The defendants submit that the settlement agreement with CCM represented an amicable resolution of the dispute, and it allowed the plaintiff to preserve its relationship with Kajima and also to make use of CCM's equipment on site so as to cause minimal disruption to the Bishopsgate project. The *ex gratia* payment of $498,134.17 was not "free money". It was a reasonable sum

as it accounted for the machinery and manpower left on site by CCM, and avoided the need for the plaintiff to incur additional costs in obtaining replacements.

The Goodwood project

63 According to the defendants, the need for additional labour on the Goodwood project was a result of significant delays in the provision of construction drawings by the developer, as well as the insolvency of some of the appointed labour subcontractors.

64 Due to the labour crunch at the material time, it was necessary to engage additional manpower at an hourly rate rather than on a per-unit basis. The prospective subcontractors were not agreeable to being paid on a per-unit basis because they would be taking over in the middle of the project without knowing the state of the construction, and would therefore bear the risk of rectifying defective works left behind by previous subcontractors. The subcontractors were also worried about uncertainties as the construction drawings were not ready, and as such could not provide quotations on a per-unit basis.

65 Contrary to the plaintiff's allegations, the defendants insist that there was adequate supervision of the casual labourers employed, such as via the use of a biometric check-in system, as well as personal site visits.

66 There were also plans to back charge the subcontractors to recover costs, and specifically to recover the cost of hiring additional workers from the subcontractors who had rendered defective works that required rectification. No actual back charging had been done prior to the plaintiff being placed in JM, as it was thought that this would have an impact on morale at the worksite and the

plaintiff did not in any case have the resources to pursue those claims while the projects were ongoing.

The concealment issue

67 The first and second defendants deny that there was any concealment of the plaintiff's losses from the plaintiff's board or the UFS board. They argue that cost overruns in the plaintiff's projects did not require them to reconsider the plaintiff's profitability, as these were costs which were incurred in advance of future payments from the developer, or which could be recovered through claims against the developer. The first defendant makes the point that the first time he became aware of projected losses was in September 2012, following E&Y's August 2012 audit (see [48] above). Even then, the first and second defendants argue that the losses surfaced by E&Y in August 2012 arose because of its more conservative accounting treatment of the plaintiff's potential claims against the developers, and such treatment did not necessarily mean that the claims were unsustainable resulting in the plaintiff incurring losses. The first defendant also asserts that UFS's board had taken the position that the plaintiff's pre-August 2012 accounts were correct, even after E&Y's August 2012 audit.

68 In response to the plaintiff's allegations regarding the failure to disclose the plaintiff's cash flow difficulties to its board, the second defendant argues that this was outside the scope of the plaintiff's pleaded case. In so far as the cash flow difficulties arose from delays to the plaintiff's projects, the first and second defendants argue that these matters had been disclosed to the plaintiff's board, either implicitly or explicitly. Finally, the first defendant argues that even if he had breached his duties in relation to the concealment of financial information, the plaintiff could not show that if he had discharged those duties,

the board would have taken effective action such that the plaintiff would have been able to avoid its losses.

The first defendant's Goodwood unit

69 The first defendant argues that the Goodwood unit had been open for sale to the public, and that he had purchased the unit in the same manner as a member of the public could have. The first defendant adds that his purchase price of $8.68m was above the developer's minimum sale price. In relation to the alleged breach of the no-conflict rule, the first defendant argues that it could not have been in his interests to have hoped for delayed delivery of the unit just so as to obtain liquidated damages.

The third party claim

70 The first defendant in turn brought a claim against the first, second and third third parties (collectively, the "third parties"), alleging that they were liable to contribute on the following bases:

(a) The third parties failed to take steps towards ensuring that UFS repaid the $12.2m it owed the plaintiff, which contributed towards the plaintiff's insolvency.

(b) The third parties were involved in key decisions for the plaintiff's projects and were aware of the plaintiff's accounting practices; therefore, if the defendants were liable in respect of plaintiff's claims above, the third parties would likewise be liable. In particular:

(i) The first third party would be liable in respect of the claims in relation to the Sophia project, as he had signed the

Conditions of Contract and would have been aware of the underbidding.

(ii) The third parties had decided to continue with the existing labour arrangements for the Goodwood project at the plaintiff's board meeting on 22 October 2012; they would therefore also be liable in respect of the hiring of casual labourers.

(iii) The first third party signed the tender for the Bishopsgate project prior to its submission; he would therefore have knowledge of and be liable for the total subcontract.

(c) After the third parties removed the defendants from the plaintiff's management, the third parties took over management of the plaintiff and mismanaged the plaintiff's projects, such as by failing to make EOT claims. The third parties also applied to place the plaintiff in JM in a negligent manner, without considering the impact of the JM on the plaintiff's business and the possible alternatives to JM, which included the first defendant's expressed interest to purchase the plaintiff. This was because of their conflicting interest in wanting to secure the reverse takeover of UFS. These actions prevented the plaintiff from avoiding insolvency.

71 In his closing submissions, the first defendant also alleges that the third parties' failure to consult key stakeholders prior to placing the plaintiff in JM undermined its prospects of survival.

The third parties' case

72 The third parties deny that they were liable for contribution in respect of any of the claims against the defendants. They argue that they relied on the first defendant to present an accurate picture of the plaintiff's financial situation, and were not in a position to compel UFS's repayment of the $12.2m loan. The first third party argues that he was not aware of the tender price for the Sophia project until after it was awarded to the plaintiff, and that he was unaware of any total subcontract of the Bishopsgate project at the time the subcontract to CCM was awarded. In respect of the third party claims pertaining to the Sophia and Bishopsgate projects, the third parties also argue that the plaintiff's underlying claims against the defendants fail for lack of evidence. In respect of the casual labourers at the Goodwood project, the third parties claim that they did not know about the details of these labourers' engagement even as late as the 22 October 2012 board meeting.

73 The third parties submit that upon taking over the plaintiff's management, they had properly managed the plaintiff and properly brought it into JM. The allegation pertaining to the *manner* in which the third parties brought the plaintiff into JM was unpleaded and could not be relied upon. In any case, the justifiability of the JM was *res judicata* by virtue of the JM order.

Issues for determination

74 The following issues thus arise for my determination:

(a) In relation to the Sophia project, whether the first and second defendants had breached their duties to the plaintiff in tendering for the Sophia project at a price of $115.84m;

(b) In relation to the Bishopsgate project, whether the plaintiff had wholly subcontracted the project to CCM, and whether the first and second defendants had breached their duties to the plaintiff in allowing or causing the plaintiff to do so;

(c) In relation to the Goodwood project, whether the defendants had breached their duties to the plaintiff by:

(i) Allowing or causing the plaintiff to hire casual labourers at an excessive and/or improper wage, and/or failing to adequately supervise their work;

(ii) Failing to ensure that the labour subcontractors were back charged for their inadequate supply of labour; and

(iii) Failing to ensure that EOT claims for the project were properly made;

(d) In relation to all three projects, whether the first and second defendants had breached their duties by concealing the losses incurred by the plaintiff;

(e) Whether the first defendant had breached his duties to the plaintiff by buying the Goodwood unit; and

(f) If there has been a breach in respect of any of the above claims—

(i) What loss was caused to and is recoverable by the plaintiff for each breach; and

(ii) Whether the third parties are liable for contribution in respect of the defendants' liability.

My decision

75 At the outset, I must reiterate that the plaintiff's case at the end of the trial is not entirely consistent with its case as pleaded in the Statement of Claim, as would have been evident from my outline of the plaintiff's case above. I am therefore mindful of the general rule that a court should decide on the basis of unpleaded issues or claims only in the very rare circumstances where "no prejudice is caused to the other party" or where "it would be clearly unjust for the court not to do so": *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 at [40]. In my view, this high bar is not met by any of the plaintiff's submissions in the present case which could be said to be unpleaded. As such, where the plaintiff makes an argument at the close of the trial which is substantially outside of the scope of its pleaded case, it will not factor in my decision. I will return to this point at appropriate junctures in my analysis below.

The Sophia project

76 At its core, the plaintiff's allegation against the first and second defendants in respect of the Sophia project is that the bid of $115.84m was too low, and would have resulted in either an excessively thin profit margin, or an outright loss. In its pleaded case, the main focus of the plaintiff's allegation was that notwithstanding the UFS board's approval of a bid at $120m, the first and second defendants had submitted a different and lower bid (see [30] above). It should be noted that the plaintiff's case was predicated on UFS board approval, as opposed to approval by the plaintiff's own board, being sufficient authorisation of the tender price. I turn first to the narrower question of the UFS board approval.

