IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC(A) 44

Civil Appeal No 125 of 2021

Between

Diamond Glass Enterprise Pte Ltd

… *Appellant*

And

Zhong Kai Construction Co Pte Ltd

… *Respondent*

Civil Appeal No 129 of 2021

Between

Zhong Kai Construction Co Pte Ltd

… *Appellant*

And

Diamond Glass Enterprise Pte Ltd

… *Respondent*

In the matter of Suit No 1282 of 2019

Between

Zhong Kai Construction Co Pte Ltd

… *Plaintiff*

And

Diamond Glass Enterprise Pte Ltd

… *Defendant*

And Between

Diamond Glass Enterprise Pte Ltd

… *Plaintiff in counterclaim*

And

Zhong Kai Construction Co Pte Ltd

… *Defendant in counterclaim*

JUDGMENT

[Building and Construction Law — Damages — Liquidated damages]
[Building and Construction Law — Scope of works — Variations]
[Building and Construction Law — Statutes and regulations — Building and Construction Industry Security of Payment Act]
[Building and Construction Law — Termination — Repudiation of contract]

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Diamond Glass Enterprise Pte Ltd
v
Zhong Kai Construction Co Pte Ltd and another appeal

[2022] SGHC(A) 44

Appellate Division of the High Court — Civil Appeal Nos 125 and 129 of 2021
Woo Bih Li JAD, Quentin Loh JAD and Hoo Sheau Peng J
21 July 2022

23 December 2022 Judgment reserved.

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

Introduction

1 The present dispute concerns two cross-appeals in AD/CA 125/2021 ("CA 125") and AD/CA 129/2021 ("CA 129") arising out of the decision of the High Court judge (the "Judge") in *Zhong Kai Construction Co Pte Ltd v Diamond Glass Enterprise Pte Ltd* [2021] SGHC 277 (the "Judgment").

2 By a Letter of Award dated 7 November 2016 (the "Subcontract"), Zhong Kai Construction Co Pte Ltd ("ZK") engaged Diamond Glass Enterprise Pte Ltd ("DG") as a subcontractor for the supply of materials, equipment and tools to carry out and complete the aluminium cladding of an external facade, blast/ballistic doors and windows, aluminium doors, and window works. These works were for a project for the construction of equipment buildings and

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facilities at the Singapore Changi Airport (the "Project"). The works under the Subcontract were divided into Phase 1 and Phase 2A works.

3 In the proceedings below, ZK claimed against DG for liquidated damages ("LD") arising from DG's delays. The LD claimed amounted to a total of $501,800, comprising Phase 1 works amounting to $383,400 and Phase 2A works amounting to $118,400. ZK also claimed the sum of $340,233.10 against DG for replacement works arising from DG's abandonment of the worksite around 6 June 2018 and for rectification works done. ZK further sought to overturn the adjudicated amount that was awarded to DG in an adjudication determination under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA") issued on 15 November 2019 (the "AD").

4 In response, DG counterclaimed for the following:

(a) payments due under four variation orders (*ie*, DV0006 ("VO 6"), DV0008 ("VO 8"), DV00018 ("VO 18"), DV00019 ("VO 19"), collectively the "VOs") in the amount of $65,849.45;

(b) the retention sum for the Subcontract (the "Retention Sum") in the amount of $27,902.75, (we pause to note that references in the Judgment, at [29(b)] and [245], to the Retention Sum as the sum of $28,051 appears to be an inadvertent error; the Retention Sum of $27,902.75 is recorded as an agreed figure in para 151 of the AD,[1] (see [26] below), DG's Appellant's Case at paras 111

[1] See para 151 of the Adjudication Determination at JROA Vol V Part G at p 175.

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to 115 and DG's Defence and Counterclaim dated 12 May 2021);[2]

(c) remainder of the Subcontract sum ($561,019.90, minus payments received of $339,136.60, the disputed VO sum of $65,849.45, and the Retention Sum); and

(d) legal costs associated with the AD.

5 The Judge allowed ZK's claims for LD in part. He allowed ZK's claims for LD for Phase 1 works in the amount of $356,400, which was less than the claimed sum of $383,400, and disallowed LD of $118,400 for Phase 2A works. He also allowed the costs of replacement and rectification works in part, in the amount of $197,501.49 out of the $340,233.10 claimed by ZK. We set out at [93], a table taken from the Judgment at [220], containing the itemised claims for such works. A reference to an item simpliciter is to an item from that table. The Judge also dismissed ZK's claim for overturning the main works allowed by the adjudicator in the AD.

6 As for DG's counterclaims, the Judge allowed DG's counterclaim for payment due under VO 18 in the amount of $5,070 and disallowed DG's counterclaims for payments in respect of VO 6, 8 and 19. The Judge also dismissed DG's claims for [4(b)]–[4(d)] above.

7 In summary, we allow DG's appeal in CA 125 in part and ZK's appeal in CA 129 in part, as follows:

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[2] See JROA Vol II at p 44.

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(a) DG's appeal in respect of LD awarded to ZK is allowed in part and the $356,400 LD awarded to ZK for Phase 1 works is reduced by $165,600 to $190,800;

(b) DG's appeal against the award of $5,906.40 to ZK in respect of ZK's claim for replacement and rectification works, is allowed, (see item 1(e) at [93]), and this award is accordingly set aside;

(c) ZK's appeal against the dismissal of its claim for $27,735.47 in respect of its claim for replacement and rectification works (see item 4(a) at [93]), is allowed and ZK is awarded this sum;

(d) DG's appeal against the dismissal of its counterclaim for payments in respect of VO 6 (*ie*, the sum of $32,602.50) is allowed, and DG is awarded this sum;

(e) DG's appeal against the dismissal of its counterclaim for payments in respect of VO 8 (*ie*, the sum of $13,185) is allowed, and DG is awarded this sum;

(f) DG's appeal against the dismissal of its counterclaim for the Retention Sum (*ie*, the sum of $27,902.75) is allowed, and DG is awarded this sum; and

(g) The question of DG's entitlement to its legal costs for the adjudication as well as the quantum is remitted back to the Judge for his determination (see [280] below). If for any reason the Judge is not available, the parties may write to this court to make this determination.

As there are or will be various sums owing by DG to ZK and *vice versa* under these cross-appeals, (pursuant to (a) to (f) above), as well as under the Judgment,

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(which fall outside (a) to (f) above), the parties will have to set-off these various sums against each other to arrive at a final balance. We therefore make the necessary consequential orders below at [282] in relation to Companies Winding Up No 95 of 2020 ("CWU 95", see [32]–[33] below) and the sum of $211,044 paid into court by ZK by way of security for a stay of CWU 95 pending the outcome of these cross appeals (the "Security Sum").

Facts

8 We gratefully adopt the Judge's summary of the facts in so far as they are relevant to the issues in the present appeals (Judgment at [1]–[3] and [6]–[27]).

The parties

9 ZK is a Singapore-incorporated company in the building and construction industry. Its principal business is in building and construction.[3] DG is also a Singapore-incorporated company in the building and construction industry. It is engaged in the design, manufacture, supply, installation and maintenance of architectural glass.[4]

10 ZK was a subcontractor involved in the Project, which was for the construction of equipment buildings and facilities at the Singapore Changi Airport.[5] The owner of the Project was the Civil Aviation Authority of Singapore ("CAAS"). Surbana Jurong Infrastructure Pte Ltd ("SJ") was CAAS'

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3 JROA Vol II at p 17 para 1.

4 JROA Vol II at p 33 para 5.

5 JROA Vol III Part F at pp 101 and 102 para 2.

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consultant for the Project.[6] SCB Building Construction Pte Ltd ("SCB") was the main contractor for the Project.[7] ZK was a subcontractor of SCB for the Project.

11 Through the Subcontract dated 7 November 2016,[8] ZK engaged DG as a subcontractor for the supply of materials, equipment and tools to carry out and complete the aluminium cladding of the external facade, blast/ballistic doors and windows, aluminium doors, and window works for the Project.[9] The "Subcontract Sum" was a provisional sum of $558,055 excluding goods and services tax ("GST").[10]

Background to the dispute

12 The Subcontract was divided into two phases: Phase 1 and Phase 2A. Phase 1 related to works for an eight-storey Equipment Building ("Phase 1 Works") while Phase 2A related to works for a two-storey Annex Building ("Phase 2A Works" and "Annex Building" respectively).[11]

13 According to ZK, DG began to show signs of delay in meeting the schedule for the Subcontract works sometime in February 2017.[12] SCB and ZK gave many written notices and reminders to DG from February 2017 to February 2018.

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6 JROA Vol III Part F at p 103 paras 9 and 10.

7 JROA Vol III Part F at p 103 para 12.

8 See footnote 6 in the Judgment: "The defendant disputed at trial that the Subcontract was concluded on 7 November 2016 and argued that it was instead concluded sometime in December 2016. However, the exact date the Subcontract was concluded is not relevant to the determination of the issues before me."

9 JROA Vol V Part A at pp 62 to 113.

10 JROA Vol V Part A at p 62.

11 JROA Vol V Part A at p 63.

12 JROA Vol III Part A at p 16 para 21 and p 127 to JROA Vol III Part B p 62.

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14 According to DG, these delays were not caused by them but by ZK and/or those further up the contractual chain.[13] The delay was caused by, among other things, ZK's delay in obtaining the requisite approval from the Building and Construction Authority ("BCA") to carry out the structural works for Phase 1, the change in glass specifications, and ZK's refusal to agree to payment of claims or to make payment on time and in full.[14]

15 The disagreement between the parties continued in April 2018 as evidenced by email correspondence between them concerning the purchase of cabin glass that DG was obliged to install on the eight-storey Equipment Building under Phase 1 Works.

16 In an email by SCB dated 17 April 2018, addressed to both ZK and DG, it was stated that "[t]ill date, despite our repeated reminders, you have not placed order for the cabin glass and there has been no progress update".[15]

17 On 25 April 2018, DG sent a letter via email to ZK, with the header "Cancellation of Purchase Order for Cabin Glass".[16] In that letter, DG stated that "[d]espite our very lucid explanation of the facts and the various issues raised regarding payment of monies due and owing to us plus our requirement that the relevant parties accept responsibility for the costs of airfreight, we have not received any substantive reply from [ZK]".[17] As such, DG had "no choice but to cancel the Purchase Order for Cabin Glass with immediate effect".[18] DG also

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13 JROA Vol III Part K at pp 60 and 61 para 12.

14 JROA Vol III Part K at pp 60 and 61 para 12.

15 JROA Vol V Part L at p 86.

16 JROA Vol V Part L at p 112.

17 JROA Vol V Part L at p 112.

18 JROA Vol V Part L at p 112.

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sought written confirmation from ZK to bear the liability to pay $48,380 to settle DG's claims, without which they would not be able to proceed further.

18 In response, ZK sent an email to DG on the same day stating that "to cancel the purchase order for cabin glass is a serious impact to achieve overall completion of work [*sic*]".[19] ZK also stated that they would purchase the cabin glass and the cost incurred would be deducted from DG's progress payment claim.[20]

19 On 30 May 2018, DG replied to ZK's email stating:[21]

> **Repudiatory Breach of Contract**
>
> …
>
> For the reasons set out in our correspondence on **19 April 2018** we have explained and established that there was no delay by [*DG*] in their project from the moment the glass specifications were changed …
>
> Further, it is painfully obvious that despite our progress claims, no payment has been made on the sum outstanding of **$261,006.74**. [*ZK*]'s refusal to approve the variation work quotes and total failure to obtain payment for all the variation work requested puts us in jeopardy of making a loss in this project.
>
> …
>
> [emphasis in original]

20 DG also demanded payment of $149,436.99 by 12.00pm on 5 June 2018. Should ZK fail to meet the deadline, DG would treat the

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19 JROA Vol V Part L at p 118.

20 JROA Vol V Part L at p 118.

21 JROA Vol V Part L at pp 148 and 149.

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Subcontract as terminated.[22] ZK did not make the demanded payment by the deadline. On 6 June 2018, DG abandoned the work site.

21 On 26 June 2018, several emails were exchanged between the parties in relation to the calculation of the sums alleged as due by DG. On 29 June 2018, DG sent a letter to ZK via email stating that it had "no choice but to accept [ZK's] repudiatory breach and terminate the contract" [emphasis in original omitted] due to the lack of payment in full, unsigned variation quotations, *etc*.[23] DG also stated that as a gesture of goodwill, it was willing to complete the works on the condition that ZK gives assurance that ZK would pay DG fully upon completion of the works and that ZK pays DG $50,000 upfront immediately.[24]

22 ZK replied the next day on 30 June 2018 and stated that "all the figures and matters [in the 29 June 2018 letter] are untrue and misleading".[25] ZK also stated that it had no choice but to engage third parties to complete the remaining works and remedy any defects on DG's behalf, and that DG would be responsible for the consequences that would occur.[26]

The progress claim and Suit No 917 of 2019

23 On 28 August 2019, more than a year after DG's letter of 29 June 2018, DG served a progress claim on ZK, demanding a sum of $261,006.74.

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22 JROA Vol V Part L at pp 148 and 149.

23 JROA Vol V Part L at pp 215 to 218.

24 JROA Vol V Part L at pp 215 to 218.

25 JROA Vol V Part L at pp 219.

26 JROA Vol V Part L at pp 220.

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24 On 14 September 2019, ZK commenced Suit No 917 of 2019 ("S 917") in the High Court, claiming for the sum of $317,559.90 for "goods sold and delivered and services rendered to the [d]efendants".[27] This action was commenced by ZK through its then solicitors, Peter Ong Law Corporation.

25 On 16 September 2019, ZK responded to DG's progress claim for $261,006.74. ZK either declined to certify or did not certify in full the amounts claimed by DG. The reasons provided by ZK included, *inter alia*, that the works were not in fact done, or that the variation works claimed for were under the original scope of the Subcontract.[28]

The Adjudication Application

26 On 1 October 2019, DG commenced Adjudication Application No 339 of 2019 ("AA 339") under the SOPA for the sum of $264,789.08.[29] In ZK's written submissions in AA 339, it was argued that DG had failed to carry out the terms of the Subcontract and that most of the works done were either incomplete, defective and/or did not go through a "final handing over process".[30] ZK therefore had to rectify the defects of DG's works using third-party contractors, complete the remainder of the works and prepare the works for the final handing over.[31]

27 An Adjudication Determination (*ie*, the AD) was issued on 15 November 2019 where the adjudicator awarded the sum of $197,522.83 (the

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27 Statement of Claim in HC/S 917/2019 dated 14 September 2019 at para 3.

28 JROA Vol III Part J at pp 238 to 246.

29 JROA Vol V Part D at pp 230 to 243.

30 JROA Vol V Part F at p 21.

31 JROA Vol V Part F at p 22.

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"Adjudicated Amount") plus interest to DG.[32] As for the costs of the adjudication, the adjudicator noted that DG had succeeded on most items in the adjudication and ordered that the costs of the adjudication, being the adjudication application fee of $642 (inclusive of 7% GST) and the adjudicator fee of $12,945.93 (inclusive of 7% GST), were to be borne 20% by DG and 80% by ZK.[33]

Suit No 1282 of 2019

28 ZK did not make payment of the Adjudicated Amount. Instead, on 19 December 2019, ZK, without discontinuing S 917, commenced the suit below, Suit No 1282 of 2019 ("S 1282"), through another set of solicitors, Zenith Law Corporation, against DG.

29 On 11 March 2020, on ZK's application, S 917 and S 1282 were consolidated (the "Consolidated Suit") under S 1282. The sums claimed in the Consolidated Suit were identical to the sums claimed when S 1282 was first commenced.

The winding up application and the Court of Appeal decision

30 On 17 January 2020, DG obtained a court order to enforce the AD as a judgment debt ("DC/OSS 5/2020"). DG then served a statutory demand on 7 February 2020 on ZK seeking payment of $211,044, being the Adjudicated Amount plus interest for late payment, the costs of DC/OSS 5/2020, and 80% of the costs of the adjudication within three weeks of the date of service of the demand.

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32 JROA Vol V Part G at pp 145 to 184; JCB Vol II Part A at pp 39 to 78.

33 JROA Vol V Part G at p 177.

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31 On 18 February 2020, ZK filed Originating Summons No 223 of 2020 ("OS 223") to set aside the statutory demand and in the alternative, seek an order or declaration that DG was precluded from issuing a statutory demand because S 1282 was still ongoing.

32 As ZK did not meet the statutory demand within the three-week deadline, DG commenced CWU 95 on 23 March 2020 to wind up ZK. CWU 95 was served on ZK the following day. On 1 April 2020, ZK filed HC/SUM 1577/2020 ("SUM 1577") to dismiss CWU 95 and alternatively, to stay, restrain, or adjourn CWU 95 until the disposal of the Consolidated Suit.

33 On 24 June 2020, both OS 223 and SUM 1577 were heard in the High Court. The judge dismissed OS 223 but allowed SUM 1577 and stayed CWU 95 until the determination of the Consolidated Suit and any appeal thereof. The decision to stay CWU 95 was upheld by the Court of Appeal on 21 June 2021 in *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 ("*DGE v ZK*"), with the added condition that ZK pay the Security Sum of $211,044 into court.

The parties' cases in these appeals

CA 129

34 In the two appeals, ZK makes the following contentions:

(a) The Judge erred in finding that the contractual completion dates were 29 December 2017 for Phase 2A and 16 March 2018 for Phase 1, and that these dates were applicable to the calculation of LD. ZK argued

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that an earlier set of dates was relevant for the purpose of LD computation.[34]

(b) The Judge erred in allowing ZK's claim for replacement and rectification works only in part.

(i) ZK is appealing the Judge's dismissal of its claims for items 1(b), 1(c), 2(a), 2(b), 3(a), 3(b) and 4(a) as itemised in the table at [93] below.[35]

(ii) ZK is *not* appealing the Judge's dismissal of its claims for item 4(b), admin charge of $1,829.70 for item 4(c), item 4(d), and items 6(a) to 12(a) as itemised in the table at [93] below.[36]

(c) The Judge erred in dismissing ZK's claim for overturning the main works allowed by the adjudicator in the AD.[37]

35 DG makes the following contentions in response:

(a) As regard the LD claims,

(i) ZK is not entitled to claim LD for Phase 1 and Phase 2A;[38] or

(ii) alternatively, ZK is not entitled to further claims for LD beyond what the Judge had correctly decided.[39]

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34 AC in CA 129 at paras 10 and 32.

35 AC in CA 129 at paras 54, 56, 58, 62, 65, 72 and 76.

36 AC in CA 129 at paras 85 and 86.

37 AC in CA 129 at para 87.

38 RC in CA 129 at para 51.

39 RC in CA 129 at paras 37 to 44.

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(b) ZK is not entitled to its claims for replacement works.[40]

(c) The Judge did not err in refusing to overturn the main works awarded under the AD.[41]

CA 125

36 In DG's appeal in CA 125, DG makes the following contentions:

(a) The LD awarded to ZK for Phase 1 should be reduced, because:

(i) ZK is not entitled to LD beyond the date that the Subcontract was terminated, *ie*, after 6 June 2018, so the Judge erred in awarding LD from 6 June 2018 to 30 September 2018;[42] and

(ii) DG is not liable for delays caused by events attributable to ZK.[43]

(A) In this regard, DG is *not* appealing the Judge's decision that the delays did not arise from ZK's delay in obtaining BCA approvals.[44]

(b) ZK is not entitled to its claims for replacement works save for item 4(c).[45]

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40 RC in CA 129 at Heading IV and para 59.

