IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 86

Civil Appeal No 169 of 2019

Between

Sandy Island Pte Ltd

… *Appellant*

And

Thio Keng Thay

… *Respondent*

JUDGMENT

[Building And Construction Law] — [Building and construction contracts]
[Building And Construction Law] — [Damages] — [Damages for defects]
[Building And Construction Law] — [Dispute resolution]

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Sandy Island Pte Ltd
v
Thio Keng Thay

[2020] SGCA 86

Court of Appeal — Civil Appeal No 169 of 2019
Judith Prakash JA, Steven Chong JA and Quentin Loh J
22 May 2020

28 August 2020 Judgment reserved.

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

Introduction

1 This appeal deals with a question of law arising out of a sale and purchase agreement ("the SPA") for the construction and sale of a bungalow at Sentosa Cove between the appellant-developer, Sandy Island Pte Ltd ("the appellant"), and the respondent-purchaser, Thio Keng Thay ("the respondent").

2 The SPA contained a defects liability clause (see [6] below), which required the appellant to make good any defects in the bungalow which became apparent within 12 months from the date the respondent received the notice of vacant possession. The learned trial judge ("the Judge") held that despite the respondent's unreasonable acts, which in effect denied the appellant access to perform the rectification works, the respondent's right to recover damages for

the defects at common law was not extinguished, but it would be relevant for the assessment of the quantum recoverable.

3 The central question before this court is whether the Judge had erred in reaching this decision.

Facts

Background to the dispute

4 The relevant facts for the purposes of this appeal are not in dispute, and the exchanges between the parties in relation to the defects were comprehensively set out by the Judge (see the High Court's decision in *Thio Keng Thay v Sandy Island Pte Ltd* [2019] SGHC 175 ("the Judgment")). We shall therefore only set out the salient facts for the purposes of our decision.

5 The appellant was the developer of Sandy Island, a collection of 18 waterfront villas located in Sentosa Cove.[1] By way of the SPA, the respondent purchased a four-storey detached bungalow at 7 Sandy Island, Singapore 098243 in Sentosa Cove at the price of $14.32m ("the Property") from the appellant. The appellant's main contractor for the development was YTL Construction (S) Pte Ltd ("YTL").

6 The SPA was in the standard form prescribed by r 12(1) of the Housing Developers Rules (Cap 130, R1, 2008 Rev Ed) ("Housing Developers Rules"). The relevant clauses of the SPA, *viz*, the appellant's obligations in relation to the building and the defects liability period ("DLP"), were as follows:[2]

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1 Record of Appeal ("ROA") Vol II at p 11.

2 ROA Vol III(N) at p 299; ROA Vol III(O) at p 4.

> **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.
>
> …
>
> **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.
>
> 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.
>
> [emphasis in original]

7 The respondent received notice of vacant possession from the appellant on 28 February 2012 and took possession of the Property on 15 March 2012. Soon after entering into possession, the respondent complained of numerous

defects in the Property. On 5 April 2012, the respondent, through his personal assistant, sent to the appellant an email that included a table listing some 277 defects which he had discovered in the Property.[3] This table referred to numbered photographs of each defect but the photographs were not sent with the email. The respondent sent an additional email to the appellant on 19 April 2012, alleging the existence of some fundamental defects, including extensive leaks which were concealed by coats of paint, failures of design, workmanship, materials and/or supervision and requested that rectification works be carried out.[4] The appellant replied, seeking access to the Property in order to inspect the defects.

8 Eventually, the parties carried out a joint inspection of the Property on 3 May 2012. In an email dated 15 May 2012, the appellant replied that from its information, most of the alleged defects in the respondent's list of defects were not truly defects and were capable of rectification within a reasonable period of time. Whilst it made no admissions as to the respondent's allegations and reserved all its rights, the appellant nonetheless asked for access to investigate the defects, establish the causes of the same and propose rectification steps. However, despite the appellant's provision of numerous method statements to the respondent, the latter refused to grant the appellant permission to carry out rectification works, on the basis that the proposed works were unsatisfactory and insufficient. Eventually, as the parties remained at an impasse, on 16 July 2014, the respondent, after conducting two tender exercises, engaged a new contractor, JTA Construction Pte Ltd ("JTA Construction"), to carry out the rectification works.

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3 ROA Vol V(B) at pp 184-201.

4 ROA Vol V(B) at pp 218-219.

9 On 10 October 2016, the respondent instituted High Court Suit No 1073 of 2016 against the appellant on the basis that the latter had breached certain express and implied terms of the SPA. It was not in contention that although the respondent had initially sought to invoke cl 17 of the SPA, his suit was premised on claims under the common law. He sought:

(a) damages for the costs of engaging JTA Construction to rectify a total of 492 defects in the Property (excluding the lifts) ("the general defects") in the sum of S$894,688.10;

(b) damages for the costs incurred in engaging independent third parties to investigate the defects in the Property in the sum of S$129,372.29;

(c) damages for the loss of the use of Property from 15 March 2012 to 28 May 2015 in the sum of S$867,519.64; and

(d) damages for the costs of engaging contractors to rectify the lifts in the Property ("the lift defects"), to be assessed.

10 The respondent alleged a total of 492 defects.[5] The appellant admitted to 222 defects in full and 85 defects in part,[6] but emphasised that it had been prevented by the respondent from accessing the Property to carry out rectification works.

Proceedings below

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5 ROA Vol II at pp 37–85.

6 ROA Vol III(KK) at p 162, lines 7 to 9.

11 The parties agreed that the trial would be held in two tranches with the first tranche centring on the appellant's liability for the general defects and lift defects, and the respondent's liability in respect of the appellant's counterclaim for defamation. The extent and severity of the general defects, including the question whether they were defects or not, would remain to be decided at the second tranche of the trial, after the taking of expert evidence.

12 By the end of the first tranche of the trial, the Judge found that the appellant had breached its obligations under cl 10 but that the respondent had acted unreasonably in preventing the appellant from carrying out repairs in respect of the general defects (see the Judgment at [82]). We note that there was ample evidence to support this finding, and the respondent has, quite rightly in our view, not appealed against this finding.

13 In reaching his decision, the Judge formulated the key question he had to decide as follows (see the Judgment at [82]):

> 82 The central issue that I had to determine at the end of the first tranche of the trial was whether, notwithstanding the [appellant's] breach, the [respondent] is precluded from claiming damages against the [appellant] as a result of his obligations under the defects liability clause of the SPA …

14 After analysing a number of English and Singapore authorities, the Judge found that the respondent continued to possess a common law right to claim damages for the general defects despite there being a defects liability clause under the SPA.

15 He relied on the English case of *Pearce and High Ltd v Baxter and Baxter* [1999] BLR 101 ("*Pearce*"), which was cited with approval in *Management Corporation Strata Title Plan No 1993 v Liang Huat Aluminium Ltd* [2001] 2 SLR(R) 91 ("*Liang Huat Aluminium*"), for the legal proposition

that 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 (see the Judgment at [112]). This was consistent with the principle that a common law right cannot be abrogated in the absence of clear express wording (see the Judgment at [114]).

16 As cl 17 of the SPA did not contain clear words excluding the respondent's right to claim damages at common law, the Judge held that the respondent's breach would only affect the amount of damages he would be entitled to, which would be determined in the second tranche of the trial (see the Judgment at [117]).

The parties' arguments on appeal

17 The appellant's first submission is that the Judge, in reaching his decision, had mischaracterised the key issue before him. According to the appellant, the court should have addressed the question whether, "having invoked and breached cl 17, [the respondent] is entitled to recover damages".[7]

18 The appellant's second submission is that on a proper construction of cl 17, the respondent would be precluded from claiming for defects that were admitted by the appellant, whether pursuant to cl 17 or under common law. According to the appellant, the respondent would only be able to pursue a common law action against the appellant for defects that the appellant did not admit to ("non-admitted defects"). In support of this, the appellant mounts the following arguments:

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7 Appellant's Case at para 34.

(a) Clause 17 is a self-contained clause that, once invoked, results in the respondent losing his right to recover damages for the defects under common law – the only remedy that the respondent may avail himself of is performance by the appellant of his obligation to rectify the defects.[8] The parties had pre-agreed a self-contained set and hierarchy of rights and remedies that would take effect once cl 17 was invoked.[9] Reliance was placed on the decisions of *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd and another* [2008] 1 SLR(R) 285 ("*Sonny Yap*") and *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWSC 1302 ("*Bitannia*").[10]

(b) Once cl 17 has been invoked but is thereafter breached by the appellant, the sum that cl 17 permits the respondent to recover is the amount that the respondent loses because of the appellant's failure to rectify the defects, not an amount arising from the original breach of cl 10. If, having invoked cl 17, the respondent had complied with his obligations thereunder and given the appellant the opportunity to rectify the defects, the defects would have been rectified at no cost to the appellant. The invocation and breach of cl 17 by the respondent constitutes a *novus actus interveniens* ("*novus actus*") that breaks the chain of causation between the appellant's breach of cl 10 and the costs incurred by the respondent for the rectification works ("the Causation Argument").[11]

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8 Appellant's Case at paras 22–24.