77 According to the first defendant, subsequent to the initial approval from the UFS board (via Mr M Rajaram and Mr Jaka Prasetya) for a bid at $120m, he had a discussion with the second defendant, who informed him that the developer had indicated that the plaintiff needed to reduce its tender price in order to secure the Sophia project. The first and second defendants then agreed that the tender price should be reduced to $115.84m. They both felt that it was important, if not critical, for the plaintiff to secure the Sophia project given the plaintiff's lack of success with bids in the past 18 months. As this discussion occurred one day before the tender deadline, the first defendant telephoned both Mr M Rajaram and Mr Jaka Prasetya and through them obtained UFS board approval for the new tender price of $115.84m.

78 The plaintiff adduced no evidence to contradict the first defendant's account. Notably, Mr M Rajaram and Mr Jaka Prasetya were not called as witnesses. Instead, the plaintiff argues that the first defendant's claim that the developer had given its views on the tender price before the tender had closed was incredible. However, on the contrary, if there were no truth to the first defendant's version of events, I find it difficult to understand why the first and second defendants would unilaterally decide to lower the bid price already approved by the UFS board without returning to the UFS board for a fresh mandate. Acting unilaterally compromised the defendants' position as they would have lowered the bid price for no reason, and worse still, without authority. There was really no reason or incentive for the first and second defendants to take upon themselves the responsibility and risk of a perilously low bid – let alone a below-costs bid – and in the process breach the approval that they had previously secured. They could have easily sought approval for a fresh mandate from the UFS board and left the UFS board to assume the commercial risk of submitting an untenable bid. The plaintiff did not explore or

offer any possible motive the first and second defendants might have had for unilaterally lowering the bid price, and I find it quite difficult to understand why they would do so.

79 It is also telling that upon the plaintiff being awarded the Sophia project, UFS made an SGX announcement of the award of the tender at the price of $115.84m. If the UFS board had only approved a tender price of $120m, members of the UFS board would no doubt have raised concerns at the time of the SGX announcement. Indeed, I would assume that an investigation would have been undertaken as to how the tender was submitted at a price that was not approved, and the first and second defendants would have been held to account. There is no evidence to suggest that this happened. This to me is telling.

80 I therefore accept that the UFS board had approved the tender price of $115.84m, and that this was because of information the first defendant received that not lowering the tender price from $120m could result in an unsuccessful bid. In this regard, I am cognisant of the fact that the plaintiff's order book had dried up with no projects secured in the preceding eighteen months. This would explain the aggressive bid that was authorised to be made. Analysing it this way must lead to the conclusion that the UFS board and the plaintiff must have been aware that the successful tender price for the Sophia project was on a thin margin.

81 Having answered the question of whether the first and second defendants had acted outside the scope of the UFS board's approval in the negative, I turn to the broader allegation that the Sophia project bid was below the estimated cost of construction and therefore known to be unprofitable from the outset. My observations with regard to the lack of any motivation for the defendants to unilaterally lower the bid price are apposite here as well. Indeed,

if the bid price were below-cost, it would be even more inexplicable for the defendants to have acted without the approval of the UFS board. It is important to bear this overlay in mind when embarking on the main inquiry, which is twofold: first, what the first and second defendants had thought was the genuine projected cost of construction of the Sophia project at the time the bid was submitted, and secondly, whether it was reasonable for the first and second defendants to have operated on the basis of such estimate.

82 On the first question, a number of figures for the projected cost surfaced during the trial. I should point out that it is not entirely clear whether the numbers advanced were projected costs or proposed contract prices, but for the purposes of the present analysis I have assumed that they were projected costs figures:

(a) $134,224,378.24, being the "estimated contract sum" stated in a preliminary costing document, which was struck through by hand and replaced with $120m;

(b) $120,801,940.41, being the "estimated contract sum" stated in a revised preliminary costing document;

(c) $116,957,400.75, being the projected cost in the bill of quantities ("BQ") which was prepared by the plaintiff's team of quantity surveyors, technical staff and contract managers, including Ms Gao and the plaintiff's ex-contracts manager Ms Goh Mee Sing ("Ms Goh");

(d) $111,238,944.22, being the reduced projected cost in the BQ following discussions between the second defendant, third defendant, and Ms Goh; and

(e) $112.8m, being the calculated projected cost based on a tender price of $120m with a 6% profit margin.

83 According to the second defendant, the tender price of $120m "with a 6% margin" initially approved by UFS's board was calculated by him on the basis of the projected cost of approximately $111m ([82(d)] above). Clearly, this calculation was far from precise. Indeed, the price of $120m with a 6% margin implies that the projected cost was about $112.8m (*ie*, [82(e)] above), which formed the basis of the first defendant's pleaded case. Nevertheless, whether the projected cost is taken as $111m or $112.8m, the point remains that the tender price of $115.84m would be a profitable bid, albeit not by much.

84 As for the projected costs at [82(a)]–[82(c)] which exceed the plaintiff's bid, I am satisfied that these were not the figures that the first and second defendants relied upon in making the plaintiff's bid. In relation to the figures at [82(a)] and [82(b)], Ms Gao, who was the lead quantity surveyor for the Sophia project, and the second defendant both testified that these were rough estimates for calculating the costs of premiums for insurance and performance bonds, and Mr Nelson agreed that this appeared to be the case. In relation to the $116m figure in [82(c)], I accept that it must have been revised before the UFS board approved the tender price of $120m, as the 6% margin on which this tender price was approved would be impossible to reconcile with a purported projected cost of $116m. That the projected cost of $116m was eventually reduced to $111m was reflected in the testimony of the second defendant and Mr Lim Soon Hock, in addition to being recorded in the BQ. The plaintiff has failed to adduce evidence to refute this. I therefore accept that the projected cost that was relied upon by the first and second defendants in submitting the plaintiff's bid for the Sophia project was $111m.

85 I turn now to the second question, regarding the reasonableness of the projected cost of $111m. In her evidence, Ms Gao explained in detail how the BQ was prepared. To the extent that quotations were not obtained for each and every item in the BQ, there was no evidence to show that this substantially compromised the reliability of the BQ. In addition, the second defendant's evidence that the plaintiff would have maintained a tender file for the Sophia project was not seriously challenged. Such a file ought to have been in the plaintiff's possession. In the absence of the tender file being produced and examined, I find it difficult to fault Ms Gao's processes.

86 According to the second defendant, the discount from a projected cost of $116m to $111m was justified on the basis of estimated cost savings from improved construction methods, lower cost of materials, and a shortened contract completion period. This was purportedly in line with the plaintiff's usual practice of continuing negotiations with subcontractors and checking the quantity of materials needed against past projects, even after the draft costing sheet is prepared, to attempt to achieve cost savings. Whether or not this might have been optimistic with the benefit of hindsight, it appears to me to be logical for a contractor such as the plaintiff to engage in this exercise, and there is nothing to suggest that this usual practice was abandoned in the instant case.

87 To be clear, I placed little weight upon Mr Nelson's estimated cost of $143m (see [32] above), as it was calculated entirely on the basis of generic construction costs per unit area for "luxury condominiums". For a start, Mr Nelson's conclusion that the Sophia project should be classified as a "luxury condominium" is certainly open to challenge. Mr Nelson's analysis started with the fact that the Sophia project was described as having "full facilities". Mr Nelson then referred to an industry digest, which he claimed provided a definition of "Luxury Standard Condominiums" as having "full communal and

recreational facilities" and "Medium Standard Condominiums" as having "average standard communal and recreational facilities". As the Sophia project had been described as a condominium project with "full facilities", Mr Nelson concluded that it was a "Luxury Standard Condominium". In other words, Mr Nelson's calculation of the projected cost does not rest on an actual assessment of whether the Sophia project could justifiably be described as a "Luxury Standard Condominium" based on location, the quality of specifications, and the range and quality of its facilities. Instead, Mr Nelson arrives at his conclusion based on a sweeping generalisation that all condominiums with full facilities would be regarded as "Luxury Standard Condominiums". Mr Nelson then assumed that all such "Luxury Standard Condominiums" would in turn require a certain cost of construction. This seems to be layering conjecture upon conjecture. In the face of direct evidence from witnesses of both the projected cost and how it was derived, I find Mr Nelson's evidence to be of limited utility.

88 I therefore accept the first and second defendant's account of the projected cost on which the Sophia project bid was based, and find that it was reasonable for them to have relied on it. In my view, this discharges their duty of honesty and diligence in managing the plaintiff's business as far as the Sophia project is concerned.

