IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 175

Suit No 1073 of 2016

Between

Thio Keng Thay

… Plaintiff

And

Sandy Island Pte Ltd

… Defendant

Between

Sandy Island Pte Ltd

… Plaintiff in Counterclaim

And

Thio Keng Thay

… Defendant in Counterclaim

JUDGMENT

[Building and Construction Law] — [Building and construction contracts] — — [Defects liability clause]
[Building and Construction Law] — [Damages] — [Damages for defects]

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Thio Keng Thay
v
Sandy Island Pte Ltd

[2019] SGHC 175

High Court — Suit No 1073 of 2016
Lee Seiu Kin J
16–19, 22–25 October 2018; 8 April 2019

29 July 2019 Judgment reserved.

Lee Seiu Kin J:

1 The plaintiff purchased a bungalow from the defendant, who is the developer of the property. The plaintiff claims that the property was constructed with defects and seeks to recover the costs of rectifying the said defects. The defendant's case is that it had always been willing and able to rectify the defects alleged but had been unreasonably denied access by the plaintiff to perform the rectification works. The defendant also advanced a counterclaim in defamation arising out of statements made by the plaintiff in an article published by *The Straits Times*.

Introduction

2 By way of a sale and purchase agreement dated 20 August 2009 ("the SPA"),[1] the plaintiff purchased a property developed by the defendant located on Sandy Island in Sentosa at the price of $14.32m ("the Property").[2] The SPA is in the standard form prescribed by r 12(1) of the Housing Developers Rules (Cap 130, R1, 2008 Rev Ed). The Property is a four-storey detached bungalow comprising three floors and a basement, and has a private swimming pool. It is part of a collection of 18 waterfront villas developed by the defendant.[3] The development was marketed as a high-end luxurious housing project.[4] The main contractor for the development is YTL Construction (S) Pte Ltd ("YTL").[5]

3 Since taking possession, the plaintiff has alleged that the Property contains numerous defects and that such defects constitute a breach of contract by the defendant. The alleged defects include water seepage in a number of rooms, rain ingress on the first floor, and an irregularly designed and built staircase. The high level of moisture arising from the water seepage also caused mould growth on hard surfaces within the Property.[6] A total of 492 defects are alleged by the plaintiff ("general defects"). In addition to general defects, the plaintiff also alleges that the defendant supplied defective home passenger and

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1 Agreed Bundle ("AB") Vol 8 pp 4465–4516.

2 Statement of claim (Amendment No. 1) ("SOC") at para 3.

3 Affidavit of Evidence-in-Chief of Thio Keng Thay dated 8 August 2018 ("AEIC of TKT") at para 5.

4 Affidavit of Evidence-in-Chief of Lee Wui Nghun dated 8 August 2018 ("AEIC of Lee") at para 3.

5 Defence closing submissions ("DCS") at para 8(b).

6 SOC at para 10.

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car lifts for the Property ("lift defects"). Among other things, the plaintiff is claiming damages for the costs of rectification works.

4 The defendant admits that there were a number of defects in the Property. However, it argues that it had a contractual right to rectify the defects under the SPA during the defects liability period but was prevented by the plaintiff from exercising that right. It claims that the plaintiff had imposed a number of unreasonable conditions on the defendant and did not ultimately grant access to the defendant to carry out the rectification works. The defendant submits that the plaintiff is therefore precluded from claiming damages in respect of the defects which it would have rectified but for the plaintiff's actions. The defendant also claims that some of the defects alleged by the plaintiff do not constitute defects.[7]

5 The first tranche of the trial took place over eight days. As the evidence adduced was sufficient for me to make a decision on: (a) the defendant's liability for the defects in the Property; and (b) the defendant's counterclaim in defamation, I directed counsel to make submissions on these two issues. Parties filed written submissions on 8 April 2019.

6 Having considered the evidence and the submissions made by the parties, I find that the defendant has breached the SPA since the Property contained numerous defects. In addition, the plaintiff has breached the defects liability clause of the SPA by impeding the defendant's access to the Property to perform rectification works. Such breach does not however remove the plaintiff's right to recover damages under common law but would be relevant

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[7] DCS at paras 17 to 18.

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in the assessment of the quantum of damages that the plaintiff is entitled to. The extent of the defects which the defendant is liable for and the precise quantum of damages are to be determined at the second tranche of the trial after the taking of evidence on all the defects is completed.

7 As regards the counterclaim, the plaintiff admitted to one of the three meanings pleaded by the defendant. I am satisfied that one other meaning was made out. Of these two meanings, I find that the plaintiff succeeded on the defence of justification in respect of one of them but failed in relation to the other. The plaintiff also pleaded the defence of fair comment for this latter meaning. Although I hold the words constitute fair comment, I find malice on the part of the plaintiff and therefore this defence fails. However I award nominal damages of $1,000 to the defendant as I am satisfied that the defendant has not suffered any substantive damages in view of the fact that it is a company formed for the purpose of developing the properties at Sandy Island in Sentosa, and there was no evidence of further business activity after the sale of all the units in the development.

Facts

8 On 29 December 2011, the Building and Construction Authority ("BCA") issued the temporary occupation permit ("TOP") for the Property. The plaintiff received notice of vacant possession from the defendant on 28 February 2012. He took possession of the Property on 15 March 2012 through his then-building surveyor, Mr Casimir Crispin ("Mr Crispin"). On 24 April 2012, the Certificate of Statutory Completion was obtained.[8]

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[8] SOC at para 7; Defendant's Closing Submissions ("DCS") at para 10.

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9 The pertinent facts in respect of the alleged defects, including the material exchange of correspondence between the parties, are summarised in the following paragraphs.

Facts relating to general defects

Defects lists, inspections and requests for method statements

10 On 5 April 2012, the plaintiff, through his personal assistant, sent the defendant a table listing the defects which he discovered in the Property. The table contained a column labelled "photo".[9] The plaintiff initially informed the defendant that he would send a CD containing pictures of the defects via courier but he subsequently changed his mind and did not eventually send the CD to the defendant (see [13] below).[10]

11 On 19 April 2012, the plaintiff wrote to the defendant's representative expressing his dissatisfaction with the Property and requesting the defendant to provide a methodology for rectification works. The relevant parts of his letter read as follows:[11]

> There are so many defects in the house so apparent in its early life that you must be aware of them at the time of possession. Some of the defects are fundamental. For example the extensive water leaks. This made the handing over of possession premature because the house was uninhabitable. The way the leaks were concealed by coats of paint is disturbing. I reserve all my rights.
>
> …
>
> I expect you to agree to an acceptable program of rectifications without having to raise the decibels to reach a wider audience.

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9 AB Vol 1 pp 447–463.

10 AB Vol 1 p 446.

11 AB Vol 1 pp 480–481.

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> You are the builder of the house. You know the house and its problems and defects better than I can discover bearing in mind the disturbing discoveries. Would you like to salvage some credibility by sharing such knowledge with me? Help me with the defects and their expeditious remedy to avoid mutual aggravations. This might also create some goodwill for you and your other projects.
>
> …
>
> What I need from you now are
>
> 1. The methodology of any rectification work,
>
> 2. Full details/specifications of waterproofing used.

12 On 20 April 2012, the defendant's representative reverted, seeking access to the Property to inspect the defects:[12]

> …
>
> We note your concern and request for the methodology of rectification work.
>
> In order for us to produce relative and realistic method statement as well as the programme, the main contractor and consultants would like to seek your consent to enter your villa for necessary assessment and examination of the degree and source of the defects.
>
> …

13 A second defects list was sent by the plaintiff to the defendant on 25 April 2012, which had the column for photographs removed.[13] On 27 April 2012, responding to a query from the defendant, the plaintiff informed the defendant that he no longer intended to supply photographs to the defendant but that the defendant was free to take any photographs it needed during the inspection.[14]

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12 AB Vol 1 p 487.

13 AB Vol 1 p 493–511; NE dated 16 October 2018 at p 98 (line 14)–99 (line 2).

14 AB Vol 1 p 515.

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14 The parties carried out a joint inspection of the Property on 3 May 2012. On 15 May 2012, the defendant wrote to the plaintiff, stating that they were unable to agree with the plaintiff that the Property was uninhabitable, and that most of the defects listed were either not defects in the true sense or were capable of rectification if it was granted access to the Property.[15] The defendant added that:

> That said, apart from those items that we agree are defects and which we will duly rectify, to the extent that there are reasonable steps we can take to address any of the other concerns you have raised, on a without prejudice basis, we are prepared to consider the same together with our consultants to see what can be done.
>
> …
>
> We expect to be get [*sic*] back to you as soon as possible with how we propose to move forward on this. Once we have established the cause and proposed rectification steps, we would appreciate it if you can grant us access to commence investigation of the defects and to follow up with the rectification works. …

Further correspondence was thereafter exchanged between the parties wherein the defendant requested for further inspections while the plaintiff requested for schedules, method statements and other data.[16]

15 On 2 August 2012, the defendant provided a method statement for the rectification works ("first method statement") and requested access for rectification.[17] This was rejected by the plaintiff in an email dated 5 August 2012 which stated:[18]

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15 AB Vol 1 p 536.

16 AB Vol 1 pp 540–689.

17 AB Vol 1 p 690–694.

18 AB Vol 1 p 717.

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> I refer to your email of 2 August 2012.
>
> The document you attached does not constitute a Method Statement.
>
> This has made the prospect of a satisfactory resolution ominous.

16 On 28 September 2012, the defendant sent amongst others, a schedule for rectification works[19] which the plaintiff expressed dissatisfaction with in his reply of 1 October 2012.[20] On 23 November 2012, the defendant further provided another method statement ("the second method statement") "[p]urely on a good will basis" and again requested access to the Property.[21] The plaintiff wrote to the defendant in response on 27 November 2012 stating that the second method statement was "insufficient" but again did not provide the reasons for his position.[22]

17 Subsequently, on 7 December 2012, the defendant offered the plaintiff $130,000 in settlement, comprising $110,000 for enhancement works and $20,000 for defects rectification, as an alternative to the defendant performing the works in relation to the Property.[23] The defendant added in a subsequent email that:[24]

> We would like to highlight that in the event you do not accept the proposed sum of S$130,000, we remain ready, able and willing to rectify all genuine defects, and ask that you provide access and allow our contractor to carry out the rectifications

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19 AB Vol 2 pp 789–799.

20 AB Vol 2 p 801.

21 AB Vol 2 pp 885–894.

22 AB Vol 2 p 899.

23 AB Vol 2 p 926, 931.

24 AB Vol 2 p 955.

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> in accordance with the terms of the Sales & Purchase Agreement. …

18 On 18 December 2012, the plaintiff sent a supplementary defects list which he said (along with the defects list dated 25 April 2012) were being submitted to the defendant to make good the defects therein. He also stated that the "house is open for [the defendant's] inspection".[25] Further correspondence was exchanged between the parties, but the impasse remained.