9 Appellant's Skeletal Arguments at para 7.

10 Appellant's Skeletal Arguments at paras 16-17, 19.

11 Appellant's Skeletal Arguments at paras 31-33.

(c) By seeking common law damages after refusing to give the appellant the opportunity to rectify the admitted general defects, the respondent's actions constituted a breach of the prevention principle ("the Prevention Argument").[12]

(d) Allowing the respondent to sue the appellant would result in a circuity of action ("the Circuity Argument").[13]

19 The respondent disagrees with the appellant's contentions. According to the respondent, the Judge properly considered the relevant issues before him. Moreover, the appellant had impermissibly shifted its position on appeal.[14]

20 The respondent also submits that the Judge's decision was correct because:

(a) In the absence of clear express wording, defects liability clauses in contracts do not create an exclusive remedy which displaces the purchaser's common law right to damages for defective work.[15]

(b) Any breach of cl 17 by the respondent would only affect the issue of mitigation, rather than his entitlement to damages at common law.[16]

Issues to be determined

21 The following issues rise for determination:

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12 Appellant's Skeletal Arguments at para 30.

13 Appellant's Skeletal Arguments at para 34.

14 Respondent's Case at paras 31–35.

15 Respondent's Skeletal Arguments at para 19.

16 Respondent's Skeletal Arguments at para 38.

(a) whether the Judge had mischaracterised the key issue before him;

(b) whether cl 17 of the SPA precluded the respondent from making any common law claims for damages in respect of the admitted defects;

(c) whether the Causation Argument was made out;

(d) whether the Prevention Argument was made out; and

(e) whether the Circuity Argument was made out.

22 We shall deal with each issue in turn. In so doing, we note the following findings made below and from which no appeal has been brought. First, the appellant was in breach of the SPA, in particular cl 10, as the Property contained numerous defects. Secondly, the respondent invoked cl 17 by notifying the appellant of defects in the bungalow. Thirdly, the respondent complained of 492 defects but[17] the appellant admitted to only 222 of those as defects in full.[18] Fourthly, the respondent behaved unreasonably in not granting the appellant access to the Property and by preventing the appellant from remedying the defects.

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17 Notes of Evidence ("NE") (22 May 2020) at p 11, lines 14 to 16.

18 NE (22 May 2020) at p 11, lines 19 to 21.

Analysis

Whether the Judge had mischaracterised the key issue before him

23 As stated above at [17], the appellant claims that the Judge had failed to address the key issue in this case. This was:[19]

> "[W]hether, having invoked clause 17 and vested [the appellant] with the right (if it did not already have it before the invocation) to rectify the defects and avoid having to pay damages, the respondent was entitled to unilaterally resile from that invocation and breach the pre-conditions in [cl] 17, deprive [the appellant] of the rights and protections it had under that clause, and then bring a claim in damages against [the appellant] that he could not have brought if [the appellant] had had the chance to and did rectify the defects as it was entitled to under [cl] 17".

24 In order to determine the veracity of the appellant's claim, it is important to first examine the case that the appellant ran below, before considering the Judge's characterisation of the key issue before him.

The appellant's case in the proceedings below

25 In the proceedings before the Judge, the appellant sought to establish four key points:[20]

> (a) that cl 17 provides a right to the developer to rectify defects in the Property, just as it provides a right to the respondent to require the appellant to do so;

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19 Appellant's Case at para 35.

20 ROA Vol IV Part B at p 17.

(b) that the respondent had to act reasonably in accordance with the contract, and not prevent the appellant from exercising this right to rectify;

(c) that to the extent that the respondent prevented the appellant from rectifying the defects in the Property, the respondent was in breach of cl 17 of the SPA; and

(d) that the consequence of the respondent's breach is that the respondent is unable to claim for those defects that the appellant was prevented from rectifying.

26 Taking the above points in totality, it is clear that the appellant was essentially taking the position that the respondent, having prevented the appellant from carrying out any rectification works in relation to the defects, could no longer pursue any claims against the appellant. Specifically, the appellant had argued that the respondent's loss of his right to common law damages was by virtue of the defects liability clause in the SPA (cl 17). This was made clear during trial, when the Judge sought to clarify the primary position adopted by then counsel for the appellant, Mr Joseph Lee ("Mr Lee"):[21]

Mr Lee:	…it will be our submission that [cl 17.3] is the empowering clause that gives the [appellant] its rights under the conditions mentioned in 17.1 and 17.2 to make a claim for defects.
Court:	You are saying there's no common law claim?
Mr Lee:	Yes, our primary position, your Honour, is that the contract prescribes a common law claim insofar as it relates to defects that become manifest in this one-year period.

[21] ROA Vol III Part GG at p 204, lines 4 to 25.

> Court: [Counsel for the respondent's] point that any abrogation of the common law right should have been clearly expressly stated in the terms of the agreement.
>
> Mr Lee: Yes, your Honour, we recognise that point, but we also recognise that the only prescription – and it is stated in affirmative terms – is in [cl] 17.3. So we approach it from the other way. If there was an intention to preserve common law rights, that would have been stated by way of a reservation, that the terms of this do not prescribe the common law position.
>
> Court: What do you mean by 'stated by way of a resolution'?
>
> Mr Lee: There is no savings of common law rights here stated.

27 As seen from the above exchange, (putting to one side the probable transcription error of the words "prescribe" and "prescription" instead of "proscribe" and "proscription" and "reservation" instead of "resolution"), counsel for the appellant at that stage had adopted the position that given the existence of the defects liability clause, the respondent could not have recourse to *any* common law right pertaining to the defects. This point is of some significance.

28 Counsel for the respondent naturally contended that the appellant was mistaken in law, and that cl 17 did not displace the respondent's common law right to claim damages for breach of contract in respect of the defects.[22]

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22 ROA Vol IV(B) at p 109.

The Judge's characterisation of the key issue

29 The Judge had observed that the appellant's arguments essentially pertained to the legal effect of the defects liability clause. He stated, at [69] of the Judgment:

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

30 Following this, he framed the appellant's argument pertaining to the significance of the defects liability clause in the SPA as the following:

> 82 The central issue that I had to determine at the end of the first tranche of the trial was whether, notwithstanding the [appellant's] breach, the [respondent] is precluded from claiming damages against the [appellant] as a result of his obligations under the defects liability clause of the SPA …
>
> …
>
> 104 On the issue of the legal implications of the [respondent's] breach of the defects liability clause of the SPA, the [appellant] relied on the decision of the High Court in *Sonny Yap* for the position that such breach removed the [respondent's] right to claim damages …

31 We do not think that the Judge had misunderstood the appellant's arguments, or that he had mischaracterised the key issue before him. As may be seen above from [25] - [27], the appellant had sought to establish that given the *existence* of the defects liability clause, as well as the respondent's breach of said clause, the respondent would not be able to pursue *any* claim against the appellant for the defects under common law.

32 There is thus no merit to the appellant's contention that the Judge had mischaracterised the key issue before him. In our view, the Judge had correctly considered and addressed the appellant's case below.

Whether the appellant had shifted its case on appeal

33 Having reviewed the appellant's arguments before the Judge, we find it pertinent to note that the appellant had, on appeal, departed from the arguments it made below. This was in two material aspects: first, the legal significance of the defects liability clause as providing a condition precedent; and secondly, the defects liability clause as only precluding claims in relation to admitted defects.

34 First, on appeal, the appellant is essentially arguing that the defects liability clause possesses a different legal effect – it functions as a complete code to govern the parties' behaviour.[23] Clause 17 embodies a self-contained regime of rights and remedies which kicks in and applies when that clause is *invoked*.[24] It claims that the procedure contained in cl 17 functions as a condition precedent that the respondent had to comply with before he would be able to recover the cost of rectification from the appellant.[25] In other words, the respondent, having failed to provide the appellant with an opportunity to rectify the defects, did not comply with the pre-conditions as laid out in cl 17, which disentitled him from mounting any claim against the appellant for those defects under the common law.[26]

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23 Appellant's Case at para 33.

24 Appellant's Skeletal Arguments at para 7.

25 NE (22 May 2020) at p 16, lines 4 to 8; p 22, lines 13 to 16.

26 NE (22 May 2020) at p 9, lines 1 to 5.

35 This is in contrast to the position adopted by the appellant in the proceedings below, where it contended that the mere *existence* of the defects liability clause was sufficient to altogether exclude the employer's right to claim under the common law.