89 Finally, the plaintiff also argues that the first and second defendants failed to "lock in" the prices of its subcontracts following the award of the Sophia project (see [34] above). Since there is no reference to such a failure anywhere in the pleadings, I disregard it. Further, it appears from the unchallenged evidence of Mr Lim Soon Hock and Ms Gao that quotations from subcontractors would typically have a validity period during which the subcontractors are locked in to the quoted price, although this might not be the case for all quotations received. This was the case with the plaintiff's past

projects. I do not see how the plaintiff can reasonably take issue with the defendants proceeding on the same basis for the Sophia project. Strangely, the same criticism has not been made with regard to the Bishopsgate and Goodwood projects. It therefore seems to be a convenient afterthought.

The Bishopsgate project

90 CCM was the plaintiff's subcontractor for the Bishopsgate project. The first question is whether this was a total subcontract, in breach of cl 2.3.1 of the Conditions of Contract (see [35] above). There is much evidence to suggest that this was the case (see [36] above). In my view, the most compelling pieces of evidence are the email by the second defendant (referred to at [20] above), and the email from Mr Lim Soon Hock to the plaintiff's former solicitors (referred to at [17] above). In the second defendant's email, which was written for the purpose of obtaining permission from the plaintiff's and UFS's boards for the settlement with CCM, the second defendant wrote that the plaintiff had "agree[d] to subcontract out majority of the project to [CCM] on [a] back-to-back basis". What is even more telling is the second defendant's account of the plaintiff's initial response to Kajima's protests against CCM's involvement, which was to "reduce[] the scope of CCM's work to only Structural Works." This necessarily implies that CCM's original role in the Bishopsgate project went beyond structural works. I therefore find the second defendant's assertion, that "CCM was awarded the structural works" only, difficult to believe. Likewise, Mr Lim Soon Hock's email to the plaintiff's former solicitors stated that the difference between the plaintiff's tender sum and the subcontract awarded to CCM was the plaintiff's "profit margin and the costs for providing our management staff and other expenses required for the successful completion of the project." The evidence of a total subcontract to CCM seems compelling.

91 To answer the question of whether there was a total subcontract in the negative, I would have to be satisfied that a not insignificant proportion of the work in the Bishopsgate project was being undertaken at the material time by the plaintiff itself. This is because the prohibition in cl 2.3.1 of the Conditions of Contract (see [16] above) is against "sub-contract[ing] the whole of the design and construction of the Works", and is not merely a prohibition against a total subcontract to a *single* subcontractor. In other words, cl 2.3.1 required the plaintiff to undertake, on its own, at least a material portion of the design and construction of the relevant works.

92 The second defendant submits there was not a total subcontract to CCM as "essential" work such as the aluminium and glass works and the supply of marble and stone works had been subcontracted to Kajima subsidiaries. In so far as the second defendant is pointing towards the mere *supply* of marble by Kajima subsidiaries, this does not help establish that there was no total subcontract to CCM of the design and construction of the relevant works. Further, there is no documentary evidence before the court of any such subcontracting, when one would expect that to be readily available if the assertion is true. Ultimately, as I have pointed out, cl 2.3.1 requires the plaintiff to undertake a material potion of these works itself, and so this submission does not help the second defendant in any case.

93 The first and second defendants also rely on Kajima's complaints of misrepresentations by CCM to show that Kajima itself did not think that the plaintiff had totally subcontracted the works to CCM; instead, Kajima was only dissatisfied that CCM was *misrepresenting* itself as a total subcontractor. However, a somewhat different perspective presents itself when Kajima's complaints are considered in detail. In Kajima's letter to the second defendant dated 2 July 2010, Mr Yasuda began by "reiterat[ing]… that you will not be

allowed to sub-contract the whole of the Works". This is consistent with the interpretation of cl 2.3.1 I have set out above. The letter then went on to complain that rumours of a total subcontract of the works to CCM abounded, and that such an impression was detrimental to Kajima's reputation and business (see [18] above). In this letter, Kajima did not suggest that it had any *evidence* that the works had been totally subcontracted. Indeed, it would appear that the plaintiff and CCM had taken steps to ensure that Kajima would remain unaware of the degree of CCM's involvement, such as by requiring CCM to purchase the plaintiff's uniforms for its workers (see [35] above). Kajima's main concern was therefore to address the "rumours" that there was a total subcontract to CCM. For good measure, Kajima nevertheless emphasised that there was a prohibition on a total subcontract under cl 2.3.1. It is clear that Kajima's complaints do not shed much light on whether there had *in fact* been a total subcontract. Kajima's complaints therefore do not assist the first and second defendants.

94 Further, on balance, I find that the nature of Kajima's complaints and its subsequent insistence on CCM's removal from the Bishopsgate project support the plaintiff's case that there was in fact a total subcontract to CCM. If there was no total subcontract and Kajima was solely concerned about a misrepresentation on CCM's part, the natural response would have been for Kajima to direct its dissatisfaction at CCM, and to force CCM to remove the inaccurate misrepresentations. The plaintiff bore no responsibility for CCM's action in this regard. That Kajima's dissatisfaction was largely directed at the plaintiff would suggest that its true complaint was that the plaintiff had engaged in a total subcontract in breach of its contractual obligations. Looked at from another perspective, if there was in fact no total subcontract to CCM, it is unclear why CCM would lie in its prospectus. I would have expected two things

to have happened then. First, CCM itself would have taken steps to rectify the prospectus and clarify with Kajima its correct role, for fear that Kajima or the plaintiff would take drastic steps if it failed to do so. Second, the second defendant would have asserted that CCM's representation was incorrect and taken steps to establish to Kajima's satisfaction that that was indeed the case. Neither of this happened. Instead, one year after Kajima's protests, the defendants took the step of procuring the plaintiff to terminate the subcontract and pay CCM compensation pursuant to a settlement agreement instead of standing its ground. This sequence of events only makes the second defendant's failure to assuage Kajima or to have CCM correct the representations in the prospectus even more difficult to understand. Whether looked at from the perspective of Kajima, CCM, or the defendants, the events that I have outlined make little sense if the CCM subcontract were not a total subcontract, but are entirely understandable if it were. It is also notable that neither the first nor the second defendant called any representative of CCM to corroborate their account.

95 I therefore find that the CCM subcontract was a total subcontract in breach of cl 2.3.1. The subcontract clearly was not in the plaintiff's best interests, and by entering into it, the defendants who were involved would have breached their duties: see *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 ("*Beyonics*") at [77(c)].

96 It is not in dispute that the second defendant was actively involved in the awarding of the CCM subcontract. The second defendant has thus breached his duties to the plaintiff. It is also clear that the second defendant cannot be excused from this breach under s 391 of the Companies Act (Cap 50, 2006 Rev Ed),

since he has not acted honestly and reasonably by deliberately breaching cl 2.3.1 in awarding the subcontract to CCM.

97 The remaining question is whether the first defendant was also implicated. The first defendant's defence is that he was unaware of the total subcontract when he signed off on the plaintiff's bid for the Bishopsgate project. As against this, the plaintiff argues that the first defendant would have been aware of the total subcontract, as (1) this would have become apparent during the first defendant's review of the tender price; (2) there was no tender costing sheet for the Bishopsgate project, which ought to have raised the first defendant's suspicions; and (3) the first defendant's involvement in the plaintiff's operational matters meant that he must have known that the plaintiff had no manpower for the Bishopsgate project. I have great difficulty in accepting that the thin evidence presented on each of these points is sufficient to show that the first defendant must have been aware of the total subcontract. For example, the plaintiff's sole evidence that the first defendant was heavily involved in the plaintiff's operational matters was that he had to be provided with a company car to travel "from site to site". As for the tender documents, there is nothing in them which would have put the first defendant on alert as to the total subcontract, and the plaintiff has not presented any other evidence to suggest that the first defendant ought to have pressed further. Finally, the first defendant's evidence was that he had no involvement in the award of the CCM subcontract and therefore no knowledge of its details, and the first defendant was never contradicted on this point.

98 The plaintiff has thus not shown that the first defendant had authorised the subcontract with CCM. This is fatal to the plaintiff's claim against the first defendant: once the plaintiff contracted with Kajima to build the Bishopsgate project and the CCM subcontract was awarded, the die was cast – there is no

evidence that following these events, at whatever date the first defendant came to know of the total subcontract, any wrongful action or inaction on his part *increased* the plaintiff's consequent loss.