19 On 18 January 2013, the plaintiff informed the defendant for the first time that he was "past having [the defendant] perform the rectification works".[26] The plaintiff subsequently provided another supplementary defects list on 21 February 2013, and asked the defendant to let him know if it needed "any clarification and/or inspection of the house". In a second email on the same date, he repeated that "the house remains open for your inspection".[27]

20 On 27 February 2013, the plaintiff rejected the defendant's offer of $130,000 and repeated that he was past having the defendant perform any rectification works but he permitted the defendant to inspect the Property.[28]

21 On 11 March 2013, the plaintiff repeated a third time that he was past having the defendant perform the rectification works but at the same time asked the defendant if it was prepared to meet the standards of rectification of his consultants and be supervised by them.[29]

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25 AB Vol 2 p 956.

26 AB Vol 2 p 983.

27 AB Vol 2 pp 1012, 1015.

28 AB Vol 2 p 1106.

29 AB Vol 2 p 1125.

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Tender exercises

22 A tender exercise for the rectification works was carried out by the plaintiff in February 2013, based on the method of rectification specified by the plaintiff's then-building surveyor Mr Casimir. In an email dated 15 March 2013, the plaintiff sent the defendant the tender report drawn up by Mr Casimir. A tender price of $1,880,350 was submitted by Skybolt Pte Ltd ("Skybolt"), which the tender report stated as being "accurately priced".[30]

23 The defendant was of the view that the costs of engaging Skybolt was "manifestly excessive" and wrote on 21 March 2013 that it would not reimburse the plaintiff should he proceed to engage Skybolt to do the rectification works. The defendant also reiterated that it has "always been ready, able and willing to rectify genuine defects but [has] been prevented from doing so due to the imposition by [the plaintiff] of conditions which are outside of the contract".[31]

24 The plaintiff did not proceed to engage Skybolt.[32] In April 2013, the plaintiff appointed a new building surveyor, Mr Roger Goshawk ("Mr Goshawk"). Given that the parties remained at an impasse, the plaintiff called for a second tender based on specifications drawn up by Mr Goshawk.[33] JTA Construction Pte Ltd ("JTA Construction") provided the lowest bid of $1,213,200. In a letter dated 21 May 2014, the plaintiff's lawyers informed the defendant of the results of the second tender exercise and forwarded the relevant

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30 AB Vol 2 pp 1126–1133, 1138–1201; AEIC of TKT at para 111.

31 AB Vol 2 p 1203.

32 AEIC of TKT at para 113.

33 AEIC of TKT at para 118. SOC at paras 29–31.

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tender document drawn up by Mr Goshawk. The following was stated in the said letter from the plaintiff's lawyers:[34]

> Our client prefers your clients to carry out the rectification according to the said specifications under the full supervision of his appointed architect. If your client do not accept this arrangement within 7 days of this letter, our client intends to engage JTA and proceed with the rectification without further notice to yours.

25 On 3 June 2014, the defendant's lawyers replied stating:[35]

> Our client is in-principle agreeable to having your client's architect supervise the rectification works carried out by our client and their contractors, subject to agreement being reached on the terms of rectification, including the items to be rectified and the method of rectification. As communicated previously, our client proposes that our respective clients' surveyors meet and reach agreement on both fronts. …

26 The plaintiff was "not prepared to accept the caveats in [the defendant's] letter" and offered the defendant a final opportunity to "carry out the rectification works in the tender under [the plaintiff's] architect's supervision and management".[36] Following a further exchange of letters, the parties were ultimately unable to come to an agreement as the plaintiff expected the defendant to agree to perform every item specified in the tender while the defendant wished to proceed on a subset of items to be mutually agreed by the parties.[37] The defendant stated in its letter dated 11 July 2014:[38]

> It was our client's intention to revert to your client on which items in JTA's tender it agrees to perform and which it disagrees

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34 AB Vol 4 p 1920.

35 AB Vol 4 p 2019.

36 AB Vol 4 p 2022.

37 AB Vol 4 pp 2030–2031, 2034–2035, 2140–2141, 2147.

38 AB Vol 4 p 2140.

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> to. However, given the large number of items in the tender and the short timeframe given by your client, our client has not been able to complete this exercise by the deadline of 11 July 2014 given by your client. …
>
> It occurred to our client to request from your client more time to process the information in the tender document but it was concluded that such a request would not lead to any meaningful result if your client remains entrenched in his position that every item in the tender must be performed by our client and that our client must pick up the costs of the architect for supervising the same. If however, we have wrongly assumed that your client's position is set in stone, and in fact, your client is prepared to entertain the possibility that the parties could proceed on a subset of items in the tender that are mutually agreed, please let us know. Such an agreement, were it reached, could substantially reduce the scope of the dispute and save much time and costs for our respective clients moving forward.

In reply, the plaintiff's solicitors stated that "[i]n view of what you say, our client has given instructions to award the rectification contract to JTA Construction".[39]

27 In the circumstances, the plaintiff proceeded to engage JTA Construction on 16 July 2014.[40] The rectification work for the general defects was carried out from 1 September 2014 and completed on 30 May 2015.[41]

Facts relating to lift defects

28 The home passenger lift and car lift in the Property (collectively, "the Lifts") were supplied and installed by the defendant's lift contractor, Gylet Elevator Co Pte Ltd ("Gylet").

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39 AB Vol 4 p 2147.

40 AB Vol 4 p 2147; SOC at para 40.

41 SOC paras 45–46.

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29 In the lead up to TOP, the relevant standard applicable to the home passenger lift at the time was the CP2:2000 standard ("CP2").[42]

30 As for the car lift in the Property, the relevant background concerning the certification of the lift may be summarised as follows:

(a) The defendant initially understood the relevant standard applicable to the car lift to be the CP2 standard.[43] This was based on earlier communications by the BCA to that effect.[44]

(b) On the understanding that CP2 was applicable, the defendant applied for a waiver of five clauses of CP2 from the BCA in August 2009 as various aspects of the car lift departed from the CP2 standard.[45]

(c) BCA however subsequently informed the defendant that the waivers sought were not applicable because it did not consider CP2 to be applicable to the car lift.[46]

(d) The defendant claims that it thereafter met with officers from the BCA to clarify BCA's position and was informed that the car lift was not considered a CP2 lift because it did not have a permanent shaft/ barrier, and that it should have a third party accredited body certify the car lift.[47]

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42 PCS at para 202; DCS para 155; Joint statement of lift experts ("JSL") at s/n1 and s/n 21.

43 AEIC of Foo Chai Yee at para 10–11.

44 AEIC of Foo Chai Yee at para 14.

45 AEIC of Foo Chai Yee at paras 14–15.

46 AEIC of Foo Chai Yee at para 17.

47 DCS at para 159; AB Vol 8 p 4287.

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(e) The defendant proceeded to get the car lift certified by a third-party professional engineer and obtained approval for the car lift from the Ministry of Manpower ("MOM").[48]

31 On taking possession of the Property, the plaintiff had concerns over the safety of the Lifts installed by the defendant and thus engaged an independent professional engineer, Mr Foo Teik Yong ("Mr Foo") to inspect the Lifts. In his report to the plaintiff on 12 November 2013, Mr Foo expressed the view that the Lifts did not comply with the prevailing safety regulations and were not safe to use. A copy of Mr Foo's report was also provided to the BCA.[49]

32 Thereafter, the BCA carried out an investigation into the plaintiff's complaints on the Lifts. On 26 June 2014, BCA wrote to the plaintiff stating, amongst others:[50]

> 2. BCA has completed its investigations. BCA issued the Temporary Occupation Permit (TOP) and Certificate of Statutory Completion (CSC) to the development on 29 December 2011 and 24 April 2012 respectively, based on the declarations of the Qualified Professional (QP) and the Builder that the development had obtained the necessary technical approvals.
>
> 3. Following the inspection of a car lift which is of identical design to yours and a home lift at Sandy Island, Sentosa Cove, BCA requires both the car lifts and home lifts at Sandy Island to undergo some modification works to meet the relevant Code of Practice. After the rectifications, the home lift will comply with CP2, and the car lift will comply with Machinery Directive (MD), a directive that provides harmonization on essential health and safety requirements for machinery in the European Union (EU), to which the car lift is designed.
>
> 4. BCA has contacted the lift contractor, Gylet Elevator Co Pte Ltd, to discuss possible corrective measures. Gylet Elevator Co

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48 DCS at para 160; AB Vol 8 pp 4294–4295.

49 SOC at paras 50–52.

50 AB Vol 4 p 2118.

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> Pte Ltd will be contacting you shortly to make arrangements to discuss the modification works with respect to your car and home lifts. Once the modification works have been completed, the owner of the lifts have to lodge both Certificates of Lift Maintenance and Testing in respect of the car lift and home lift with BCA.

33 There was thereafter a series of exchange of correspondence between the parties in relation to the Lifts. In sum, the defendant denied that the Lifts were defective and was of the view that the works requested by the BCA were enhancement works. It maintained that the Lifts complied with the authorities' requirements at the material time, which enabled the obtaining of TOP and CSC.[51] Nevertheless, it informed the plaintiff on 15 April 2015 that Gylet was "ready, able and willing to undertake the modification works" requested by the BCA and provided a broad description of the proposed works to the plaintiff.[52] On the other hand, the plaintiff disagreed that the modifications works were enhancement works and was of the opinion that "[b]oth lifts have serious defects and are non-compliant".[53] The plaintiff was not satisfied with the broad description of the works in the defendant's letter of 15 April 2015 and requested in response that the defendant provide full details of the proposed works and evidence that the works were approved by the BCA and would render the Lifts compliant with all of BCA's regulations and requirements.[54]

34 The parties continue to remain at an impasse and the Lifts have to date not been modified. The plaintiff has also made a complaint against Gylet's Professional Engineer Mr Gay Yun Lin ("Mr Gay") to the Professional

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51 AB Vol 4 p 2109.

52 AB Vol 4 p 2257–2258, paras 5,10.

53 AB Vol 4 p 2155.

54 AB Vol 4 p 2266.

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Engineers' Board ("PEB"). The complaint was dismissed at first instance but on appeal to the Minister for National Development, the PEB was directed to convene a fresh investigation committee to look into certain aspects of the plaintiff's complaint.[55]

Commencement of suit

35 On 10 October 2016, the plaintiff commenced the present suit against the defendant, claiming that the defendant has breached certain express and implied terms of the SPA. The plaintiff claims the following reliefs:[56]

(a) damages for costs incurred in engaging JTA Construction to rectify the defects in the Property (excluding the lift defects) in the sum of $955,867.10;

(b) damages for costs incurred in engaging independent third parties to investigate the defects in the Property in the sum of $135,405.29;

(c) damages for the loss of the use of the Property from 15 March 2012 to 27 May 2015 in the sum of $867,519.64; and

(d) damages for the costs of engaging contractors to rectify the Lifts and/or loss of amenity of the Lifts to be assessed.

36 The defendant denied the plaintiff's claims and brought a counterclaim in defamation against the plaintiff. This arose out of statements made by the

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55 AEIC of TKT at para 181; AB Vol 6 pp 3396–3398.

56 SOC p 24.

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plaintiff which were reported in a newspaper article published by *The Straits Times* entitled "Claims of flaws at Sentosa villa" (reproduced at [133] below).