36 Secondly, on appeal, the appellant has conceded that the respondent would possess the right to sue for breach of contract under the common law for *non-admitted defects*.[27] In other words, the appellant is only taking issue with the respondent's right to sue it in common law insofar as the *admitted* defects are concerned – the appellant argues that the respondent ought to be barred from claiming rectification costs in relation to the admitted defects, as the appellant had been prepared to rectify the admitted defects but was prevented from doing so.[28] In contrast, the appellant had argued in the proceedings below that the respondent's act of preventing it from carrying out rectification works as per the defects liability clause disentitled the respondent from recovering *any* cost of rectification, regardless of whether the defects were admitted or otherwise.[29]

37 The appellant's concession and shift in stance demonstrates, with respect, the flaws in its case. During oral argument, counsel for the appellant, Mr Davinder Singh *SC* ("Mr Singh"), was asked to comment on the following hypothetical, with facts similar to the present circumstances:[30]

> (a) an owner enters into a SPA with a developer, which contains a defects liability clause;

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27 NE (22 May 2020) at p 7, line 26 to p 8, line 9; p 9, line 24 to p 10, line 1.

28 NE (22 May 2020) at p 8, lines 24 to 29.

29 NE (22 May 2020) at p 6, lines 14 to 20.

30 NE (22 May 2020) at p 5, lines 18 to 24.

(b) after inspecting the property, the owner produces a defects list comprising 100 defects and invokes the defects liability clause; and

(c) the developer reviews the defect list and agrees only to repair two of the 100 listed defects.

38 Departing from the appellant's case below, Mr Singh agreed that the owner would not be prevented from pursuing a claim against the developer under the common law in respect of the remaining 98 defects. There is little reason why the right to claim under common law cannot exist alongside the rights of the parties under the defects liability clause.[31] There should not be an artificial distinction drawn between the right to claim under common law for admitted and non-admitted defects, save for situations where the wording of the parties' defects liability clause expressly provides so. As we explain below (see [46]) many building defects that first manifest themselves within the defects liability period ("DLP") may appear to be simple defects but later turn out to be more complex. For example, a stained wall that is rectified with some touching up by painting, may in fact have been caused by water ingress some distance away which underlying cause remains undetected and unrectified. Secondly, there are also defects of a serious nature that make living in the house impossible, *eg*, defects in the structure of the staircase that require demolition and reconstruction. Clause 17 clearly does not make provision for this kind of defect.

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[31] NE (22 May 2020) at p 8, lines 1 to 9.

39 There are also several problems with the appellant's assertion that cl 17 is meant to function as a condition precedent – this is simply not supported by the wording of cl 17 or the nature of defects liability clauses.

Whether cl 17 of the SPA precluded the respondent from any common law claims for damages

40 As stated above, the appellant argues that cl 17, having been invoked but breached by the respondent, disentitles him from seeking common law damages for the admitted defects;[32] the decisions of *Sonny Yap* and *Bitannia* purportedly make this clear.

41 The respondent disagrees with this contention, arguing that the decisions of *Sonny Yap* and *Bitannia* are inapplicable. Instead, the decision of *Liang Huat Aluminium*, which was central to the Judge's holding that the respondent's common law rights were preserved, should be followed.

42 We will first consider the nature of a defects liability clause generally, before examining the specific wording of cl 17, as well as the applicable judicial, academic, and legislative authorities surrounding defects liability clauses. This kind of clause is commonly found in standard form contracts and espouses a principle commonplace in the building and construction industry. It is also closely tied to another principle regarding delivering possession of a building to a purchaser even though there are minor outstanding works. Hence, certificates of practical completion or handing over possession to a purchaser or employer often come with a list of outstanding minor works. It is common practice to allow completion of these minor outstanding works within a

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[32] Appellant's Case at para 35.

reasonable time from the commencement of the DLP. How long they can extend into the DLP will depend on the terms of the contract and the unique circumstances of each case.

Nature of a defects liability clause

43 As a preface to our discussion of defects liability clauses, we must not lose sight of the important fact that before any such clause becomes operative there will have been a breach or breaches by the contractor of its obligations to construct the building in a good and workmanlike manner according to the contract, the specifications and approved plans. It would be this breach or breaches that has given rise to the defects. Prior to the introduction of these kinds of clauses, contractors had no right to return to site to rectify defects; by the same token, an employer had no right to require the contractor to return to site to rectify defects (see I.N. Duncan Wallace, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 11th Ed, 1994) ("Hudson 1994") at para 5-050). As observed in *Pearce* at 104, while an employer may have a right to recover damages under common law from his contractors for defects, absent a defects liability clause, the employer "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". This was clearly not a practical state of affairs. It is important to emphasise that a defects liability clause is, ultimately, for the benefit of both employer and contractor. In a well-recognised standard text, the learned author of *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 13th Ed, 2015) ("Hudson 2015") states, at para 4-094:

> The right to call for the Contractor [*sic*] remedy defects is in the interests of both parties and there can be no presumption that

> it is intended to exclude other remedies for defects. *Remedial work can usually be carried out more cheaply, and possibly more efficiently, by the original Contractor rather than by some outside Contractor brought in by the building Employer, so defects clauses may in practice confer a substantial advantage on both parties to the contract.* The Contractor may not only be seen as having the obligation but, in many cases, the right to make good at its own cost any defects which appear within the period … [emphasis added]

44 To elaborate on the commonsensical and practical position stated in Hudson 2015, where the defect relates to, *eg*, a cracked ceramic tile, or chipped stone cladding or a damaged piece of timber or gaps in timber flooring, the developer/contractor can easily obtain those same items either from his left-over material (which almost every contractor has factored into his supply contract to cater for wastage and/or damage) or the original supplier; issues of materials being of a different type, quality or tone will thus be non-existent or minimised. A new contractor engaged to rectify such defects may not have that same capacity for exact replacement and will certainly charge more to rectify those same items with perhaps less satisfactory results. Another example will be painted walls, where the developer/contractor will be able to get the same batch and shade of paint to rectify a patch and will not have to repaint part of or the entire wall. The developer/contractor's familiarity with the site will also enable such rectification works to be completed more quickly and efficiently. In the case of a defect in concealed electrical wiring or water pipes, there is no question that the developer/contractor who carried out the work will be able to locate or identify the problem area and rectify the same with greater speed and lower costs than a new electrician or plumber who will, in addition, charge an uplift to warrant the same after the repairs are effected.

45 However, we should not lose sight of the fact that there is an enormous range of defects that can appear in a building. The types of defects or

combinations thereof that can arise in building and construction cases are as myriad as the different kinds of buildings, structures, construction methods and materials used. Defects are unsurprisingly one of the major components of almost all building and construction disputes. We need only raise a few hypothetical examples to illustrate that a defects liability clause, including cl 17, even with a 12-month duration, does not and cannot cater for some of these defects that can arise.

46 As noted at [38] above, a discoloured patch in the wall which has not yet blistered, appears to be a simple "touch-up" paint job. But it can mask the real problem – water ingress behind the surface of the wall which may originate from a location that may be quite distant from the manifestation of the problem. It may be some time before the discolouration re-appears or the water ingress causes other problems. One can consider the following scenario. The owner has "invoked" cl 17 by noting and informing the developer/contractor of the presence of discoloured paint. The developer/contractor touches up the patch with paint and the owner signs off on the apparent rectification. A few months later, the discolouration reappears and soon turns into blistered paintwork. How does that problem fit into cl 17 and do the provisions of cl 17 resolve that problem? Clause 17 clearly makes no provision for the reappearance of the discoloured paint and/or blistering within or outside the DLP or the rights of the parties in such a situation. The same kind of difficulty may occur in a staircase with wooden steps anchored onto a reinforced concrete beam. Cracks in the beam are thought to be plaster or surface cracks – they are patched and painted over and the owner signs off on rectification. In actual fact, there are construction and design (reinforcement) defects in the staircase. Fifteen months later, cracks re-appear and the defects are discovered to be due to structural deficiencies requiring the demolition and re-building of the staircase beam.

Again, cl 17 does not cater for this scenario. There is yet another kind of issue where the defects are of such a nature that the purchaser or owner has, with good reason, lost confidence in the contractor's ability to rectify the defect (see *eg*, Hudson 1994 at para 5-051). This can happen with widespread leaks and waterproofing issues. It surely cannot be the case that the purchaser or owner must continue to allow the developer/contractor multiple opportunities over the course of the DLP to attempt to rectify such defects. Clause 17 also makes no provision for the situation where the owner or purchaser has to vacate the premises for the repairs to be carried out, as in the example of the defective staircase which requires demolition and the subsequent re-construction of the beam and staircase.