41 RC in CA 129 at Heading V.

42 AC in CA 125 at para 25.

43 AC in CA 125 at para 9.

44 AC in CA 125 at para 29.

45 AC in CA 125 at para 60.

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(i) In this regard, ZK is not entitled to impose the 15% administrative charge for items 1(d)–(e) and 5(a).[46]

(c) DG is entitled to its claims for VO 6 and VO 8.[47]

(i) In this regard, DG is not appealing the Judge's decision to dismiss DG's claim for VO 19.[48]

(d) The claimed sum of $297,819.49, which was described by the Judge as DG's counterclaim for the remainder of the contract (Judgment at [245]), instead represents the total works (including variation works) claimed by DG that were carried out and completed by DG under the Subcontract less the payments received from ZK. These claims therefore have been adjudicated on in the AD. Accordingly:

(i) If this court allows DG's appeal on VO 6 and VO 8, the Security Sum of $211,044 should be released to DG.[49]

(ii) If this court affirms the Judge's decision on VO 6 and VO 8, the sum of $160,168.50 (being $211,044 less $50,875.50, which is the total sum allowed in AA 339 for VOs 6, 8 and 18 overturned by the Judge), should be paid to DG with accrued interest.[50]

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46 AC in CA 125 at para 96.

47 AC in CA 125 at para 118.

48 AC in CA 125 at para 117.

49 AC in CA 125 at paras 142 to 149.

50 AC in CA 125 at para 149.

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(iii) Save for its claims for VOs 6 and 8, and for the release of the sums adjudicated on, DG is *not* seeking any further recovery for the "remainder of the contract".[51]

(iv) The Judge erred in dismissing DG's claims for the legal costs incurred for the AD.[52]

37 ZK makes the following contentions in response:[53]

(a) Because of DG's wrongful premature termination of the Subcontract on 5 June 2018, DG cannot argue that the LD do not apply beyond the date of such wrongful termination.

(b) ZK is entitled to its claims for replacement works for which DG is liable.

(c) DG is not entitled to its claims for VO 6 and VO 8.

Issues to be determined

38 The main issues before us are as follows:

(a) Whether the LD awarded to ZK was correctly ascertained;

(b) Whether ZK's claims for replacement and rectification works were correctly decided;

(c) Whether the Adjudicated Amount should be set aside;

(d) Whether DG can claim VO 6 and VO 8;

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51 AC in CA 125 at para 150.

52 AC in CA 125 at para 151.

53 RC in CA 125 at para 5.

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(e) Whether DG can claim the Retention Sum;

(f) Whether DG can claim the remainder of the Subcontract; and

(g) Whether DG can claim legal costs associated with the AD.

ZK's claim for liquidated damages

39 The Judge allowed ZK's claims for LD for Phase 1 in the amount of $356,400 (see [5] above). This was less than the claimed sum of $383,400 for Phase 1. He disallowed ZK's claims for LD for Phase 2A in the amount of $118,400 (Judgment at [31], [53], [60], [77], [93] and [102]). He made the following findings:

(a) It was the completion dates in cl 6 of the Subcontract (*viz*, 16 March 2018 for Phase 1 and 29 December 2017 for Phase 2A) and not the dates in cl 4 that were applicable to the calculation of the LD (Judgment at [33] and [41]–[52]).

(b) Based on the completion dates in cl 6 of the Subcontract, there was no delay in the completion of Phase 2A but there was delay in the completion of Phase 1 as the actual completion date for Phase 1 was 30 September 2018 which was 198 days after 16 March 2018. ZK was entitled to LD of $356,400 for Phase 1 but no LD for Phase 2A (Judgment at [44]–[53]).

(c) The LD quantum in cl 6 of the Subcontract was a genuine pre-estimate of loss and not a penalty (Judgment at [102]).

(d) ZK was not entitled to general damages for alleged delays caused by DG for Phase 2A Works (Judgment at [54]–[60]).

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(e) DG did not show that there was a persistent course of payment delays that justified its repudiation of the Subcontract, so DG had wrongfully terminated the Subcontract. There was therefore no basis for DG to reduce the period of delay on account of the alleged repudiatory breach of ZK (Judgment at [77]).

(f) DG could not show that the delay period should be reduced because of ZK's alleged failure to give timely or clear instructions (Judgment at [93]).

Whether the completion dates in cl 6 or cl 4 of the Subcontract applied

40 ZK submits in CA 129 that the Judge erred in finding that the "contractual completion dates" were stipulated by cl 6, *viz*, 16 March 2018 for Phase 1 and 29 December 2017 for Phase 2A (Judgment at [44] and [52]).[54] ZK submits that it is the completion dates in cl 4 that apply, *viz*, 31 July 2017 for Phase 1 and 20 February 2017 for Phase 2A.[55]

41 We set out cll 4 and 6 here for reference:[56]

> **4. Contract Period/Programmed**
>
> The Subcontract period shall be strictly in accordance with our Master Programme as attached and any revision thereafter. The commencement of the subcontract is with immediate effect and *the completion date for the whole of the subcontract* shall not be later than as follows:

Phases	Description of work	TOP Ready Date	*Date for Completion*
Phase 1	8-Storey Equipment Building –	10 November 2017	*31 July 2017*

54 AC in CA 129 at para 10.

55 AC in CA 129 at para 15.

56 JROA Vol 5 Part A at pp 63 to 65.

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	Blast/Ballistic dr/wdw, alum cladding incl. steel support, alum dr/wdw		
Phase 2A	2-Storey Annex Building – alum cladding incl. steel support, alum dr/wdw	17 March 2017	*20 February 2017*

Should it appear to the Sub-Contract that the execution of the Subcontract Works does not conform with the Master Programme or the Sub-Contractor's own programme, then the Sub-Contractor is require to submit a revised or catch-up programme. The provision, receipt and/or acceptance of any such revised or catch-up programme shall not in any way amount to or constitute an application for, notice of and/or grant of an extension of time nor shall be give rise to or form the basis for any additional payment or compensation to the Sub-Contractor.

The Sub-Contractor shall be entitled to extension of time for the events, where the Sub-Contractor has been prevented to execution of the Sub-Contract Works due to any Wrongful and/or negligent act or default or delay or breach of this Sub-Contract by the Contractor and/or Main Contractor and/or Principal.

The Sub-Contractor shall, as a condition precedent to such extension of time, make such application to the Contractor in writing with sufficient supportive documents (e.g Impact Analysis and etc) within 30 days of the occurrences of the relevant events.

…

6. Liquidated and Ascertained Damages

Liquidated and Ascertained Damages for *late completion* of the Subcontract Works shall be at the rate as follows per calendar day for each day the Works still remain incomplete. We shall be entitled to deduct or set-off against any monies due to you under the Subcontract including without limitation, any payment or Retention Monies due under the Sub-Contract; or to recover such amount or amounts from the Sub-Contract as a debt; for such damages as incurred by us arising from such delay.

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Description of work	*Duration*	Liquidated Damages (Per Day)
Phase 2A 2-Storey Annex Building (Excluding AES Watchroom)	*16th Jun 2016 – 29th Dec 2017*	$800.00
Phase 1 8-Storey Equipment Building	*16th Jun 2016 – 16th March 2018*	$1,800.00

[emphasis in original in bold; emphasis added in italics]

42 The issue here is therefore one of true construction of cll 4 and 6 of the Subcontract. In our view, it is cl 6 which governs the calculation of LD and not cl 4.

43 The wording of cl 4 shows that the dates therein relate to the Master Programme, which sets out the schedule of works under the main contract. It therefore stipulates how the subcontractor must carry out his Subcontract works *within* the Master Programme. The beginning of cl 4 states that "[t]he Subcontract period shall be strictly in accordance with our Master Programme as attached and any revision thereafter". The dates in the table are the dates by which the subcontractor must complete his works so that the "TOP Ready Date[s]" can be achieved, (*ie*, the dates by which his works have to be ready so that the inspection for the Temporary Occupation Permit can take place). The dates on which DG conducts its Subcontract works can therefore shift, according to the Master Programme or any revision thereof. Clause 4 goes on to emphasise that the execution of the Subcontract Works must conform with the Master Programme or the subcontractor's own programme, failing which the subcontractor has to submit a revised or catch-up programme. The rest of the clause then relates to extension of time in the event the subcontractor has been prevented from completing the Subcontract works. Hence, cl 4 plainly

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relates to the dates by which DG has to complete the Subcontract works within the Master Programme.

44 In contrast, the wording of cl 6 indicates that it specifically governs the date when delay starts and LD starts to run. To begin with, cl 6 is titled "Liquidated and Ascertained Damages" in contrast to the title of cl 4, "Contract Period / Programmed [*sic*]". The body of cl 6 and the table therein further refer to "Liquidated and Ascertained Damages" or "Liquidated Damages". The wording of cll 4 and 6 therefore shows that, objectively, the parties had intended for cl 6 to govern the ascertainment of when delay starts and the calculation of LD. The practice of scheduling a subcontractor's work *within* the main contractor's master programme, with the ability for flexibility and float for that subcontractor's works to fit in with the many different trades and kinds of construction work being carried out in a construction project, is something that happens in almost every construction project. It is not something unusual or arcane. It is daily fare for project managers, quantity surveyors and architects and allied professionals in the building and construction industry. For that reason, and bearing in mind that DG is a sub-subcontractor, cl 4 – which deals with the Master Programme and DG's works, which sit within ZK's scope of works – states the "Date for Completion" for Phase 1 is 31 July 2017 but cl 6, which deals with LD gives a later end date by stating that the duration of Phase 1 runs from 16 June 2016 to 16 March 2018. It is only after that end date of 16 March 2018 that LD starts to run. Similarly, for Phase 2A, cl 4 gives 20 February 2017 as the date for "Completion" of the works but under cl 6, LD only runs after the end date of 16 March 2018.

45 The parties' objective intention for cl 6 to apply is further reinforced by the fact that the dates therein coincide with the period applicable to calculating LD in the SCB-ZK contract (*ie*, the main contract), *viz*, 29 December 2017 for

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Phase 2A Works and 16 March 2018 for Phase 1 Works.[57] In this regard, we agree with the Judge's reasoning at [41(c)] and [41(d)] of the Judgment:

> (c) Moreover, [ZK] has chosen not to adduce the SCB-ZK contract. There is therefore no evidence of the scope of works between them, or the completion dates for any of the phases of work that [ZK] is responsible to SCB for. What was adduced, following cross-examination of Mr Gan by counsel for [DG], is a one-page document which [ZK] states is an extract from the SCB-ZK contract. This states that for the purposes of LD, the completion date is 29 December 2017 for Phase 2A and the completion date is 16 March 2018 for Phase 1.
>
> (d) In other words, on [ZK's] evidence, the dates in the Subcontract under cl 6 for Phase 2A and Phase 1 are *exactly the same as the LD dates in the SCB-ZK contract*. There is nothing irrational about such an arrangement. *Indeed, aligning the dates at which LD would start, would allow [ZK] to potentially claim LD from its subcontractor, [DG], during the same period that it is liable to its main contractor, SCB, for LD*.
>
> [emphasis added]

We emphasise that, as the Judge rightly noted, such an agreement makes sense: if LD are imposed on ZK for delay in DG's Subcontract works, ZK can then look downstream to DG for recovery for the same period of liability.

46 In the circumstances, it is not necessary to consider whether the *contra proferentem* rule applies against ZK with the same result, *ie,* that cl 6 is the applicable provision.

47 We therefore agree with the Judge that cl 6 of the Subcontract applies and LD starts to run from 30 December 2017 for Phase 2A Works and from 17 March 2018 for Phase 1 Works. ZK is therefore entitled to LD for Phase 1 Works.

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57 JROA Vol 3 Part M at p 149.

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48 As for Phase 2A Works, the Judge noted that ZK had taken an inconsistent position in its case below. At para 19 of its Statement of Claim (Amendment No 1) ("SOC"), ZK pleads the contractual completion date as 15 February 2017. However, its case later was that:

(a) the contractual or scheduled completion date is 20 February 2017 *per* cl 4 of the Subcontract;

(b) DG was 148 days late in completing Phase 2A; and

(c) the actual completion date for Phase 2A is 15 July 2017.

Subsequently, in its closing submissions, ZK clarified that 15 February 2017 was wrongly pleaded. Regardless of which date is used, however, the Judge noted that it did not follow that the actual completion date for Phase 2A is 15 July 2017 because: (a) 148 days from 20 February 2017 is 18 July 2017; and (b) even if the wrongly pleaded contractual completion date of 15 February 2017 is adopted, 148 days from 15 February 2017 is 13 July 2017 (Judgment at [45]–[46]).

49 Ultimately, the Judge found that the actual completion date for Phase 2A was 20 July 2017 based on Dembicon Equipment Pte Ltd's ("Dembicon") payment claim records (Judgment at [46]). Since actual completion was achieved before 29 December 2017 under cl 6, it followed that ZK was not entitled to LD for Phase 2A Works. It is important to note that in the appeal, ZK does not dispute that the actual completion date for Phase 2A was 20 July 2017. Instead, its dispute is that the completion dates for Phase 2A and Phase 1 should be derived from cl 4 and not cl 6. We have already elaborated on why cl 6 applies. Hence, its appeal for LD for Phase 2A must fail.

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Whether ZK should have been awarded liquidated damages for Phase 1 for the period following the termination of the Subcontract

50 The Judge had found that ZK was entitled to LD for Phase 1 after 16 March 2018 (the date stated in cl 6) and ending on 30 September 2018, the date of *actual completion*. This amounted to 198 days of delay and the total LD ZK was entitled to for Phase 1 was $356,400 (Judgment at [52]).

51 In CA 125, DG contends that the Judge had erred in factoring in the period after the termination of the Subcontract to the date of actual completion.[58] Instead, the LD period should end on *the date which the Subcontract was terminated*. DG's position is that it accepted ZK's repudiatory breach and terminated the Subcontract on 5 June 2018 while ZK's position is that DG wrongfully terminated the Subcontract on 5 June 2018 and thereby repudiated the same, which ZK accepted on 30 June 2018.[59] Hence, DG submits that the LD awarded to ZK for Phase 1 ought to be reduced either because the LD should end on 5 June 2018 or 30 June 2018.

52 If DG is correct that the Judge erred in factoring in the period after the termination of the Subcontract to the date of actual completion in calculating the LD, and ZK indeed validly accepted DG's repudiation of the Subcontract on 30 June 2018, then the LD period in question should be reduced by 92 days.

53 The Judge had found that DG had wrongfully terminated the Subcontract on the ground of non-payment for work completed on 5 June 2018 (Judgment at [65] and [77]). We note that DG contests this finding and claims that it was entitled to terminate the Subcontract. DG claims that: (a) ZK had

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58 AC in CA 125 at para 25.

59 AC in CA 125 at para 12; RC in CA 125 at para 41.

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consistently undervalued and under-certified the progress payments due to DG from May 2017;[60] (b) ZK had improperly withheld payment from DG;[61] and (c) while ZK has certified the work done by DG in the sum of $344,263.72, ZK has only paid DG the sum of $339,136.06, *ie*, ZK has withheld the sum of $5,127.66.[62]

54 Having considered DG's submissions, we are of the view that they did not address whether the Judge had erred in the many reasons he gave for his finding (Judgment at [69]–[76]), such that it was plainly wrong or against the weight of the evidence. DG's submissions instead focus on the pure mathematical variance of the claimed and certified sums, and the fact that ZK had started imposing backcharges against DG.[63] As for the sum of $5,127.66, even if this was an instance of ZK withholding payment from DG, this small sum does not, of its own, show a persistent course of payment delays or a protracted delay in the payment of a substantial amount on ZK's part that would justify DG's termination of the Subcontract.

55 DG's wrongful termination was therefore a repudiatory breach on DG's part, which ZK could accept for termination of the Subcontract to occur. After DG abandoned the works on 6 June 2018, the parties engaged in a period of correspondence until ZK informed DG on 30 June 2018 that ZK would need to engage third parties to complete the remaining works (Judgment at [50]). The letter states as follows:[64]

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60 AC in CA 125 at paras 64 and 65.

61 AC in CA 125 at para 66.

62 AC in CA 125 at para 67.

63 RC in CA 125 at paras 124 and 138.

64 JROA Vol V Part L at p 220.

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> …
>
> We have repeatedly reminded DG to expedite the remaining outstanding works by deploying sufficient manpower to the works, however, since 06th June 2018, there has been no manpower deployed on site from DG, despite our numerous reminders on your defects and incomplete works that has been chased by the client and consultants.
>
> As informed through our emails date [*sic*] 22nd June 2018 9:59AM, 26th June 2018 12:21PM & 7:19PM, 27th June 2018 9:32AM by no choice, in order to complete the remaining works, *we will mobilize the 3rd parties to complete the remaining works, incomplete works, defect works and etc. on your behalf, to hand over to our client*. DG is responsible for the [*sic*] whatever consequences caused.
>
> [emphasis added]

56 Accordingly, the Subcontract was terminated only on 30 June 2018, when ZK accepted DG's repudiatory breach by informing DG that it would need to engage third parties to complete the remaining works (Judgment at [50]). We see no reason to disagree with this finding in light of the evidence considered by the Judge. Hence, if DG's submission on the law is correct, the period applicable to the calculation of the LD should end on 30 June 2018 and the period *after* termination of the Subcontract to the actual completion of the works, *ie*, from 1 July 2018 to 30 September 2018 (both dates inclusive), should be omitted from the calculation of the LD. This amounts to 92 days.

57 DG's submission that ZK is not entitled in law to claim LD after termination of the Subcontract rests mainly on the decision of the High Court in *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] 4 SLR 477 ("*LW Infrastructure*") and the decision of the UK Supreme Court in *Triple Point Technology Inc v PTT Public Co Ltd* [2021] AC 1148 ("*Triple Point*").

58 In *LW Infrastructure*, the court stated as follows at [14] and [18]:

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> 14 … [*British Glanzstoff Manufacturing Company, Limited v General Accident, Fire and Life Assurance Corporation, Limited* [1913] AC 143] was but a different iteration of the well-established principle that no liquidated damages accrue once a contract has been terminated, in the absence of express contractual provision to the contrary. …
>
> 18 … It is *well-established* that the effect of termination on liquidated damages is only that no claim to liquidated damages can be brought *in respect of the period after termination*. In the absence of express provision to the contrary, termination of the contract does not affect a claim to liquidated damages in respect of the period before termination.
>
> [emphasis added]

59 As DG points out, the above position is consistent with that set out in, *Hudson's Building and Engineering Contracts* (Nicholas Dennys & Robert Clay gen eds) (Sweet & Maxwell, 14th Ed, 2020) ("*Hudson*") at para 6-039 and Stephen Furst & Vivan Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 11th Ed, 2021) ("*Keating*") at para 10-039. The former states as follows:[65]

> … In the absence of special provision, it is submitted that any liquidated damages accrued due prior to the date of termination, forfeiture or determination will be recoverable, but in respect of any later delay the Employer will be required to prove its damage (if any) in the normal way. …

The latter states as follows:[66]

> … Generally, however, it is thought the employer will be entitled to recover liquidated damages in respect of any period of contractor culpable delay up to the date when the contract is terminated but then only to general damages thereafter in respect of any losses flowing from the termination, including in respect of any further delay thereafter, any obligation to pay liquidated damages having ceased on termination or determination. …

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65 ABOA for CA 125 at Tab 9.