99 Thus, I find that the second defendant alone has breached his duty to the plaintiff in relation to the subcontract with CCM in the Bishopsgate project. I return to the issue of his liability for subsequent losses at [141] below.

The Goodwood project

100 In relation to the casual labourers, the plaintiff's pleaded case is that they were paid excessive wages and were not adequately supervised (see [40] above). To the extent that some of the plaintiff's arguments in its closing submissions focus solely on the excessive *hiring* of casual labourers, this unpleaded claim is not open to the plaintiff, and I do not consider it further.

The excessive wages claim

101 I turn first to the plaintiff's argument that the plaintiff should have hired workers on a per unit rate rather than on an hourly rate (see [41] above). The defendants do not deny that such hiring was unusual, but try to explain that their circumstances were in fact unusual, due to the fact that the works were incomplete, there were delays in the construction drawings, and there was a labour crunch at the time (see [64] above). In my view, it is important to bear in mind the context in which the hiring of hourly-rate labourers first began. Although there is some controversy over the precise parameters of the decision taken at the meeting in February 2012, there is no doubt that the decision to allow the third defendant to hire casual labourers was taken by the first defendant at this meeting, which the second defendant also attended. By the time of this meeting, it was clear that the plaintiff's existing labour

subcontractors for the Goodwood project were having difficulties supplying the necessary manpower, largely because a main subcontractor was facing imminent insolvency. Indeed, this subcontractor did become insolvent in February 2012. The labour shortage must also be seen against the backdrop of a severe delay in the Goodwood project with the completion date rapidly approaching (see [23] above). The third defendant was therefore appointed project manager for the Goodwood project in February 2012 in order to manage the crisis. In these circumstances, it does not appear to me such an unreasonable step for the defendants to have decided to hire a large number of hourly-rate labourers if unit-rate labourers could not be found. The reasons offered by the defendants for why there was difficulty in finding unit-rate labourers appear cogent. These reasons have not been rebutted.

102 The plaintiff's retort is that (a) the third defendant had in fact managed to engage labour on a unit-rate basis, and there was no evidence of subcontractors refusing to work on this basis; and (b) it made no sense to engage casual labourers when there were concerns with delayed construction drawings, since more labour could not resolve these concerns.

103 I find it difficult to accept the argument that just because there is some evidence that the third defendant managed to engage unit-rate labour on *one* occasion, that therefore means that he must have been able to do the same on other occasions, but failed to do so. I thus do not place much weight on this evidence. In fact, if any conclusion is to be drawn from this evidence, it would more likely suggest that the third defendant was not insistent on hiring casual labourers and would engage per-unit labour where possible. It is just that he was not able to find labour on that basis generally. This is in line with the uncontradicted evidence of the first and third defendants that the plaintiff was in fact *unable* to find labour subcontractors at a per-unit rate. It seems

inconceivable that the third defendant would engage hourly-rate casual labour if there were labour available at a per-unit rate – there is simply no reason for him to prefer the former over the latter. As for the second argument, it is tolerably clear from the first defendant's evidence that the real difficulty was that the construction drawings were being progressively prepared and made available to the subcontractors even as they were waiting onsite to commence work. This would mean that work could still be done by the labourers, albeit at an unpredictable rate. This evidence has also not been rebutted. I am therefore convinced that the defendants' decision to hire hourly-rate labour was not unreasonable in the circumstances.

104 Next, I turn to the plaintiff's argument that the plaintiff paid unskilled workers the wages of skilled workers (see [42] above). At the outset, I note that the plaintiff's pleaded case is that the workers were being paid beyond their skill level (*ie*, that unskilled workers were being paid skilled workers' wages). However, the plaintiff's closing submissions extended the allegation to all the workers being paid beyond the market rate. In so far as the plaintiff's pleaded case is concerned, the only evidence the plaintiff has adduced is from Mr Nelson who concludes that the plaintiff was billed for non-skilled labourers at skilled labourers' rates. If I understand Mr Nelson's reasoning correctly, his sole basis for this conclusion is that the labourers in question had non-Chinese names, indicating that they were not of PRC origin. Although Mr Nelson has no doubt produced statistics showing that non-PRC workers were generally paid lower wages, his conclusion suffers from two problems. First, there is no direct evidence that the workers were indeed not of PRC origin apart from Mr Nelson's conclusion based on his review of their names, a conclusion he was not qualified to make as an expert. Second, there is no evidence that these workers were in fact unskilled. Ms Ker Wei Xuan ("Ms Ker"), a quantity

surveyor employed by the plaintiff at the site of the Goodwood project, testified that to her knowledge, all the casual labourers on site were skilled, and her evidence has not been contradicted. I therefore cannot accept the logical leap that *these* allegedly non-PRC labourers whose wages Mr Nelson took issue with were unskilled simply by reason of their nationality. Mr Nelson's conclusion that *all* non-PRC workers were paid lower than PRC workers because the former were all unskilled seems to me to be more a sweeping generalisation than a properly considered view backed by empirical data. Indeed, on the stand Mr Nelson much more reasonably characterised the relationship between nationality and skill level as a trend rather than a rule. The plaintiff has therefore not made good its case that there were unskilled workers being paid skilled workers' rates.

105 Even if the plaintiff's pleaded case were to be read expansively to include the allegation that all the labourers were paid above market rate, I am of the view that the evidence on the appropriate wages at the relevant time is equivocal. As noted earlier, Mr Nelson's evidence is based on conjecture rather than actual evidence of the market rate, and there was some ambiguity as to whether all the overheads of the labour subcontractors had been taken into account. I am therefore unable to prefer his calculations over those of the first defendant's expert Mr See Choo Lip ("Mr See").

106 A related argument made by the plaintiff is that skilled labourers who were being paid as such were doing tasks that did not require skilled labour. Of course, this runs against the plaintiff's pleaded case that the workers were in fact unskilled but remunerated on the basis that they were skilled. Putting that aside, the evidence, however, is that these labourers were doing a mix of skilled (*eg,* structural works) and unskilled (*eg*, housekeeping) tasks. Since it cannot be the case that every use of a skilled labourer to perform any amount of unskilled

labour amounts to a breach of the defendants' duties, the potential liability here, if at all, is one of inadequate supervision. I consider this question in the next section.

The inadequate supervision claim

107 The plaintiff relies on a wide range of alleged facts in support of its claim that the defendants failed to adequately supervise (or ensure the supervision of) the additional labourers:

(a) There were no deployment plans or productivity records for the labourers – the third defendant's assertion that he had prepared deployment plans was false;

(b) Instead, the labourers were verbally assigned to works on site, resulting in skilled labourers doing unskilled labour;

(c) Daily site meetings did not occur until June 2012 – the third defendant's assertion that he had always held daily site meetings was false;

(d) Instead of an actual record of work done by labourers, the plaintiff paid them solely based on their attendance as recorded in worker cards blindly signed by site managers or supervisors;

(e) As a result, subcontractors were frequently claiming for more workers than were actually on site; and

(f) The first and second defendants should have supervised the third defendant more closely because of his fractious relationship with the second defendant and his past questionable labour management, especially after they became aware of labour cost overruns.

108 In response to [107(a)], the third defendant insisted in his testimony that the plaintiff had monthly and weekly "master plans" for labour deployment, from which he extracted daily plans. No such documents appear in the evidence, although it is Mr See's expert evidence that the master plans themselves must have existed. I do not have reason to disbelieve the third defendant. In any event, I am not convinced that the lack of *written* daily plans for labour deployment would by itself be enough to conclude that the third defendant had breached his duty to the plaintiff. The burden is still on the plaintiff to show that there was inadequate supervision because of the absence of a daily plan. In any case, the third defendant's evidence is that he held (i) a daily site walk at 9 am with subcontractors' supervisors to brief them on what they needed to achieve within the day; (ii) a daily site meeting at 11 am to brief "zone supervisors" who have responsibility for specific areas in the site; and (iii) a daily site walk at 5 pm with subcontractors' supervisors to check on their progress, at which the third defendant would admonish them if they had failed to achieve their targets from the 9 am site walk.

109 The plaintiff argues, however, that at least the daily site meetings did not occur until June 2012 (see [107(c)] above). This is based on evidence of Mr Tan Kian Huay that he "instituted" daily meetings at 11.30 am on 11 June 2012. However, the plaintiff never suggested to the third defendant that he had concocted his evidence about previous daily meetings. Indeed, Mr Tan Kian Huay's testimony about instituting daily meetings is equivocal; despite being asked in multiple ways to confirm that there were no daily meetings before he arrived, Mr Tan Kian Huay insisted that he was unaware of whether there were such meetings. On the other hand, the third defendant, who was also present at the first daily meeting convened by Mr Tan Kian Huay, characterised the latter as having "joined" the daily site meetings.