47 It may be convenient at this juncture to deal with a submission by the appellant, *viz*, the appellant, exercising his rights under cl 17, can rectify the defect at no cost because he has engaged a main contractor who has to make good the defects without cost to him. That may well be the case here when the developer and contractor are within the same group of companies,[33] however they are separate corporations and it remains to be seen if this is the true state of affairs. However, in returning to the appellant's submission, where there is a developer who has separately engaged a contractor to carry out the construction, it may still not be the case that rectification of defects will be carried out at no cost to the developer. Let us take a hypothetical example. The owner who takes possession of the house finds that his white marble slabs have become stained around the door posts. The developer replaces those marble slabs, which are usually specially cut to fit around the door posts. In time, the replaced marble slab begins to stain again, with the staining becoming progressively worse. The

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[33] Respondent's Case at para 13.

underlying cause of these stains is that the tanalised wooden door post was not properly treated and sleeved to prevent the anti-termite and wood rot chemicals leaching out, thereby staining the white marble slabs. It is possible that the specifications in the main contractor's contract did not require this sleeving, which might have been an oversight on the part of the developer's architect or because it was originally envisaged that the floor tiles would be ceramic tiles that would not be affected by such staining, or that between the developer and the purchaser, they agreed to change the flooring ceramic tiles to white marble slabs. Leaving aside the issue of non-rectification of the underlying case, the main contractor would be entitled to payment for this not inconsiderable cost of rectifying the underlying cause. The same problem would arise where there is a complaint of water ingress to doors that face the elements. An architect may have neglected to provide in the specifications for a proper threshold with an adequate slope to ensure proper run-off of rain water, or forgotten to provide a detailed drawing with the required slope to the threshold, or failed to specify the maximum gap between the door and the threshold, or failed to provide the same because a canopy and some wall was removed thereby exposing that door to the elements. Rectification of this defect would result in costs to the developer. Whether a developer would have to pay its contractor would always depend on the facts of each particular case and it cannot be assumed that rectification works will be carried out at no cost to the developer. In any event, the net effect of the appellant's argument is not that the rectification under the defects liability clause would not involve any costs whatsoever (this is clearly not the case given the admitted defects) but rather that the rectification works would be carried out by its main contractor who has to make good the defects without any cost to the appellant. However, where the rectification costs would ultimately lie would be a function of the terms of the contract between the appellant and the main

contractor and the outcome of that inquiry could not possibly exclude the respondent's common law right to claim damages.

48 We note that a defects liability clause certainly does not cover latent defects or defects that will manifest after the DLP. Factually, it is therefore not correct to say cl 17 is a complete code that will cater for *all* defects.

Whether cl 17 is a complete code

49 We now turn to examine the provisions of cl 17 and the construction advocated for by the appellant. For the sake of convenience, we reproduce cl 17 in full:

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

50 As stated above at [34], the appellant's case is essentially that cl 17 functioned as a complete code that governed the parties' rights and obligations in relation to any defects arising out of the property. Clause 17 had set out pre-conditions that, if not followed, would disentitle the respondent from claiming any costs of rectification at common law from the appellant in relation to the admitted defects.

51 In contrast, the respondent submitted that cl 17 merely provided an additional remedy by which the respondent could require the appellant to rectify defects.[34]

52 During oral proceedings, Mr Singh went to great lengths to insist that the wording of cl 17 supported his case. He placed special emphasis on cl 17.3, that as the respondent's "right to cause the rectification works to be carried out and to recover from the [appellant] the cost of those rectification works" was premised on the appellant having failed to carry out rectification works despite being duly notified under cl 17.2, cl 17 functioned as a condition precedent to be satisfied before the respondent could pursue an action against the appellant.[35]

53 Additionally, he submitted that reading cll 17.2 and 17.3 in totality would demonstrate that the respondent's common law rights had been abrogated

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34 Respondent's Case at para 5.

35 NE (22 May 2020) at p 15, line 27 to p 16, line 8.

by cl 17.[36] Otherwise, if the respondent's common law rights were preserved alongside the procedure in cl 17, the latter would not have any significance.[37]

54 We reject Mr Singh's argument that cl 17 is a complete code dealing with defects and an examination of the provisions in cl 17 clearly shows it cannot be construed in that way. We have already given our views on the range of defects that can arise in a building and some hypothetical examples which are outside the contemplation and provision of defects liability clause such as cl 17. We start with cl 17.1 which states that the vendor "must" make good, at his own cost and expense, *any defect* in the building "*which becomes apparent within the [DLP]*" [emphasis added] which refers to a period of 12 months from the date the purchaser receives the notice of vacant possession. This is an unexceptional statement of a basic obligation, ubiquitous in building and construction contracts, that any defects in the building which appear during the DLP must be made good at the developer/contractor's own cost. "Defect" is defined in cl 1.1.1 very broadly as "*any* fault in the Building which is due either to defective workmanship or materials or to the Building not having been constructed in accordance to the Specifications" [emphasis added].[38] The existence of such defects is a breach of cl 10. However cl 17 clearly does not deal with defects that appear after the DLP or with latent defects. So clearly, as noted above, not all breaches of cl 10 are governed by cl 17.

55 The provisions of cl 17.2 obviously deal with a class of defects that can be rectified within a fairly short space of time. It provides that the vendor "*must*"

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36 NE (22 May 2020) at p 16, lines 9 to 17.

37 NE (22 May 2020) at p 22, lines 19 to 25.

38 ROA Vol III(N) at p 293.

[emphasis added] make good any defect *within one month* of his receiving a notice from the purchaser requiring the vendor to make good such defect. What if the defect is such that it requires more than one month to rectify or repair? Such a defect would appear to fall outside the contemplation of cl 17.2. Clause 17.2 then goes on to say that "failing which the Purchaser *may*" [emphasis added] embark on a course of action set out therein, *viz*, notify the vendor of his intention to carry out the rectification and the estimated cost of doing so and give the vendor an opportunity to *carry out the proposed rectification works within 14 days of the notice*, failing which the purchaser can proceed to rectify the defect by using his own workmen. The first thing to note is that under cl 17.2 the rectification works must be completed within 14 days – it is not sufficient for the vendor to merely *start* the rectification works within 14 days of receipt of such notice. Secondly, on its plain reading, especially with the use of the words "The Vendor must" in the opening words of cl 17.2 in juxtaposition with the word "may" in relation to what the purchaser may do, it is apparent that the course set out in cl 17.2 is an option open to the purchaser. There is a good reason for this. As noted above, there are sound practical and commercial reasons for the parties to adopt this course of action, especially for simpler and/or more straightforward defects which can be readily identified and rectified within the stipulated period of one month from the receipt of the purchaser's notice, or rectification of which the vendor/his contractor can complete within 14 days of receiving the cl 17.2(a) notice. However, for defects which require investigation, probably by experienced surveyors or professionals to ascertain the underlying cause of the defect and the method of rectification, it would not be possible to complete the rectification works within a period of 14 days, especially given the need for proper investigations and proposed method statements before rectification works may begin. As noted above, there

may also be occasions where the defects are such as to require the purchaser to move out of the premises whilst the repair works are taking place.

56 Thus, the timelines in cl 17.2 demonstrate why the procedure in the defects liability clause is merely an option for the respondent to invoke, and why the word "may" is used. Further, as Mr Singh had to accept, if the appellant did not accept an alleged defect as a defect, then the strictures in cl 17 which Mr Singh sought to apply, would be of no application. Similarly, it is evident that if the respondent did not avail himself of the procedure under cl 17, the clause would not apply but could still potentially affect the damages that the respondent would recover from the appellant. There is nothing in cl 17 which even remotely suggests that if the appellant had breached any of its obligations under cl 10, then the only path the respondent could take was rectification under cl 17 and no other. As we have noted above, first, Mr Singh had to concede that cl 17 only covered admitted defects, and secondly, with certain kinds of defects, cl 17 would not be a viable procedure to adopt. We need hardly add that at times, whether something is a defect or not, is not straightforward. This case is itself a good example because in the next tranche, experts will assist the court in determining whether the defects alleged by the respondent were truly defects, and whether the rectification methods that were adopted by JTA Construction were reasonable. We should point out that nothing we have said here prevents an employer and contractor from agreeing to a longer period to rectify defects. That again is outside cl 17.