66 ABOA for CA 125 at Tab 8.

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60 We add that this proposition is also supported by Chow Kok Fong, *Law and Practice of Construction Contracts* vol 2 (Sweet & Maxwell Asia, 5th Ed, 2018), where it is stated at para 14.025 as follows:[67]

> It is settled law that the termination of a contract does not affect rights which have accrued before termination. This is because termination only brings to an end those obligations which will fall to be discharged after the date of termination. Termination does not affect those rights which have been acquired [citing *LW Infrastructure*]. It follows that any liquidated damages which have accrued before termination will be recoverable, but *any delay which* ***follows*** *termination would have to be proved in the usual way*. Obviously the contract can provide for the right to liquidated damages to be extinguished upon termination but in the absence of such a provision, any right to liquidated damages which have accrued before the termination survives the termination.
>
> [emphasis added]

61 In *Triple Point*, the proposition that the accrual of LD comes to an end on the termination of the contract was affirmed by Lady Arden JSC (with whom the other members agreed on this issue) at [35] and Lord Leggatt JSC at [86].[68]

62 We agree with the above authorities, which were unfortunately not raised before the Judge below. They support the proposition that LD do not accrue after the termination of a contract, in the absence of special provision. On first principles, this must be the case since the primary obligations of a contract come to an end upon termination: see *Triple Point* at [79]. We therefore endorse the High Court's decision in *LW Infrastructure* on this point.

63 We therefore hold that the LD period for Phase 1 should be reduced by a period of 92 days, being the period from 1 July 2018 to 30 September 2018

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67 ABOA for CA 125 at Tab 10.

68 AC in CA 125 at paras 17 to 24.

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(both dates inclusive). As the LD rate for Phase 1 Works under cl 6 is $1,800 *per* day, this amounts to a reduction of $165,600.

Events of delay caused by and/or attributable to ZK

64 In the proceedings below, DG submitted that SCB and ZK committed "acts of prevention" which prevented DG from completing the works on time. Specifically, ZK prevented DG from completing the works by failing to give timely and clear instructions to DG and the delay was caused by changes in the glass specifications on the part of CAAS, SJ, SCB, and/or ZK (Judgment at [78]).

65 The Judge has summarised the material facts in the Judgment at [79]:

Dates	Event
Undated	Tender Corrigendum No 4 ("TC 4") states the required glass specifications and limits the suppliers to a pool of three manufacturers – Guardian Glass, AGC or Singapore Safety Glass ("SSG").
4 April 2017	DG emails SCB on the tower cabin glass specification data.
8 May 2017	Presentation slides by DG on the installation of four pieces of cabin glass mock-up were emailed from DG to ZK, SCB and SJ from 8–24 May 2017.
7 June 2017	SCB informs DG to arrange for six pieces of mock-up glass instead of four, pursuant to CAAS' request.
30 August–11 September 2017	DG provides comparison data of Saint-Gobain glass with SSG glass.

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Early September 2017	In early September 2017, DG recommended Saint-Gobain glass because, *inter alia*, the "[c]larity of glass is better" and "energy saving is ensured". In a later email dated 17 January 2018 from DG, it was explained that sometime in September 2017, they had recommended Saint-Gobain glass "due to [the] overwhelming costs of complying with the designated type of glass required by CAAS plus the number of panels".
13–14 September 2017	On 13 September 2017, SJ rejected Saint-Gobain glass via email because it "does not meet the requirements of the contract specifications". It was also stated in this email that "[in] order to show that the reflectance of Saint-Gobain Glass will not be a problem, [DG] informed that they will expedite 3 panels of Saint-Gobain … for the Viewing Mock Up …" SJ's 13 September email was forwarded by SCB to DG on 14 September 2017.
25–27 September 2017	SJ issues Superintending Officer's Instruction ("SOI") 13 in their letter to SCB, informing that "[i]n the event that the [visual mock-up] is rejected by Client and/or Consultant, SCB is to revert to the previously approved SSG glass for the R3 Tower Cabin without delay to meet the original contract completion date." SCB informs DG of SOI 13 by email on 27 September 2017 and asks for a warranty letter from DG, that if the Saint-Gobain glass is not accepted by client, DG "will proceed with the previously approved Singapore Safety Glass, accordingly." SCB was concerned that the "specifications of the proposed Saint Gobain DGU unit is not equivalent to the previously approved SSG glass".
25 October 2017	A letter of assurance was sent by DG to ZK stating that "in events [*sic*] that the newly proposed Saint-Gobain glass is not accepted by the client and user with written email or letter, we will proceed with the previous approved [*sic*] Singapore Safety Glass".

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13 November 2017	In SOI 18 dated 13 November 2017, SJ stated that "[t]he SETSCO Test report … indicates that the tested … Saint-Gobain … is not equivalent to the previously approved Singapore Safety Glass … or our Contract Specifications, especially in terms of the Indoor and Outdoor Visible Light Reflectance" [emphasis in original]. This document was sent to DG by SCB via email on the same day.
29 December 2017	SJ emails SCB, copying DG, stating that "Saint-Gobain glass does not comply with the contract specification". SCB is urged to expedite SSG glass viewing based on the previously approved SSG glass without further delay.
9 January 2018	DG sent an email to ZK and SCB stating that "I was astonished to understand that [CAAS] does not want to accept the current cabin glass specifications given under the contract which requires a **centre mullion**. … To achieve what he wants … [f]rom our knowledge only Saint-Gobain can achieve this." [emphasis in original]
12 January 2018	In an email from SJ to SCB on 12 January 2018, it was stated that "[w]e are certain that Saint-Gobain glass can achieve the full panel size as seen from the mock up. As much as we are keen to have large panel glass, the glass performance in terms of clarity and reflectivity, cannot be compromised. … [W]e have concurrently sought [SSG] to review the DGU in order to omit the centre mullion to achieve a larger glass panel, yet possess equivalent glass performance as per contract specification. SSG informed that minor adjustment to the DGU make up is required to achieve this" [emphasis in original]. It was also stated in this email that "time is of essence and we have lost much time reviewing SCB's alternative cabin glass proposal which is not fully compliant to the contract specification" and that SSG informed SJ that the "glass lead time and cost remains unchanged, please submit catch up schedule …" [emphasis in original]. This email was forwarded to DG on the same day.

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17 January 2018	DG wrote to ZK. At para 4(a), DG acknowledged that in September 2017, DG recommended a change in specifications in glass due to the overwhelming costs of complying with the designated type of glass required by CAAS plus the number of panels.
27 and 29 January 2018	SJ sent an email to SCB on 27 January 2018 stating that they "[h]ave not received an update of the actual schedule from the Cabin glass" and that "glass lead time and cost remains unchanged, compared to the original approved [SSG]". This email was forwarded to DG on the same day. DG replied on 29 January 2018 saying they will work on what is requested from the Qualified Person.
17 April 2018	In an email from SCB to ZK and DG on 17 April 2018, it was stated that "[t]ill date, despite our repeated reminders, you have not placed order for the cabin glass and there has been no progress update".

66 From the above, the Judge found that there was no reason to reduce the delay period because of ZK's alleged failure to give timely or clear instructions (Judgment at [93]).

67 Having considered the documentary evidence, the Judge found that the delays in the procurement of glass were not due to CAAS/SJ/SCB/ZK changing their minds regarding cabin glass specifications, *viz*, from "SSG-1 Glass" to Saint-Gobain glass, and then to "SSG-2 Glass". The Judge also found that the delay in the completion of Phase 1 Works was not caused by delays in instructions from the relevant parties to DG to proceed with SSG glass (Judgment at [84]).

68 Rather, the Judge found that DG had proposed using Saint-Gobain glass in September 2017 due to "overwhelming costs" for them. Despite SJ's rejection of Saint-Gobain glass and indications to proceed with SSG glass on

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13 November 2017, 29 December 2017 and 12 January 2018, DG did not place any order for the modified SSG glass (Judgment at [85]). DG does not contest this finding on appeal[69] and we see no reason to disturb this finding.

The three purported periods of delay

69 DG submits, however, that there are three other periods of delay which are attributable to ZK:[70]

(a) First, that pertaining to the initial change to SSG-1 Glass.

(b) Second, that pertaining to the change from SSG-1 to SSG-2 Glass.

(c) Third, that pertaining to the additional delay due to the visual mock-up.

In its view, the LD period should be reduced by these three purported delay periods.

70 The first period relates to the period prior to DG's recommendation of Saint-Gobain glass in September 2017.

71 Item 2a of Annex A of the Subcontract provides that DG is to supply and install 16 panels of full height cabin glass for the eight-storey Equipment Building, each measuring 2040 x 2700mm.[71] In this regard, TC 4[72] provides that

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69 AC in CA 125 at para 40.

70 AC in CA 125 at paras 33, 39, and 45.

71 JCB Vol II Part D at p 195.

72 JROA Vol V Part M at pp 255 to 269.

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the cabin glass panels should be 39.52mm thick and includes a list of glass manufacturers from whom DG was to order all glazing works (collectively, the "Original Specifications"). The thickness of each glass panel is the aggregate of the following:[73]

(a) 17.52mm laminated glass;

(b) 12mm air interspace with mill finish aluminium black spacer; and

(c) 10mm clear monolithic glass with Luxar anti-reflective coating.

72 Paragraphs 1.6 and 1.7 of TC 4 provides that DG is to provide mock-up samples of the glass panels, measuring 300 x 300mm, for inspection prior to bulk fabrication. These paragraphs state as follows:[74]

> 1.6 Submittals
>
> …
>
> Samples:
>
> Submit
>
> Each type and thickness of glass 300mm x 300mm, showing cut edges and ground and polished edges.
>
> Each type of glazing material.
>
> Main Contractor is to provide shop drawings and/or samples endorsed by certified personnel for all security components.
>
> …
>
> 1.7 Mock-up Samples
>
> The Contractor shall prepare mock-up samples which shall incorporate all aspects of a typical module of glazing work selected by the Architect

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73 JCB Vol II Part A at p 23 para 20; JCB Vol II Part D at pp 95 and 259 at Heading "Glass Type – Cabin Glass"; AC in CA 125 at para 31.

74 JCB Vol II Part D at p 257.

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> at his own cost for inspection prior to bulk fabrication

73 By an email dated 6 April 2017, DG enquired with SSG on the supply of cabin glass as per the Original Specifications.[75] On 7 April 2017, SSG informed DG that it could not supply 16 glass panels of 2040 x 2700mm, and it could instead supply 32 smaller glass panels of 1058 x 2735mm, with the same thickness of 39.52mm with a centre mullion, *ie*, a structural support that would be erected in between each of the two panels.[76]

74 On 19 April 2017, SJ informed SCB that CAAS would now: (a) require an "on-site mock-up of the R3 Cabin", which was to include a "viewing angle of more than 90 degree (5 panes of glass)"; and (b) also require SCB to prepare PowerPoint slides on the proposed on-site (or visual) mock-up for presentation to CAAS/SJ. SCB subsequently instructed DG to prepare the PowerPoint slides.[77] It was explained by one of DG's witnesses during the trial that a visual mock-up sample is a "full panel"[78] and "a large size installation on site on the main structure",[79] which DG understands to be a full-size sample of the cabin glass panel; such samples are therefore larger than the mock-up samples of 300 x 300mm.[80]

75 From 8 May 2017 to 24 May 2017, SCB instructed DG to make several amendments to the PowerPoint slides in order to meet CAAS' presentation

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75 AC in CA 125 at para 33; JCB Vol II Part B at p 235.

76 AC in CA 125 at para 33; JCB Vol II Part A at p 23.

77 AC in CA 125 at para 35; JCB Vol II Part B at pp 237 to 239.

78 JCB Vol II Part D at p 182 line 4.

79 JROA Vol III Part R at p 74 lines 15 to 16.

80 AC in CA 125 at paras 46 and 47.

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requirements. On 30 May 2017, DG presented the PowerPoint slides on the visual-mock up to CAAS.[81]

76 DG claims that because SSG could not provide the cabin glass panels in accordance with the Original Specifications (see [71] and [73] above), DG proposed the use of 32 smaller panels with dimensions of 1058 x 2735mm with a centre mullion (*ie*, SSG-1 Glass).[82] The use of SSG-1 Glass was subsequently approved and on 7 June 2017 SCB instructed DG to purchase six panels of SSG-1 Glass for the visual mock-up.[83]

77 DG submits that: (a) the change in specifications from the Original Specifications to SSG-1 Glass; and (b) the new requirement of a *presentation* of a visual mock-up to be first carried out, caused a delay of 61 days from 7 April 2017 to 7 June 2017.[84] This period, according to DG, constitutes the first period of delay.[85]

78 The second period of delay occurred after the approval of the SSG-1 Glass, when DG proposed glass from an alternative supplier, Saint-Gobain. Although CAAS/SJ eventually rejected the usage of Saint-Gobain glass, DG submits that it could not have proceeded to procure the SSG-1 Glass in any event as it was informed of "a further change to the glass specifications shortly thereafter" to SSG-2 Glass on 9 January 2018 and such change was only approved 21 days later on 30 January 2018. DG submits that during this time it

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81 AC in CA 125 at para 35.

82 AC in CA 125 at paras 34 to 36.

83 AC in CA 125 at para 36; JCB Vol II B at p 267.

84 AC in CA 125 at paras 36 to 38.

85 AC in CA 125 at para 38.

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could not have procured the SSG-2 Glass and its completion of the works was therefore delayed by 21 days.[86]

79 As for the third period of delay, and as explained above (at [74]) in relation to the approval of SSG-1 Glass, DG submits that CAAS introduced a new requirement of a visual mock-up using *full sized cabin glass panels* (instead of 300 x 300mm samples) to be carried out on-site before the cabin glass could be approved for bulk fabrication and delivery, which was not within DG's original scope of works under the Subcontract.[87]

80 DG submits that because of the additional step introduced in the procurement process, a delay of two months and one week resulted and the LD period should be reduced accordingly.[88]

81 Summing the above three periods of delay, DG submits that the delay period for Phase 1 Works should be reduced by 149 days.[89]

Our decision

82 Preliminarily, we note ZK's point that the three purported delay periods above were not specifically pleaded.[90] In DG's Defence and Counterclaim (Amendment No 2) ("Defence and Counterclaim"), all that was pleaded in relation to this was that "the particulars [in ZK's SOC] do not take into account changes in timelines that came about due to various factors that arose on site

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86 AC in CA 125 at paras 39, 40, 43 and 44.

87 AC in CA 125 at paras 46 and 47.

88 AC in CA 125 at paras 51 and 56.

89 AC in CA 125 at para 57.

90 See RC in CA 125 at paras. 97 and 116.

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and/or [ZK's] failure to give clear and timely instructions to [DG]".[91] We also note that, in DG's submissions below, DG did not specifically argue the above three delay periods and only stated in general terms that there were delays caused by the changes in specifications of the cabin glass.[92] DG certainly did not take issue with the additional requirements of preparing PowerPoint slides and the provision of a visual mock-up using full sized cabin glass panels. Hence, strictly speaking, we do not need to consider such a new case on appeal: see *Wei Ho-Hung v Lyu Jun* [2022] SGHC(A) 30 at [33]. Nevertheless, for completeness, we shall briefly address the merits of DG's arguments.

83 Clause 4 of the Subcontract states as follows (see [41] above):[93]

> …
>
> The Sub-Contractor shall be entitled to extension of time for the events, where the Sub-Contractor has been prevented to execution of the Sub-Contract Works due to any Wrongful and/or negligent act or default or delay or breach of this Sub-Contract by the Contractor and/or Main Contractor and/or Principal.
>
> The Sub-Contractor shall, as a condition precedent to such extension of time, make such application to the Contractor in writing with sufficient supportive documents (e.g Impact Analysis and etc) within 30 days of the occurrences of the relevant events.
>
> …

84 Applying cl 4 above, in the event that DG has been prevented from executing the Subcontract works, DG would be entitled to an extension of time for completing such works. However, cl 4 importantly stipulates that a condition precedent must be satisfied before DG is entitled to an extension of time, *viz*,

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91 JROA Vol II at p 37 para 20.

92 JROA Vol III Part V pp 46 to 55.

93 JROA Vol V Part A at p 64.

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DG must make an application to ZK in writing with supporting documents within 30 days of the occurrence of the delay caused by, among other persons, ZK. In this regard, DG confirmed during the hearing that no extension of time application was ever made while the Subcontract subsisted.[94] By the operation of cl 4, DG would therefore not be entitled to the extension of time and there would therefore be no change in the date on which the LD period commences.

85 Such a situation occurred in the case of *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2010] SGHC 106 ("*Ho Pak Kim*"). In that case, the defendant employer counterclaimed for liquidated damages amounting to $414,400 arising from the plaintiff contractor's 276 days of delay in completion of the project (*Ho Pak Kim* at [52]). The plaintiff claimed that it was not responsible for the delay and that it should have been granted extensions of time to complete the project (*Ho Pak Kim* at [21]). The court found that the plaintiff had indeed caused 276 days of delay (*Ho Pak Kim* at [106]). The court also found that not only did the plaintiff fail to satisfy the condition precedent under cl 23(2) of the contract for an extension of time to be granted, it did not even make a request for an extension of time (*Ho Pak Kim* at [53], [54] and [97]–[99]). The court therefore allowed the defendant's counterclaim for $414,000 in liquidated damages (*Ho Pak Kim* at [109]).

86 However, in oral submissions, DG relied on the Australian case of *Gaymark Investments Pty Ltd v Walter Construction Group Ltd (formerly Concrete Constructions Group Ltd)* [1999] NTSC 143 ("*Gaymark*") to make the point that because ZK had caused delay during the three alleged delay periods in the procurement of the cabin glass panels, ZK is not entitled to LD notwithstanding DG's non-compliance with the condition precedent set out in

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94 Transcript (21 July 2022) at p 3 lines 28 to 31.

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cl 4. Hence, the issue here is whether in a situation where an employer has caused delay, a contractor's non-compliance with the condition precedent for an extension of time affects the employer's entitlement to liquidated damages.[95]

87 We note that *Gaymark* supports the proposition that liquidated damages and extension of time clauses should be strictly construed, and as a result, a contractor's failure to comply with the condition precedent for an extension of time would, in the absence of special provision, set time at large and therefore prevent the employer from claiming liquidated damages, where the employer is responsible for the delay: see *Gaymark* at [69]. We find the following summary of *Gaymark* in Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell Asia, 5th Ed, 2018) ("*Law and Practice of Construction Contracts*") at para 9.188 to be helpful:

> In [*Gaymark*], a contractor applied for time to be extended by 87 days as a result of delays attributable to the employer. The time extension clause ("SC19") provided that the contractor shall only be entitled to an extension of time where the contractor has "complied strictly" with the notification provisions relating to these claims. The contractor's application for an extension of time was time-barred because of non-compliance with the notification requirements for the extension of time clause. As a consequence, the contractor administrator rejected the application for time extension. The arbitrator found that in respect of the delay to the works, 77 days arose from causes for which the employer was responsible. The court affirmed the common law principle that liquidated damages and time extension provisions should be construed strictly *contra proferentum*. In a situation where part of the delay resulted from the employer's own breach, the employer can only recover liquidated damages for that part of the delay caused by the contractor if the extension of time clause provides – expressly or by necessary inference – for time to be extended in respect of such breach by the employer. In this case, the court noted that the clause empowering the contract administrator to unilaterally award an extension of time had been deliberately deleted from the contract. The court thereby held that the result of a failure by the contractor to comply with the notification

95 Transcript (21 July 2022) at p 13 lines 27 to 31; p 15 lines 7 to 22.

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> requirements in these circumstances is to set time at large and deny the employer his claim for liquidated damages. In the course of his judgment Bailey J said [(at [69]):
>
> > SC19 makes provision for an extension of time for delays for which Gaymark directly or indirectly is responsible but the right to such an extension is dependent on strict compliance with SC19 (and in particular the notice provisions of SC19.1). In the absence of such strict compliance … there is no provision for an extension of time because GC 35.4 which contains a provision which would allow for this (and is expressly referred to in GC 35.2 and GC 35.5) has been deleted.