The plaintiff's case

General defects

Breach of SPA by defendant

37 At the core of the plaintiff's case is his claim that the defendant built a Property which was delivered to him in an unacceptable condition given the number of defects. There were significant defects on every floor in almost every room of the Property, including most notably, the lack of proper waterproofing in the Property such that when it rained, rainwater seeped through the main door into the house and the bedrooms. The overall quality and workmanship of the construction was also poor.[57] Even the defendant's main witness, its Senior Project Manager, Mr Lee Wui Nghun ("Mr Lee") conceded that there were defects on every floor and practically every room.[58]

38 The plaintiff claims that the defects in the Property are breaches of the SPA and that he is entitled to claim the costs he incurred in carrying out investigations and repairs.[59] In this regard, the plaintiff refers to cll 10.1 and 13.2 of the SPA which he claims have been breached by the defendant:[60]

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57 PCS at paras 37–42.

58 PCS at para 253(a); NEs dated 19 October 2018 at pp 37 (line 24)–38 (line 6).

59 PCS at para 5.

60 AB Vol 8 pp 4472–4473.

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> **10. Vendor's Obligations**
>
> 10.1 The Vendor must as soon as possible build the Building on the Property in a good and workmanlike manner according to the Specifications and the plans approved by the Commissioner of Building Control and other relevant authorities.
>
> …
>
> **13. Delivery of Possession**
>
> …
>
> 13.2 Before delivering vacant possession of the Property to the Purchaser, the Vendor must ensure that the Property has been completed so as to be fit for occupation and must remove all surplus material and rubbish from the Property.

The plaintiff also argues that there is an implied term in the SPA that the Property and its features and fixtures would be fit for their intended purpose and reasonably safe for use, which the defendant has also breached.[61]

Defects liability clause fulfilled by plaintiff

39 The plaintiff claims that he had duly fulfilled the requirements of the defects liability clause, *ie*, cl 17 of the SPA (reproduced at [85] below).[62]

40 First, the plaintiff notified the defendant of the defects as required under cl 17.2 of the SPA by sending a number of defects lists to the defendant between April 2012 and February 2013.[63]

41 Second, following the plaintiff's notification of defects, there was a protracted period during which the plaintiff attempted unsuccessfully to have

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61 PCS at paras 77–85.

62 PCS at paras 49, 111.

63 PCS at para 113.

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the defects rectified by the defendant. When it became apparent that the parties remained at an impasse, the plaintiff appointed Mr Goshawk to carry out the second tender exercise. He provided the defendant with those specifications, and with the results of the tender exercise by way of the letter from his solicitors dated 21 May 2014.[64] In doing so, the plaintiff complied with the requirements under cl 17.2(a).

42 Third, the plaintiff had, in compliance with cl 17.2(b), given ample opportunity to the defendant to carry out the rectification works even after the tender was called by engaging in further correspondence with the defendant to explore the possibility of the defendant carrying out the rectification works.[65] Having given numerous opportunities to the defendant to rectify the defects, the plaintiff exercised his right under cl 17.3 of the SPA on 16 July 2014, by engaging JTA Construction to perform the rectification works in respect of the general defects.[66]

43 In relation to the defendant's submission that the plaintiff had prevented the defendant from rectifying the defects by imposing unreasonable conditions, the plaintiff claims firstly that his requests for method statements were reasonable since he was entitled, as the homeowner, to know what works were being done in respect of his Property.[67] It was also entirely reasonable for the plaintiff to have requested for method statements given that the plaintiff learned that the defendant had previously attempted unsuccessfully to remedy some of

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64 PCS at paras 120–126.

65 PCS at paras 127–129.

66 PCS at para 130.

67 PCS at para 137–138.

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the defects using temporary and ineffective methods such as (a) applying sealant to water leakage areas in the roof terrace and master lounge window; (b) applying sealant to the external façade of the building; and (c) cutting a groove in the flooring to rectify water ponding in the courtyard.[68]

44 The plaintiff also claims that his rejection of the method statements supplied by the defendant was justifiable since they were incomplete and woefully inadequate.[69]

45 Further, the plaintiff submits that, in any event, his requests for method statements did not actually prevent the defendant from accessing the Property. The plaintiff had given unfettered access to the defendant to inspect or rectify the Property on numerous occasions, for instance, in his emails dated 18 December 2012 and 21 February 2013 (see [18] and [19] above).[70]

46 Finally, while the defendant stated that it was ready, able and willing to rectify all genuine defects, the defendant offered the plaintiff a sum of only $20,000 for defects rectification. This demonstrated to the plaintiff that the defendant was not serious about rectifying the extensive defects in the Property.[71]

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68 PCS at para 139.

69 PCS at paras 141–144.

70 PCS at paras 145–156; Plaintiff's reply submissions at paras 52–54.

71 PCS at para 32.

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Legal effect of defects liability clause

47 The plaintiff submits that, in any event, the function of a defects liability clause is to provide an additional remedy (as opposed to an exclusive remedy) to the homeowner. Therefore, even if the court finds that the plaintiff breached the defects liability clause by denying access to the defendant to carry out repair works, the defendant is still liable for damages under common law for breach of contract. At the most, the plaintiff's breach of the defects liability clause is relevant to the issue of mitigation of loss and the quantum of damages recoverable by the plaintiff. It does not remove the plaintiff's right to recover damages in totality.[72]

Lift defects

Breach of SPA by the defendant

48 In addition to the general defects in the Property, the plaintiff also alleges that the defendant supplied and installed defective lifts. The plaintiff claims that the defects in the Lifts constitute a breach of cll 10.1 and 10.3 of the SPA, and an implied term that the Property and its features and fixtures would be fit for their intended purpose and reasonably safe for use.[73] Clauses 10.1 and 10.3 of the SPA read:[74]

> **10. Vendor's Obligations**
>
> 10.1 The Vendor must as soon as possible build the Building on the Property in a good and workmanlike manner according to the Specifications and the plans approved by the

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72 PCS at paras 6–8.

73 SOC para 64; PCS at para 200.

74 AB Vol 8 p 4472.

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> Commissioner of Building Control and other relevant authorities.
>
> …
>
> 10.3 The Vendor must obtain all the necessary consents and approvals of the Commissioner of Building Control and other relevant authorities for the construction of the Building, and must comply with all the requirements of the Commissioner of Building Control and other relevant authorities for the construction of the Building.

The Lifts did not comply with regulations

49 According to the plaintiff, the governing standard that was applicable to the Lifts was either SS 550 (at the time of the application of the CSC signed by a Qualified Professional) or its predecessor CP2 (at the time of TOP). For the purpose of the present suit, the court is not required to make a finding as to whether the applicable standard was SS 550 or CP2 since it was accepted that CP2 is the predecessor of SS 550 and there are no differences between the two standards material to the present suit.[75] In so far as the home passenger lift was concerned, the plaintiff highlighted that the defendant's lift expert was in agreement with his expert on the fact that various aspects of the lift did not comply with the requirements under CP2.[76]

50 As for the car lift, the contemporaneous evidence also showed that it did not comply with CP2.[77] On the defendant's submission that it had been informed by the BCA that it did not have to apply for a waiver as the car lift was not a CP2 lift, the plaintiff took the position that the communication from the BCA

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75 PCS at para 202.

76 PCS at para 203.

77 PCS at paras 204–206.

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appeared to contradict earlier communications from the BCA and the defendant should have clarified the applicable standards.[78]

51 Further, in relation to the defendant's submission that it had obtained approval from the BCA to have the MOM approve the car lift as a "third party accredited body" (without having to go through the waiver process), no notes of the relevant meeting with BCA in which this was allegedly agreed were produced in discovery.[79] In addition, the MOM Certificate of Test lodged by the defendant could not have been sufficient to show that the car lift was safe or safer than the requirements in CP2 for the following reasons:[80]

(a) MOM was not a "third party accredited body".

(b) While the MOM Certificate of Test certified that the car lift complied with the requirements for lifting equipment as stipulated in the Workplace Safety and Health (General Provisions) Regulations (Cap 354A, Rg 1, 2007 Rev Ed) ("Workplace Safety Regulations"), the plaintiff's expert testified that Rgs 19(4), (5), (6) and (9) had not been complied with.

(c) It was also illogical for the car lift to be certified in accordance with the Workplace Safety Regulations as the regulation was intended to apply to lifting equipment used in a factory while the car lift was meant to be used in a residential home.

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78 PCS at para 211(b).

79 PCS at paras 205–206.

80 PCS at para 210.

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Non-disclosure of documents by the defendant

52 The plaintiff also takes issue with the non-disclosure of certain documents by the defendant. First, the defendant had withheld information pertaining to a certification issued by its Qualified Professional, Mr Gay, in respect of the car lift ("load test certificate"[81]). Mr Gay had certified that the lifting equipment had been examined thoroughly by him on 16 March 2012. However the plaintiff took possession of the Property on 15 March 2012 and he knew that no tests were carried out on the car lift on 16 March 2012 as he was present on the Property that day.[82] Under cross-examination, Mr Lee conceded that no inspection or testing of the car lift took place on 16 March 2012.

53 It emerged at trial that the defendant knew about this since 30 August 2012 but had withheld this fact from the plaintiff despite the plaintiff's queries. This is evident from an email from Mr Gay to Mr Lee dated 30 August 2012 which stated:[83]

> 1) The Load Test was actually done on the 25/11/11 and as there was no handling over.
>
> Yet we together with YTL decided to delay the lodgement to MOM because every lodgement is Valid for 6 months only.
>
> 2) We lodged in to MOM on the 12/4/12 and as we need to reflect an earlier date for the load test we arbitrarily revise it to 20/3/12.
>
> 3) We did not enter the house to do the load testing on 20/3/12.
>
> 4) The corner sensors supercede the earlier sensors as they were giving nuisance activation during usage.

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81 AB vol 6 at p 3446.

82 PCS at para 168.

83 PCS at paras 169; Plaintiff's Bundle of Documents ("PBOD") at p 80.

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> 5) The car lift is safe to use even without these new sensors as the earlier sensors are still liable to detect but are too sensitive.

Yet, when the plaintiff raised this issue with the defendant on 23 August 2012, Mr Lee said in his email reply of 4 September 2012 that the defendant was still checking with Gylet on the plaintiff's queries and had been told by Gylet that the persons in charge of this matter were overseas.[84] Furthermore, the email from Mr Gay was not disclosed by the defendant in the present suit and was instead obtained by the plaintiff from documents forwarded by the PEB to the plaintiff (arising from the plaintiff's complaint against Mr Gay to the PEB).[85]

54 Second, the defendant also failed to produce other relevant documents, such as documents relating to quotations obtained by the defendant for lift rectification/replacement. The fact that the defendant had obtained such quotations undermined the defendant's position that the Lifts were not defective.[86]

The plaintiff was justified in disallowing Gylet to perform its proposed works

55 The plaintiff further submits that he was justified in not allowing Gylet to perform the proposed works in the defendant's 15 April 2015 letter.

56 The defendant had, despite the plaintiff's repeated requests, refused to obtain and provide the plaintiff with BCA's proposed corrective measures.[87] The plaintiff therefore could not be assured that Gylet's proposed works were

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84 PCS at para 170; AB Vol 1 p 728.