57 On closer examination, the provisions of cl 17.3, upon which Mr Singh anchors his submission, fail to support his construction. It is clear that cl 17.3 comes into effect only *if* the respondent decides to invoke cl 17.2. If the respondent does not, the obligation remains on the appellant to make good the notified (and accepted) defect within one month of receiving the notice of defect

from the respondent. The clock continues to tick if the appellant delays in accepting the notified defect as a defect. If there is any such delay, then the risk of a shortened period to effect rectification falls squarely on the appellant. When would a purchaser invoke cl 17.2? A purchaser is likely to do so if after having given notice of a defect, the vendor delays in effecting the rectification work or does not carry out such work with an adequate degree of competence. If a purchaser does invoke cl 17.2, which is akin to a final chance to the vendor, then the Vendor has "to make good the defect *within the specified time*" [emphasis added], which must refer to the 14 days from the date of the notice. Clause 17.3 provides that if the defect is not made good within the specified time of 14 days, then the purchaser had "the right to cause the rectification works to be carried out and to recover from the Vendor the cost of those rectification works". Clause 17.3 goes on to provide that alternatively, a purchaser "may deduct" the cost of such rectification works from the stakeholder sums held by the Singapore Academy of Law.

58 There are therefore no words in cl 17 suggesting that, upon notification of defects to the vendor, a condition precedent, based upon the right of the vendor to be given an opportunity to rectify defects, must be fulfilled before the purchaser has a right to claim common law damages. On the contrary, there are conditions of time within which the rectification must be done that are imposed on the vendor in cl 17 and, as discussed above, there are some kinds of defects that fall outside the operation of cll 17.2 and 17.3. Clause 17 also does not make provision for the situation where a purchaser gives notice of a defect and the vendor does not complete the rectification within the stipulated time periods. It would appear to be the case that under cl 17 a purchaser can require a vendor's contractor to stop work, pack up and leave the premises at the end of the stipulated period and proceed to employ his own contractor to rectify the defect.

However a final decision on this exact point can await a suitable case where this issue arises.

59 It is also evident that cl 17 does not contain words suggesting that the respondent's common law rights have been replaced by those under cl 17. In our judgment, cl 17 provides a certain procedure to rectify defects that are for the benefit of both parties and cannot be read as excluding the respondent's common law rights, which can only be done by clear words. There is little doubt that cl 17 was not designed to cater for the more serious defects as discussed above, nor for rectification works that require the respondent to vacate the premises or for defects that appear after the DLP or for latent defects. Further, Mr Singh's submissions on cl 17 cannot be right because cl 17 clearly does not deal with consequential damages, *eg*, where, hypothetically speaking, a notified and accepted defect, like widespread ingress of water or the example of the defective staircase above, requires a houseowner to move out of the house during the rectification works (see *P & M Kaye v Hosier & Dickinson* [1972] 1 All ER 121 at 139, per Lord Diplock, cited by this court in *Liang Huat Aluminium* at [20]). We nonetheless note, once more, that outside cl 17, the same considerations of cost, effective rectification, efficiency and convenience, may, and often do, result in parties mutually agreeing to extend such tight timelines.

Judicial and academic authorities on defects liability clauses

60 Both the appellant and respondent referred us to various cases concerning defects liability clauses in order to bolster their arguments on the construction of cl 17. As stated above at [18(a)], Mr Singh relied chiefly on the decisions of *Sonny Yap* and *Bitannia* to argue that cl 17 served as a condition precedent and a complete code, while counsel for the respondent, Mr Cavinder

Bull *SC*, submitted that we should follow the Court of Appeal's decision in *Liang Huat Aluminium*, which opined that cl 17 merely provided an additional avenue for dispute resolution and did not affect the respondent's rights under the common law.

61 *Liang Huat Aluminium* concerned the construction of a Deed of Indemnity ("the Deed"). The developer, Hong Leong Holdings Ltd ("Hong Leong") had engaged Comtech Corp Pte Ltd ("Comtech") as the main contractor to build a condominium – Comtech in turn engaged Liang Huat Aluminium Ltd ("Liang Huat") as a subcontractor for the aluminium windows and glazing works. Hong Leong later assigned to the management corporation for the condominium development ("the MC") all their interests, rights and benefits under the Deed (see *Liang Huat Aluminium* at [4]). Clauses 2, 3 and 4 of the Deed in *Liang Huat Aluminium* collectively imposed obligations on Comtech and Liang Huat to make good defects in the works upon notice being given to either of them, with the MC being entitled to step in to remedy the defects and thereafter be reimbursed by Comtech and/or Liang Huat for the costs of remedying such defects should Comtech and Liang Huat fail to perform their obligations (see *Liang Huat Aluminium* at [11]). Clause 4 of the Deed stated:

> 4 Should [Comtech] or [Liang Huat] fail to perform their obligations under Clause 2 and 3 above within the time directed by [Hong Leong] or in the absence of such direction, within a reasonable period, [Hong Leong] shall [*sic*] entitled to remedy the said defects and [Comtech] and [Liang Huat] shall forthwith on demand reimburse [Hong Leong] all costs and expenses incurred by [Hong Leong] for making good the said defects including all legal costs on a Solicitor and Client basis incurred by [Hong Leong] in enforcing this Clause.

62 After completion of the works, the MC discovered certain defects in the aluminium windows and glazing of the condominium and gave formal notice of

these defects to Liang Huat, and later to Comtech as well. Despite these notices, the defects remained unrectified and the MC commenced legal action against Liang Huat and Comtech for breach of contract. Before trial, Comtech went into liquidation. The trial judge found there were defects and Liang Huat was liable to make good these defects under the Deed. As the Deed was in the nature of an indemnity, the MC was entitled to go ahead with the repairs and claim reimbursement under the Deed from Liang Huat. However, since the MC had not proceeded to rectify and make good the defects and had not expended any moneys therefor, the claim for an indemnity had not arisen. He therefore dismissed their claim. The Court of Appeal, in allowing the appeal, rejected Liang Huat's argument that the MC's right against them was confined only to a claim for reimbursement under cl 4 of the Deed (see *Liang Huat Aluminium* at [16]). The Court framed the crucial issue before it as follows (see *Liang Huat Aluminium* at [19]):

> … has cl 4, by its express terms or by necessary implication, taken away the right, which the MC has at law, namely the right of action for damages for breach of contract? The answer is clearly a resounding "No". There is nothing in cl 4, expressly or impliedly, which suggests that such a right of the MC has been taken away.

63 The Court of Appeal held instead that cll 2 and 3 of the Deed constituted an agreement or undertaking to make good defects and a breach of either of these clauses gave rise to an action for damages at law. The MC had the right to claim for damages for breach of contract under common law, a right which continued to subsist.

64 The Court of Appeal also cited with approval the English Court of Appeal's decision in *Pearce* in determining whether the owners' right to common law damages had been excluded due to their failure to invoke the defects liability clause (see *Liang Huat Aluminium* at [21]). The building

contract in *Pearce*, a contract on the JCT Form for Minor Building Works, contained a defects liability clause (cl 2.5) which provided that any defects, excessive shrinkages or other faults, which appeared within six months of practical completion that were due to materials or workmanship not being in accordance with the contract shall be made good by the contractor entirely at his own cost. The owners accepted that the defects became apparent within the DLP but they only raised a claim for defects in their defence and counterclaim, which was after the expiry of the DLP, to a claim by the contractor for the balance owed to it.

65 Evans LJ found that that any failure to comply with the procedure set out in cl 2.5 would not affect the purchaser's common law right for damages. In doing so, he disagreed with the decision reached by the Recorder (see 104):

> 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 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.*
>
> Mr Gibson submits for the contractors that if clause 2.5 does not have this effect, then it adds nothing to the parties' existing rights. I cannot agree. *It gives both parties the express rights referred to above, both of which are likely to be a great practical*

> *value to the party concerned, without impinging on the employer's common law right to recover damages for the contractor's previous breach.*
>
> [emphasis added]

66 Evans LJ also cited with approval the judgment of HHJ Stannard in *William Tomkinson and Sons Limited v The Parochial Church Council of St Michael and others* [1990] 6 Const LJ 319, at 326:

> In construing such a contract, one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear and express words must be used in order to rebut this presumption" – per Lord Diplock in *Gilbert-Ash (Northern) Limited v. Modern Engineering (Bristol) Ltd* [1974] A.C. 689 at p. 717H. … the true function of clause 2.5 is in my judgment firstly to confer a remedy for defective works on the employer, i.e. the right to require the contractor to make them good. Such a provision is generally to be regarded as providing an additional remedy for the employer, and not as releasing the contractor from his ordinary liability to pay damages for defective works: *Hancock v. B.W. Brazier (Anerley) Ltd* [1996] 2 All E.R. 901 per Lord Denning M.R. at page 904F-I.

67 The Court of Appeal in *Liang Huat Aluminium* thus endorsed the position in *Pearce* on the need for either clear and express wording or a clear and strong implication from the express words used before a purchaser's right to common law damages could be excluded.