88 However, the court in the UK case of *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EHWC 447 (TCC) ("*Multiplex*") considered *Gaymark* and cast significant doubt on its correctness (see *Law and Practice of Construction Contracts* at paras 9.188 and 9.195; *Keating* at para 8-034). Indeed, the court in *Multiplex* stated as follows (at [103]):

> I am bound to say that I see considerable force in Professor Wallace's criticisms of *Gaymark*. I also see considerable force in the reasoning of the Australian courts in the *Turner* and *Peninsula* cases and in the reasoning of the Inner House in *City Inn*. Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that *Gaymark* represents the law of England. Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. *If Gaymark is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large.*
>
> [emphasis added]

89 We also note that *Gaymark* is at odds with two earlier decisions of the Australian courts and has not been followed elsewhere in Australia. In *Law and Practice of Construction Contracts*, the learned author states as follows at paras 9.189 and 9.192:

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> 9.189 The decision in *Gaymark* appears at odds with two earlier decisions of the Australian courts. In both *Turner Corp Ltd v Austotel Pty Ltd* (1994) [13 BCL 374] and *Turner Corp Ltd v Coordinated Industries Pty Ltd* (1994) [12 BCL 33] the courts held on the construction of the relevant provisions of the contract that the contractor's failure in each case to apply for extensions of time in accordance with the procedural and notification requirements of the contract did not necessarily prevent the application of the time extension provisions to delay events which were attributable to the employer and, accordingly, they did not operate to deprive the employer of his right to recover liquidated damages for delay caused by the contractor.
>
> …
>
> 9.192 *Gaymark* has not been followed elsewhere in Australia. In *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [[2002] NSWCA 211], Hodgson JA in delivering the judgment of the New South Wales Court of Appeal accepted the views of Duncan Wallace and refused to follow *Gaymark*. He held that if a claim had not been made in time, the Superintendent (the certifier) has no power to extend time but this merely meant that the contractor would be 'precluded from the benefit of an extension of time and [be] liable for liquidated damages'.

90 Further, we note that the reasoning in *Gaymark* has been criticised. In essence, the liability to pay liquidated damages despite the occurrence of act(s) of prevention should be understood to be caused by the contractor's failure to give the required notice rather than by said act(s) of prevention: see *Law and Practice of Construction Contracts* at para 9.191; *Hudson* at paras 6-031–6-033; and *Hsin Chong Construction (Asia) Ltd v Henble Ltd* [2006] HKCU 1397 at [135]. Since extensions of time based on employer prevention are expressly subject to strict notice requirements, such an understanding accords with contractual principles of party autonomy and of reasonable commercial intention. Moreover, as stated in *Steria Ltd v Sigma Wireless Communications Ltd* [2007] EWHC 3454 (TCC) ("*Steria*") at [95]: "... one can see the commercial absurdity of an argument which would result in the contractor being better off by deliberately failing to comply with the notice condition than by complying with it". The commentary to the report of *Steria* in the Building Law

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Reports therefore states that: "[t]he employer's entitlement to damages, it might be said, was caused not by the delay but by the delay coupled with the contractor's failure to satisfy the condition precedent". We agree and endorse this understanding on first principles.

91 From the weight of authority and on first principles, we hold that a contractor must fulfil the condition precedent for an extension of time to be availed of such an extension of time, and the contractor's non-compliance with such a condition precedent does not prevent the employer from claiming liquidated damages. To this extent, we approve of *Multiplex* and reject the approach in *Gaymark*. In the present case, since DG has admitted that it did not make any extension of time application while the Subcontract subsisted (see [84] above), it did not fulfil the condition precedent for an extension of time as required by cl 4 of the Subcontract. Time is not set at large by virtue of this non-compliance. DG's reasons for its being delayed are therefore irrelevant for the purposes of whether the LD period should be reduced. Hence, the LD period should not be reduced on account of any alleged delay attributable to CAAS/SJ/SCB/ZK.

ZK's claim for replacement and rectification works

92 In the proceedings below, ZK claimed for replacement and rectification works amounting to $340,233.10, for works that were allegedly not carried out and completed by DG as a result of DG's abandonment of the worksite around 6 June 2018 and for rectification works done. In support of its claim, various invoices were displayed in the affidavit of evidence-in-chief ("AEIC") of

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Ms Chai Yoke Choo ("Ms Chai"), who was the contracts manager for ZK (Judgment at [103]).[96]

93 The Judge held that ZK was entitled to claim for items 1(a), 1(d), 1(e), 4(c) (but without 15% administrative charge), 5(a), 5(b) and 5(c). This is summarised in the table below (Judgment at [220]):

Item	**Quantum claimed**	**Status**
1(a): Mobile crane rental for 7 December 2017	$642.00	Allowed.
1(b): Supply of mobile crane work from 8 February to 14 February 2018	$4,565.26	Dismissed.
1(c): Rental of mobile crane for replacement of 3 pieces of glass	$4,245.23	Dismissed.
1(d): Rental of mobile crane for installation of cabin glass	$6,306.31	Allowed.
1(e): Rental of mobile crane for replacement of 13 pieces of glass	$5,906.40	Allowed.
2(a): Rental of boom lift for installation of cabin glass from 29 September 2018 to 28 October 2018	$2,522.53	Dismissed.
2(b): Rental of boom lift from 19 February 2018 to 28 February 2018	$4,675.90	Dismissed.
3(a): Supply of capping cladding, invoice dated 20 April 2018	$9,293.97	Dismissed.
3(b): Supply of capping cladding, invoice dated 20 September 2018	$18,637.15	Dismissed.

[96] JROA Vol III Part A at p 4.

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4(a): Labour cost to install cabin glass	$27,735.47	Dismissed.
4(b): Labour cost to repair metal blast glass door	$6,952.33	Dismissed.
4(c): Labour cost for welding works	$2,104.16	Allowed with GST but without 15% admin charge, for $1,829.70.
4(d): Labour and material cost for Z-panel	$2,282.58	Dismissed.
5(a): 70% balance for 13 pieces of glass panel	$111,930.27	Allowed.
5(b): 30% deposit for 13 pieces of glass panel	$47,970.11	Allowed.
5(c): 70% deposit for 3 pieces of mock-up panel	$22,916.70	Allowed.
6(a): Broken glass	$16,663.00	Dismissed.
7(a): Re-erected scaffolding	$6,767.75	Dismissed.
8(a): Technical submissions and/or applications to BCA	$13,904.65	Dismissed.
9(a): Safety violation, invoice dated 20 January 2018	$184.58	Dismissed.
9(b): Safety violation, invoice dated 22 March 2018	$1,353.55	Dismissed.
10(a): Cabin capping and annex aluminium cladding	$20,298.33	Dismissed.
11(a): Rectification works on cladding	$1,292.03	Dismissed.

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12(a): Rectification works on FAP window and other windows	$1,082.84	Dismissed.
Total quantum claimed	$340,233.10	
Total quantum allowed	$197,501.49	

94 In CA 129, ZK appeals against the Judge's dismissal of its claims for items 1(b), 1(c), 2(a), 2(b), 3(a), 3(b) and 4(a).[97]

DG's appeal against the items awarded by the Judge to ZK

95 In CA 125, DG makes three submissions: (a) first, DG was entitled to terminate the Subcontract and therefore ZK was not entitled to any claims for the items allowed by the Judge;[98] (b) secondly, even if DG had wrongfully terminated the Subcontract, ZK was not entitled to the items which the Judge had allowed save for item 4(c) and in respect of items 5(a)–(c) ZK was only entitled to claim a sum of $85,804.84;[99] and (c) thirdly, ZK was not entitled to impose the 15% administrative charge for items 1(d), 1(e) and 5(a).[100]

96 We need not consider DG's first submission as we agree with the Judge that DG had wrongfully terminated the Subcontract (see [53]–[54] above).

97 In respect of DG's second submission, we need address only items 1(d) and 1(e) (see [124] below). We are of the view that for the other items allowed by the Judge, it is clear that DG has not been able to show any ground for appellate intervention. DG has not explained how the Judge had erred in his

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97 AC in CA 129 at paras 54, 58, 62, 65, 72 and 76.

98 AC in CA 125 at para 61.

99 AC in CA 125 at paras 60 and 95.

100 AC in CA 125 at para 96.

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reasoning in awarding the items. Hence, the Judge's findings in this regard cannot be said to be plainly wrong or against the weight of the evidence: see *Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd* [2009] 4 SLR(R) 1101 at [41].

98 We now turn to address DG's third submission, which concerns the 15% administrative charge included in most of ZK's claims for replacement and rectification of defective works (Judgment at [108]).[101]

99 In the proceedings below, ZK argued that since it had to engage third parties to supply materials or to carry out works on behalf of DG, it was entitled to the 15% administrative charge (Judgment at [109] and [110]) under cl 12.2 of the Subcontract, which states:[102]

> Should you required [*sic*] [ZK] to purchase materials or carry works on behalf [*sic*], a up to 15% administrative charge of the total amount involved will be deducted from your progress claims.

100 ZK also relied on items 16.9 and 16.10 of Annex B of the Subcontract, which state:[103]

> 16.9 Materials order on behalf of for the Sub-Contractor with 15% administrative charges.
>
> 16.10 All works carried out on behalf of Sub-Contractor is subject to 15% administrative charges.

101 DG submitted in response to cl 12.2 that since it never "made a request" for ZK to purchase materials or to carry out works on its behalf, cl 12.2 of the Subcontract does not apply. DG did not submit specifically against the

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101 JROA Vol III Part A at p 39 para 104.

102 JROA Vol V Part A at p 67.

103 JROA Vol V Part A at pp 79 and 80.

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application of items 16.9 and 16.10 of Annex B of the Subcontract, but submitted that for items 5(a), 5(b) and 5(c) the 15% administrative charge should not be applied as DG would have done the work if it was paid its dues (Judgment at [111]).

102 The Judge found that cl 12.2 of the Subcontract required that there be a request made by DG and that the deduction be made from the progress claim. Clause 12.2 was therefore not applicable to any of ZK's claims for replacement and rectification works. In contrast, items 16.9 and 16.10 of the Subcontract allowed for the imposition of a 15% administrative charge, where materials are ordered or work is done "on behalf" of DG, *without* there being a request from DG, and *without* payment being made through a deduction from the progress claim. In respect of items 5(a), 5(b) and 5(c), the Judge reasoned that, because he had found earlier that DG had not proven that there was a persistent course of payment delays from ZK, he rejected DG's submission that the materials ordered or work done would not have been carried out by ZK "on behalf" of DG and that the administrative charge should not be applied for these three items (Judgment at [112] and [113]).

103 DG now submits that ZK is not entitled to impose the 15% administrative charge under cl 12.2 or items 16.9 and 16.10 after the Subcontract was terminated in June 2018. In this regard, items 1(d) and 1(e) relate to mobile crane rentals incurred in September 2018 and July 2018 respectively, and item 5(a) relates to costs incurred in the delivery of cabin glass panels in July 2018. DG therefore submits that the awarded sums should be reduced as follows:[104]

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104 AC in CA 125 at paras 97 to 99.

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(a) item 1(d): less $822.56 (including GST);

(b) item 1(e): less $770.40 (including GST); and

(c) item 5(a): less $14,599.60 (including GST).

104 In response, ZK submits that DG's position is incorrect. ZK argues that the administrative charge applies to subsisting obligations that DG had to fulfil while the Subcontract was still alive and before it was wrongfully terminated by DG. Since DG was already contractually bound to carry out the works and purchase the materials, it is absurd of DG to argue that ZK is disentitled to levy the administrative charge against DG in respect of these works and materials.[105]

105 In our view, DG's position is untenable. ZK had to conduct the replacement and rectification work by reason of DG's repudiatory breach (and wrongful termination) of the Subcontract, and ZK's claim for such work and the administrative charges are *founded on such breach*.[106] Pursuant to items 16.9 and 16.10 of Annex B of the Subcontract, ZK would have been able to claim for the administrative charges if it had ordered materials or done works on DG's behalf while the Subcontract was subsisting. The measure of damages here is to put ZK in the position it would have been in had the Subcontract been performed. It is therefore immaterial that such works were conducted after the termination of the Subcontract. ZK is entitled to claim the administrative charges.

106 Hence, DG has not shown that the Judge erred in awarding the 15% administrative charge for items 1(d), 1(e) and 5(a) if the main claim under each

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105 RC in CA 125 at paras 145 to 152.

106 JROA Vol II at p 22 para 14.

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item is allowed. We add that such an administrative charge is fairly standard practice in the construction industry.

The parties' cross-appeals against the items

Item 1(b)

107 Item 1(b) is ZK's claim for $4,565.26 (inclusive of 7% GST) pursuant to an invoice dated 22 March 2018 for "Supply [of] Mobile Crane to work at Changi T5 [from] 08/02/2018 to 14/02/2018".[107] The 15% administrative charge was not included here (Judgment at [128]).

108 The Judge disallowed this claim as he found that ZK did not sufficiently prove this claim (Judgment at [131]). The Judge reasoned that: (a) the documents adduced by ZK[108] do not indicate that they relate to the work done by DG; (b) there is no explanation of why an invoice is described with reference to "Samsung Koh Brother JV's gate entrance";[109] and (c) there was also no evidence from ZK's witnesses, whether through their AEICs or on the stand, about how the documents relate to the specific claim (Judgment at [131]).

109 ZK now submits that Ms Chai did give evidence in her AEIC and on the stand to show how the documents had related to this specific claim in item 1(b).[110] DG contends that the Judge did not err in his reasoning and that ZK would have had to incur these costs in any event.[111]

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107 JROA Vol III Part B at p 179.

108 JROA Vol III Part B at pp 179 to 190.

109 JROA Vol III Part B at p 180.

110 AC in CA 129 at para 55.

111 RC in CA 129 at paras 60 to 65.

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110 An invoice dated 6 February 2018 from ZK to Pollisum Engineering Pte Ltd states under "Delivery Details", "Delivery To: Tanah Merah Cross Road, Gate L2 (Via Samsung Koh Brother JV's gate entrance)".[112] According to ZK, Ms Chai had explained on the stand that during the construction of the Project, there was no proper road name assigned to the work site, so the road in the vicinity would be used and therefore the reference in the invoice was to Tanah Merah Cross Road.[113]

111 With regard to the reference to "Tanah Merah Cross Road", the Judge appeared to have accepted such an explanation in the context of item 1(a) (Judgment at [125]):

> 125 The supporting work order from Pollisum refers to "Tanah Merah Cross Road" and "T5 Changi" rather than "Serangoon". Ms Chai testified that during the construction stage, there was no proper road name, so Pollisum would just take a nearby road name. From Google Maps, Tanah Merah Crossroad is one of the roads that leads to the project area. The supporting work order also states that the works were from "0800 to 1200" and "1300 to 2300". The date for the work mentioned in this work order is 7 December 2017, which corresponds to the date stated on the invoice.

We also note that Ms Chai's explanation on the stand, which is relied on by ZK in respect of item 1(b), was given in the context of item 1(a) as she was referred to the documents pertaining to item 1(a).[114]

112 However, the Judge's point here is that the reference to "Samsung Koh Brother JV's gate entrance" is unexplained. In our view, since he who asserts

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112 JROA Vol III Part B at p 180.

113 AC in CA 125 at para 54; JROA Vol III Part P at p 140 line 4 to p 141 line 6.

114 JROA Vol III Part P at p 140 lines 7 to 10.

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must prove, this specific reference is for ZK to explain, which Ms Chai (or any other witnesses from ZK) has not done.

113 Moreover, even if the Judge had accepted the above point in favour of ZK, that would not have been sufficient for a finding that item 1(b) could be claimed by ZK. As explained by the Judge, the evidence in support of item 1(b) was deficient as compared to item 1(a): "*in contrast to the documentation for Item 1(a)*, where an examination of the documents reveals sufficient linkages to the work of [DG] such that the naming of the project name as 'Serangoon' should only be regarded as a typo, the documentation here do not assist in showing the relationship between the invoice and [DG's] work" [emphasis added]. ZK has not proffered any reason to dispute this point.

114 Hence, in our judgment, ZK has not shown that the Judge's finding in respect of item 1(b) was plainly wrong or against the weight of the evidence. We therefore uphold the Judge's decision to disallow ZK's claim for item 1(b).

Item 1(c)

115 Item 1(c) is ZK's claim for $4,245.23 pursuant to an invoice dated 25 June 2018 for "Rental of Mobile Crane for replacement of 3 pcs glass" for $4,245.23 (inclusive of 7% GST and 15% administration charge) (Judgment at [132]).[115]

116 In CA 129, ZK submits that the Judge erred in disallowing item 1(c), presumably for the same reasons it submitted for item 1(b).[116] We uphold the

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115 JROA Vol III Part B at p 191.

116 AC in CA 129 at paras 56 and 57.

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Judge's decision to disallow ZK's claim for item 1(c) for the same reasons applicable to item 1(b) above.

Items 1(d)–(e)

117 Item 1(d) is ZK's claim for $6,306.31 (inclusive of 7% GST and 15% administrative charge) pursuant to an invoice dated 27 September 2018 for "Rental of Mobile Crane for Installation of Cabin Glass".[117]

118 Item 1(e) is ZK's claim for $5,906.40 (inclusive of 7% GST and 15% administrative charge) pursuant to an invoice dated 16 July 2018 for "Rental of mobile crane for replacement of 13 pcs glass".[118]

119 The Judge noted that it was undisputed that the cabin glass was for the eight-storey Equipment Building and that a mobile crane would be needed to install such glass. It was also admitted by Mr Rethna Balan Rajeesh ("Mr Rajeesh") of DG that the installation of 13 pieces of cabin glass was outstanding and the invoices relate to the rental of a mobile crane for the installation of the cabin glass. The dispute between the parties was over who bears the cost of the cranage. In respect of item 1(d), the Judge noted that he had earlier found that, under item 6.2 of Annex B of the Subcontract, DG as subcontractor was to provide its own cranage. The Judge allowed ZK's claims for items 1(d) and 1(e) (Judgment at [139] and [143]).

120 DG now contends that the Judge erred in awarding ZK its claims for items 1(d) and 1(e). DG submits that:

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117 JROA Vol III Part B at p 198.

118 JROA Vol III Part B at p 204.

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(a) ZK has failed to establish the causal link between the rental of the mobile cranes and the 13 pieces of SSG-2 Glass. The invoices for items 1(d) and 1(e) are for entirely separate periods (*ie*, September and July 2018 respectively). Further, the invoices relied on for item 1(e) already states it is for "replacement of 13 pcs glass", so the invoice for item 1(d) cannot be for the "installation" of the same 13 pieces of cabin glass. Hence, at the very least, if item 1(e) is allowed, then item 1(d) should not be allowed.[119]

(b) The Judge failed to give due effect to items 2.1 and 6.1 of Annex B of the Subcontract, which state that ZK is to provide general access and that DG is allowed to use mobile cranes which are on-site. DG, as a subcontractor for the Project, would have been entitled to use the mobile cranes notwithstanding the effect of item 6.2.[120]

(c) No evidence was adduced by ZK to show that the mobile cranes were specifically rented to carry out DG's works under the Subcontract or that the only works being carried out by ZK at the material time were in respect of DG's alleged outstanding works (as opposed to ZK's own works).[121]

121 DG therefore submits that ZK should not be entitled to the awarded sums of $6,306.61 and $5,906.40 for items 1(d) and 1(e) respectively.[122]

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119 AC in CA 125 at para 81.

120 AC in CA 125 at para 82.

121 AC in CA 125 at para 85.

122 AC in CA 125 at para 86.

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122 We note that the Judge has already dealt with the effect of items 2.1, 6.1 and 6.2 of the Annex B of the Subcontract (Judgment at [115]–[118]). The Judge ultimately concluded that DG could not rely on item 6.1 as a basis for not paying for the crane operations provided by ZK, especially because item 6.1 did not impose an obligation on the main contractor to provide access to the subcontractor in the form of mobile cranes (Judgment at [118]). DG has not proffered any reason why the Judge's finding was plainly wrong or against the weight of evidence.