110 Given the foregoing, the plaintiff's casting of the facts in [107(b)] above may somewhat understate the level of coordination at the Goodwood project site. Indeed, where the plaintiff quotes Ms Ker as explaining that the labourers were just "assigned to works by the supervisors", she had merely been asked to explain what "casual labour" meant. She therefore understandably did not add that the supervisors had in turn been instructed on what their teams had to achieve on a fairly systematic basis. I am not persuaded that [107(a)]–[107(c)] above are sufficient to discharge the plaintiff's burden to establish its case.

111 In [107(d)]–[107(e)] above, the plaintiff attacks the systems in place at the Goodwood project site to verify that the labourers had turned up for work and completed their work in good time. At the outset, a distinction must be drawn between the adequacy of these monitoring systems and the results which they achieved – being unable to eradicate false claims and low productivity does not necessarily mean that the defendants' efforts had fallen below the level of adequate supervision required by their duties owed to the plaintiff.

112 In this regard, whether steps were taken to address shortcomings in monitoring would be highly relevant. For example, the plaintiff criticises the defendants for having implemented the biometric system to monitor labourers' comings and goings at the worksite only in September 2012, many months after the plaintiff started taking on large numbers of casual labourers. This must, however, be seen in the light of the "safety toolbox meeting" conducted every morning even prior to the biometric system being installed. The third defendant said that this involved checking that the number of workers on site tallied with the records on their time cards. Ms Ker confirmed this. As for the eventual installation of the biometric system, Ms Ker's evidence was that this occurred in response to questions raised about workers' attendance at the site. The biometric system was not the only measure implemented. The second defendant

also resorted to conducting *ad hoc* headcounts together with the plaintiff's head of security and HR manager. The second defendant subsequently informed the plaintiff's management that the headcount exercises in October 2012 found that multiple subcontractors had billed the plaintiff for significantly more labourers than were physically present. On 12 November 2012, the first defendant asked the plaintiff's HR manager to attend at the worksite in person every Wednesday to supervise the workers checking in and out of the site, particularly during the lunch break, which was allegedly hitherto unmonitored. However, it should be noted that in the "Independent Report" prepared by Mr Ronnie Foon ("Mr Foon"), the plaintiff's head of security, dated 25 March 2013, Mr Foon reported that the headcounts had shown that the records of the attendance of labourers from those same subcontractors "were in order". In my view, it seems clear that measures were being consistently deployed to monitor the number of workers, and Mr Foon's "Independent Report" suggests that these measures were effective. Even if these measures were ineffectual, in my judgment they do not demonstrate evidence of a culpable lack of diligence on the part of any of the defendants. On the contrary, even if the measures taken were ultimately ineffectual, the facts show that the defendants did take progressive steps to address inadequacies in the supervision of labourers as they emerged. It is notable that Mr See considered the third defendant's supervision of casual labourers "sufficient" to "tie over a good period", and that Mr Nelson did not disagree.

113 Likewise, when it comes to the monitoring of labourers' working hours, I do not find the evidence to show that the system in place was so inadequate as to sound in liability for the defendants. For example, in Mr Foon's "Independent Report" dated 30 July 2012 (which appears identical in the relevant portions to his subsequent report dated 25 March 2013, referred to at [112] above), which

was commissioned by the second defendant, Mr Foon found that the subcontractor Long Rise had deployed its labourers "legally and efficiently". In respect of his criticisms of Long Rise, such as the lack of verification of the labourers' time cards, Mr Foon recommended additional measures which were used by "other supervisors … at Goodwood". Such accounts do not suggest that the defendants had ultimately failed in their duty of adequate supervision.

114 Finally, I am unable to accept the distinct argument that the first and second defendants had a greatly *heightened* duty of supervision of the third defendant purely because of his past record and personal rivalry with the second defendant (see [107(f)] above). I do not consider these factors as meriting much special attention taken *apart* from the actual labour situation and the adequacy of the third defendant's supervision at the worksite. In that regard, I have already highlighted in the foregoing analysis instances in which the first and second defendants took direct steps to address the supervision of labourers.

115 In the final analysis, while it can perhaps be said that the Goodwood project site could have been run in a more organised fashion, it must not be forgotten that the third defendant was operating under trying circumstances which were not of his making. It would be wholly unreasonable to judge his actions through the lens of hindsight. It would be harsh to do so, and I am of the view that is precisely what the plaintiff is seeking to do. Taking all the plaintiff's allegations in the round, I am unable to conclude that any of the defendants had breached their duties to the plaintiff in the management of casual labourers in the Goodwood project.

The failure to impose back charges

116 Although the plaintiff pleaded the defendants' failure to impose back charges on the original labour subcontractors (see [45] above), this head of claim is not pursued in its closing submissions. In any case, I observe that Mr Tan Kian Huay, who acted as an advisor to the first defendant, has given evidence that he had advised the defendants that they could not pursue back charges against the labour subcontractors. On the other hand, if back charges were possible, the court has heard no evidence as to when they ought reasonably to have been pursued. Finally, even if the back charges ought to have been pursued in a timelier fashion, I do not see why the liquidators could not simply pursue the same claims against the subcontractors upon taking office. Consequently, I am of the view that the defendants are not liable on this ground.

The inadequate EOT claims

117 The claim against the defendants for failing to properly make EOT claims for the Goodwood project (see [45] above) was ultimately not pursued by the plaintiff in its closing submissions as a cause of action. Instead, in its closing submissions the plaintiff only attempts to rebut the defendants' argument that their liability under the remaining heads of claim ought to be reduced or eliminated on the basis that EOT claims would be allowed (see [50] above). The defendants maintain that the EOT claims had been properly made.

118 In any case, the available evidence from both Ms Pauline Lee and Mr James Taylor confirms that the practice in the industry is to account for and negotiate over EOT claims and other adjustments in a final accounting at the completion of the project. In the light of this, the submission of delayed and/or poorly substantiated EOT claims by the plaintiff during the course of the Goodwood project fades in significance. It would always be possible to

negotiate over the EOT claims or supplement them at the end of the contract (see [126] below).

119 For completeness, I also note that it is for the plaintiff to show that the EOT claims would have been prejudiced as a result of them being filed out of time. In the light of the industry practice I have referred to above, it would appear that a delay in submission might not carry the prejudicial effect that the plaintiff contends that it does. Further, the plaintiff has not taken the court to any EOT claim which was rejected by the developer *because* it was filed too late. For example, the plaintiff pleaded that it had submitted an EOT claim to the architect in the Goodwood project on 22 December 2011, when it was about two months overdue, and that this EOT claim was rejected. However, the architect's partial rejection of this EOT claim on 9 January 2012 made it clear that the delay in submission was *not* the reason for rejection.

120 I am therefore unable to conclude that the defendants' actions in relation to the EOT claims have caused any loss to the plaintiff.

The concealment issue

121 Taken at its broadest, the plaintiff's complaint against the first and second defendants is that they concealed relevant information about the plaintiff's financial situation from its board (and the UFS board) prior to the second defendant's revelation of the plaintiff's losses on 25 September 2012. However, I harbour serious doubts as to why the first and second defendants would conceal the plaintiff's financial situation from its board if they indeed had reason to believe or believed that the plaintiff was facing such serious financial difficulty. In this regard, it must be remembered that this was not a situation of the first and second defendants' making. Putting aside the issue of

the underbidding of the Sophia project, there is no allegation that the losses that the plaintiff faced in relation to the Goodwood and Bishopsgate projects were attributable solely to any act or omission of the first and second defendants. These were primarily a result of serious delays in both the projects. It is those losses that the plaintiff alleges were concealed. Why would the first and second defendants conceal those losses when they were not of their making? There is simply no incentive for the defendants to hide the true position from the plaintiff's board, and it is difficult to see what the defendants could have hoped to gain by doing so. Further, given the purported scale of the financial problems, it is inconceivable that the defendants could have harboured any realistic hope of concealing the situation from the plaintiff's board or the auditors indefinitely. These are questions that the plaintiff must answer. Moreover, since the alleged concealment extended to presenting misleading management accounts to the plaintiff's board, this would have required the acquiescence, if not active cooperation, of the plaintiff's staff. Yet, the members of staff which the plaintiff had called as witnesses stood by the integrity of the accounts (see [123] below), and they were not challenged on this position. The plaintiff therefore had set a high bar for itself in pitching its case as one of concealment.