68 The principal case that stands against the decisions in *Liang Huat Aluminium* and *Pearce* is *Sonny Yap*, which was relied on by Mr Singh for his construction of cl 17. In *Sonny Yap*, the plaintiff homeowner engaged the first defendant ("the Contractor") to design and build a three-storey semi-detached dwelling on his property under a memorandum of agreement ("MOA") which incorporated the 2001 REDAS Design & Build Conditions of Contract (Real Estate Developers' Association of Singapore, 2001) ("the REDAS

Conditions"). The homeowner brought a claim for delays in completion, failure to carry out the homeowner's instructions in that three of the four bedrooms were less than the stipulated size and for defects in the building. On the last set of claims, the Contractor accepted that there were defects but took the position that first, it had promptly attended to and rectified all defects notified by the homeowners and secondly even if there were outstanding works, the homeowners had, in breach of the MOA, unreasonably refused the Contractor access to the property to carry out the rectification despite repeated oral and written requests to do so. The Contractor submitted that it was "mandatory for the employer to provide access to do remedial work and an employer's right to have defects remedied within a stipulated time after completion is in substitution for his right to a claim in damages in respect of the cost of remedial work done by another contractor" (see *Sonny Yap* at [107]). The Contractor relied on a passage in Nigel M Robinson *et al*, *Construction Law in Singapore and Malaysia* (Butterworths Asia, 2nd Ed, 1996) ("Nigel Robinson") at pp 170-171 for this proposition. The Court held that the homeowner was obliged to allow the Contractor to rectify defective works during the maintenance period and to the extent the homeowner prevented the Contractor from rectifying the defects, the homeowner was acting unreasonably and in breach of contract and he therefore could not recover the cost of rectifying those defects from the Contractor.

69 It is important to note that *Liang Huat Aluminium* and *Pearce* (see [61] - [66] above) were not cited to the learned judge in *Sonny Yap*. Counsel for the Contractor instead relied on a text that pre-dated those authorities. Furthermore, the Court was not referred to the relevant standard practitioner's building and construction textbooks at the time like Hudson 1994 and Stephen Furst, *Keating on Construction Contracts* (Sweet & Maxwell, 8th Ed, 2006) ("Keating 2006"),

which would have provided useful guidance as to the applicable state of law. Hudson 1994 stated, at para 5-053, that in the absence of express provision, the remedies under maintenance clauses were in addition to, and not in substitution of the common law rights:

> It is always a question of construction whether the rights under the maintenance clause are intended to supplant the right to damages at common law altogether. *In the absence of express provision, the remedies under these clauses are in addition to and not in substitution for the common law rights, and even where the defects have appeared within the period the owner may sue for damages rather than call on the contractor to do the work, subject, in that event, to the possibility of the owner's damages being limited, if he has acted unreasonably* in the light of the discussion in the preceding paragraphs, to the cost to the contractor of doing the work at that time, rather than the possibly greater cost of bringing in another contractor either then or at a later date. [emphasis added]

70 Similarly, Keating 2006 made clear at para 10-023 that:

> "The contractor's liability in damages is not removed by the existence of a defects clause except by clear words, so that in the absence of such words the clause confers an additional right and does not operate to exclude the contractor's liability for breach of contract".

These passages remain valid propositions even today, and are reflected in the modern editions of Hudson and Keating (see Hudson 2015 at para 4-095 and Stephen Furst, *Keating on Construction Contracts* (Sweet & Maxwell, 10th Ed, 2016) ("Keating 2016") at para 11-033.

71 Thus, in so far as Nigel Robinson is understood to postulate that the defects liability clause is in substitution for the employer's right to claim for damages to recover the cost of rectification works carried out by another contractor, with respect, we disagree. That text has, in any case, been overtaken by subsequent case authority. To the extent that the High Court in *Sonny Yap*

took a different view from *Liang Huat Aluminium* and *Pearce*, it was wrong and should not be followed on this point.

72 We turn finally to address the New South Wales Supreme Court's decision in *Bitannia*, which the appellant relies on as demonstrating that defects liability clauses ought to be seen as a complete code for regulating the conduct of parties. The case of *Bitannia* concerned the redevelopment of the Ettalong Hotel at Ettalong on the Central Coast of New South Wales. The plaintiffs had commenced legal action against the defendants for delays and defects in the construction works, and sought damages for the cost of rectification of alleged defects. The relevant clauses in the parties' construction contract were cll 3.05 and 6.11. Clause 3.05 prescribed the following (see *Bitannia* at [19]):

> ***3.05 ACCESS TO MAKE GOOD***
>
> *After taking possession of the Works the Proprietor shall allow the Builder reasonable access to the Site and the Works for making goods defects as required by Clause 6.11 provided that in carrying out any such making good the Builder shall take all reasonable measures to minimise inconvenience to the Proprietor or those then authorised by the Proprietor to occupy the Works.*
>
> [emphasis in original]

73 Clause 6.11 provided for the giving of instructions to rectify defects during the DLP and provided as follows (see *Bitannia* at [25]):

> ***6.11 MAKING GOOD DEFECTS***
>
> *If at any time during the Defects Liability Period referred to in Clause 9.11 any faults, omissions, shrinkages or other defects in the Works are apparent then:*
>
> *6.11.01* *The Architect may issue an instruction to the Builder during the Defects Liability Period which shall state in what respect there are defects in the Works and may state a reasonable time within or at which the Builder shall complete the making good of those defects.*

> *6.11.02* *The Builder shall promptly make good such defects by appropriate rectification work and shall complete the same within or at any time stated in such instruction.*
>
> *6.11.03* *Where such defects are due to materials and/or workmanship not being in accordance with this Agreement, such making good by the Builder shall be at no cost to the Proprietor.*
>
> *6.11.04* *Where such defects occur notwithstanding that materials and/or workmanship are in accordance with this Agreement such making good shall be dealt with as would a Variation and in accordance with Clause 6.10.*
>
> *6.11.05* *If any defect is not made good within or at the reasonable time as may be so stated by the Architect or otherwise within a reasonable time the Proprietor may have the defect made good by others pursuant to the provisions of Clause 5.06.*
>
> [emphasis in original]

74 It was not in dispute that the plaintiffs had denied access to the defendants to carry out rectification works (see *Bitannia* at [55]). The defendants argued that cl 6.11 was a code determining the rights and obligations of both parties in respect of the making good of defective work – it relied on the case of *Turner Corporation Pty Ltd v Austotel Pty Ltd* (1994) 13 BCL 378 ("*Turner*"). The plaintiffs disagreed, contending that clear and express words were needed to rebut the presumption that the plaintiffs retained all remedies available to them for breach of contract (see *Bitannia* at [72]).

75 The Supreme Court first noted that the contract before it contained clauses that were the same, or materially the same, as the standard form building contract considered in the earlier decision of *Turner*. In particular, the defects liability clause was the same. In that decision, Cole J had found that the parties' contract provided a comprehensive code that governed their respective rights and obligations (see *Turner* at [394] - [395]):

> It follows, in my view, that the contract *does provide a code which establishes the rights, obligations and liabilities of the parties, and the mechanisms by which completion of the Works is to be achieved* …
>
> …
>
> … the contract specifies and confers upon the Proprietor its rights flowing from such breach; that is, *the parties have, by contract, agreed upon the consequences to each of the Proprietor and the Builder, both as rights and powers flowing from and the consequences of, such breach* …
>
> [emphasis added]

76 Similarly, the New South Wales Supreme Court in *Bitannia* found that the defects liability clause in that case also operated to restrict the rights of the plaintiffs in pursuing a common law claim for damages as there were *sufficiently clear words* in the defects liability clause to "rebut the presumption that a contracting party does not intend to abandon any remedies for breach of the contract arising by operation of law" (see *Bitannia* at [76]). Thus, the plaintiffs would only be entitled to have the work of making good carried out by others and claim the cost of doing so from the defendants in accordance with the procedures in cl 6.11.

77 In our respectful view, the Supreme Court's decision in *Bitannia* must be limited to its own special facts. The decision of the Supreme Court did not make clear which specific words were sufficiently "clear" as to disentitle the plaintiffs from their common law claims. That being said, we note that the parties' contract in *Bitannia* contained more prescriptive language in cl 3.05, which expressly provided for access to the contractor during the DLP to make good defects. The contract also went into more detail regarding the applicable procedure should defects be discovered in the property. For example, the contract in *Bitannia* called for the architect to make the decision on the defects and issue an instruction which had to state in what respect there were defects in

the works, as well as specify a reasonable time within which the contractor had to complete the making good of defects. There were also provisions providing for the contractor to notify the architect in writing if the architect's instructions were either given in error or involved a variation of the works (cl 5.05) or where a defect occurred even though the materials and/or workmanship were in accordance with the contract, in which case it would fall to be treated as a variation (cl 6.11.04). In fact, we find it pertinent to note that other Australian decisions suggest that *Bitannia* ought to be confined to its specific facts.