85 PCS at para 171.

86 PCS at paras 173–183.

87 PCS at paras 213, 216.

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aligned with the corrective measures mentioned in BCA's letter of 26 June 2014.[88] Gylet had also described the proposed works as "enhancement works" and took the position that the "lifts [were] not defective", which the plaintiff disagreed with.[89]

57 Further, the plaintiff's concerns that Gylet's proposed works were insufficient to render the Lifts compliant and safe were confirmed by expert evidence led at trial.[90]

Defamation counterclaim

58 In relation to the defendant's defamation counterclaim, the plaintiff argues that the relevant legal requirements for defamation were not made out by the defendant.

59 First, the newspaper article did not expressly refer to the defendant since it referred to "YTL" and not "Sandy Island Pte Ltd". The defendant also did not give evidence of its pre-existing reputation in Singapore which was capable of being injured by the alleged defamation. It is difficult to see how this requirement could be fulfilled by the defendant since it is a one-ship company that was incorporated for the development of Sandy Island.[91]

60 Second, the plaintiff claims that the words complained of by the defendant are not defamatory. The newspaper article did not convey the

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88 PCS at para 220–222.

89 PCS at paras 216–218.

90 PCS at para 233.

91 PCS at para 236.

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meaning alleged by the defendant, *ie*, that the defendant was "untruthful or dishonest" and that "YTL's people were incapable of rectifying the defects".[92]

61 Third, in any event, the plaintiff submitted that he has valid defences to defamation, in particular, the defences of justification and fair comment.[93]

The defendant's case

General defects

62 Out of the 492 general defects alleged by the plaintiff, over 200 are admitted by the defendant.[94] The defendant's case is that notwithstanding the admitted defects, the defendant is not liable to the plaintiff for damages.

Breach of the defects liability clause

63 The main submission made by the defendant is that the plaintiff breached the defects liability clause of the SPA (cl 17) by imposing unreasonable conditions on the defendant. In any event, there is nothing in the language of cl 17 which suggests that the plaintiff may impose conditions on the defendant in giving the defendant an opportunity to carry out the rectification works.[95] The defendant made the following complaints regarding the plaintiff's actions.

64 Firstly, the plaintiff was aggressive and uncooperative from the outset. This is evident from the correspondence from the plaintiff wherein he threatened

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92 PCS at para 241.

93 PCS at paras 252–253, 254 – 268.

94 DFCC at pp 19–35; NEs dated 22 October 2018 p 159 (lines 7–10).

95 Defendant's reply submissions at paras 33, 39.

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to publish his allegations against the defendant to a wider audience.[96] In addition, although the plaintiff initially informed the defendant that a CD with the pictures of the defects would be couriered to the defendant, he subsequently informed that he did not intend to send the CD and it was never sent.[97]

65 Next, on numerous occasions when the defendant sought access for inspection, the plaintiff imposed unreasonable conditions in the form of, amongst others, requests for method statements and schedules.[98] The plaintiff had in fact requested for a method statement before even allowing the defendant an opportunity to inspect the Property.[99]

66 Further, although the plaintiff eventually granted the defendant access to the Property to carry out inspections, the plaintiff never allowed the defendant access to perform rectification works despite the defendant being ready, willing and able to perform the said works. The plaintiff rejected the defendant's method statements without reason.

67 Thereafter, from November 2012 onwards, the plaintiff threatened to engage external parties to rectify the defects. In various correspondence from January 2013 onwards, the plaintiff stated that he was past having the defendant perform the rectification works but simultaneously also asked the defendant how it planned to rectify the works. The defendant claims that this showed that the plaintiff was "blowing hot and cold".[100]

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96 DCS at paras 67–70.

97 DCS at paras 80–90.

98 DCS at paras 91–104.

99 DCS at paras 71–75.

100 DCS at paras 119, 122–125.

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68 Finally, in relation to the plaintiff's allegation that his assessment of the defendant's proposed rectification works was coloured by the defendant's offer of $110,000 for enhancement works and $20,000 for rectification works, the defendant's offer was that they would pay these amounts or they would perform the rectification works for the plaintiff. The latter remained the defendant's preferred option. The defendant pointed out that the proposal to pay the plaintiff $130,000 was to their disadvantage as it would have cost the defendant nothing to rectify the defects because the defendant's contractor was obligated to rectify the Property at no cost to the defendant.[101]

Legal effect of defects liability clause

69 The defendant claims that as a result of the plaintiff's breach of cl 17, the plaintiff cannot claim for the defects which he prevented the defendant from rectifying. The defendant submits that cl 17 provides a right to the developer to rectify defects just as it provides the plaintiff a right to require the defendant to do so.[102]

Lift defects

The Lifts complied with regulations

70 The defendant's position on the Lifts is that they were compliant with the relevant standards imposed by the BCA at the material time.

71 In respect of the car lift, the defendant submitted that CP2 was not applicable at the material time as evidenced from BCA's communication to the

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101 DCS at paras 143–145.

102 DCS at para 27.

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defendant that the waivers which it had sought in respect of CP2 were "not applicable". In addition, the defendant had the car lift certified by a third-party professional engineer and obtained approval for the car lift from the MOM pursuant to the requirements which BCA communicated at the material time. The BCA had issued the TOP and CSC for the Property on this basis.[103]

72 The BCA's subsequent requirement for modifications to the Lifts took place around June 2014, years after the defendant had already obtained approval for the Lifts, by which time the Property had been handed over and the defects liability period had also expired.[104]

73 As for the Lifts' compliance with BCA's standards at the material time, the Ministry of National Development had, in its letter directing the PEB to convene a fresh investigation committee to look into aspects of the plaintiff's complaint against Mr Gay, stated the following:[105]

> 2 Minister has considered the above-mentioned representations on this matter, and his findings are as follows:
>
> …
>
> **(b) Whether the lifts complied with BCA's requirements and standards:**
>
> As the regulatory authority for lifts in Singapore, BCA has the discretion to approve the use of one or more standards for a lift. If need be, BCA may also waive or modify regulatory requirements and standards. The [investigation committee's] assessment that (i) the standards used by Gay for the lifts at the Property were appropriate and (ii) the lifts met BCA's requirements was a reasonable one.

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103 DCS at paras 155–161.

104 DCS at paras 149, 162–163.

105 AB Vol 6 p 3396–3397.

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On this basis, it was argued that there is no question that the defendant and its lift contractor had applied the appropriate lift standards in developing the Property and that the Lifts met the authorities' requirements at the material time. The defendant should not be held liable based on standards applied to the Lifts after the expiry of the defects liability period.[106]

The plaintiff unreasonably prevented Gylet from performing the modifications

74 The plaintiff was informed by the BCA that it was in contact with Gylet on corrective measures, and was also informed by the defendant's lawyers that the BCA had approved the modifications carried out in respect of identical lifts located in other houses in the development.[107] Nevertheless, the plaintiff did not allow Gylet to perform the modification works and again imposed unreasonable conditions.[108] On this basis, the defendant argues that the plaintiff acted unreasonably.

75 The plaintiff's submission that Gylet's proposed works are insufficient to render the Lifts compliant and safe is also denied by the defendant. The defendant relies in this regard on the fact that the BCA had issued the Permits to Operate for lifts on other properties in the development which had undergone the modification works carried out by Gylet.[109]

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106 DCS at paras 166–168.

107 AB Vol 4 p 2297.

108 DCS at paras 169–173.

109 Defendant's reply submissions at paras 126–128.

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Other matters

76 In relation to the insertion of an arbitrary date on the load test certificate, the defendant accepts that Gylet had done so but submits that that was as far as the matter went. The evidence showed that the load test was successfully performed and the car lift certified.[110]

77 Finally, the defendant takes issue with the sums claimed by the plaintiff for the lift defects which it says are excessive since they appear to be for replacement of the Lifts rather than for modifications.[111]

Defamation counterclaim

78 The defendant disputes the plaintiff's claim that he can rely on the defence of justification. In so far as the plaintiff's statements concern his allegation of serious defects in the Property, the defendant says that the expert evidence yet to be taken may have some bearing on this point and reserves its position until the evidence is complete.[112] As for the plaintiff's allegation that the defendant was incapable of rectifying the defects, the fact that the defendant admitted to some of the defects did not mean that the defendant was incapable of rectifying the defects; there is also no basis for the allegation since the plaintiff never once permitted the defendant to access the property to rectify the defects.[113]

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110 DCS at para 172.

111 DCS at para 176.

112 DCS at para 189.

113 DCS at paras 190–193.

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79 The defendant further argues that the plaintiff cannot rely on the defence of fair comment as his comments do not relate to a matter of public interest since the comments relate to private property purchased by the plaintiff for his private purposes. In addition, the plaintiff was actuated by malice and therefore cannot invoke the defence of fair comment.[114]

Decision

80 The defendant does not deny that there are defects in the Property. I find that in respect of the general defects which are admitted by the defendant, the defendant has breached, at the very least, cl 10.1 of the SPA pursuant to which the defendant had a contractual obligation to construct the Property in a good and workmanlike manner. As to whether the defendant has also breached other express terms of the SPA and/or the implied term alleged by the plaintiff, the issue is rendered moot given my finding that the defects in the Property, to the extent that they are admitted by the defendant, constitute a breach of cl 10.1. The extent and severity of the general defects, including whether the alleged defects that are denied by the defendant constitute defects, remain to be decided at the second tranche of the trial, after the taking of expert evidence in relation to all of the defects is completed.

81 In so far as the Lifts are concerned, I find that the Lifts constructed did not comply with the applicable regulations at the material time and that the non-compliance constitutes a breach of cll 10.1 and 10.3 of the SPA by the defendant.

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114 DCS at paras 198–211.

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82 The central issue that I had to determine at the end of the first tranche of the trial was whether, notwithstanding the defendant's breach, the plaintiff is precluded from claiming damages against the defendant as a result of his obligations under the defects liability clause of the SPA. I find that the plaintiff had denied access to the defendant to rectify acknowledged defects and that this constitutes a breach of the plaintiff's obligations under the defects liability clause. However, in my judgment, the plaintiff's breach does not supplant his common law right to recover damages from the defendant for defective work. The plaintiff's obligations under the defects liability clause is relevant to his duty to mitigate his losses and affects the quantum of damages recoverable rather than the right to recover damages.

83 As for the precise quantum of damages which the plaintiff is entitled to, this will be determined at the end of the second tranche of the trial.

84 In respect of the defendant's counterclaim, I award nominal damages of $1,000 to the defendant.

Analysis

Issue 1: Whether the plaintiff breached the defects liability clause

85 The defects liability clause of the SPA reads:[115]

> **17. Defects Liability Period**
>
> 17.1 The Vendor must make good at his own cost and expense any defect in the Building which becomes apparent within the defects liability period, namely, the period of 12 months from the date the Purchaser receives the Notice of Vacant Possession in respect of the Property.

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115 AB Vol 8 p 4475.