122 In my analysis, I will first consider whether the first and second defendants had discharged their duty to make sufficient disclosure of the plaintiff's *profitability* to its board prior to the E&Y audit in August 2012, which is the pleaded allegation. I will then address the plaintiff's unpleaded allegation that the first and second defendants had concealed the plaintiff's *cash flow* situation from its board.

Information provided to the plaintiff's board on profits and losses

123 The starting point of the analysis is the plaintiff's management accounts, showing its profits and losses ("P&L") broken down by project, that were placed before its board. There is no doubt that prior to the E&Y audit in August 2012, these management accounts consistently showed the Sophia, Goodwood and Bishopsgate projects as turning in a profit. I note that it is significant that the plaintiff's financial statements up to the interim financial statement for the period ending 30 June 2012 had been audited by E&Y without any issue being raised as to the accuracy of the management accounts. Likewise, the plaintiff's finance managers involved in the preparation of the management accounts over the relevant period, Ms Sharon Lee and Ms Irene Ng, continue to vouch for the contemporaneous accuracy of those accounts. It is telling that even in the light of the dramatic adjustment to the plaintiff's P&L in August 2012, the precise shortcomings of the earlier management accounts leading to the discrepancy have never been established.

124 Despite the management accounts, the plaintiff argues that the first and second defendants knew that there were mounting cost overruns and increasing delays giving rise to large potential liquidated damages, and that they therefore should not have relied on those accounts. Relatedly, the question arises as to whether the first and second defendants ought to have disclosed any other information to the board. The plaintiff's argument here assumes that cost overruns and delays must reasonably lead to the conclusion that the plaintiff faced liquidated damages which translate into a loss for the plaintiff. This is not a fair assumption, as the link between the former and the latter turns on the cause of the cost overruns and delays. If they were attributable to the developer or to unforeseen circumstances, then the plaintiff would be entitled to EOT and prolongation costs from the developer. If, on the other hand, they were of the

plaintiff's own making, then liquidated damages might be the result. Given that the plaintiff's case is one of concealment, it has to show that the view taken by the defendants as reflected in the management accounts is not *bona fide*; without that, there cannot be concealment of losses from the P&L. I do not believe the plaintiff has done that.

125 The main focus of the analysis on cost overruns is on what is commonly termed "work in progress" ("WIP"), which refers to costs incurred by a construction company in excess of its progress billings. WIP is therefore costs which are not reflected in the plaintiff's P&L. As I understand it, it is a balance sheet item. The testimony of Ms Pauline Lee, who was UFS's acting chief executive officer and executive director, and who attended meetings of the plaintiff's board as the plaintiff's company secretary, is helpful in this regard. Ms Pauline Lee was adamant that WIP was not equivalent to a cost overrun, because WIP could potentially be recovered through future progress billings, or claims against the developer like EOT claims and variation orders. In Ms Pauline Lee's view, a large amount of WIP was not grounds for concern for a project which was far from completion. This was also the view taken by the first and second defendants. According to the first defendant, in February 2012, he still believed that "[the second defendant] and the team can complete the job and we can get the claim back". Likewise, according to the second defendant, in August 2011, he was confident that "our claim is valid and we will fight for it very vigorously", and that even though there could never be a guarantee that the claim would be accepted by the developer, it was nevertheless "a very clear case". These assertions ought to be taken against the backdrop of the commercial reality that EOT claims would not be set in stone until the final accounting at the end of the completion of the works (see [118] above).

126 To explain this logic in greater detail, I turn to the cost overruns in respect of the Sophia project, which registered by far the largest WIP in the plaintiff's management accounts. This was also the project for which the first and second defendants had received early warnings about cost overruns, in the form of Ms Sharon Lee's 19 August 2011 email which said that "the total cost [had] exceeded the claim". In reply, the second defendant reassured the first defendant by writing, "[t]his posts as a cash flow problem[,] not P&L". Although it may have been optimistic of the second defendant to have taken such a sanguine view of the plaintiff's projects, and to have maintained the same expected level of profit in successive budget reports while the projects continued to experience delays, I remain unconvinced by the plaintiff's efforts to show that this amounted to a breach of duty. To take an example, the second defendant was cross-examined at some length on an EOT claim for the Sophia project which the plaintiff submitted on 12 May 2011, and which the developer rejected on 9 June 2011. Despite this initial rejection, the same EOT claim was ultimately accepted to a substantial extent by the developer on 24 August 2012, and an EOT of 61 days granted for some of the delays the plaintiff had complained of. The second defendant's optimism at the time was evidently not misplaced.

127 It is also clear that the plaintiff's board was not in the dark about delays and the resulting exposure to liquidated damages – it was in fact informed of significant delays in respect of the Sophia, Goodwood and Bishopsgate projects. The minutes of the 5 March 2012 meeting of the plaintiff's board recorded that the Sophia project had "a huge delay". The transcript of the audio recording of the same meeting also showed the board discussing the "complicated" delays to the Goodwood project involving "the consultant, client, [and] job requirement", and the fact that the Bishopsgate project had been experiencing "quite a bit of

delay". In any case, as Ms Pauline Lee's evidence shows, the percentage progress of each project was evident from the cumulative unbilled revenue recorded in management accounts (see, *eg,* [23] above). I therefore agree that the plaintiff's directors could see for themselves that the plaintiff's projects were significantly delayed from the management accounts before them. As such, they were in a position to challenge the first and second defendants' views on how well things were going for the plaintiff – and it is not unreasonable for the first and second defendants to have expected the directors to have done so if there were any issues with the accounts. In the final analysis, did the first and second defendants *conceal* losses? I am not able to conclude that they did.

Information provided to the plaintiff's board on cash flow

128 A somewhat different picture presents itself in relation to cash flow. In closing submissions, counsel for the first defendant, Mr Chong Yee Leong, agrees that the plaintiff's board was not presented with documents reflecting the plaintiff's cash flow. To be fair to the defendants, this was not the pleaded case; it is an argument that was advanced by the plaintiff primarily in closing submissions. From the summary at [46]–[47] above, it is highly doubtful that the issue of concealment of cash flow problems can be encompassed by the plaintiff's pleadings. Although the plaintiff's statement of claim alluded to the plaintiff's cash flow problems at paras 88(1) and 91(A), these were passing references far from amounting to a pleaded allegation that the first and second defendants had wrongly concealed the plaintiff's cash flow from its board. More importantly, these references were embedded within paragraphs that were clearly aimed at setting out allegations relating to the concealment of losses and delays. A concealment of losses is not the same as a failure to highlight cash flow difficulties. I am therefore of the view that this is a case that the plaintiff cannot advance.

129 In any event, to the extent that the plaintiff's complaint is one of active *concealment* rather than a lack of diligence in bringing cash flow issues to the attention of the plaintiff and UFS's board, it must fail once we consider the role of Ms Pauline Lee. Ms Pauline Lee, a certified public accountant, admitted that as the finance director of UFS she had responsibility over financial matters of the UFS group as a whole, which included the affairs of the plaintiff. Ms Pauline Lee also admitted that she had access to the plaintiff's financial information including P&L, balance sheet, WIP summary statements, and internal audit reports on a regular basis. Thus, even if Ms Pauline Lee had not been provided with cash flow projections, it appears to me that she would have been aware from the mounting WIP amounts that the plaintiff's cash position was precarious. An accountant of her experience and her position in UFS would surely have realised the implications of the mounting WIP on the plaintiff's cash flow. The WIP after all represents work that has not been translated into billings and revenue. Thus, a huge accumulation of WIP would have a cash flow impact on the plaintiff. Indeed, I find it hard to believe that Ms Pauline Lee would not have had access to the plaintiff's cash position at any given time in view of her position. It is hard to imagine how she could have discharged her role as finance director of UFS without having access to such information, given that the plaintiff was UFS's only significant revenue-generating asset (see [2] above). Since the plaintiff was in the construction business where cash flow was critical, there would have been all the more reason for Ms Pauline Lee to examine the necessary information. In addition, as discussed above at [127], the plaintiff's board was also aware of the delays on the key projects at least from March 2012. Thus, the members of the boards of the plaintiff and UFS ought to have been aware of the cash flow implications of the mounting WIP and the project delays at least by that point in time.