78 Prior to *Bitannia*, the New South Wales Supreme Court in *SAS Trustee Corporation v Scott Carver Pty Limited & others* [2003] NSWSC 1097 ("*SAS Trustee*") had emphasised the principle that a defects liability clause merely confers an additional right to the purchaser. In *SAS Trustee*, it was argued that the deed between the parties contained a condition precedent to liability, and that the plaintiff had to give notification in accordance with the requirements of the deed before it would be permitted to claim for any defective work. The Court disagreed, stating at [47]–[48] that:

> 47 *When one looks the terms of clause 2 one does not find any express language that notice is to be a condition precedent. In particular one does not find any express language which limits the rights which have already been given in clause 1 of the deed.* … A principal's right to damages for breach of contract is not removed by the existence of the defects clause except by clear words …
>
> 48 In the present case there is nothing on the face of the deed which in any way limits the right to sue for damages in respect of any breach of clause 1 of the deed. In these circumstances I am satisfied that it was not a condition precedent to liability that notice of defects be given. In these circumstances it is not necessary to deal with other arguments advanced on the plaintiff's part in respect of any right to sue on the original contract and whether in fact notice of defects have been given.
>
> [emphasis added]

79 It is also important to consider the later decision of *Sun Building Services Pty Ltd v Minh & another* [2015] QCAT 134 ("*Sun Building Services*") by the Queensland Civil and Administration Tribunal, which noted that *Bitannia* had to be seen in its proper context. The tribunal noted that both *Bitannia* and *Turner* concerned the use of JCC (Joint Contracts Committee) standard form contracts and that the clauses in those contracts removed a principal's common law rights to sue for damages given the "detailed allocation of rights" (see *Sun Building Services* at [128]). The tribunal subsequently distinguished both *Bitannia* and *Turner*, holding that there were no clear or express words in the contract before it to justify the exclusion of a common law right to damages (see *Sun Building Services* at [131]).

80 We therefore find ample authority in support of the holding that unless there are clear words or a clear and strong implication from the express words used in a defects liability clause or in the contract, an owner or employer in a building and construction contract containing a defects liability clause does not thereby lose the right to a claim for damages at common law for defects in the building; this right includes, where applicable, his common law right to claim for consequential damages like costs of alternative accommodation and associated expenses. A defects liability clause typically confers a right on the contractor to return to site, to rectify defects at his own cost as well as the obligation to do so if called upon by the owner or employer; there is the concomitant right of the owner or employer to require the contractor to return to site and rectify defects in the building. These rights and obligations are dictated by considerations of practicality in dealing with such problems. In addition, they confer on both contractor and owner or employer not insubstantial advantages. Accordingly, if the owner or employer does not, without good reason, exercise this option to call for the contractor to return to site and rectify

defects or having exercised that right, without good reason, prevents the contractor from carrying out such rectification, then such omissions or acts will impact on the owner's or employer's duty to mitigate and will be relevant to the amount of damages the owner or employer may recover from the contractor at common law. What does or does not amount to good reason will depend on all the facts and circumstances of each case and it is not desirable to lay down any hard and fast rule. We have generally adverted to some hypothetical situations which might amount to good reason above and we do no more than that.

81 As explained in Hudson 2015 at para 4-096:

> *…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 cost the Contractor to rectify the defects. [emphasis added]

82 The same view can be found in Keating 2016 at para 11-033:

> … If the employer fails to give notice, or otherwise to avail itself of a defects clause, or fails to take up an offer by the contractor to remedy the defect, and brings a claim for *damages it may, on the principle of mitigation of loss, be liable to some reduction in the damages which would ordinarily be awarded.* It may not be able to recover more than the amount that it would have cost the contractor to perform the obligation. But this does not mean that, if the work has been subcontracted and the contractor could require the subcontractor to return at no cost to itself, the employer is disentitled from recovering damages. [emphasis added]

83 We endorse both these views in Hudson 2015 and Keating 2016.

Defects liability clauses in standard form construction contracts

84 It is also useful to consider the defects liability clauses contained in the various standard form construction contracts in Singapore – the aforementioned REDAS Conditions, the Public Sector Standard Conditions of Contract for Construction Works (7th Edition July 2014) ("PSSCOC"), and the Singapore Institute of Architects Conditions of Building Contract (9th Edition September 2010) ("SIA Conditions"). In our view, the PSSCOC, REDAS Conditions and SIA Conditions have consistently treated their respective defects liability clauses as merely offering an alternative procedure for rectifying construction defects.

85 A perusal of the REDAS Conditions demonstrates that cl 20 (the defects liability clause therein) does not affect an owner's common law rights. They state:

> 20.2 Completion of Outstanding Works
>
> During the Maintenance Period, the Contractor *shall* complete the minor outstanding works (if any) as set out in the Schedule to the Handing Over Certificate.
>
> 20.3 Remedying of Defects
>
> The Employer's Representative *may* at any time during the Maintenance Period instruct the Contractor to remedy any defects that appear in the Works.
>
> 20.4 Failure to Remedy Defects
>
> If the Contractor fails to remedy any defect within 14 days or such other time as instructed in Writing by the Employer's Representative, the Employer's Representative *may* give Written notice to the Contractor to remedy the defect within 7 days from the date of such notice. If the Contractor fails to remedy the defec within the 7 days period as set out in the Written notice, the Employer *may* carry out the remedial works himself or employ other contractors to do so. The costs of such remedial works shall be recoverable by the Employer against the Contractor.
>
> [emphasis added]

86 We note cl 20.3 uses the same words "may… instruct the Contractor to remedy any defects" as well as short time periods in cl 20.4. Academic commentaries affirm that an owner's right under common law to sue in relation to latent defects especially (which are unlikely to be adequately covered by defects liability clauses) continue to operate under the REDAS conditions (see Eugenie Lip and Christopher Chuah, *Contract Administration Guide: to the REDAS Design and Build Conditions of Contract* (LexisNexis, 2012) at para 2.065).

87 Clause 18.5 of the PSSCOC states explicitly that "[t]he provisions of [cl] 18.1 to 18.4 shall not derogate in any way whatsoever from the Contractor's liability under the Contract or otherwise for defective work at common law." This has been described as an "avoidance of doubt provision", which confirms that "the Employer retains all his other rights under common law to proceed against the Contractor in respect of any defective work" (see Chow Kok Fong, *The Singapore Public Sector Construction Contract: Commentary on the Public Sector Standard Conditions of Contract 7th Edition* (LexisNexis, 2015) at p 329).

88 The SIA Conditions of Contract are similar to the REDAS Conditions. Clause 27(1), which concerns "maintenance following completion" states that during the defects maintenance period, the contractor "shall complete" any outstanding work, and that an owner "may at any time" following the Completion Certificate give directions or instructions for the making good of defects. The use of the term "may" in relation to the owner suggests that this is merely an option that he may wish to exercise. There is, again, academic authority supporting such a reading of the SIA Conditions (see Eugenie Lip and Choy Chee Yean, *Contract Administration Guide to the SIA Conditions of Building Contract* (LexisNexis, 2009) at para 2.156).