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> 17.2 The Vendor must make good any defect in the Building within one month of his receiving a notice from the Purchaser requiring the Vendor to make good such defect, failing which the Purchaser may do the following:
>
> (a) notify the Vendor of his intention to cause rectification works to be done and the estimated cost of carrying out those works; and
>
> (b) give the Vendor an opportunity to carry out the proposed rectification works within 14 days after the date of the notice in paragraph (a), failing which he may proceed to rectify the defect by his own employees or workmen.
>
> 17.3 If the Vendor, after having been duly notified under clause 17.2, fails to carry out the rectification works to make good the defect within the specified time, the Purchaser has the right to cause the rectification works to be carried out and to recover from the Vendor the cost of those rectification works. The Purchaser may deduct the cost of those rectification works from any sum held by the Singapore Academy of Law as stakeholder for the Vendor.
>
> 17.4 This clause does not excuse the Vendor from his obligations under Clause 15.

86 The plaintiff claims that he duly complied with his obligations under cl 17 of the SPA by performing the following acts (see [40]–[42] above):[116]

> (a) Pursuant to cl 17.2, supplying defects lists to the defendant on 25 April 2012, 12 December 2012, 18 February 2013 and 27 February 2013 which were consolidated in a list dated 3 May 2013, and requiring the defendant to rectify the defects therein.[117]

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116 PCS at paras 49, 111–113.

117 SOC para 14, 27; NE dated 19 October 2018 at pp 119 (line 11)–121 (line 14).

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(b) Pursuant to cl 17.2(a), when the defendant failed to fix those defects, notifying the defendant of his intention to appoint his own contractors in his lawyer's letter of 21 May 2014.[118]

(c) Pursuant to cl 17.2(b), giving the defendant more than 14 days after the 21 May 2014 letter to carry out the rectification works.[119]

87 The defendant did not dispute the fact that various defects lists were forwarded by the plaintiff to the defendant, and that more than 14 days elapsed between the plaintiff's second notification on 21 May 2014 and the date on which JTA Construction was engaged by the plaintiff. The defendant's main submission at the end of the first tranche of the trial was that, to the extent that the plaintiff prevented the defendant from rectifying the defects in the Property by imposing unreasonable conditions and ultimately denying access for rectification works, the plaintiff has breached cl 17.

88 In my judgment, the plaintiff has breached cl 17. While the plaintiff claims that he gave numerous opportunities to the defendant to rectify the defects, a review of the relevant correspondence suggests otherwise. The plaintiff's actions, viewed holistically, were unreasonable.

The plaintiff's requests for method statements

89 From an early stage, the plaintiff did not act in a constructive manner in his dealings with the defendant. While the plaintiff had taken photographs of the defects and informed the defendant in his first email of 5 April 2012 that he

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118 SOC para 32; NE dated 19 October 2018 pp 121 (line 16)–125 (lines 21 – 22)

119 SOC at para 33, 40.

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would be sending a CD with the photographs via courier to the defendant, he eventually declined to provide the photographs to the defendant (see [10] above). The plaintiff testified under cross-examination that he did so because he had difficulty cross-referencing the photographs taken with the locations of the defects in the Property.[120] However, I find the plaintiff's explanation not credible given that in the defects list sent on 5 April 2012, he included a column referencing a photograph number for a majority of the listed defects. It was thus clear that he had organised the photographs in some manner and this renders his explanation not believable.

90 Further, the plaintiff requested method statements for the rectification works on numerous occasions. He had in fact requested a method statement as early as 19 April 2012, before the defendant had an opportunity to inspect the defects in the list sent on 5 April 2012 (see [11] above).[121] On this issue, I reject the plaintiff's claim that his request for a method statement in his email of 19 April 2012 was in respect of an issue with the swimming pool in the Property, which the defendant had already inspected. The wording of the plaintiff's email, which referred to the "many defects in the house", clearly suggested that the plaintiff's request for a methodology was in respect of the general defects in the Property (which had not yet been inspected by the defendant) and not only the issue with the swimming pool. In addition, I do not find the plaintiff's explanation that he had asked his personal assistant to send a second email[122] on 19 April 2012 "to tell them [the first email] is about the

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120 NEs dated 16 October 2018 at pp 100 (lines 6)–101 (line 13); Plaintiff's reply submissions at para 48.

121 AB Vol 1 p 480.

122 AB vol 1 p 485.

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swimming pool" to be credible because this was not supported by the wording and context of both emails.[123]

91 When the defendant duly supplied the method statements requested by the plaintiff, the plaintiff rejected them without providing any explanation to the defendant. The defendant's first method statement and second method statement were tersely rejected by the plaintiff, as evident from the plaintiff's emails dated 5 August 2012 and 27 November 2012 (see [15] and [16] above). While I accept that the plaintiff's request for a method statement was not by itself unreasonable given that he was to a certain extent entitled to know what works were being done in respect of his Property, it was his persistent rejections of the defendant's method statements, without the provision of reasons, which was unreasonable.

92 The plaintiff said that he was justified in rejecting the method statements as they were incomplete and lacking in detail.[124] In my view, if the plaintiff had thought so, he ought to have informed the defendant and given the defendant an opportunity to rectify the method statement in a manner that was acceptable to him. In my judgment, the defendant's method statements were not so devoid of detail or so clearly inadequate as to render the plaintiff's dissatisfaction self-explanatory. The plaintiff also submitted that he should not be expected to explain what a satisfactory method statement entails since the defendant, being in the business of developing properties, would know this better.[125] However, given the state of affairs, the defendant could not be expected to know which aspects of its method statement the plaintiff was dissatisfied with.

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123 NEs dated 16 October 2018, pp 89 (line 15)–91(line 18); NEs dated 17 October 2018 p 72 (lines 17–18); Plaintiff's reply submissions at paras 41–42.

124 PCS at para 142.

125 Plaintiff's reply submissions at para 55.

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93 In addition, I reject the plaintiff's submission that his requests for method statements did not ultimately prevent the defendant from accessing the Property to carry out rectification works.[126] The plaintiff had only allowed the defendant to access the Property for the purposes of inspection. As regards access for rectification works, it is clear from the parties' correspondence that the plaintiff was not willing to grant access until he received a method statement which he was satisfied with. This is clear from the plaintiff's email to the defendant dated 27 November 2012, which stated, amongst others:[127]

> I have consistently insisted on an acceptable method statement before I would agree to any rectification work.
>
> …
>
> Your method statement of 21 November 2012 is insufficient.
>
> Would you agree to have our respective surveyors meet to agree on a joint method statement? …

As an aside, I note that the defendant was amenable to a joint method statement but parties ultimately reached an impasse on this proposed solution due to disagreement over who would be responsible in the event that the parties' surveyors could not come to an agreement.[128]

94 Likewise, in the plaintiff's emails of 18 December 2012 and 21 February 2013 (see [18] and [19] above), the plaintiff granted access to the defendant for the purposes of inspection and not to perform rectification works.

95 I therefore reject the plaintiff's submission that "notwithstanding the Plaintiff's dissatisfaction with the method statements, the Plaintiff did not insist

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126 PCS at paras 145–156; Plaintiff's reply submissions at para 54.

127 AB Vol 2 p 899.

128 Defendant's reply submissions at paras 65–72.

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on receiving further or better method statements as a condition to allowing the Defendant to carry out the rectification works".[129]

Subsequent communications from the plaintiff

96 I also agree with the defendant's submission that the plaintiff's correspondence from January 2013 onwards was inconsistent and confusing and that by that time, the plaintiff had effectively closed the door on allowing the defendant to perform the rectifications.

97 On 18 January 2013, the plaintiff informed the defendant for the first time that he was "past having [the defendant] perform the rectification works".[130]

98 On 27 February 2013, the plaintiff again stated that he was past having the defendant perform any rectification works but at the same time stated that the defendant could inspect the Property.

99 On 11 March 2013, the plaintiff repeated that he was "past having [the defendant] perform the rectification works" but had also asked the defendant in the same email, "[a]re you prepared to meet the standards of rectification of my architect and building surveyor and be supervised on the works? If you are, we shall need to agree on the list/scope of works".[131]

100 Under cross-examination, the plaintiff explained that his use of the words "we are past having you perform any rectification works" on three

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129 PCS at para 148.

130 AB Vol 2 p 983.

131 AB Vol 2 p 1125.

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separate occasions was nothing more than a position taken in the negotiation process.[132] However, in my judgment, the plaintiff had not acted reasonably and had effectively closed the door on allowing the defendant to perform the rectification works. This was a point which the plaintiff himself was unable to deny under cross-examination:[133]

> Q. It's a bit difficult, Mr Thio, wouldn't you agree, for the developers to still want to come in when you emphasised, on three separate occasions, in three succeeding months, that you do not wish them to do the rectification works?
>
> A. All they have to do is ask, because I already offered them, on 18 December 2012, "Please inspect as you wish".
>
> Q. Didn't they ask you whether it was just to inspect for documentation purposes or it is to inspect with a view to doing rectification works and didn't you go back to tell them that you are past having them do the rectification works?
>
> A. Many things are said in negotiation, your Honour, but it's the ultimate conclusion of the negotiation that demonstrate the intent of the parties, your Honour.
>
> Q. Are you saying that they shouldn't have taken you seriously when you said that on all three occasions?
>
> A. Your Honour, all this time the defendant complained about my insistence of a method statement. But there -- when -- there came a time where I wasn't getting anywhere with the method statement. So I informed the defendant, December 2012, I said, "The house is open for you to inspect. No method statement required". Because if I had continued to ask for the method statement and they give me a method statement that my surveyor don't agree, I would not be making progress.
>
> Q. Yes, Mr Thio? I'm putting it to you that by your emails, those three emails when you tell them, the developers, that you're past making them do the rectification, that you are shutting the door on them coming in to do the rectifications. Agree? That's what you stated.
>
> A. As it appears on the face of the email, yes.

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132 NEs dated 18 October 2018 pp 35 (line 21)–36 (line 5); PCS at para 158.

133 NEs dated 18 October 2018 p 31.

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Conclusion

101 It is evident from a review of the contemporaneous correspondence that the parties were in disagreement from an early stage on the extent and severity of the defects, including whether some of the alleged defects were actual defects (see for example [14] above). That the plaintiff was dissatisfied with the defendant's characterisation of some of his requests for rectifications as requests for enhancements was clear. Even after the plaintiff carried out a second tender exercise, the parties were still at a disagreement on the items which the defendant was liable to rectify. The plaintiff wanted the defendant to perform all items of work as stated in and in compliance with Mr Goshawk's tender specifications while the defendant was willing to proceed only on the basis of a subset of the same (see [26] above).

102 Notwithstanding the disagreement between the parties, the plaintiff should have allowed the defendant to rectify the defects that it was willing to rectify, while reserving his position on the rest of the items which were disputed by the defendant: *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd and another* [2008] 1 SLR(R) 285 ("*Sonny Yap*") (at [114]). In this case, the defendant had, on numerous occasions, expressed its intention to rectify the admitted defects and requested access to perform the rectification works. This was the case at an early stage in May 2012 when the defendant was first notified of the defects (see [14] above), and when the defendant provided its method statements to the plaintiff. Even when the defendant offered the plaintiff a monetary settlement in December 2012 after its method statements had been rejected by the plaintiff, it made clear to the plaintiff that it was willing and able to perform the works in the event the offer was rejected by him (see [17] above). Moreover, after the second tender exercise, the defendant was still willing to

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perform a subset of items in the tender specifications under the supervision of the plaintiff's architect (see [25]–[26] above).