123 We agree with the Judge that items 1(d) and 1(e) are claims in relation to the installation of 13 pieces of cabin glass, which ZK had to procure due to DG's abandonment of the Subcontract works. We do note, however, there was no elaboration by ZK on the claims for these two items in their closing submissions below (save for the quantum claimed),[123] no substantive elaboration in their reply submissions below[124] and no elaboration on appeal. In the absence of such an explanation, only one of two claims should be allowed.

124 We note that there is corroborating evidence for item 1(d) but it is unclear that such evidence was adduced for item 1(e). ZK has adduced an invoice with the description of "Hired Third party to supply labour to install cabin glass" and "YJ International" for the sum of $22,540. This invoice is dated 27 September 2018, which is the *same date* for the invoice pertaining to Item 1(d).[125] Hence, we allow DG's appeal against item 1(e) but uphold the decision to award ZK's claim for item 1(d).

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123 JROA Vol III Part U at p 127.

124 JROA Vol III Part U at pp 229 and 230.

125 JROA Vol III Part B at p 248.

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Item 2(a)

125 Item 2(a) is ZK's claim for $2,522.53 (inclusive of 7% GST and 15% administrative charge) pursuant to an invoice dated 27 September 2018 for "Rental of Boom Lift for Installation of Cabin Glass" from 29 September 2018 to 28 October 2018.[126]

126 In the proceedings below, ZK's position was that by reason of DG's breach of the Subcontract and desertion of the works, ZK had to rent such machinery to complete the works. DG's position was that there was no evidence that DG had requested ZK to rent such machinery (Judgment at [146] and [147]).

127 The Judge reasoned that the following showed that there was no correlation between the invoices and the claim:

(a) While the invoice for this claim is for $2,522.53, the supporting invoices from JP Nelson Access Equipment ("JP Nelson") to ZK were for $4,000 and they state that the work was done for a project entitled "Samsung Koh Brother JV" located at Tanah Merah Cross Road, which DG was not involved in.

(b) There was nothing else in the AEICs or the testimony of ZK's witnesses that explained this discrepancy or links the invoice to DG's work.

The Judge therefore dismissed this claim (Judgment at [148]).

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126 JROA Vol III Part B at pp 209 to 211.

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128 ZK now submits that the Judge had erred in dismissing its claim and makes the following contentions in support:

> (a) First, as with the case of item 1(b), the location "Tanah Merah Cross Road Gate L2" had to be used because that was the only available road name proximate to the Project site which did not have a road name as it was under construction.[127]
>
> (b) Secondly, the Judge did not give due weight to the purchase order given by ZK to JP Nelson Access in which the project title clearly stated the "Construction of 8-Storey Equipment Building And 2-Storey Annex Building at Changi Airport". There, ZK ordered from JP Nelson a boom lift to be delivered to the project site, which had no road name and therefore the delivery location had to be stated as "Tanah Merah Cross Road, Gate L2 (via Samsung Koh Brother JV's gate entrance)". ZK submits that "the delivery location ought not to have weighed in the Judge's mind so much so that that the location itself would render his finding that there was no correlation between the invoice and the claim".[128]

129 In our view, DG rightly submits that ZK's submissions have not addressed the evidential deficiencies in ZK's case.[129] They do not address: (a) whether the work done for a project entitled "Samsung Koh Brother JV" was related to DG's works under the Subcontract and (b) the discrepancy between the invoice to DG (claiming for $2,522.53) and the amount paid to JP Nelson ($4,280, inclusive of 7% GST).

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127 AC in CA 129 at para 60.

128 AC in CA 129 at para 61.

129 RC in CA 129 at paras 68 to 72.

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130 There is therefore nothing to indicate that the Judge's finding was plainly wrong or against the weight of the evidence. The Judge was not wrong to dismiss ZK's claim for item 2(a).

Item 2(b)

131 Item 2(b) is ZK's claim for $4,675.90 (inclusive of 7% GST and 15% administrative charge) pursuant to an invoice dated 28 February 2018 for "Rental of Boom Lift On behalf" from 19 February 2018 to 28 February 2018.[130]

132 In the proceedings below, ZK's position was that by reason of DG's breach of the Subcontract and desertion of works, ZK had to rent such machinery to complete the works. DG's position was that there was no evidence that DG had requested ZK to rent such machinery (Judgment at [150] and [151]).

133 The Judge reasoned that the invoices do not explain how the works in the invoices were related to DG's works and there was nothing in the AEICs of ZK's witnesses or in their testimony on the stand that explained how this item related to DG's works. The Judge therefore dismissed this claim (Judgment at [152]).

134 ZK now submits that the Judge had erred in dismissing its claim and contends that the documentary evidence sufficiently proved its claim. ZK claims that it issued a purchase order[131] to JH Equipment & Services Pte Ltd stating that the order for the rental of the boom lift was for the Phase 1 Works (at the Equipment Building) and for the Phase 2A Works (at the Annex Building),

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130 JROA Vol III Part B at p 213.

131 JROA Vol III Part B at p 217.

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which works fell under the scope of DG's works for Phase 1 and Phase 2A. Further, the delivery order, tax invoices and payment records consistently pointed to the delivery of the order and payment for the order in respect of the same works.[132]

135 DG submits that ZK has not challenged or directly addressed the Judge's findings in the Judgment.[133]

136 We agree with DG's submission above, which is plainly obvious from ZK's scant submissions on this point. We also highlight that like item 1(b) (see [112] above), the purchase order for item 2(b) states "Via Samsung Koh Brother JV's gate entrance" and the significance of this has not been explained by ZK. In the absence of such an explanation, it appears more likely that the works concern works that are unrelated to DG's works under the Subcontract. There is therefore no reason for appellate intervention and the Judge's decision to disallow ZK's claim for item 2(b) should be upheld.

Item 3(a)

137 Item 3(a) is ZK's claim for $9,293.97 (inclusive of 7% GST and 15% administrative charge) pursuant to an invoice dated 20 April 2018 for "Annex Building" and "Re-erect Scaffolding".[134]

138 The Judge noted that while ZK's claim was described as "Supply of Capping Cladding" in the table in Ms Chai's AEIC at para 104,[135] the invoice is

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132 AC in CA 129 at para 64.

133 RC in CA 129 at para 76.

134 JROA Vol III Part B at p 218.

135 JROA Vol III Part A at p 40 SN 3.

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for "Annex Building Re-erect Scaffolding". During cross-examination, Ms Chai explained that cladding related to "the finishes as to complete the cabin glass".[136] The Judge concluded that the invoices therefore did not correspond with the claim as described in her AEIC or testimony on the stand (Judgment at [158]).

139 The Judge further noted that the amount invoiced for this claim was $7,553 (without the 7% GST and 15% administrative charge), but the invoices from Dembicon to ZK at pp 504 and 505 of Ms Chai's AEIC[137] did not have this figure. There was also a table at Ms Chai's AEIC at pp 506 and 509 that refers to "re-erect scaffold" at "annex building" for $7,533,[138] but it is not stated what this table is about or for. None of the other documents mention the figure of $7,533. There was no explanation for this from the AEICs or testimony of ZK's witnesses. The Judge concluded that there was insufficient clarity to prove this claim (Judgment at [159]).

140 ZK now submits that the Judge's findings were "manifestly against the weight of the evidence relating to Dembicon's invoices and supporting documents including the table". ZK makes the following submissions in support:

> (a) First, "granted that the amount of $7,553 invoiced by [ZK] differed from the amount of $7,533 claimed by Dembicon and certified by [ZK] to Dembicon, still the difference of $20 (*ie*, $7,553 - $7,533) is *de minimis*, and it therefore ought not to weigh against [ZK] by reason of the Judge's observation that this amount of $7,553 claimed by [ZK]

136 JROA Vol III Part P at p 168 lines 23 to 28.

137 JROA Vol III Part B at pp 220 and 221.

138 JROA Vol III Part B at pp 222 and 225.

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against [DG], was absent from Dembicon's invoice and other supporting documents".[139]

(b) Second, ZK submits that the documents sufficiently prove ZK's claim for Item 3(a) either for $9,293.97 or $9,269.35 in the alternative (reduction of $20 and factoring 7% GST and 15% administrative charge).[140]

We address ZK's submissions in turn.

141 As regards ZK's first submission (see [140(a)] above), the Judge was not fixated so much on the difference between the sum of $7,553 stated in the invoice to DG[141] and the sum of $7,533 stated in the table at pp 506 and 509 of Ms Chai's AEIC.[142] Rather, the point here was that the invoices from Dembicon to ZK at pp 504 and 505 of Ms Chai's AEIC[143] did not have this figure of $7,553. In fact, because the Judge noted the sum of $7,533 stated in the table at pp 506 and 509 of Ms Chai's AEIC, it was implicit in the Judge's analysis that the Judge *did* treat the $20 difference between the sums of $7,553 and $7,533 as *de minimis*. Hence, ZK's first submission is plainly unmeritorious.

142 As regards ZK's second submission (see [140(b)] above), ZK essentially refers to documents that corroborate the reference to the *re-erection of scaffolding* at the Annex Building. Yet, central to the Judge's reasoning (see [138] above) was that ZK's claim was described as "Supply of Capping

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139 AC in CA 129 at para 67.

140 AC in CA 129 at para 68 to 71.

141 JROA Vol III Part B at p 218.

142 JROA Vol III Part B at pp 222 and 225.

143 JROA Vol III Part B at pp 220 and 221.

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Cladding" in the table in Ms Chai's AEIC at para 104,[144] but the invoice had a different description, *viz*, "Annex Building Re-erect Scaffolding". It was explained by Ms Chai during cross-examination that cladding related to "the finishes as to complete the cabin glass".[145] ZK did not address this difference in its Appellant's Case.[146]

143 In its Appellant's Reply, however, ZK appears to attempt to address the foregoing point as follows:[147]

> 55. In response to [DG's] misleadingly wrong submission, Item 3(a) relates to [ZK's] claim for remedial works or re-works that had to be carried out because [DG] had botched up the original rockwool installations with the result that the rockwool first installed were spoilt by water ingress, Such [*sic*] spoilage in its installations were not rectified by [DG] before it abandoned the Project. Dembicon, a third-party subcontractor then had to be engaged to carry out removal of the spoilt rockwool (formerly installed at the Annex Building of 2-storey in height), which removal *necessitated the* ***re-erection of scaffold*** *at the Annex Building in order to* ***remove the aluminium cladding panels, remove the spoilt rockwool, re-install and re-align the aluminium panels*** *that form the external façade of the Annex Building.* These are *not replacement works as allegedly defined by [DG].* It also shows an utter distortion by [DG] as regards the very nature of the defective works that [DG] well knew it had shoddily carried out before it abandoned the Project.
>
> [emphasis in original omitted; emphasis added in italics and bold italics]

144 It is, however, still not clear from the above explanation that the works described in the documentary evidence relate to the works described under item 3(a). ZK's claim here for "cladding" appears to be for the *first installation of cladding panels as part of the application of the finishes to complete the*

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144 JROA Vol III Part A at p 40 SN 3.

145 JROA Vol III Part P at p 168 lines 23 to 28.

146 AC in CA 129 at paras 65 to 71.

147 AR in CA 129 at para 55.

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installation of cabin glass (as described by Ms Chai; see [138] above),[148] rather than for the subsequent removal of cladding panels for rectification works relating to *rockwool*. Moreover, ZK has cited no references at all in providing the above explanation in its Appellant's Reply.

145 ZK has therefore not shown that the Judge's finding in this regard was plainly wrong or against the weight of the evidence. We uphold the Judge's decision to disallow item 3(a).

Item 3(b)

146 Item 3(b) is ZK's claim for $18,637.15 (inclusive of 7% GST and 15% administrative charge) pursuant to an invoice dated 20 September 2018 for "Supply Capping @ R3 Cabin".[149]

147 The Judge noted that (Judgment at [161]):

(a) The invoice is for "Supply Capping @ R3 Cabin" for $15,146 (without the 7% GST and 15% administrative charge).[150]

(b) There is an invitation to quote from ZK to Synthesis Metal Industries Pte Ltd ("Synthesis") at Ms Chai's AEIC at p 529[151] and a quote for $15,146 from Synthesis at Ms Chai's AEIC at p 528.[152]

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148 JROA Vol III Part P at p 168 lines 23 to 28.

149 JROA Vol III Part B at p 229.

150 JROA Vol III Part B at p 229.

151 JROA Vol III Part B at p 245.

152 JROA Vol III Part B at p 244.

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148 However, the Judge noted that the payment certificates at Ms Chai's AEIC at pp 515 and 516[153] relate to "fabrication, delivery, installation of honeycomb ceiling with perforated panel and main steel framing works". It was not clear from the documents at Ms Chai's AEIC at pp 513–531,[154] that the supporting quote or payment certificates are related to DG's works. There was no explanation for this from the AEICs or testimony of ZK's witnesses. Hence, the Judge concluded that there was insufficient clarity to prove this claim (Judgment at [162]).

149 ZK now submits that the Judge erred in finding that there was insufficient clarity to prove ZK's claim. ZK argues that the documentary evidence provided sufficient clarity in so far as it related to the supply of capping for the external façade works involving aluminium cladding works, for which DG was contractually bound to carry out and complete, including to supply "all connections, fixing and accessories[155] which are considered necessary for the full and satisfactory completion of the work".[156] In this regard, ZK submits that:[157]

> (a) The documents related to works on aluminium cladding, which necessitated aluminium capping for the completion of the cladding works. Specifically, based on the quotation from Synthesis[158] — a replacement contractor — and the email from ZK to Synthesis on the

153 JROA Vol III Part B at pp 231 and 232.

154 JROA Vol III Part B at pp 229 to 247.

155 JROA Vol V Part A at p 71.

156 AC in CA 129 at para 75.

157 AC in CA 129 at paras 73 and 74.

158 JROA Vol III Part B at p 244.

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former's request for quotation,[159] the works related to aluminium capping for the aluminium cladding works, which in turn related to DG's works.

(b) In accordance with item 1(a) of Annex A of the Subcontract, DG's scope of works include external façade works for the Equipment Building, which works were in Phase 1.

150 DG submits that ZK has failed to address the evidential difficulties identified by the Judge:[160]

(a) First, ZK has not identified any evidence showing that the aluminium capping works in the quotation from Synthesis dated 11 September 2018 was related to DG's works under the Subcontract. ZK's submission in its Appellant's Case that these works "related to the aluminium capping for the aluminium cladding works that in turn related to [DG's] works" is completely unsupported by evidence.

(b) Second, ZK has not explained which of the items certified in the payment certificates related to the items of work in the quotation. While the quotation relied on in ZK's Appellant's Case was for the total sum of $15,146, this sum does not appear anywhere in the payment certificates relied on by ZK (and identified by the Judge), which certified a total sum of $30,093.75. Therefore, ZK has likewise failed to prove its claim for item 3(b).

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159 JROA Vol III Part B at p 245.

160 RC in CA 129 at paras 91 and 92.

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151 We agree that ZK has not addressed the evidential deficiencies in its claim for item 3(b). ZK has not shown, on a balance of probabilities, that the aluminium capping works in the quotation from Synthesis related to DG's external façade works for the Equipment Building. Hence, we uphold the Judge's decision to disallow ZK's claim for item 3(b).

Item 4(a)

152 Item 4(a) is ZK's claim for $27,735.47 (inclusive of 7% GST and 15% administrative charge) pursuant to an invoice dated 27 July 2018 with the description "Hired Third party to supply labour to install cabin glass YJ International".[161]

153 In the proceedings below, ZK's position was that these were labour costs for supplying labour to install the cabin glass. DG's position was that the documents exhibited do not show that works done were attributable to works allegedly not properly carried out by DG. The documents also do not just include labour costs, but costs for materials supplied by third parties as well. There are no documents to show that the materials supplied by third parties are the same materials with specifications similar to the Subcontract (Judgment at [165] and [166]).

154 The Judge noted that there was no explanation in the AEICs or testimony of ZK's witnesses as to what this claim specifically relates to, how the labour costs relate to DG's works or how the costs of the materials supplied relate to the claim for labour costs. Hence, the Judge dismissed ZK's claim for item 4(a) (Judgment at [167]).

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161 JROA Vol III Part B at p 248.

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155 ZK now submits that the documentary evidence adduced sufficiently proved this claim. ZK makes the following points:[162]

(a) The replacement subcontractor was YJ International ("YJ"). YJ's quotation to ZK stated that the proposed works related to supplying labour to replace glass panels and remove existing glass panels. The quotation also clearly stated the total quantity of 14 pieces of glass, which corresponded with the balance glass not installed by DG in the Project, taking into account one piece of glass installed by DG but was subsequently found to have cracked. The quotation price of $22,540 was accepted by ZK with the result that YJ and ZK entered into a written subcontract[163] for the installation of cabin glass.

(b) Since it is undisputed that DG was the only subcontractor engaged to install the cabin glass for the Project, it is therefore incontrovertible that the replacement works relating to such installation of glass must relate to DG's works. In particular, the 14 pieces of glass installed by YJ were works carried out and attributable to the same glass works not properly carried out and eventually abandoned by DG.

(c) The Judge's finding that there was no explanation as to "how the costs of the materials supplied relate to the claim for labour costs" was a red herring because material costs were not part of this claim.

156 In our view, with respect, the documentary evidence does show that the works done by YJ were related to DG's works under the Subcontract.

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162 AC in CA 129 at paras 78 to 84.

163 JROA Vol III Part B at pp 249 to 252.

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157 To begin with, the documentary evidence referred to by ZK does show that DG was indeed required to install temporary cabin glass panels and did indeed do so. We highlight three points below.

158 First, the use of temporary glass was part of what DG had to do prior to actual glass installation, and this was evidenced by the various written notification and reminders in the chaser emails from the resident engineer, CAAS, SCB and ZK to DG on the submission of a schedule for temporary cabin glass installation works. To that end, DG's representative responded with the draft work schedule for the temporary glass installation and he stated in his email on 26 January 2018 at 8.34am that "[DG's] goal is to installed [*sic*] the temporary glass by 09 Feb 2018" and that DG's representative "[Mr Rajeesh] stands ready to support". SCB then sent an email dated 12 February 2018 stating that "[t]he temporary glass installation progress observed on site is too slow" among other delays from DG. SCB also highlighted to DG that "DG has already been out of the schedule for temporary glass installation that [DG's representative] submitted on 26 Jan 18".[164]

159 Secondly, DG had itself installed the temporary cabin glass and indicated the installation as such in the shop drawings that formed part of its Progress Claim No 12 dated 28 March 2018.[165]

160 Thirdly, a drawing adduced (see Annex A) does indicate that the temporary glass panels were part of the cabin glass installation requirements.[166] These temporary glass panels are used to prevent the control cabin from being

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164 ASCB pp 5 to 8; JCB Vol II Part C pp 218 and 219.

165 JROA Vol V Part C pp 38 to 40 and 49 to 51.

166 JROA Vol V Part C at p 51.

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exposed to the elements (*ie*, the sun, wind and rain) before the actual glass panels are installed.[167] They are different from the mock-up glass panels used for the presentation to CAAS/SJ for approval purposes (see [72] and [74] above).[168]

161 Since the evidence shows that DG had indeed installed the temporary cabin glass, it follows that the temporary cabin glass panels have to be removed before the actual approved SSG-2 Glass can be installed.