130 Seen in this context, it seems incorrect to conclude that the defendants actively concealed the plaintiff's cash flow issues. Indeed, given Ms Pauline Lee's role and the information that was available or known to the plaintiff and UFS's boards, the defendants could not have believed that they could have successfully concealed any cash flow issue. If the defendants thought that the plaintiff and UFS's boards were keeping an active watch over the plaintiff's affairs through the involvement of Ms Pauline Lee, such a plan surely would not have crossed their minds.

131 As such, even if the plaintiff were allowed to run the case of the defendants' active concealment of the plaintiff's cash flow problems, I do not believe that the evidence supports that conclusion. Further, as I will discuss at [145]–[149] below, I am unconvinced that any alleged concealment had caused the plaintiff loss.

132 Nevertheless, I should add that the defendants could have taken more active steps to bring the cash flow situation to the attention of the relevant boards, as there was evidence that the defendants were aware of the problem. This is apparent from cash flow projections sent to the first and second defendants by Ms Sharon Lee in September 2011, showing a projected worsening of the plaintiff's cash balances from $11.5m in October 2011 to $1.5m in March 2012, as well as another email regarding projected cash flow sent by Ms Sharon Lee in January 2012 commenting that the plaintiff "will face cash flow problem[s] in near future if the other projects [are] not able to pick up". To be fair to the defendants, it has not been alleged that there was any practice of disclosing cash flow. Even so, the defendants could very well have brought the deteriorating cash position to the attention of the plaintiff's board. However, this does not mean that there was any concealment on their part, as there is clearly a difference between active concealment and a lack of diligence

in bringing cash flow issues to the attention of the plaintiff's board. Given my conclusion above that the plaintiff's pleaded case did not encompass a claim for concealment of cash flow problems, *a fortiori* the plaintiff cannot now run a case based on the defendant's lack of diligence in surfacing these cash flow issues.

The conflict of interest issue

133 In *Regal (Hastings), Ltd v Gulliver and others* [1967] 2 AC 134 ("*Regal (Hastings)*"), directors of the plaintiff company, Regal, incorporated a subsidiary to acquire two cinemas. The landlord was prepared to lease the two cinemas, but on condition that the lessee had a paid-up capital of £5,000. The plan was for Regal to own all the shares of its subsidiary, but it was unable to raise the full sum. As part of the directors' solution to this problem, four of the directors subscribed to the shares of the subsidiary for £500 each. Subsequently, all the shares of the subsidiary were sold at a profit. The House of Lords held that the four directors were liable to repay their profits on the sale of their shares to Regal on account of the no-profit rule. Lord Russell of Killowen, with whom the other members of the House agreed, held (at 149):

> … [T]he directors standing in a fiduciary relationship to Regal in regard to the exercise of their powers as directors, and *having obtained these shares by reason and only by reason of the fact that they were directors* of Regal and ***in the course of the execution of that office***, are accountable for the profits which they have made out of them. … [emphasis added]

134 In the same passage, Lord Russell rejected the argument that the no-profit rule did not apply when the company itself was unable to take up the opportunity. Lord Russell also called "[t]he suggestion that the directors were applying simply as members of the public" "a travesty of the facts" (at 150). This finding arose from the sequence of events in that case: in essence, since the

plan for the directors to personally subscribe for shares was an alteration of Regal's original plan for its subsidiary, only Regal's directors *qua* directors could have carried such an alteration into effect (at 145–146).

135 In Singapore, the rule in *Regal (Hastings)* was applied by the High Court in *Nordic International Ltd v Morten Innhaug* [2017] 3 SLR 957. At [54], the High Court held:

> The no-profit rule obliges a director not to retain any profit which he has made through the use of the company's property, *information or opportunities to which he has access by virtue of being a director*, without the fully informed consent of the company. The rule is … a strict one and liability to account arises simply because profits are made … [emphasis added]

136 This formulation of the principle was cited by the Court of Appeal in *Beyonics* at [51]. In *Beyonics*, the defendant was the plaintiff's director when he signed agreements to provide assistance to the plaintiff's main competitors in securing contracts from one of the plaintiff's key customers. The Court of Appeal emphasised that it was immaterial that the payments under these agreements were not made to him *qua* the plaintiff's director (at [54]):

> … [P]ayments that flout the no-profit rule need not strictly flow to the fiduciary *qua* director. Instead, the profit merely has to be obtained *in connection* with his position as a director … or "by reason or in virtue of the fiduciary office" … [emphasis in original]

137 In the same passage, the Court of Appeal pointed out that the opportunity to make the secret profit came to the defendant because he was the plaintiff's director. He had acted in that capacity when he met the customer and presented his case for the customer to award a grant to the competitor. Likewise, he was acting in the same capacity when he met the competitor to negotiate a payment in return for his assistance to redirect the customer to the competitor.

138 In my view, the first defendant's purchase of the Goodwood unit does not fall within the no-profit rule as laid out in the cases above. The evidence showed that there was a "soft launch" of Goodwood Residence on 5 March 2010, before the first defendant entered into the transaction for the purchase of the Goodwood unit. The Goodwood unit was therefore being offered for sale to the general public. The first defendant's evidence, which was never contradicted, was that he contacted a sales representative for the purchase of the Goodwood unit without any intervention or assistance from any other party. A key aspect of the independence of this transaction was that the first defendant purchased the unit at its market value and did not seek any discount. Thus, the opportunity to buy the Goodwood unit was available to the first defendant entirely devoid of any connection to his position as the plaintiff's director. I am therefore satisfied that the first defendant did not breach the no-profit rule in his dealings in relation to the Goodwood unit. This finding is unaffected by the fact that the first defendant might have learnt of the opportunity to purchase units in the Goodwood project during his lunch with Ms Trina Loh, as there is nothing to suggest that such information was in any way privileged or shared with the first defendant *qua* director of the plaintiff. Ultimately, this was not an opportunity that came to the *plaintiff* which it could not take up, as in the case of *Regal (Hastings)*, or one which the plaintiff was not afforded the opportunity to take up because the defendant had usurped it. The units were on sale to the public. In the circumstances, it is unnecessary for me to make any finding on whether the first defendant had disclosed his intended purchase to Mr M Rajaram and Mr Hoshi Deboo. In any case, I observe that disclosure to two directors of the plaintiff's shareholder (UFS), if it was indeed made, would not have been sufficient.

139 Even though the no-profit rule was not breached, the plaintiff's interests are still protected by the no-conflict rule, which would be engaged if the plaintiff's purchase of the Goodwood unit gave rise to any conflict with the plaintiff's interests. However, any alleged breach of the no-conflict rule was not pleaded by the plaintiff. Notwithstanding this, I am satisfied that no such conflict existed, and that the plaintiff rightly no longer pursues this allegation in closing submissions before me (see [53] above).

Causation and loss

140 As I have found that the second defendant has breached his duty to the plaintiff in relation to the award of the subcontract to CCM for the Bishopsgate project, I now turn to the discussion on whether and to what extent the losses suffered on the Bishopsgate project can be attributed to this breach. For completeness, this is followed by a similar discussion on the concealment issue, even though I have found that there was no breach on the part of the first and second defendants in this regard.

The Bishopsgate project

141 It is undisputed that the plaintiff paid a total of $2m to CCM as settlement for the early termination of the subcontract with CCM, and that this sum included a sum of $498,134.17 as *ex gratia* payment. It is the defendants' unchallenged evidence that the remaining portion of the $2m settlement sum was primarily payment for works done by CCM, and this is also supported by objective contemporaneous evidence. Thus, I find, as far as the settlement with CCM is concerned, that the second defendant's liability is restricted to the *ex gratia* payment of $498,134.17 which would not have had to be paid if not for the subcontract being entered into in breach of cl 2.3.1. The first and second defendants argue that this sum was not in actual fact *ex gratia* in the sense that

it also represented payment for machinery and manpower left on site by CCM (see [62] above). I decline to accept this as there was no evidence of the extent to which the sum of $498,134.17 should be discounted to reflect the value of this machinery or manpower, nor indeed any evidence of what machinery or manpower was actually provided to the plaintiff by CCM.

142 The plaintiff also claims that the belated removal of CCM from the project site, more than a year after Kajima first directed CCM's removal, led to wastage of management resources and the subsequent delays to the progress of the Bishopsgate project (see [39] above). However, I do not think that the plaintiff has sufficiently established the causal link between any alleged delay in CCM's removal and any subsequent losses suffered. In fact, it was the evidence of Mr Nelson that any prolonged negotiations between the plaintiff and CCM and delays in removing CCM from site did not materially cause delay to the Bishopsgate project. Similarly, Mr Foo agreed that the delay in the Bishopsgate project is attributable to the belated delivery of, and the developer's persistent preference for, a particular type of marble.