103 At the end of the day, while the plaintiff's dissatisfaction with the Property was understandable, he was still contractually obliged under cl 17 of the SPA to give the defendant an opportunity to rectify the defects that the defendant had agreed to rectify. The plaintiff had failed to do so.

Issue 2: Whether the plaintiff has a common law right to claim damages

Case law

104 On the issue of the legal implications of the plaintiff's breach of the defects liability clause of the SPA, the defendant relied on the decision of the High Court in *Sonny Yap* for the position that such breach removed the plaintiff's right to claim damages. On the other hand, the plaintiff relied on the decision of the Court of Appeal in *Management Corporation Strata Title Plan No 1993 v Liang Huat Aluminium* [2001] 2 SLR(R) 91 ("*Liang Huat Aluminium*") and the English case of *Pearce and High Ltd v Baxter* [1999] CLC 749 ("*Pearce*"), as cited in *Liang Huat Aluminium*.

105 In *Sonny Yap*, the plaintiff homeowner entered into a Memorandum of Agreement with a contractor for the latter to design and construct a semi-detached house. The homeowner commenced suit against the contractor for defective works. The contractor's defence was *inter alia* that the homeowner breached the maintenance clause of the parties' contract by unreasonably refusing to allow the contractor to access the property during the maintenance period to carry out repair works. The homeowner's position – somewhat akin to that of the plaintiff in the present case – was that he did not act unreasonably in refusing to grant access to the contractor as he did not agree with the contractor's

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assessment of whether some items constituted defects and with the remedial actions proposed. He also claimed that he had lost confidence in the contractor.

106 The High Court held that the homeowner was contractually obligated to allow the contractor to rectify the undisputed defects during the maintenance period. To the extent that he did not, he was in breach of contract (at [115]). Further, it was held that the consequence of the homeowner's failure to grant access to the contractor was that he could not recover the costs of rectifying those defects (at [130]):

> I have found that the plaintiff was unreasonable in not permitting [the contractor] to have access to remedy those defects that [the contractor] recognised. The consequence of this finding must be that the plaintiff cannot now recover the cost of rectifying those defects from [the contractor]. There were, however, other defects which [the contractor] did not recognise as defects and was not willing to rectify and which I have now found to be defects. The cost of rectifying those defects must be borne by [the contractor] …

107 The case of *Liang Huat Aluminium* involved a dispute between a property owner and a sub-contractor over defects in a property. In that case, the plaintiff MCST (*ie*, the property owner) did not deny access to the sub-contractor to carry out rectification works. On the contrary, the sub-contractor in that case refused to perform the rectification works requested by the MCST. The MCST instituted proceedings against the sub-contractor before proceeding with rectification works. The issue in that case was whether the MCST could advance a claim against the sub-contractor before it incurred the costs of rectification.

108 Although the relevant issue before the court in *Liang Huat Aluminium* was strictly speaking not the same as that in the present case, the legal principles set out by the Court of Appeal are nevertheless relevant. This is because in

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determining the issue before it, the Court of Appeal considered the question of whether a property owner's right to be reimbursed for the costs it incurred in rectifying defects, as conferred under an express clause of a building contract, could have the effect of supplanting the property owner's right at common law to claim damages against the contractor. In *Liang Huat Aluminium*, the relevant clauses on defects in the parties' deed read as follows (at [11], [32]):

> 2. In the event of any deterioration or defects … the Contractor (**) shall forthwith upon notice given to either of them and within such time as the Employer [i*e*, the MCST] may direct, effect remedial works to the defective area or areas and shall make good to the absolute satisfaction of the Employer all damages … arising directly or indirectly out of the said defects.
>
> 3. In the event that remedial works undertaken by the Contractor or the Sub-Contractor prove ineffective as determined by the Employer … the Contractor and the Sub-Contractor shall effect such additional works in such a manner and within such time as the Employer may direct and shall carry out all test, as directed by the Employer until all the defects have been remedied to the absolute satisfaction of the Employer.
>
> 4. Should the Contractor or the Sub-Contractor fail to perform their obligations under Clause 2 and 3 above within the time directed by the Employer or in the absence of such direction, within a reasonable period, the Employer shall [*sic*] entitled to remedy the said defects and the Contractor and the Sub-Contractor shall forthwith on demand reimburse the Employer all costs and expenses incurred by the Employer for making good the said defects including all legal costs on a Solicitor and Client basis incurred by the Employer in enforcing this Clause.

109 The Court of Appeal held that even if the parties' deed was in the nature of an indemnity, it did not follow that in the event of a breach of cll 2 or 3 of the deed, the MCST's right against the contractor/sub-contractor was confined only to a claim for reimbursement under cl 4 (at [16]). While cl 4 gave the MCST a right to claim the costs incurred for remedial works it had undertaken, it did not, by its express terms or by implication, take away the MCST's common law right of action for damages for breach of contract (at [18]–[19]).

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In holding that cl 4 did not supplant the MCST's common law right to recover damages for breach of contract, the Court of Appeal referred, amongst others, to the English case of *Pearce* (at [21]).

110 In *Pearce*, the homeowner (*ie*, the employer) in a building contract failed to give notice of the defects to the contractor during the defects liability period as required under cl 2.5 of the parties' contract. The first instance judge held that as the defects were not notified within the defects liability period, the homeowner was not entitled to rely on cl 2.5 to seek payment from the contractor to remedy the defects. On appeal, the English Court of Appeal held that cl 2.5 did not take away the right of the homeowner to claim damages for breach of contract, since there were no express words in the contract to such effect. The appeal was therefore allowed. Evans LJ cited with approval the decision of *William Tomkinson & Sons Ltd v Parochial Church Council of St Michael* [1990] CLJ 319 (at 752–753). He also stated (at 752):[134]

> The recorder proceeded from his finding that notice should be given, to hold that if no notice is given during the period then the employer loses all right to recover damages for the defects which have become apparent. This view, if it is correct, gives the clause a particular potency. The existence of the defect means that there was a breach of contract by the contractors. That clearly is the effect of the opening words. That breach gave the employers, subject to the contract terms, a right to recover damages, but they would have no right to require the contractors to rectify the defect, apart from the theoretical and speculative possibility that in certain circumstances the court might order specific performance of the contractor's obligation which had been broken. *Clause 2.5 gives the employers an express right to require the contractor to return, as well as to the contractor himself the right to return and repair the defect himself, if he is willing to do so. There are no words of exclusion, yet the effect of the clause, if the judgment is correct, is that the employer's right to damages in respect of the cost of repairs is lost for all time. It is unnecessary to cite authority for the*

134 Plaintiff's Bundle of Authorities for Opening Statement Tab 8.

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> *proposition that such a right cannot be excluded except by clear, express words or by a clear and strong implication from the express words used.* [Emphasis added]

111 At the same time, the English Court of Appeal recognised that the cost of employing a third-party repairer was likely to be higher than the cost to the contractor from doing the work himself. It was held in *Pearce* that this would be taken into account in the assessment of damages by reducing the damages awarded to the plaintiff to the costs that would have been incurred by the defendant had it been given an opportunity to rectify the defects (at 752):

> … The cost of employing a third party repairer is likely to be higher than the cost to the contractor of doing the work himself would have been. So the right to return in order to repair the defect is valuable to him. The question arises whether, if he is denied that right, the employer is entitled to employ another party and to recover the full cost of doing so as damages for the contractor's original breach.
>
> In my judgment, the contractor is not liable for the full cost of repairs in those circumstances. The employer cannot recover more than the amount which it would have cost the contractor himself to remedy the defects.
>
> Thus, the employer's failure to comply with cl 2.5 whether by refusing to allow the contractor to carry out the repairs or by failing to give notice of the defects, limits the amount of damages which he is entitled to recover. This result is achieved as a matter of legal analysis by permitting the contractor to set off against the employer's damages claim the amount by which he, the contractor, has been disadvantaged by not being able or permitted to carry out the repairs himself, or more simply, by reference to the employer's duty to mitigate his loss.

Finding

112 In my judgment, the approach in *Pearce*, which was affirmed by the Singapore Court of Appeal in *Liang Huat Aluminium* should be adopted. Thus, a defects liability clause does not extinguish a plaintiff's right to recover damages under common law unless there is express language to the contrary in

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the contract. A plaintiff's departure from the requirements of a defects liability clause will affect the quantum of damages he is entitled to recover (under the principle of duty to mitigate), rather than exclude his right to claim damages altogether.

113 Although the homeowner in *Sonny Yap* was not allowed to recover the costs of rectifying the defects which the contractor intended to rectify, from a review of the relevant facts and holdings in that case, I do not think that the case goes so far as to endorse the proposition put forward by the defendant in the present case, *ie*, that a defects liability clause has the effect of supplanting the right to claim damages at common law. The plaintiff in *Sonny Yap* denied that he was in breach of the maintenance clause. He did not argue in the alternative that he was entitled to damages at common law even if he was found to have breached the clause (see [109] to [113]). In this regard, neither the case of *Pearce* nor *Liang Huat Aluminium* was considered in *Sonny Yap*. I therefore do not read *Sonny Yap* as suggesting that a departure from the English approach as set out in *Pearce* is appropriate.

114 Further and in any event, I am of the view that the approach set out in *Pearce* is sound. First, the approach is consistent with the principle that a common law right cannot be abrogated unless by express wording. In *Gilbert-Ash (Northern) Limited v Modern Engineering (Bristol) Limited* [1974] AC 689, a case cited by the plaintiff, Lord Diplock stated that in construing contracts, "one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption" (at 717). Second, the fact that the requirements of the defects liability clause have not been fulfilled by the property owner does not detract from the fact that the contractor has breached its contractual obligation (in this case, under cl 10.1 of the SPA), which gives

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the property owner a right to claim damages. At the same time, under the *Pearce* approach, the contractor's right (here, the developer's right) to make good the defects at its own cost is recognised through a calibration of the quantum of damages awarded to the property owner, at the assessment of damages stage.

115 In addition, there is support for the *Pearce* approach in academic literature. The learned author of *Building Contract Law in Singapore* (Edwin Lee Peng Khoon, 3rd Ed, LexisNexis 2016) states (at p 217):

> In [*William Tomkinson & Sons Ltd v Parochial Church Council of St Michael* [1990] CLJ 319], it was held that during the defects liability period, despite no notice and opportunity having been given to the contractor to rectify the defects, the contractor was nonetheless still liable for the defects — except that the damages to be awarded would be reduced to what it would have cost the contractor to rectify had it been given the proper notice; rather than the actual cost of rectification incurred by the employer by engaging a third party contractor to do so. The latter decision, which was not raised and considered in the [*Sonny Yap*] decision, may be more sound in principle since the failure to provide access does not negate the fact that the works were defective in the first place. Hence damages should be awarded to the extent that it places parties back into the position of what it would have been the case had proper access been given.