162 Moreover, we are of the view that the fact that the documents adduced by ZK also included costs for materials supplied by third parties, could be explained. The photos and drawings adduced by ZK show that there were aluminium frames installed prior to DG's abandonment of the works on 6 June 2018, for the installation of cabin glass.[169] Such aluminium frames sit on multiple aluminium pieces known as extrusions, which require specially designed clips made of aluminium or stainless steel. In addition, the fitting of cabin glass into the aluminium frames would require gaskets made of rubber, silicone or a composite material, which secure the glass against the aluminium slots. These clips and gaskets would have to be procured by ZK given DG's abandonment of the works.

163 However, we note that ZK has not referred to any evidence by its witnesses for the explanation that the total quantity of 14 pieces of glass was needed because DG did not install the balance 13 pieces of glass in the Project

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167 AR in CA 129 at para 60.

168 AC in CA 125 at para 35.

169 JROA Vol V Part B pp 28 and 29; JROA Vol V Part B p 39; JROA Vol V Part B p 78; JROA Vol V Part C p 53; JROA Vol V Part C p 98.

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and that there was *one piece of glass installed by DG but was subsequently found to have cracked*. Nevertheless, this minor point is not fatal to ZK's claim.

164 Considering the above in totality, the works done by YJ were related to DG's works under the Subcontract. Hence, we allow ZK's appeal in respect of item 4(a).

Items 5(a)–(c)

165 Items 5(a)–(c) are ZK's claims for "Mock-up Panels" totalling $182,817.08 and ZK displayed multiple invoices in Ms Chai's AEIC.[170]

(1) Item 5(a)–(b) and the findings below

166 Item 5(a) is ZK's claim for $111,930.27 (inclusive of 7% GST and 15% administrative charge) pursuant to an invoice dated 14 July 2018 for "70% balance for 13pcs panel".[171] Item 5(b) is ZK's claim for $47,970.11 (inclusive of 7% GST and 15% administrative charge) pursuant to another invoice dated 26 April 2018 for "30% Deposit for 13pcs mock up panel".[172]

167 In the proceedings below, ZK pointed to Mr Rajeesh's admission under cross-examination that 13 pieces of cabin glass work was outstanding (Judgment at [182]).[173]

168 The Judge noted that DG raised for the first time in its closing submissions the argument that they had not agreed to supply and install SSG-2

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170 JROA Vol III Part C at pp 73 to 95.

171 JROA Vol III Part C at p 73.

172 JROA Vol III Part C at p 87.

173 JROA Vol III Part S at p 18.

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Glass. DG claimed that if there was a direction to change to SSG-2 Glass, DG would have, but for the termination of the contract, put in a claim for a VO for this. DG should hence not be made to bear the cost of purchase and installation of the glass (Judgment at [183]).[174]

169 The Judge then noted that it was a new argument that DG did not agree to install the SSG-2 Glass and would have raised a VO in relation to SSG-2 Glass, because it was at a higher price than what they anticipated in the Provisional Subcontract Sum at Annex A of the Subcontract. This point was not pleaded or attested to by any of DG's witnesses in their AEICs or at trial. Neither was it consistent with DG's position as set out in the documentary evidence (Judgment at [184]):

(a) SJ had given DG notice to install SSG-2 Glass as early as 27 January 2018,[175] before it abandoned the work site on 6 June 2018, but never at any point prior to the abandonment of works, did DG give any indication that it did not agree to install SSG-2 Glass and would only do so if it was approved as a VO.

(b) In an email dated 17 January 2018 from DG, DG explained that sometime in September 2017, it had recommended Saint-Gobain glass "due to [the] overwhelming costs of complying with the designated type of glass required by CAAS plus the number of panels".[176] In other words, the issue of the higher than anticipated cost of the glass had already surfaced in September 2017, *before* SSG-2 Glass was even in

174 JROA Vol III Part V at pp 99 and 100 at paras 115 and 116.

175 JROA Vol III Part H at p 224.

176 JROA Vol V Part J at p 290.

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contemplation. DG did not ask for a VO then but instead recommended the Saint-Gobain glass as an alternative to deal with the costs issue.

(c) It is also notable that SJ in its email dated 27 January 2018 informed DG that the cost of the modified glass from SSG (which DG terms SSG-2) "remains unchanged, compared to the original approved SSG glass".[177]

170 The Judge further noted that when DG issued its demand to ZK in its letter of 30 May 2018 for moneys for the 13 pieces of balance glass, it also did not give indication that it intended to treat SSG-2 Glass as a VO.[178] Moreover, cl 2 of the Subcontract states that the "Subcontract Sum [of $558,000] shall be inclusive of all ancillary and other works and expenditure of every nature, whether separately or specifically mentioned or described in or to be inferred from the Sub-Contract Documents or not, which are indispensably necessary to carry out and bring to completion the Subcontract Works described in the Subcontract Documents".[179] Mr Rajeesh also admitted that this work was outstanding (Judgment at [185]).[180]

171 The Judge therefore allowed ZK's claims for items 5(a) and 5(b).

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177 JROA Vol III Part H at p 224.

178 JROA Vol V Part L at p 148.

179 JCB Vol II Part D at pp 186 and 187.

180 JROA Vol III Part S at p 85.

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(2) Item 5(c) and the findings below

172 Item 5(c) is ZK's claim for $22,916.70 (inclusive of 7% GST and 15% administrative charge) pursuant to an invoice dated 1 June 2018 for "70% deposit for 3pcs mock up panel".[181]

173 In the proceedings below, DG noted in its closing submissions that it was willing to pay the amount of $18,065.17 before 7% GST, and that this amount was mentioned in DG's letter dated 30 May 2018 to ZK. As ZK had failed to pay DG its dues since April 2018, DG had no choice but to let ZK pay first. DG therefore claimed that ZK was not entitled to the 15% administrative charge. We note that there is a discrepancy of $10 between the amount stated by the Judge below, *viz*, $18,075.17 (Judgment at [187]) and that stated in DG's closing submissions, but we consider this *de minimis* discrepancy to be irrelevant.[182]

174 The Judge noted that the evidence was that DG was obliged to provide 16 pieces of glass. From the evidence, three of such pieces would be delivered first, and serve as a mock-up. There were separate claims by ZK for the remaining 13 pieces of glass. Hence, the total number of pieces of glass claimed for by ZK was for 16 pieces (characterised by ZK as three pieces of mock-up glass and 13 pieces of balance glass), which DG did not dispute it was obliged to provide under the Subcontract. The three pieces of glass fell under DG's obligation. DG's position was that it was willing to pay for this claim, but not the 15% administrative charge as ZK only secured this material on DG's behalf because ZK did not pay DG its dues. The Judge noted that he had also previously

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181 JROA Vol III Part C at p 91.

182 JROA Vol III Part V at p 88 at para 96(k).

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found no basis to DG's submission that there was a persistent course of delay in payment from ZK (Judgment at [188]).

175 The Judge therefore allowed this claim, including the 15% administrative charge.

(3) DG's appeal in CA 125

176 On appeal, DG now claims that the Judge had erred in allowing ZK's claims for items 5(a)–(c). DG does not dispute that the cabin glass panels were not provided by it. However, DG submits that ZK is not entitled to claim for the entire cost of the SSG-2 Glass as these works are variations to the original glass panels that DG was to provide under the Subcontract.

177 DG makes the following contentions in support:[183]

(a) The change in specifications for the cabin glass from the Original Specifications (2040 × 2700mm and 39.52mm thick) to SSG-1 Glass (1058 × 2735mm and 39.52mm thick), and ultimately to SSG-2 Glass (2116 × 2735mm and 43.04mm thick) was a variation to the Subcontract requirements for which DG would have been entitled to additional payments if it had supplied the SSG-2 Glass.

(b) Also, DG was required under the Subcontract to deliver the cabin glass panels by sea freight instead of airfreight.

(c) By awarding ZK the full sum of its claims for the 16 SSG-2 Glass panels without accounting for the above point, ZK was placed in a better

[183] AC in CA 125 at paras 52, 87 to 95.

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position than if DG had performed its original obligations under the Subcontract and ZK was therefore essentially awarded a windfall.

(d) Hence, ZK should not be entitled to claim: (i) the additional cost of the 16 pieces of SSG-2 Glass that is in excess of the cost of 16 pieces of cabin glass panels based on the Original Specifications under the Subcontract; and (ii) additional airfreight charges in excess of the costs of bringing in the original cabin glass panels.

DG therefore submits that ZK is only entitled to claim the sum of $85,804.84 for items 5(a)–(c), instead of the $182,817.08 awarded by the Judge.

178 We are of the view that DG's submission that ZK's claim would put it in a better position than if the Subcontract had been performed is without merit.

179 The requirement of procuring and installing SSG-2 Glass rather than the glass panels with the Original Specifications does indeed constitute a variation to the terms of the Subcontract. DG accepted this variation prior to its abandonment of its works. This is evidenced by DG having already ordered three SSG-2 Glass panels for the mock-up, as seen in an email from DG on 19 April 2018:[184]

> …
>
> As all parties were all aware, the sample SSG glass with new specifications was only approved on 30th January 2018. Order was given for 3 panels of the exact type of glass approved, by [DG] on 2nd February 2018. …
>
> …

[184] JROA Vol V Part L at p 104.

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We highlight that the terms of the Subcontract have been changed, such that ZK's position if the Subcontract had been performed should be determined with respect to the *procurement and installation of the SSG-2 Glass*, not the glass panels with the Original Specifications.

180 DG then submits that it would have been entitled to claim the costs pertaining to the SSG-2 Glass as variation works. Crucially, however, DG did not provide any reason to dispute the Judge's reasoning that DG's argument that DG would have raised a VO in relation to the SSG-2 Glass was a new one that was: (a) not pleaded; (b) not attested to by any of DG's witnesses in their AEICs or at trial; and (c) inconsistent with the documentary evidence (see [169] above). There is therefore no evidence to show that DG would have claimed the works in respect of the SSG-2 Glass as variation works.

181 Hence, DG cannot claim for the difference in costs between SSG-2 Glass and the glass panels with the Original Specifications, in order to reduce the costs of rectification works claimed by ZK for the same.

182 In respect of the airfreight costs, DG claims that delivery of the cabin glass panels by sea freight is part of its Subcontract obligations, but oddly only refers to a Purchase Order dated 7 February 2018 in support.[185] This is but one instance by which delivery by sea freight was used and the Subcontract does not stipulate that delivery by sea freight must be used. There is therefore no evidence to support DG's claim here.

183 Moreover, cll 2 and 9.2 of the Subcontract provide as follows:[186]

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185 AC in CA 125 at para 94; JCB Vol II Part A at p 241.

186 JROA Vol V Part A at pp 62, 63 and 66.

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> **2. Provisional Subcontract Sum**
>
> …
>
> The Subcontract Sum shall be inclusive of all ancillary and other works and expenditure of every nature, whether separately or specifically mentioned or described in or to be inferred from the Sub-contract Documents or not, which are either *indispensably necessary* to carry out and bring to completion the Subcontract Works described in the Sub-Contract Documents, or which may contingently become necessary to overcome difficulties before completion.
>
> …
>
> **9. Management/ Site Supervision**
>
> …
>
> 9.2 [DG] shall carry out the Subcontract Works with *diligently and due expedition*. If the rate of the progress of the Subcontract Works is at any time, too slow to achieve completion by the specified date for completion of the Subcontract Works, [DG] [is] obliged to *take such steps as are necessary to expedite progress* and to complete the Subcontract Works in accordance with the Sub-Contract. [DG] shall not be entitled to any additional payment whatsoever for taking any of the steps referred to herein.
>
> [emphasis in original in bold; emphasis added in italics]

184 In the same email from DG on 19 April 2018 referred to above (at [179]), DG acknowledges that the *only way* for the works for the cabin glass panels to be finished by end-June 2018 was for the SSG-2 Glass to be delivered by airfreight:[187]

> …
>
> If ZK and those above, insist on finishing the cabin glass by end June 2018, SSG told us this could be possible if the glass is air-freighted in at a cost of SGD$48,380.00 which is an added cost we will not and cannot bear. Further we have not been paid on our Payment Claims and we need your written confirmation that ZK will make immediate payment to us, so we have the funds to place the order with SSG on an airfreight basis. …

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187 JROA Vol V Part L at p 104.

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…

185 The above evidence shows that delivery by more expeditious means, *viz*, by airfreight, was necessary to complete the works on time. DG would have been obliged to incur these costs on its own under cl 9.2 of the Subcontract in any case. The above evidence also shows that delivery by airfreight is arguably "indispensably necessary" within the meaning of cl 2 of the Subcontract, for which DG would not have been entitled to additional compensation from the Subcontract Sum. Hence, ZK would not be put in a better position than it would have been if the Subcontract had been performed.

186 We therefore uphold the Judge's decision to award items 5(a)–(c) to ZK.

ZK's claim to set aside the Adjudicated Amount

187 In the proceedings below, ZK sought, in its closing submissions, to set aside the entirety of the Adjudicated Amount on the basis that the adjudicator erred in allowing VO claims which were not agreed to by the Principal or its representative (which are, pursuant to cl 1 of the Subcontract, CAAS and SJ respectively), when the Subcontract requires such agreement, and that the payment for the main works (excluding the variation works) was reasonably withheld by ZK (Judgment at [221]).[188]

188 DG submitted that ZK had not adduced evidence to show how the AD was erroneous. ZK did not make reference to its Adjudication Response and show how the AD was erroneous in how the Adjudication Response and Adjudication Application were considered. Consequently, ZK has not shown

[188] JROA Vol III Part U at pp 139 and 140 at paras 427 and 428.

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that the AD was wrongly determined on a balance of probabilities (Judgment at [222]).

189 The Judge noted that the SOC at para 20 states that "the Plaintiff pleads to and fully disputes the Adjudicated Amount of S$197,522.83."[189] The Judge then noted that there was a lack of reference to the AD at paras 127 to 141 of Ms Chai's AEIC. The Judge also noted that the section of her AEIC entitled "The Adjudication Determination was Wrongly Made in Respect of the Disputed Payment Claims Allowed by the Adjudicator"[190] makes no mention of ZK's positions regarding the main works awarded under the AD (Judgment at [223]).

190 In any event, the Judge considered that the points made at paras 127 to 141 of Ms Chai's AEIC did not address the adjudicator's reasons for his decisions in the AD (Judgment at [224]).

191 The Judge also considered the following points (Judgment at [225]):

(a) None of ZK's witnesses testified, in their AEICs or on the stand, on why the main works awarded under the AD should be overturned.

(b) ZK's Closing Submissions on the various payment claims did not assist its case, because:

(i) Its Closing Submissions relate to its submission that it did not under-certify the payment claims and that hence there was no basis for DG's submission that there was a persistent course of payment delay.

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189 JROA Vol II at pp 28 and 29 at para 20.

190 JROA Vol III Part A at p 55.

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(ii) ZK did not relate the submissions on the payment claims to the parts of the AD which it was contesting, and the submissions certainly contained no specific response to the adjudicator's reasons for his award in the AD.

(iii) Moreover, where portions of ZK's Closing Submissions did touch on areas dealt with under the AD, the explanations came through counsel rather than ZK's witnesses. As ZK was the party seeking to set aside the AD, the burden was on ZK to provide such evidence through the witnesses. This was not done and so DG did not have a chance to contest this during the trial.

192 The Judge therefore dismissed ZK's claim for overturning the main works allowed by the adjudicator in the AD (Judgment at [226]).

193 On appeal, ZK accepts that Ms Chai's AEIC did not refer to the paragraphs of the AD noted by the Judge.[191] However, ZK submits that Ms Chai's AEIC contains evidence that "had addressed and refuted the adjudicator's reasons for his wrong decisions made in the AD" and the Judge therefore had misdirected himself as to the evidence, specifically with regard to the evidence pertaining to paras 127 and 128 of Ms Chai's AEIC.[192] ZK further submits that Ms Chai did not admit on the stand that Mr Joseph Lugtu ("Mr Lugtu") from SCB had the authority to approve the quantity of works claimed by DG and submits in this regard that he did not have such authority.[193]

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191 AC in CA 129 at para 89.

192 AC in CA 129 at paras 91 and 92.

193 AC in CA 129 at paras 93 to 120.

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194 DG disputes ZK's submissions above.[194] DG contends that ZK's claim to overturn the adjudicator's determination regarding the main works in the AD amounts to a double claim and must be dismissed.[195] DG further contends that even if the main works awarded under the AD are overturned, those sums must in any event be accounted for and set off against DG's claims for replacement and/or rectification works.[196]

Ms Chai's AEIC

195 The Judge noted that paras 127 to 141 of Ms Chai's AEIC did not address the adjudicator's reasons for his decisions in the AD (Judgment at [224]).

Equipment Building and Annex Building façade system

196 As regards para 127 of Ms Chai's AEIC,[197] the Judge noted that she stated that ZK only certified 80% of the amount claimed by DG for the R3 Tower Equipment Building external façade system without insulation as there were defects which were not rectified. This appears to relate to Item B2 of the AD.[198] At paras 93–94 of the AD,[199] the adjudicator found that ZK had not produced any evidence of the costs of rectification of such defects nor satisfactorily explained why ZK certified only 80%, which appears to be an arbitrary estimate. Nothing in para 127 of Ms Chai's AEIC addresses these points of the adjudicator. There is only a bare assertion that there were

194 RC in CA 129 at paras 108 to 123.

195 RC in CA 129 at paras 124 to 127.

196 RC in CA 129 at paras 128 and 129.

197 JROA Vol III Part A at p 48.

198 JROA Vol V Part G at p 180.

199 JROA Vol V Part G at pp 165 and 166.

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"[d]efects, including alignment issues, [that] were found and were not rectified by the [d]efendant [*ie*, DG]"[200] (Judgment at [224(a)]).

197 Paragraph 127 of Ms Chai's AEIC states as follows:[201]

> **Claims relating to Subcontract Works on the External Façade System**
>
> 127. For the works relating to R3 Tower Equipment Building external façade system without insulation, [DG] did not complete 100% as claimed. Defects, including alignment issues, were found and were not rectified by [DG]. In this regard, [ZK] certified only 80% of the claimed amount.

198 ZK submits that it had adduced evidence in this regard and refers to: (a) Payment Certificate No 16[202] and (b) the List of Defects dated 11 July 2018, which was contained at pages 443 to 448 of Ms Chai's AEIC.[203]

199 We agree, however, with DG's submission that[204] ZK has not actually explained how these documents support ZK's certification of Item B2, or how the documentary evidence shows that the adjudicator's determination was wrong. Moreover, ZK has not even explained in its Appellant's Case, with reference to documentary evidence, how it calculated its certification of 80% of work done for this item due to alleged defects, which the adjudicator had considered an "arbitrary estimate".

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200 JROA Vol III Part A at p 48.

201 JROA Vol III Part A at p 48.

202 JROA Vol V Part D at pp 216 and 218.

203 JROA Vol III Part B at pp 159 to 164.

204 RC in CA 129 at para 116.

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200 As regards para 128 of Ms Chai's AEIC,[205] the Judge noted that she stated that ZK disputed DG's claim for Annex Building façade system works with insulation as it had omitted the insulation works. This appeared to relate to Items A1, A4 and A6 of the AD.[206] After examining the parties' positions at the adjudication, the adjudicator found at paras 61–62 of the AD[207] that the rockwool insulation had been installed, but ZK apparently rejected it due to poor workmanship, while DG disputed that and alleged that any damage to the insulation was due to ZK's delay in approving the sealant to be used to protect the rockwool insulation. The adjudicator went on at para 69 of the AD[208] to state that "what is not disputed is that [DG] did carry out the dismantling of the panels with rockwool insulation …". In other words, the adjudicator found that while there was a dispute over the workmanship of the insulation, the insulation itself was not omitted. It was installed and DG did carry out work to remove it. The adjudicator then awarded a combined sum of $139,636.90 for the aluminium cladding work, with and without cladding. Paragraph 128 of Ms Chai's AEIC did not address the adjudicator's reasons for his award (Judgment at [224(b)]).