143 The plaintiff more broadly seeks to attribute the total losses eventually sustained on the Bishopsgate project, amounting to close to $13m, to the original breaches of the defendants in procuring a total subcontract for the Bishopsgate project. In closing submissions, the plaintiff argues that the defendants breached their duties in committing the plaintiff to "a project that it did not have the resources to undertake", and that "but for these breaches, the [plaintiff] would not have undertaken the Bishopsgate Project, and would have avoided the losses that were eventually sustained on the project". From the analysis thus far, it is clear why the plaintiff has to allege that it lacked the resources to undertake the project in order to make good its claim for the losses sustained on the project. This is because, as I have found above, the delays in

the Bishopsgate project were not directly attributable to the subcontract with CCM. By alleging that it lacked the resources to carry out the project by itself, the plaintiff is seeking to show that *but for* the wrongful subcontract, the plaintiff *could not* have secured the Bishopsgate project, and the wrongful subcontract was therefore the *but for* cause of all the losses that arose from the Bishopsgate project. I decline, however, to make any findings in this regard given that this was not pleaded. The plaintiff did not plead that the defendants caused the plaintiff to bid for the Bishopsgate project when the plaintiff had insufficient resources to undertake the project. Instead, in its statement of claim, the plaintiff simply asserted that it did not have the capacity to undertake the necessary works *for the tendering exercise*, which is clearly an entirely different matter. Indeed, that limited proposition was also what was stated in the evidence the plaintiff presented through Mr Lim Loo Khoon. Therefore, I would also have found in any case that the plaintiff failed to establish 'but for' causation in relation to this head of loss.

144 Thus, I find that the second defendant is liable to the plaintiff for the sum of $498,134.17.

The concealment issue

145 On the plaintiff's claim that the first and second defendants concealed information from the plaintiff's board, I would have found that the plaintiff failed to establish its loss of chance, even if I were of the view that the first and second defendants were in breach of their duties to the plaintiff (and even if the plaintiff could run its case on the basis of the concealment of cash flow – see [128] above).

146 It is important to note that the present case is not bifurcated, and the plaintiff therefore would have to lead evidence on its loss of chance if it wanted to pursue such a claim. However, the plaintiff conspicuously failed to present any direct evidence of the plaintiff's prospects of being turned around if its board had a full picture of its financial state in the first quarter of 2012 (or at any stage prior to E&Y's revelations in the second half of 2012). Instead, it makes the argument that if disclosure had been made earlier, the plaintiff's board would have immediately taken the same steps that it took or was prepared to take in October 2012 when it was informed of the plaintiff's losses. This, the plaintiff argues, would have given it a higher chance of success.

147 This argument cannot succeed for two principal reasons. First, the expert evidence on the plaintiff's chances of survival if information on the losses had surfaced earlier was equivocal at best. Mr Leow Quek Shiong, the third parties' financial expert, thought that the plaintiff's prospects of survival were low even if the information had surfaced at the start of 2012 and action had been taken then. According to him, "the huge cash deficit" meant that the plaintiff might not have been able to recover in any case. Mr Timothy James Reid, the plaintiff's financial expert, took the view that "there would have been opportunit[ies] to look at other alternatives to see if there was another way forward", but even this rather limited optimism did not take into account "the liquidated damages liability that [had] accrued". This hardly amounts to good evidence of the plaintiff's chances. What these opportunities were, the prospects of them materialising, and their impact on resolving the plaintiff's position were matters upon which the plaintiff was obliged to lead evidence in establishing its claim for loss of chance. This the plaintiff failed to do.

148 Secondly, even when it was actually apprised of the company's loss-making situation in October 2012, the courses of action open to the plaintiff's

board appeared to be limited. According to the minutes of the board meeting on 22 October 2012, the only immediate comment on the plaintiff's situation was by the second third party, who said that the plaintiff was presently unable to obtain support from banks due to UFS's poor financial standing, but that this situation would change following the completion of the reverse takeover in *January 2013*. There is no suggestion, however, that if disclosure had been made in the first quarter of 2012, UFS's financial standing at that time was such that it would have been in a better position to assist. Strikingly, it is not disputed that UFS was unable to repay an outstanding loan of $12.2m from the plaintiff, even when this put the plaintiff's BCA grading and therefore its eligibility to tender for large projects at risk. In fact, in order for the plaintiff to maintain its BCA grading, UFS negotiated an undertaking from a third party investor, Asia Star Fund, to repay the $12.2m loan, but this was evidently worthless in practical terms, for it turned out that any drawdown on this undertaking would have to be used to pay down higher ranking debt instead of repaying the plaintiff. The depths that UFS had to plumb to secure the viability of the plaintiff, its only significant revenue-generating asset (see [2] above), evidences how little support the plaintiff could expect from UFS, regardless of when its financial state was revealed. Indeed, even in November 2012, *after* the plaintiff's losses became apparent, UFS remained unable to repay the said outstanding loan to provide some liquidity to the plaintiff.

149 Despite the plaintiff's situation in October 2012, the third third party testified that the outcome of the board meeting was "positive" and he had the sense that "[t]here were problems, but they were getting addressed and things … will get better by the end of the year." Without impugning the efforts made by the second third party to salvage the plaintiff, given the optimism that the board shared in the face of the dire situation in October 2012, there is little

reason to believe that there would have been vigorous steps taken to address the situation if the plaintiff's financial situation had been disclosed earlier in the year. Indeed, there was no evidence led to this effect by the plaintiff. Based on the evidence before me, I find the plaintiff's assertions that if disclosure had been made earlier, the actions taken in October 2012 to save the plaintiff would have achieved different and better results in early 2012, to be entirely speculative. I cannot conclude that the plaintiff had truly suffered a loss of a chance.

The third party claim

150 By virtue of the foregoing, I have not found any liability in respect of the first defendant for the plaintiff's claims. The third party claim therefore fails *in limine*, since none of the other defendants have pleaded any claim or contribution against the third parties: see O 16 r 8 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

151 In any case, I find the third party claim to be misconceived. For example, the first defendant claims that the first third party was liable for the Sophia project claim because the latter had signed the Conditions of Contract (see [70(b)(i)] above). However, by that time, the tender had been awarded and the second defendant had signed the Letter of Acceptance. Since the contract for the Sophia project had been formed when the Conditions of Contract were signed, it is unclear to me how the signing of that document by the first third party could give rise to liability for the contract price.

152 In respect of the Bishopsgate project, even if the second defendant had pleaded a contribution from the first third party, I would not have found the first third party liable. It is true that the first third party had, on his own account,

signed the tender for the Bishopsgate project with no discussion of its contents other than the second defendant's assertion that the project would be profitable to the tune of "[a] few million". When one considers that the first third party could not understand English, and thus had signed an important business document in his capacity as the plaintiff's director with no understanding of its contents beyond the second defendant's bare and superficial assurance of profitability, a question inevitably arises as to whether the first third party had discharged his duty of care and diligence to the plaintiff. Nevertheless, I find that the first third party's involvement as outlined here bore no connection with the total subcontract of the Bishopsgate project. As I had concluded in relation to the first defendant (see [97] above), a review of the Bishopsgate tender would not have revealed the total subcontract. Therefore, the first third party's actions, while not particularly diligent, do not give rise to liability for the consequences of the subcontract with CCM.

Conclusion

153 For the foregoing reasons, I find that the second defendant has breached his duty to the plaintiff in relation to the total subcontract to CCM for the Bishopsgate project, and is liable to the plaintiff for the sum of $498,134.17, with interest from the date of the writ. The plaintiff's remaining claims as well as the first defendant's third party claim are dismissed.

154 Parties are to file written submissions on costs limited to ten pages each within two weeks from the date of this judgment.

Kannan Ramesh
Judge

Tan Chuan Thye SC, Avinash Vinayak Pradhan, Kok Chee Yeong Jared and Chiang Yuan Bo (Rajah & Tann Singapore LLP) for the plaintiff;
Chong Yee Leong, Tan Pang Leong Nicholas and Sheryl Lauren Koh Quanli (Allen & Gledhill LLP) for the first defendant;
Oei Ai Hoea Anna and Yap Yi Ping, Deannie (Tan, Oei & Oei LLC) for the second defendant;
the third defendant in person;
Tan Poh Ling Wendy, Chua Han Yuan Kenneth and Annette Liu Jia Ying (Morgan Lewis Stamford LLC) for the third parties.