Conclusion on defects liability clauses

89 We finally consider the applicable legislative material surrounding the standard form contract that the SPA was based upon. As stated above at [6], the parties' SPA was in the standard form prescribed by r 12(1) of the Housing Developers Rules. When the Housing Developers (Control & Licensing) Act (Cap 130, 1985 Rev Ed) ("HDA") was first enacted, the then Minister of National Development, Mr Lim Kim San explained that the main purpose of the Act was to "…give a certain amount of protection to the innocent house purchaser by preventing the excesses of the building developers" (see *Singapore Parliamentary Debates, Official Report* (19 November 1964) vol 23 at col 789). The policy's aim of protecting home purchasers was reiterated in 1993 when the then Minister of State for National Development, Mr Lim Hng Kiang, explained that the "[Housing Developers Rules] are intended to regulate the practices of housing developers so that the interests of home buyers are protected" (see *Singapore Parliamentary Debates, Official Report* (28 May 1993) vol 61 at cols 262-263). The relevant Parliamentary material surrounding the standard form upon which the SPA was based (the Housing Developers Rules) shows no change in this underlying policy of protecting home buyers; it emphasises avenues of redress for rectification of defects during the DLP and specifically notes that for defects beyond the DLP, homeowners can sue the developers for latent defects on grounds of negligence or breach of contract. There is no suggestion that the DLP provision would replace the homeowners' rights at common law. During the Second Reading of the Consumer Protection (Fair Trading) (Amendment) Bill, then Minister of State for Trade and Industry, Mr Teo Ser Luck clarified that the standard form SPA under the HDA would not preclude purchasers from pursuing claims pursuant to breach of contract (see *Singapore Parliamentary Debates, Official Report* (9 March 2012) vol 88 at pp 3-4). He explained:

> Members of the public have also asked if properties and building defects are covered under the proposed law. There is already existing legislation governing the sale and purchase of new or uncompleted properties. Under the [HDA] and the Sale of Commercial Properties Act, *the standard Sale & Purchase Agreement provides for a one-year defects liability period during which the developer is required to rectify any defects in the property, at the developer's own cost. Beyond the one-year defects liability period, purchasers can still take civil action against the developer for latent defects on grounds of negligence or breach of contract, within six years from the date that the damage arose, or three years from the date that the damage was discovered, and whichever is later* … [emphasis added]

90 We therefore align ourselves with the ruling of the Judge that in the present case, cl 17 of the SPA did not preclude the respondent from commencing any common law claim for damages against the appellant. However, having given the appellant a notification of defects under cl 17, insofar as the respondent failed to grant access to the appellant for rectification of the admitted defects, such failure may affect the quantum of damages the respondent is able to recover at common law as a consequence of a failure to mitigate damages.

The Causation Argument

91 Before addressing the appellant's remaining arguments, we find it useful to first make clear that the Judge had found two distinct breaches in the present case. First, the appellant's breach of cl 10.1 by failing to build the Property in a good and workmanlike manner. Secondly, the respondent's breach of cl 17 by unreasonably denying the appellant the opportunity to rectify the admitted defects. The appellant's remaining arguments are premised on the second breach.[39]

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[39] NE (22 May 2020) at p 59, lines 14 to 16.

92 The appellant's main contention in relation to its argument on causation is that the respondent's invocation and subsequent breach of cl 17 is a *novus actus* and breaks the chain of causation between the appellant's breach of cl 10.1 and the costs incurred by the respondent for the rectification works.[40]

93 The test for determining whether an intervening event would amount to a *novus actus* was explained by the Court of Appeal in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR(R) 782 at [54]:

> As illustrated by the example just discussed, sometimes, the defendant's conduct sets off a sequence of events, each one of which is a necessary link in the causal chain between the initial wrong and the claimant's damage. In such cases, the court has to determine ***whether any of the intervening events can be said to be so significant causally as to break the causal link to be regarded as a novus actus interveniens*** … The court therefore has to decide whether the defendant's wrongful conduct constituted the "legal cause" of the damage. This ***recognises that causes assume significance to the extent that they assist the court in deciding how best to attribute responsibility for the claimant's damage*** …
>
> [emphasis added in bold italics]

94 The court is hence concerned with ascertaining the causal significance of the intervening event. In our view, the respondent's act of disallowing the appellant to conduct rectification works cannot be said to be of such significance that it would displace the appellant's legal responsibility. We say no more as the next tranche will deal with the assessment of damages and the issue of mitigation of damages. The Judge found the appellant had breached cl 10. The appellant has not appealed against this finding. This means that some of the defects in the Property were the result of a failure to construct the building in a good and workmanlike manner according to the specifications and/or the plans

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40 Appellant's Skeletal Arguments at paras 31-33.

approved by the Commissioner of Building Control and/or other relevant authorities on the part of the appellant. While the respondent may have acted unreasonably after discovering these defects, the appellant's breach of cl 10.1 remains the underlying cause of the costs incurred by the respondent to rectify the defects.

95 There is thus no merit in the Causation Argument.

The Prevention Argument

96 The appellant argues that to allow the respondent to pursue a claim for common law damages despite having invoked cl 17 would be to allow him to "take advantage" of his own breach of cl 17.[41] According to V K Rajah J (as he then was) in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634 at [51], the prevention principle prescribes that "no man can take advantage of his own wrong, so that one party may not be allowed to rely on such a provision where the occurrence of the event is attributable to his own act or default".

97 The appellant agrees that for it to invoke the prevention principle, "it must be shown that the contractual right or benefit that a party is asserting or claiming is a direct result of that party's prior breach of contract".[42]

98 Having earlier found that the respondent's breach of cl 17 did not constitute a *novus actus*, the appellant's Prevention Argument falls apart. The respondent's claim for the costs of rectification remains a direct result of the

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41 Appellant's Skeletal Arguments at para 30.

42 Appellant's Skeletal Arguments at para 28.

breaches of cl 10 by the appellant and does *not* directly result from the respondent's refusal to allow the appellant to carry out the rectification works.

The Circuity Argument

99 The appellant argues that if the respondent, having invoked cl 17, breaches it by denying the appellant the right to carry out rectification works but is still entitled to recover damages, a circuity of action will result.[43] This circuity stems from the employer first suing the contractor for the costs of rectification. The contractor would, in turn, sue the employer for damages for his breach of cl 17, with such damages being the contractor's loss which he would not have suffered if the employer had allowed him to rectify the defects.

100 At the risk of belabouring the point, the effect of an employer's denial of access to the contractor, while amounting to a breach of contract under the defects liability clause, does not result in a free-standing cause of action for the contractor. After all, it is undeniable that the defective works are attributable to the contractor, rather than the employer. There is also the not inconsiderable number of alleged defects which the appellant did not accept as defects. We should not pre-judge this issue in any way as exactly how many of these non-admitted defects were in fact defects will be investigated and assessed at the next tranche of the trial. The effect of such an employer's denial of access is that the court may make a finding that the employer had acted unreasonably in failing to properly mitigate his losses.

101 As stated by the English Court of Appeal in *Pearce* at 104:

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43 Appellant's Skeletal Arguments at para 37.

> There remains, however, the assessment of damages which the employer is entitled to recover. If the contractor does repair the defects, then no loss will be suffered, apart possibly from consequential losses which, both parties agree, are not barred by clause 2.5. If he does not, then the measure of loss will be the cost to the employer of having the defect repaired, unless in special circumstances the diminution in value of the property in question is appropriate. 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 clause 2.5, whether by refusing to allow the contractor to carry out the repair 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 …
>
> [emphasis added]

102 Thus, in *Sun Building Services*, the tribunal decided to disallow the respondent from claiming a 30% margin on the cost of performing the work. The tribunal stated, at [141]–[142]:

> [141] I have found that clause 21 does not exclude a common law claim in damages. However, failure to give access is a breach of clause 21. It is not necessary to decide whether Sun Building Services has a right to terminate the contract for that breach, because on any view it has affirmed the contract by stating that it wants the opportunity to rectify or complete the works.
>
> [142] I am satisfied that in assessing common law damages for Sun Building Services' breach I should take into account the homeowners' breach of clause 21. I accept that disallowing the 30% margin is reasonable. Sun Building Services' damages for such a breach is, at least the 30% margin on the cost of

> performing the work because but for the breach it would not be obliged to incur such an amount.

103 This approach makes eminent sense as it recognises the potential value of a defects liability clause to both the contractor and the purchaser – the purchaser is expressly given a right to require rectification without having to engage in a separate claim for damages under the common law (should he so desire), and the contractor is given the opportunity to rectify certain defects (which would be at a lower cost to him than if the purchaser had engaged a new set of contractors).

104 The final point that the appellant raises, which is related to its point on circuity, is that there would be no costs involved if the appellant had been allowed to rectify the admitted defects.[44] This was despite the fact that Judge had explicitly stated that the question of whether it "would have cost the [appellant] nothing at all to rectify the said defects" would be addressed in the second tranche of proceedings (see the Judgment at [117]).

105 As we have said before, we should not be seen to form any binding views on this matter given that it will only be fully addressed at the next tranche of the trial.

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44 NE (22 May 2020) at p 36, lines 24 to 25.

Conclusion

106 For the reasons set out above, we dismiss the appeal. Costs must follow the event and we order that the appellant is to pay the respondent costs for the appeal fixed at $50,000 (inclusive of disbursements). The usual consequential orders shall apply.

Judith Prakash	Steven Chong	Quentin Loh
Judge of Appeal	Judge of Appeal	Judge

Davinder Singh SC, Srruthi Ilankathir and Irina Golovkovskaya (Davinder Singh Chambers LLC) (instructed), and Lok Vi Ming SC, Joseph Lee, Tang Jin Sheng and Qabir Sandhu (LVM Law Chambers LLC) for the appellant;
Cavinder Bull SC, Daniel Cai Zhenyang and Kelly Lua (Drew & Napier LLC) for the respondent.