201 ZK submits that while para 128 of Ms Chai's AEIC did not address the adjudicator's reasons for his award, they were addressed at paras 148 to 151 of Ms Chai's AEIC. We set out the material portions below:[209]

> 128. For the works relating to the Annex Building external facade system with insulation, [DG] omitted the insulation works and therefore it was not entitled to claim for the works, if at all, at the sum of S$66,066.00.

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205 JROA Vol III Part A at p 49.

206 JROA Vol V Part G at p 179.

207 JROA Vol V Part G at pp 158 and 159.

208 JROA Vol V Part G at p 160.

209 JROA Vol III Part A at pp 49, 53 and 54.

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> [ZK] accordingly disputed this sum of S$66,066.00 and deducted it, in the payment response.
>
> …
>
> 148. As for [DG's] claim as additional works the supply of labour for rope access for the mock up cabin glass, [ZK] reject this claim because such supply of labour formed part of the scope of works under the Subcontract, which works [DG] were contractually bound to carry out.
>
> 149. Also, [ZK] rejected [DG's] claim for the dismantling of aluminium panels with rockwool, reinstallation and alignment of the aluminium panels. As set out in the payment response, [ZK] did not consider this as a valid claim. This was because when [DG] first installed the rockwool, they did not ensure that the installed rockwool would not be exposed to rain either by installing the aluminium panels right after the rockwool had been installed or by covering up the rockwool to protect from rain after they had been installed.
>
> 150. As a result of [DG's] shoddy ways of carrying out the aluminium panel installations and the rockwool installations, rockwool formerly installed were exposed and water ingress subsequently ruined the installed rockwool, which then had to be removed in order for new rockwool to be re-installed.
>
> 151. [DG's] claim for the dismantling of aluminium panels with rockwool, reinstallation and alignment of the aluminium panels therefore constituted re-works relating to the aluminium penal [*sic*] installation works that form part of the scope of their works. Such re-works cannot be re-characterised by [DG] as additional works or variation works entitling [DG] to extra payments. In fact, I would say that such re-works were remedial works that [DG] had to carry out in order to make up for their mistake in their poor workmanship in the way they went about installing the rockwool and the aluminium panels.
>
> [emphasis in original]

202 ZK submits that paras 148 to 151 of Ms Chai's AEIC specifically touched on the issue of the workmanship of the insulation and the necessity for removal of the rockwool and re-installation of the aluminium panels with proper alignment. According to ZK, these points addressed the AD and highlighted that

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the adjudicator erroneously viewed this as additional works as opposed to re-works or remedial works that DG had to carry out to make good its poor workmanship in its original installation of the rockwool thereby necessitating dismantling of the aluminium panels to remove the soiled rockwool, re-installation and re-alignment of the panels.[210]

203 We agree with DG's submissions that the above does not assist ZK's case. Paragraph 128 of Ms Chai's AEIC states that DG *omitted* the insulation works at the external façade system of the Annex Building. This was the same position taken by ZK in AA 339.[211] Paragraph 60 of the AD states as follows:[212]

> 60. In its [p]ayment [r]esponse, [ZK] had certified "0%" quantity for the cladding works with insulation (being for *items A1, A4 and A6*) for the stated reason *"insulation omitted"* in the [p]ayment [r]esponse. For the cladding works without insulation (items A2, A3, A5 and A7), [ZK] had certified the seemingly "increased" quantity of 761.88m2 or $103,515.68.
>
> [emphasis added]

Evidently, ZK had relied on DG's omission of the insulation in AA 339. It therefore also follows that what was stated at paras 148 to 151 of Ms Chai's AEIC was *not* ZK's case in AA 339 and is therefore irrelevant to show that the adjudicator had erred in coming to his decision on Items A1, A4 and A6 in the AD.

204 Hence, the Judge's findings as regards the points made at paras 129 to 137 of Ms Chai's AEIC in respect of the insulation work were not plainly wrong or against the weight of the evidence.

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210 AC in CA 129 at para 92.

211 RC in CA 129 at para 117.

212 JROA Vol V Part G at p 158.

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Aluminium cladding works

205 The Judge noted that as regards the dispute over another issue, *ie*, the site measurements for the aluminium cladding works, ZK's position on this issue at paras 129 to 137 of Ms Chai's AEIC was as follows (Judgment at [224(c)]):

> (a) The Subcontract was not a measurement contract and the quantity claimable was not based on actual measurement of quantity. Under cl 2 of the Subcontract, the Subcontract Sum was not subject to adjustment except for variations agreed to by the Principal and/or its representative.
>
> (b) ZK denied that there was an agreement set out in a handwritten note in the Site Measurement Document, which stated that "[a]s per agreed before signing of contract, DGE can claim any excess of quantity from the original contract quantity".
>
> (c) Mr Lugtu from SCB did not have the capacity to approve the quantity of works carried out by DG.

206 In the AD at [65],[213] the adjudicator found that the Site Measurement Document signed by Mr Lugtu and a representative of DG constituted "prima facie evidence that the claimed quantity of 810.92m^2 had been carried out and … approved by a third party". The adjudicator noted that there was a contrary response quantity of 761.88m^2 which was said to be based "on plan" only, but the adjudicator found that there was no evidence before him that the response quantity of 761.88m^2 had been agreed to between the parties.

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213 JROA Vol V Part G at p 159.

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207 The Judge noted that Ms Chai's AEIC did not deal with the adjudicator's reasons for his decision. In fact, there was nothing in Ms Chai's AEIC about the lack of evidence for the "response quantity of 761.88m^2" or why the handwritten note should be ignored.

208 The Judge also noted that:[214]

(a) ZK's case that Mr Lugtu did not have authority to approve the quantity of works carried out by DG was severely undermined by Ms Chai's admission that Mr Lugtu was "the archi [*sic*] coordinator of the main contractor, so I believe that he would be able to sign the documents".

(b) Ms Chai testified that she saw Mr Lugtu also sign the final measurements and that "because he is the main contractor's coordinator, so he can sign any document."

209 As regards Ms Chai's admission at [208(a)] above, ZK submits that the Judge had referred to Ms Chai's testimony out of context. ZK submits that Ms Chai had responded the way that she did because she was asked whether she had asked Mr Lugtu what the documents meant when she saw the job sheets and work completion forms signed by Mr Lugtu. She then explained that "as he was the archi coordinator of the main contractor (i.e. SCB), she believed that he would be able to sign the documents". Seen in this light, ZK contends that there was no admission by Ms Chai that Mr Lugtu was able to sign the documents on behalf of ZK.[215]

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214 JROA Vol III Part P at pp 27 and 28.

215 AC in CA 129 at paras 95 and 96.

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210 As regards Ms Chai's testimony at [208(b)] above,[216] ZK submits that the Judge had also taken this out of context. ZK submits that Ms Chai gave this testimony when she was further asked about her earlier testimony that she did not ask Mr Lugtu what it meant when he signed the documents. Specifically, she was asked whether it was correct that she did not check with anybody else as to the meaning of the documents signed by Mr Lugtu. She agreed with the statement and explained that the reason she did not check with others as to the meaning of the documents signed by Mr Lugtu was because "Mr Lugtu was the main contractor's (i.e. SCB's coordinator), so in her opinion he can sign any document". Seen in this light, ZK contends that there was no admission by Ms Chai that Mr Lugtu was able to sign the documents on behalf of ZK.[217]

211 We think that the above submissions are plainly without merit. It was clear from Ms Chai's cross-examination[218] that: (a) she saw Mr Lugtu sign the job sheets and work completion forms for the work done by DG; (b) she knew that because he was the main contractor's coordinator, he could sign the documents; and (c) she said that she was the only one who reviewed such documents. The significance of Mr Lugtu's signature on the documents must therefore have been known to her despite her disavowal of the same on the stand. Hence, Ms Chia should be taken to have admitted that Mr Lugtu could sign documents approving the quantity of works carried out by DG. Nevertheless, even if Ms Chia's testimony could not have been taken as an express admission in this regard, the Judge was certainly entitled to draw an inference that she had such a belief at that time.

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216 JROA Vol III Part P at pp 27 and 28.

217 AC in CA 129 at paras 98 and 99.

218 JROA Vol III Part P at pp 27 and 28.

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212 ZK then submits that the adjudicator had glossed over the issue of authority relating to Mr Lugtu at para 65 of the AD.[219] In this regard, ZK submits that the adjudicator had erroneously presumed that Mr Lugtu was "the Project architect". This was wrong because SJ was the Project consultant and Mr Lugtu was the "archi coordinator for SCB, the main contractor".[220]

213 We set out the AD at para 65 for ease of reference:[221]

> 65. I accept that the Site Measurement Memo constitutes *prima facie* evidence that the claimed quantity of 810.29 m2 had been carried out and had been *checked and approved by a third party, being the Project architect.* It also deals with the contrary response quantity of 761.88 m2, which is stated in the Site Measurements Memo to be based "on plan" only and not based on actual site measurements. There is also no evidence before me that the response quantity of 761.88 m2 had been agreed between parties as being the amount of works carried out by [DG] for this item.
>
> [emphasis added]

214 We think that while the term used by the adjudicator was inaccurate, it is unclear that he had failed to consider the issue of authority at all. It could have simply been an innocent mistake in referring to Mr Lugtu. After all, it is implied at para 65 of the AD as well that the adjudicator had reviewed the documents and would know that Mr Lugtu had signed them. Hence, the above instance, without additional evidence (such as those suggesting that the adjudicator was unaware of or mistaken as to Mr Lugtu's role), cannot be taken to support ZK's argument. In addition, the Judge rightly noted that ZK would have to overcome another crucial hurdle, *viz*, that Ms Chai's AEIC did not deal with this aspect of the adjudicator's decision (Judgment at [224(c)]). In any case, as we stated

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219 JROA Vol V Part G at p 159.

220 AC in CA 129 at paras 105 to 107.

221 JROA Vol V Part G at p 159.

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above, the Judge was entitled to infer from Ms Chai's testimony on the stand that she believed Mr Lugtu had the authority to sign the documents, despite her disavowal of the same.

215 ZK then submits that in any case:[222]

(a) The job sheet and work completion forms signed by Mr Lugtu cannot sufficiently prove that ZK had appointed or allowed Mr Lugtu as ZK's agent to act in a certain manner in relation to certification or approval of quantity of works, which certification or approval Mr Lugtu was authorised to conduct for ZK.

(b) Mr Lugtu, as the coordinator of the main contractor (*ie*, SCB), was not placed in any position that usually carries certain authority to approve or certify the quantity of works.

(c) It cannot be argued that Mr Lugtu had implied authority to do the above by reference to business practice or usages of trade in construction.

(d) Ms Chai had denied in her AEIC at para 136[223] that there was any agreement between ZK and DG before the signing of the contract that DG could claim any quantity in excess of the contract quantity originally agreed in the Subcontract. The adjudicator was wrong in finding that the main works were additional works for which DG "ought to be paid", when these works were in fact remedial works or re-works that DG had to carry out with no entitlement to additional payment.

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222 AC in CA 129 at paras 111 to 120.

223 JCB Vol III Part A p 50.

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216 The first three submissions above (at [215(a)]–[215(c)]) are plainly without merit given that Ms Chai's testimony, as referenced at [211] above, is adverse to ZK's case, whether it is treated as an express admission or otherwise.

217 As for the last submission above (at [215(d)]), the Judge had already found that there is nothing in Ms Chai's AEIC about why the handwritten note should be ignored (Judgment at [224(c)]). ZK does not provide any reason to dispute the Judge's findings in this regard. In any case, we note that the Site Management Document (on which the handwritten note was written) was signed by one Manish Tekwani (as "Project Site Coordinator") and Mr Lugtu (as "Archi Coordinator") and the note first states "actual measurement done by Joseph Lugtu & Mr Manish". DG's company stamp is also found next to the note. Hence, it could be reasonably inferred that the two signatories and DG had endorsed the handwritten note. There is therefore no reason to ignore the handwritten note.

218 Hence, the Judge's findings as regards the points made at paras 129 to 137 of Ms Chai's AEIC in respect of the aluminium cladding works were not plainly wrong or against the weight of the evidence.

Metal claddings, doors and windows

219 At paras 138 to 141 of Ms Chai's AEIC, she cites two examples to support ZK's certifying that there were no sums payable to DG for the works relating to the metal claddings, doors and windows. The Judge reasoned that those two examples alone do not suffice to explain why ZK certified no sum payable at all for the works relating to metal claddings, doors and windows. In any event, the two examples also did not assist ZK for the following reasons:

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(a) The first example was the door (GD1) for R3 Tower Equipment Building, which ZK certified 50% out of 100% claimed because the door had defects. The adjudicator awarded 70% of the claim for this, as he did not find it fair to withhold 50% after noting the nature of the defect (AD at paras 125–126). Ms Chai's AEIC did not address why the 70% awarded by the adjudicator was wrong.

(b) The second example was the certifying of 12% out of 100% claimed for the glass panels as only two out of 16 panels had been installed. However, this example was not helpful to ZK's case as the adjudicator had precisely decided that DG was entitled to claim for two panels at para 108 of the AD (Judgment at [224(d)]).

220 ZK does not appear to dispute the Judge's reasoning on appeal. In any case, we see no reason to disturb the Judge's findings as regards the points made at paras 138 to 141 of Ms Chai's AEIC in respect of the works relating to the metal claddings, doors and windows.

Conclusion

221 For the above reasons, ZK has not shown that the Judge's findings are plainly wrong or against the weight of the evidence. It is therefore unnecessary to consider DG's other submissions regarding double recovery and setting off. The Judge's decision to dismiss ZK's claim for overturning the main works allowed by the adjudicator in the AD is upheld.

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DG's counterclaim for the VOs

222 In the AD, the adjudicator allowed DG's claims for VO 6, VO 8 and VO 18 but dismissed VO 19.[224] The Judge disagreed and allowed DG's claim for VO 18 but dismissed its claims for VO 6, VO 8 and VO 19.

223 DG is not appealing against the Judge's decision to dismiss its claim for VO 19.[225] ZK is not appealing against the Judge's decision to allow DG's claim for VO 18. Thus, only the Judge's dismissal of DG's claims for VO 6 and VO 8 is disputed before us.

Requirement for agreement to variations

224 We note that cl 2 of the Subcontract provides *inter alia*:[226]

> The Subcontract Sum is a provisional priced contract and the Subcontract Sum is therefore not subject to any changes and/or adjustment of whatsoever nature except for the valid and agreed variations issued by the Principal and/or Principal's representative or unless expressly and specifically provided in the Sub-Contract.

225 The Judge correctly noted that the Principal and the Principal's representative, as defined in cl 1 of the Subcontract, are CAAS and SJ respectively. The Judge held that the adjudicator did not identify whether there had been agreement for the variations from *CAAS or SJ* but simply focused on whether there was agreement by *ZK*. There was no evidence of agreement by CAAS or SJ for the VOs. This therefore affected VO 6 and VO 8 (and we would add VO 18 as well, although that is not before us), which ought to be set aside on this basis (Judgment at [228]–[230]). We pause to note that the Judge did

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224 JCB Vol II Part A at pp 55 para 74, 63 para 114, 64 para 120, 68 para 142.

225 AC in CA 125 at para 117.

226 JCB Vol II Part D at p 187; JROA Vol V Part A at p 63.

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nevertheless allow VO 18 (see [222] above) on the basis of *acquiescence* (Judgment at [241]).

226 DG contends that the requirement that CAAS or SJ agree to the variation had been amended by the parties and was no longer applicable. According to DG, it had been agreed on 19 December 2016 at a meeting between DG and ZK that VOs would be approved by ZK instead of CAAS or SJ. DG relies on an email from DG to ZK on the same day stating that "all VO works shall be supported with a quotation in which to be submitted for *[ZK's] approval* prior to the related VO installation at the physical site itself" [emphasis added].[227] Therefore, DG contends that the Judge erred in concluding that the variations must have been agreed to by CAAS or SJ.[228]

227 Alternatively, DG contends that ZK had waived strict compliance with the said requirement. Since ZK had instructed DG in an email dated 19 April 2017 to "start works after [DG] receive[s] instruction from site and not depending on the signed quotation to avoid any delay … [ZK] hope[s] this will not happened [*sic*] again during the whole construction period from now on" and further threatened to impose liquidated damages for failure on DG,[229] ZK made it clear that DG was to start works immediately after receiving instructions on-site instead of waiting for any signed approval. Thus, even if there was a requirement for variation to be agreed to by CAAS or SJ, this requirement was waived. ZK's instructions constituted a representation by ZK to commence variation works immediately after receiving instructions and without obtaining CAAS or SJ's agreement or waiting for any signed approval. It is wholly unfair

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227 JCB Vol II Part B at p 199.

228 AC in CA 125 at paras 119 and 120.

229 JCB Vol II Part B at p 236.

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and inequitable for ZK to now belatedly insist on such agreement. Thus, ZK has waived and/or is estopped from insisting with strict compliance with the requirement for variations to be agreed by CAAS or SJ or that the variation orders must be endorsed by ZK for the VO claims to be valid.[230]

228 In our view, with respect, the Judge erred in concluding that VO 6 and VO 8 ought to be set aside on the basis that there was no agreement from CAAS or SJ (Judgment at [228]–[230]). We agree with DG that the requirement of agreement by CAAS or SJ in the Subcontract was waived by ZK. This is supported by the correspondence between DG and ZK as well as the parties' conduct throughout the course of the Project.

229 During the course of the Project, DG consistently sought ZK's signature and confirmation for the variation orders.[231] This was consistent with the agreement encapsulated in the 19 December 2016 email from DG to ZK summarising a discussion on that date which included an agreement that "all VO works shall be supported with a quotation in which to be submitted for *[ZK's] approval* prior to the related VO installation at the physical site itself" [emphasis added].[232] This was an amendment to cl 2 of the Subcontract and/or a waiver of cl 2 by ZK.

230 The parties' subsequent email correspondence show that it had always been ZK (through Ms Chai) that responded to DG regarding the approval of variation orders. There had been no reference to any need for agreement from CAAS or SJ. We set out a few examples.

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230 AC in CA 125 at paras 121 to 127.

231 JCB Vol II Part C at pp 132, 140.

232 JCB Vol II Part B at p 199.

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231 First, on 19 April 2017, DG wrote to ZK stating that it had yet to receive the confirmed variation order from ZK as regards the "cable trunking at RSAF" and that "[it was] unable to proceed with the works without the Signed Quotation of [its] variation Order". On the same day, Ms Chai responded on behalf of ZK stating that "[t]he Vo is confirm $5400 with powder coated. Colo[u]r as per required. Kindly proceed with the works with the following schedule …".[233]

232 Secondly, on 5 July 2017, DG wrote to ZK stating that following their meeting at ZK's office on 3 July 2017, it was agreed that:[234]

> …
>
> Mr Cai of [ZK] also agreed to confirm the below VOs immediately before commencement of work.
>
> 1.) VO reference VO/16/01/1001/DV001 – dated (1/03/17) amount ($1,400.00)
>
> 2.) VO reference VO/16/1001/DV003.R1 – dated (28/04/17) amount ($31,420.55)
>
> 3.) VO reference VO/16/1001/DV0004 – dated (07/04/17) amount ($3,125.00)
>
> 4.) VO reference VO/16/1001/DV0005 – dated (08/04/17) amount ($5,400.00)
>
> 5.) VO reference VO/16/1305/DV0006 – dated (17/05/17) amount ($32,602.50)
>
> 6.) VO reference VO/16/1307/DV0007 – dated (22/05/17) amount ($24,952.80)
>
> 7.) VO reference VO/1311/DV008 – dated (16/06/2017) amount (14,185.00) – air freight
>
> Kindly confirmed the above so that we can carry out the work immediately.