116 Likewise, in *Hudson's Building and Engineering Contracts* (Nicholas Dennys & Robert Clay gen ed, 13th Ed, Sweet & Maxwell 2015), the learned authors state (at paras 4-095 to 4-096):

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> …
>
> The cases show that in the absence of the clearest wording, the defects liability obligations in modern standard forms will not normally be interpreted as creating an exclusive remedy which displaces the Employer's common law right to damages for defective work.
>
> …
>
> Thus failure to give notice under the clause or carrying out repairs by another Contractor will not prevent a claim for damages.
>
> However, the existence of a defects liability clause may make it reasonable for an Employer to mitigate its loss by notifying the Contractor of the defects so that they are repaired by the Contractor. Thus, where the Employer does not provide the Contractor with a contractual opportunity to rectify defects during the defects liability period, the Employer can still recover the cost of repairing the defects, but the sum that the Employer can recover may be limited to how much it would have cost the Contractor to rectify the defects.

117 In the present case, cl 17 of the SPA does not contain clear words to exclude the plaintiff's right to claim damages at common law. Thus, for the foregoing reasons, I find that notwithstanding the plaintiff's breach of cl 17, the plaintiff has a right to claim damages at common law against the defendant for the defects in the Property. As for the precise manner and extent in which the plaintiff's breach of cl 17 reduces the damages he is entitled to, this will be determined after the second tranche of the trial, when the taking of evidence in respect of all of the defects has been completed. I note for the time-being that the defendant has claimed that since it would have cost the defendant nothing at all to rectify the said defects (given that YTL was allegedly obligated to rectify the defects at no cost to the defendant), the plaintiff cannot claim for any damages in respect of the rectification works even on an application of the

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Pearce approach.[135] This is denied by the plaintiff.[136] These and other issues relating to the quantum of damages will be determined after the second tranche of the trial.

Issue 3: The lift defects

118 Pursuant to cl 10.3 of the SPA, the defendant had to comply with "all the requirements of the Commissioner of Building Control and other relevant authorities for the construction of the Building".[137] This would include the statutory regulations applicable to the Lifts. Under section K.2.1 read with section K.3.3 of the Approved Document,[138] lifts were required to be designed and installed in accordance with the requirements of CP2 or "other relevant standards which are acceptable to the Commissioner of Building Control".

Whether the home passenger lift was compliant with the applicable regulations

119 In so far as the home passenger lift is concerned, the parties' respective lift experts were in agreement that CP2 was the applicable standard to the lift at the material time.[139]

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135 DCS at paras 41–44.

136 Plaintiff's reply submissions at paras 20–25.

137 AB Vol 8 p 4472.

138 JSL, Tab 8, at s/n 10 and pp 41–44.

139 JSL at s/n 1 and s/n 21.

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120 The defendant's lift expert agreed with the plaintiff's lift expert that there were aspects of the home passenger lift which did not comply with CP2, namely:[140]

(a) The omission of a strike plate below the lift undercarriage was in breach of cl 9.2 of CP2.

(b) The omission of a governor safety switch was not compliant with cl 8.1.5 of CP2.

(c) The installation of an emergency stop-switch inside the lift was a breach of cl 12.2.4 of CP2.

(d) The omission of a physical protective guard which covers up to a height of 2m was a breach of cl 7.5 of CP2.

(e) The 500mm depth of the pit of the lift fell short of the minimum clearance of 600mm required by cl 10.1.1 of CP2.

(f) The car top clearance of the lift fell short of the minimum clearance required by cl 10.1.2 of CP2.

(g) The home passenger lift's ratio of sheave diameter to rope diameter of 35:1 did not meet the minimum requirement of 40:1 stipulated in cl 8.1.1.4 of CP2.

(h) The omission of a remote brake-releasing device outside the lift-well was not compliant with Amendment No. 1:2004, Annex G, cl G3 of CP2.

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140 JSL at s/n 2 to s/n 11.

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(i) The omission of a remote inspection device was not compliant with Amendment No. 1:2004, Annex G, cl G3 of CP2.

(j) The omission of a mechanical car door lock was not compliant with cl 10.2.7.c of CP2.

121 The defendant's lift expert also explained that the home passenger lift was designed and installed by Gylet in accordance with the Chinese National Standards regulation in Taiwan on the manufacturer's recommendations, due to a likely "administrative oversight" on the applicable standard.[141] It was therefore not unexpected that the home passenger lift did not comply with certain aspects of CP2.

122 Since the home passenger lift was not compliant with certain aspects of CP2, I find that in respect of the home passenger lift, the defendant breached cll 10.1 and 10.3 of the SPA, pursuant to which it was contractually obliged to construct the home passenger lift in a manner compliant with the applicable regulations.

Whether the car lift was compliant with the applicable regulations

123 Having assessed the evidence, I find that the car lift was also not compliant with the applicable regulation at the material time. The relevant evidence is as follows:

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141 JSL at s/n 21; AEIC of Chee Yan Pong p 45, CYP-2 at para 7.3.1; See also NEs dated 24 October 2018 at pp 166 – 169.

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(a) BCA's Mr Goh informed the defendant's representatives on 2 June 2009 that lifts had to comply with CP2 in order to meet the requirements of the Approved Document. Mr Goh also informed that:[142]

(i) For lifts that are distinctly different from a CP2 lift, permission to install the lift must be obtained from the BCA.

(ii) As for lifts that are similar to a CP2 lift but with slight deviations, the lifts will be treated as a CP2 lift and a waiver had to be obtained for the aspects of the lift which deviated from CP2.

(b) Based on the explanation provided by Mr Goh, the defendant proceeded to apply for a waiver of certain aspects of CP2 from the BCA in August 2009.[143]

(c) On 10 November 2009, Mr Goh informed the defendant's representative that if the car lift did not carry a passenger, BCA's approval was not required.[144]

(d) On 11 December 2009, a different BCA officer, one Mr Chan, sent an email to the defendant's representative containing a table with the outcome of its waiver application. The "[d]ecision" column of the table contained the words "[n]ot applicable", with no explanation provided. In response, the defendant's representative sent an email to Mr Chan to clarify what the outcome of "[n]ot applicable" meant. Mr

142 AEIC of Foo Chai Yee FCY-4 at p 39.

143 AEIC of Foo Chai Yee at paras 14–15.

144 AEIC of Foo Chai Yee FCY-5 at p 46.

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> Chan provided a brief response, stating only that "[n]ot applicable as in this is not a CP2 lift".[145]

124 In my judgment, when the defendant received the outcome of its waiver application from the BCA in December 2009 followed by the short elaboration by Mr Chan to the effect that "[n]ot applicable as in this is not a CP2 lift", it ought to have sought further clarifications from the BCA given that what was conveyed was at odds with BCA's earlier communication. The defendant was contractually obliged to ensure that the car lift met the applicable regulatory standards and the onus was on them to deal with the inconsistencies in the information conveyed by the BCA. In any event, from a review of the chain of correspondence as summarised in the preceding paragraph, it should have been clear to the defendant that there was a possibility that BCA may have been operating under the impression, in its assessment of the waiver application, that the car lift was not intended to carry passengers when in fact it was. The correspondence from the BCA in 2014 seemed to suggest this as well. In a letter dated 5 June 2014 sent to another homeowner on Sandy Island, the BCA stated:[146]

> The Building and Construction Authority (BCA) has received feedback that the car lifts installed in the properties at Sandy Island, Sentosa do not comply with standard lift requirements.
>
> …
>
> In view of investigations indicating that the car lifts are used for transporting passengers and cars, BCA requires the car lifts to be regularised to meet an acceptable standard. …

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145 AB Vol 6 pp 3097–3098.

146 AB Vol 4 p 2142.

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125 The defendant claims that it did meet with the BCA to seek clarifications on what BCA meant in its response to the defendant's waiver application. It says it was informed by the BCA that CP2 was not applicable because the lift did not have a permanent shaft/barrier.[147] However, no minutes or other record of the alleged meeting with the BCA has been adduced by the defendant. The only evidence of this BCA meeting was a recounting and reporting of the same in the minutes of a site meeting not involving the BCA which stated:[148]

> SIPL/DPA/YTLS/UPC meet with Mr Chan of BCA to clarify BCA's comment "not applicable" for our carlift submission. BCA highlighted that because the carlift has no permanent shaft/barrier on the ground storey is will not be consider as a CP2 lift. BCA commented to have a third party accredited body to guarantee the proposed carlift. [Gylet] to prepare necessary items to be submitted to BCA for approval.

126 In addition, none of the defendant's witnesses were able to give any evidence on the alleged meeting with the BCA, including details on what was discussed.[149] The defendant's architect having conduct of the waiver application in 2009 was not called as a witness for the defendant.[150]

127 In the circumstances, there is insufficient evidence to show that in turning to the MOM to certify that the car lift was compliant with the Workplace Safety Regulations, the defendant was complying with a non-CP2 standard "acceptable to the Commissioner of Building Control" under K.3.3 of the Approved Document. There were also other factors supporting such a

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147 DCS at para 159.

148 AEIC of Chee Yan Pong at Tab 9 pp 102, 106; NEs dated 23 October 2018 at pp 57 (line 16) – 59 (line 14).

149 See *eg*, NEs dated 23 October 2018 pp 12–13.

150 NEs dated 23 October 2018 at pp 32–34.

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conclusion. Firstly, BCA's letter in 2014 to another homeowner on Sandy Island (see [124] above) stated that it required the car lifts on Sandy Island to be "regularised" to meet an acceptable standard, which suggested that prior to the modifications, the car lifts did not meet the applicable standard.[151] Secondly, as the plaintiff submitted, it was illogical for the car lift to be certified in accordance with the Workplace Safety Regulations as the regulation was intended to apply to lifting equipment "used in a workplace" (such as a factory) while the car lift was meant to be used in a residential home. This was a point which appeared to be acknowledged by the defendant's own lift expert.[152]

128 In addition, although MOM's representative had certified that the car lift was compliant with the Workplace Safety Regulations, there were aspects of the car lift that were not compliant even with this regulation.[153] For example, the car lift did not comply with certain aspects of Rg 19 of the Workplace Safety Regulations. On the defendant's lift expert's own evidence, the defendant should have applied for a waiver of Rg 19(4) but it had not.[154]

129 In addition, the fact that the load test certificate submitted to the MOM[155] contained inaccurate information on the date that the load test was conducted was also not disputed.

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151 AB Vol 4 p 2142.

152 NEs dated 24 October 2018 pp 78–79.

153 NEs dated 24 October 2018 pp 68–69, 73–99; AB Vol 8 p 4294.

154 NEs dated 24 October 2018 p 80 (lines 18–21).

155 AEIC OF Foo Chai Yee, para 19 and FY-7; DCS at para 172.

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130 For the above reasons, I find that the defendant has breached cll 10.1 and 10.3 of the SPA by constructing the car lift in a manner which did not comply with the regulation applicable at the material time.

The plaintiff's response to Gylet's proposed works

131 As with the general defects in the Property, the fact that the defendant breached the SPA by constructing lifts which did not comply with the applicable regulation, gives the plaintiff a right to claim damages. The plaintiff has a right to claim damages for breach of contract under the common law subject to his duty to mitigate losses. Thus, the plaintiff's denial of access to Gylet to perform the modification works does not disentitle him from claiming damages altogether, and only affects the quantum of damages recoverable.

132 Whether the plaintiff's refusal to grant access to Gylet constituted a failure to mitigate and if so, the precise extent in which this reduces the quantum of damages that the plaintiff is entitled to, will be determined at the second tranche of the trial, at the assessment of damages stage (along with the issue of the implications of the plaintiff's duty to mitigate on the quantum of damages for the rest of the general defects in the Property).

Issue 4: The defendant's counterclaim

133 The defendant counterclaimed for defamation on the ground that the plaintiff had made certain statements ("the Statements") to a journalist from the *The Straits Times* which were reported in the following manner in that newspaper on 15 September 2013: [156]

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156 Defence and counterclaim (Amendment No. 1) dated 4 October 2017 ("DFCC") at para 69; AB Vol 8 p 4334.

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> …
>
> Mr Thio, who took possession of the five-bedroom two-storey villa with an attic and basement spanning some 8,000 sq ft in March 2012, has been making his complaints since then. ***He alleged that the bungalow had some "serious" flaws.***
>
> They include water leakage in the living area, "gourmet kitchen", most of the rooms and basement garage, defects on bathroom doors, patchy wall paintwork, and scratches on the timber floor and glass panes, he said.
>
> Mr Thio said he received a quotation to fix the defects for $1.8 million earlier this year.
>
> **"*I bought the house as I was told by the salesman that it was of top quality and it was a nice development. What I discovered is that it was not so.*"** he alleged in an interview with The Straits Times. **"*I was surprised and have never seen anything like this in terms of the scale and extent of the defects. I'm more aggrieved by the substantial defects such as the water ingress and bathroom doors*,"** said Mr Thio, who has invested in several properties in Singapore and abroad.
>
> YTL and Mr Thio have been in talks on rectifying the flaws in the house for over a year.
>
> In December, YTL offered to pay $130,000 - $110,000 for enhancement works and $20,000 for fixing defects. But Mr Thio has rejected the offer, saying it is not enough. **"*YTL wants to do the repairs but if they use the same people, same materials and same methods, the problems will reappear,*" *he said.***
>
> …
>
> [emphasis added in bold italics]

134 The defendant pleaded that the words in bold italics, when read individually or in the context of the passage, in their natural and ordinary meaning, meant or were understood to mean that: [157]

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157 DCS at para 185; DFCC at para 70.

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(a) The defendant had misrepresented to the plaintiff that the Property was of top quality and was a nice development and the defendant was untruthful or dishonest ("meaning (a)").

(b) The defendant had constructed a property with serious defects and flaws ("meaning (b)").

(c) YTL's people were incapable of rectifying the defects ("meaning (c)").

135 In para 26 of his Reply and Defence to Counterclaim, the plaintiff pleaded that the "meaning of the words pleaded at paragraph 70(b) of the Defence [and Counterclaim] is admitted". This means that, in relation to meaning (b), it is the position of both parties that the Statements meant that "the Defendant had constructed a property with serious defects and flaws". However, the plaintiff denied that the words bear meanings (a) and (c).

136 The plaintiff made a curious point in his submission, that the Statements do not refer to the defendant, but to an entity called "YTL".[158] It is not disputed that "YTL" is a reference to the parent company of the defendant.[159] The defendant was a subsidiary incorporated for the sole purpose of carrying out the Sandy Island project.[160] I said it is a curious point because not only did the plaintiff not plead that the Statements do not refer to the defendant but to another entity called YTL, the plaintiff in fact admitted to meaning (b) in his Defence to Counterclaim. Meaning (b) expressly states that it was the defendant who had

158 PCS at para 233.

159 See *eg* AEIC of TKT at para 8.

160 PCS at para 236; Defendant's reply submissions at para 155.

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constructed a property with serious defects and flaws. Furthermore, the denials in relation to meaning (a) and meaning (c) pertained to the substance and not the target of the allegations. Had this been pleaded by the plaintiff, and therefore put in issue at the outset, the defendant would have had an opportunity to adduce evidence that the reference to "YTL" was understood to refer to the defendant. It is therefore not possible for the plaintiff to make such a submission after the trial on liability is over.

137 In respect of meaning (a), I am unable to find that the words, in their natural and ordinary meaning read in the context of the entire passage cited, bore the meaning that the defendant had misrepresented to the plaintiff regarding the quality of the house. For a representation to constitute a misrepresentation, which connotes untruthfulness and dishonesty, the person making it must be aware, or is of the belief, that it is not true. The words "I was told by the salesman that it was of top quality and it was a nice development" followed by "What I discovered is that it was not so" and "I was surprised and have never seen anything like this in terms of the scale and extent of the defects. I'm more aggrieved by the substantial defects such as the water ingress and bathroom doors" do not, in the context of the entire article, suggest to the ordinary reader that when the salesman made those statements, he knew that the Property was not of top quality or that it was not a nice development. Moreover, the context of the article indicates that it is a newly-built property and that the plaintiff had purchased it before it was built. An ordinary reader of the article would not impute the salesman with knowledge of what will happen upon completion of the Property at a future date. While the representation might have eventually turned out to be untrue, it would not be reasonable to impute any dishonesty in his sales pitch.

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138 As for meaning (c), I find that it is made out, particularly by the words "YTL wants to do the repairs but if they use the same people, same materials and same methods, the problems will reappear".

139 I find that meanings (b) and (c) would lower the estimation of the defendant in the minds of right-thinking members of the community.

140 The plaintiff pleaded the defences of justification and fair comment.

141 In relation to the defence of justification, based on the findings I have made in the trial, I hold that the plaintiff has proved the truth of meaning (b), *ie*, the defendant had constructed a property with serious defects and flaws. Specifically, the extent of the defects which have been admitted by the defendant in the trial was sufficient for me to make such a finding. However, the plaintiff has not proven the truth of meaning (c). The defendant was not given the opportunity to rectify the defects and there was no other evidence that showed it was not capable of undertaking the repair works satisfactorily. The plaintiff claims that his statement that if the defendant "uses the same people, same materials and same methods, the problems will reappear" was made after ineffective methods had been employed by the defendant including (a) applying sealant to water leakage areas in the roof terrace and master lounge window; (b) applying sealant to the external façade of the building; and (c) cutting a groove in the flooring to rectify water ponding in the courtyard.[161] However, these works were carried out by the defendant's contractors on 4 April 2012 and 12 April 2012,[162] before the defendant had a chance to inspect the Property after

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161 PCS at para 252(b).

162 AEIC of TKT at paras 41, 54–56, 93.

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the first defects list was sent by the plaintiff on 5 April 2012. I thus accepted the defendant's submission that these works did not constitute attempts at rectification and were insufficient in showing that the defendant was not capable of undertaking rectification works.[163] These works were at the most part of the original defective works by the defendant's contractors. Therefore, the defence of justification succeeds in respect of meaning (b) and fails for meaning (c).

142 I turn to the defence of fair comment. To succeed, the plaintiff must show that the statement is a comment based on facts that a fair-minded person can honestly make on the facts proved. The comment must be on a matter of public interest and the plaintiff must not be motivated by malice.

143 In relation to meaning (b), as I have found that the defence of justification succeeds, it is not necessary to consider the defence of fair comment. In any event my finding on malice below would apply and prevent the plaintiff from successfully relying on the defence of fair comment.

144 In respect of meaning (c), it is capable of being construed as a comment as the meaning is derived from the words "if they use the same people, same materials and same methods, the problems will reappear". I find this to be a comment that can be made by a fair-minded person in the circumstances of this case. Although the defendant submitted that this subject was not a matter of public interest contemplated in the law of libel, I am of the opposite view. The defendant was a developer of properties for sale to the public at large. It does not matter that the market it was in was at the ultra-high end. It is in the public interest to be informed of the quality of the properties purveyed by a developer

163 Defendant's reply submissions at paras 50–52.

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to the public at large. I therefore hold that this pertained to a matter of public interest.

145 However, I find that the plaintiff was actuated by malice. The plaintiff had threatened to subject the defendant to negative publicity if the defendant did not resolve the matter to his satisfaction. In cross-examination, the plaintiff admitted that he wanted to publicise the matter in order to place pressure and get the defendant to "sit down … to discuss this" with him.[164] His motive in doing this was clearly for that purpose. Therefore, the defence of fair comment in relation to meaning (c) also fails. To the extent that meaning (b) can amount to fair comment, the presence of malice would also defeat this defence. Therefore, the defendant succeeds in proving that the plaintiff had defamed it, on meaning (c).

146 I turn to the issue of damages. The defendant is a commercial corporate entity. Damages recoverable in defamation would be in terms of the injury to its trading reputation, without any notion of injury to a claimant's feelings available to a natural person. In *Qingdao Bohai Construction Group Co, Ltd and others v Goh Teck Beng and another* [2016] 4 SLR 977, Belinda Ang J stated that "[u]nlike individuals, a corporate plaintiff is not presumed to have a reputation; it must prove that it has a reputation that is capable of being injured by the alleged libel" (at [50]). Although the plaintiff submitted that the defendant had not adduced any evidence of its reputation,[165] there is evidence in the trial of the defendant's activities as the developer of the properties on Sandy Island in Sentosa and it can be inferred from the nature of the properties

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164 NEs dated 16 October 2018 at p 119 (lines 17–20).

165 PCS at para 236.

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successfully marketed by the defendant that it has acquired some degree of reputation. However, the plaintiff submitted that the defendant was "a one-ship company that was incorporated for the development of Sandy Island on Sentosa". Again, from the evidence, this appears to be the case, a point that the defendant did not specifically counter in its submissions. Indeed the defendant confirmed that it was the developer of Sandy Island but added, somewhat enigmatically, that the plaintiff's defamatory words "would certainly damage it in the way of its business, *ie*, property development."[166] It would appear that there is some degree of confusion between the defendant and its parent and sister companies, hence the mix-up over the reference to "YTL" in the offending *Straits Times* article. I am satisfied that the defendant has not proven that it was in the continuing business of property development and that, with the properties on Sandy Island fully sold, there was damage to its trading reputation. In the circumstances, I award nominal damages to the defendant of $1,000.

Conclusion

147 To conclude, in respect of the main action, I find that the defendant has breached the SPA because the Property contained both general defects and lift defects. The precise quantum of damages is to be determined at the second tranche of the trial.

166 Defendant's Reply Submissions at para 139.

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148 As regards the counterclaim, I award nominal damages to the defendant of $1,000.

Lee Seiu Kin
Judge

Cavinder Bull SC, Daniel Cai and Kelly Lua (Drew &Napier LLC) for the plaintiff in main action and defendant in counterclaim; Lok Vi Ming SC, Joseph Lee, Tang Jin Sheng, Qabir Singh Sandhu and Chiam Yunxin (LVM Law Chambers LLC) for the defendant in main action and plaintiff in counterclaim.

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