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233 JCB Vol II Part C at p 34.

234 JCB Vol II Part C at p 10.

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On the same day, it was Ms Chai who responded by commenting below on each variation order in italics as follows:[235]

> …
>
> Mr Cai of [ZK] also agreed to confirm the below VOs immediately before commencement of work.
>
> 1.) VO reference VO/16/01/1001/DV001 – dated (1/03/17) amount ($1,400.00)
>
> *Additional of 2 nos of alum louvre at Annex Building has been certified during payment claim no 3.*
>
> 2.) VO reference VO/16/1001/DV003.R1 – dated (28/04/17) amount ($31,420.55)
>
> *Item not known.*
>
> 3.) VO reference VO/16/1001/DV0004 – dated (07/04/17) amount ($3,125.00)
>
> *please see above explanation R3/8storey building item no 1.*
>
> 4.) VO reference VO/16/1001/DV0005 – dated (08/04/17) amount ($5,400.00)
>
> *Additional of metal cladding trunking works at RSAF has been certified during payment claim no 3.*
>
> 5.) VO reference VO/16/1305/DV0006 – dated (17/05/17) amount ($32,602.50)
>
> *please see above explanation R3/8storey building item no 1.*
>
> 6.) VO reference VO/16/1307/DV0007 – dated (22/05/17) amount ($24,952.80)
>
> *Additional of skylight rejected by client due to cost is too high, not necessary to carry out.*
>
> 7.) VO reference VO/1311/DV008 – dated (16/06/2017) amount (14,185.00) – air freight - *please see above explanation R3/8storey building item no 1.*

[emphasis added]

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235 JCB Vol II Part C at p 9.

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233 Thirdly, on 25 January 2018, Ms Chai replied to DG's letters dated 16 January 2018 and 24 January 2018 regarding the Project.[236] DG stated that:[237]

> Finally, our Ms.Odette gave a clear summary of the Variation Works carried out the VOs outstanding that we get written confirmation urgently that these claims would be paid and/or Vos accepted or rejected.
>
> To date we have not received any replies except for your rejection of the claim made for the BCA submission. …

In response, Ms Chai stated:[238]

> Up-to date, no outstanding VOs is due to us. During the meeting with Ms Odette and Mr Aye Mint on 6th January 2018, lunch meeting on 10 Jan 2018 we has [*sic*] been highlighted some items is not a VO, it's only served as a quotation especially inspection shelter, etc. and not a confirmed job. Ms Odette agreed she will change to title from "VO" to "Quotation". Hence, no outstanding VOs is due.

234 Fourthly, on 30 June 2018, Ms Chai wrote to DG expressing ZK's dissatisfaction that DG had no manpower deployed on-site from 6 June 2018. She again addressed several variation orders that were in dispute between them.[239]

235 From the above, it is clear from Ms Chai's responses to DG that it was ZK's acceptance or rejection of the various variation orders that would be determinative. At no point did she indicate that it was necessary to obtain agreement from CAAS or SJ. This is consistent with ZK's instruction to DG in an email dated 19 April 2017 to "start works after [DG] receive[s] instruction from site and not depending on the signed quotation to avoid any delay … [ZK]

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236 JCB Vol II Part C at pp 212 to 217.

237 JCB Vol II Part C at p 217.

238 JCB Vol II Part C at p 214.

239 JCB Vol II Part D at pp 129 to 130.

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hope[s] this will not happened [*sic*] again during the whole construction period from now on" and further threatened to impose liquidated damages for failure on DG (at [231] above).[240] In this email, ZK made it clear that DG was to start works immediately after receiving instructions on-site instead of waiting for any signed approval. We agree with DG that this email in the context of parties' conduct shows that ZK waived any requirement for variation to be agreed to by CAAS or SJ.

236 DG proceeded to act on this understanding to incur costs in the variation orders in reliance on ZK's representation on a good faith basis.[241] It would be unfair to allow ZK to refuse to pay for the VOs simply on the basis that CAAS or SJ had not agreed to it. In our judgment, the requirement of agreement by CAAS or SJ in the Subcontract was waived by ZK. We turn now to address DG's claims for VOs 6 and 8.

VO 6

237 In VO 6, DG sought to claim the sum of $32,602.50 for supplying labour to dismantle aluminium panels with rockwool and reinstalling and aligning the aluminium panels under a variation order request for approval dated 17 May 2017.[242] DG says that there was a long delay on the decision of the sealant to be used arising from ZK's need to ask CAAS or SJ to give their approval. When it could not wait any longer, DG reserved its position by way of an email on 1 March 2017 and used a temporary seal.[243] The rockwool was damaged by

240 JCB Vol II Part B at p 236.

241 JCB Vol II Part C at pp 44 to 46.

242 JCB Vol II Part C at pp 35 to 37.

243 JCB Vol II Part B at p 206.

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rainwater and had to be replaced. However, ZK had certified "nil" for VO 6 giving the reason "not valid. Under original contract work scope".[244]

238 The adjudicator allowed DG's claim for VO 6. He agreed with DG that there was "prolonged delay on the part of [ZK] or even the architect" on the sealant approval issue which led to the rockwool insulation being damaged. The adjudicator noted that DG had submitted the sealant type for approval to ZK since 3 January 2017. DG had also written to ZK on 1 March 2017 to state that it still had not received sealant approval from ZK and the water ingress would damage the insulation unless the sealant was applied, DG had applied a temporary seal in the meantime but would not be held liable for any damage to the insulation and DG would claim the costs of any work for removing the damaged insultation as a variation work.[245] It was only on 24 March 2017 that the architect confirmed for the sealant to be applied on the top coping panel.[246] It was not disputed that DG carried out the dismantling of aluminium panels with rockwool insulation at elevations 1, 3 and 4.[247] The adjudicator was satisfied that these works "constituted variation works as [they] clearly fell outside the scope of the original [Subcontract] works". There was no evidence that ZK had at any point objected to the rate given in DG's variation order request dated 17 May 2017 or came to any separate agreement. Thus, the adjudicator found the sum of $32,602.50 reasonable and allowed the claim.[248]

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244 JCB Vol II Part A at p 54 para 67.

245 JCB Vol II Part B at p 206.

246 JCB Vol II Part A at p 54 para 68.

247 JCB Vol II Part A at p 54 para 69.

248 JCB Vol II Part A at p 55 paras 73 to 74.

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239 The Judge disallowed DG's claim in VO 6. He noted that approval for the sealant came from CAAS or SJ. ZK's role was to seek the approval on behalf of DG and convey the approval. There was no evidence that ZK delayed when executing its role. As the installer, the onus was on DG to provide the necessary temporary protection for the rockwool. The sealant was approved on 24 March 2017. DG had not provided evidence that the time taken to approve the sealant was inordinate for such works. They had not, for example, shown that the temporary seal applied was not expected to last for the relevant duration, where it was properly applied (Judgment at [235]).

240 DG contends that it is entitled to claim for VO 6 because the removal of the rockwool arose from CAAS' changes to the original design intent and approved drawings to have rockwool insulation installed behind aluminium cladding and DG's works constitute variation works. It was ZK's instructions to install the rockwork insulation in the first place. As CAAS eventually did not want sealant applied to the aluminium cladding joints, it did not matter whether the rockwool installation had been damaged by water ingress. Thus, DG submits that the Judge erred in dismissing DG's claim for VO 6.[249]

241 In response, ZK contends that DG is not entitled to claim for VO 6 because DG failed to ensure that the rockwool installed would not be exposed or subjected to damage including water ingress that would damage it. Item 16.8 of Annex B of the Subcontract required that DG make good at its own costs for all defects found in the Subcontract works. The unprotected rockwool installation damaged by water ingress and/or adverse weather constituted defects in terms of the defective manner in which the installations of the rockwool were carried out and therefore DG is not entitled to claim the costs of

[249] AC in CA 125 at paras 128 to 132.

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rectifying the defect as variation works. The alleged delay in approval of sealant which had to be given by CAAS is not relevant.[250]

242 In our view, with respect, the Judge erred in disallowing DG's claim for VO 6. Respectfully, we think that the Judge's reasoning in disallowing DG's claim for VO 6 is unclear. Contrary to his finding that it was necessary to consider whether CAAS or SJ had agreed to the variation, he did not consider that question in determining whether to allow each of the VOs. The Judge seems to have incorrectly focused on the fact that ZK was not at fault with regard to the sealant approval and that DG had not shown that the time taken for the approval of the sealant was inordinate. These do not appear relevant to us, and the central inquiry should be whether VO 6 is a valid variation done with ZK's agreement.

243 The two-stage process of establishing a variation claim is stated at para 5.008 of *Law and Practice of Construction Contracts* as follows:

> The establishment of a variation claim may be conveniently described as a two stage process. *First, a claimant has to show that a valid instruction has been issued for the variation.* The instruction has to be issued by a person who has been specifically authorised by the contract for this purpose and the instruction issued on terms which carry an express or implied promise that the claimant would be paid for the work. *Second, it has to be established that the work ordered falls within the definition of "variation" as intended by the contract.* In most cases, this means that the claimant has to demonstrate that the item of work is either additional to the scope of work to which the original contract sum relates or, alternatively, it is work which is of a different character or has to be executed under different conditions from that originally envisaged.
>
> [emphasis added]

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250 RC in CA 125 at paras 153 to 154; JROA Vol III Part U at pp 140 to 141 paras 431 to 435.

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244 It is undisputed that CAAS instructed DG to dismantle the aluminium panels and remove the rockwool installation and reinstall and align the aluminium panels without the rockwool insulation subsequently. This is consistent with DG's record in an email to ZK on 15 March 2017 where it is recorded that "CAAS is adamant in not having sealant for the metal cladding joints" and "CAAS may required [*sic*] the relocation of the insulation to the internal room of the building, the insulation is currently installed in accordance to the approved drawings, sandwiched between the building external wall and the back of the metal cladding".[251] Subsequently, work was done by DG to dismantle the aluminium panels and remove the rockwool installation and reinstall and align the aluminium panels without the rockwool insulation and this was recorded in the work completion forms.[252]

245 We agree with the adjudicator that this "clearly fell outside the scope of the original [Subcontract] works".[253] This was not a case where original works were not done. Instead, work was done by DG and the late approval of the sealant led to rockwool damage which subsequently necessitated the removal and replacement of it. Additionally, DG is correct in pointing out that the removal of the rockwool arose from CAAS' changes to the original design intent and approved drawings to have rockwool insulation installed behind aluminium cladding and this constitutes variation works. ZK's case that DG cannot claim for VO 6 because VO 6 relates to merely the costs of rectifying a defect DG had caused from failure to protect the rockwool insulation adequately[254] is defective because DG was never asked to replace or reinstall the

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251 JCB Vol II Part B at p 207.

252 JCB Vol II Part B at pp 186 to 189.

253 JCB Vol II Part A at p 55 para 73.

254 JCB Vol II Part D at p 129.

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rockwool insulation.[255] Thus, DG should be entitled to its claim of $32,602.50 under VO 6.

VO 8

246 In VO 8, DG sought to claim for the sum of $13,185.00 being airfreight charges. VO 8 was initially issued for the airfreight cost of the six-panel mock-up SSG glass. However, this was later changed to an order for three Saint-Gobain glass panels and no new variation order was issued.[256] ZK's reason for denying this claim is that the "work has not happened".[257]

247 The adjudicator allowed DG's claim. Relying on the emails between the parties dated 5 July 2017 and 6 July 2017 which DG relied on to show ZK's express promise to pay for the airfreight charges, the adjudicator was satisfied that ZK had agreed to pay for the costs of airfreight for the six panels of mock up cabin glass and this constituted an agreed variation. It was also likely that for whatever reason, the mock up glass was not accepted, and this was probably why ZK had certified that the work had not happened in its payment response. Thus, the adjudicator held that DG was entitled to the sum of $13,185.00.[258]

248 The Judge disallowed DG's claim in VO 8. He found that ZK's agreement to pay for the airfreight charges was clearly conditional on the Annex Building metal cladding works (including removal of the rockwool) being completely done and handed over to SCB and ZK. It was undenied by DG that

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255 AC in CA 125 at para 130.

256 JCB Vol II Part A at pp 21 and 26.

257 JCB Vol II Part A at p 63 para 111; JCB Vol II Part D at p 129.

258 JCB Vol II Part A at p 63 paras 110 to 114.

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these conditions were not met. Thus, DG was not entitled to its claim (Judgment at [238]).

249 DG contends that it is entitled to claim for VO 8 because the Subcontract does not provide for the cabin glass panels to be transported by airfreight. DG claims that it was accepted by the parties that the Subcontract only required transportation by sea freight as evidenced by ZK's Purchase Order dated 7 February 2018 in which ZK placed its order for the SSG-2 Glass panels to be delivered by sea freight. Further, ZK agreed that it would bear the additional airfreight charges at a meeting on 3 July 2017. DG argues that this agreement was recorded in an email by DG to ZK on the same day and this was also acknowledged by SCB in an email to SCB to ZK dated 4 July 2017. It was only in the email dated 5 July 2017 when ZK (through Ms Chai) belatedly sought to unilaterally vary ZK's agreement to pay the airfreight charges by adding a condition that DG was required to complete the Annex Building metal cladding works (including the removal of rockwool insulation) by 15 July 2017. DG replied in an email dated 6 July 2017 that it did not agree to the condition. Further, the Annex Building in Phase 2A was entirely unrelated to the delivery of the cabin glass panels at the eight-storey Equipment Building in Phase 1. Thus, the Judge erred in accepting that the requirement of completing the Annex Building metal cladding works was a condition precedent to ZK's agreement to pay the airfreight charges.[259]

250 ZK contends that DG is not entitled to claim for VO 8 because DG failed to satisfy the condition that DG had to complete the metal cladding works including rockwool removal for the Annex Building for handover to SCB and ZK. Alternatively, ZK also argues that the airfreight costs were indispensably

[259] AC in CA 125 at paras 133 to 141.

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necessary to bring to completion the installation of the mock-up glass since airfreight was necessary to reduce transportation time to expedite progress. The payment of airfreight costs should be borne by DG under its obligation in cl 9.2 of the Subcontract to carry out the works diligently and with due expedition.[260]

251 In our view, with respect, the Judge erred in disallowing DG's claim for VO 8 and finding that ZK's agreement to pay for the airfreight charges was "clearly conditional on the Annex Building metal cladding works (including the removal of the rockwool) being completely done and handed over to SCB and [ZK]" (Judgment at [238]). The Judge seemed to accept that there was such a condition based on Ms Chai's email on 5 July 2017 where she states:[261]

> … The 6pcs of glasses required for VMU, as agreed by Mr Cai of [ZK], [ZK] will bear the Air Freight charges of (SGD$13,185.00).
>
> This has been discussed with Mr Cai and agreed with Mr See Toh and witness by Mr Chong, *the freight charges will be paid as a compensation* ***with conditions*** that Annex Building metal cladding works (included removal of rockwool) is completely done and handing over to SCB/[ZK] with witness by RE/RTO/CAAS on site included the elevation of which obstructed by temporary hoarding on 15th Jul 2017.
>
> [emphasis added in italics and bold italics]

252 However, this is contradicted by DG's initial email on 3 July 2017 which simply records that Mr Cai Jianzhong, a director of ZK, agreed that ZK "will bear the Air Freight charges of (SGD$13,185.00)"[262] and DG's subsequent email response on 6 July 2017 to Ms Chai's email in the preceding paragraph.[263] DG replied directly to Mr Cai stating that since Ms Chai was not present at the

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260 RC in CA 125 at paras 153 to 154; JROA Vol III Part U at p 142 paras 436 to 438.

261 JCB Vol II Part C at p 47.

262 JCB Vol II Part C at p 49.

263 JCB Vol II Part C at p 44.

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meeting on 3 July 2017, she would not know the full contents of their discussion. DG reiterated that VO 8 had to be "accepted and paid for in full **without conditions** immediately, as this is a cost you have already agreed to bear" [emphasis in original]. The Judge did not explain why he believed Ms Chai's version of events over DG's version of events even though she was not present at the meeting.

253 On the balance of probabilities, we think that DG's case that ZK agreed to pay the airfreight charges without conditions is more probable for the following reasons. First, the email that is most contemporaneous with the 3 July 2017 meeting is DG's first email on the same date. If there was such a condition stipulated, it is unlikely that DG would have omitted to record that. Secondly, when Mr Lugtu received DG's first email and forwarded it to Ms Chai for action on 4 July 2017,[264] he did so without comment. This suggests that he did not notice that DG's first email was inaccurate in that it did not record the condition that ZK's agreement to pay the airfreight charges applied only if the Annex Building metal cladding works (including the removal of the rockwool) was completely done and handed over to SCB and ZK. Thirdly, DG's email correcting Ms Chai's version of events is the last email on the record. There is no further response from Mr Cai or Ms Chai to reiterate the presence of such a condition. Parties seem to have moved on to discuss obtaining glass from a different manufacturer.[265] Thus, we agree with DG that this alleged condition is an afterthought by Ms Chai which cannot be unilaterally imposed on DG. In light of ZK's agreement to pay for the airfreight charges, DG is entitled to the claim of $13,185.00 under VO 8.

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264 JCB Vol II Part B at p 273.

265 JROA Vol III Part K at p 66 para 24(c).

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254 For completeness, given that ZK agreed to pay for the airfreight charges under VO 8, there is no basis to contend that the airfreight costs should be borne by DG under the cl 9.2 of the Subcontract or otherwise. Even if we accept that there is merit to the argument that the airfreight costs could be construed as a step necessary to expedite progress and complete the Subcontract works on time, this would be overtaken by ZK's subsequent agreement at the meeting on 3 July 2017 to bear the airfreight charges without conditions. This would have constituted a variation of the contractual agreement (on the assumption that DG is obligated to pay for the airfreight charges under the contract which we refrain from expressing a view on) where ZK agrees to pay for the airfreight costs in exchange for DG agreeing to procure delivery of the glass panels by airfreight specifically for the timing considerations.

DG's counterclaim for the Retention Sum

255 DG's counterclaim for the Retention Sum is for a sum of $27,902.75. As noted above, (see [4(b)] above), the Judge had dealt with the Retention Sum on the basis that it was $28,051 (5% of the Subcontract valued at $561,019.90) but this was erroneous because parties had agreed on a retention amount of $27,902.75 as recorded at [151] of the AD. This was also stated in DG's pleadings and submissions before us.

256 In any case, the Judge held that DG was not entitled to the Retention Sum because it failed to provide the warranties and indemnities as applied to the Subcontract works, which was a condition precedent to the release of the said sum as set out in cl 5 of the Subcontract. In view of the Judge's finding that DG committed the repudiatory breach by unjustifiably abandoning the works, DG's defence that they were not obliged to provide such warranties and

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indemnities because of ZK's repudiatory breach failed (Judgment at [246]–[247]).

257 DG contends that since ZK has claimed for the full sum of liquidated damages and replacement and rectification costs, there is no basis for ZK to continue to withhold the Retention Sum. Since the Subcontract has already been terminated, the Retention Sum should be set off against any damages awarded to ZK.[266] ZK has not addressed this point in its submissions.

258 In our judgment, with respect, the Judge erred in failing to account for the Retention Sum. We agree with DG that the sum of $27,902.75 should be set off against any damages awarded to ZK. Clause 5 of the Subcontract provides that:[267]

> …
>
> The Retention Sum to be held back by the Contractor shall be 10% of each payment claim, subject to a maximum limit of 5% of Sub-Contract Sum and / or adjusted Sub-Contract Sum inclusive of any Variation Works instructed.
>
> One half of the Retention Sum shall be released upon the issuance of a Certificate of Substantial Completion under the Head Contract by the So and / or upon finalization of the final account of the Subcontract Works, whichever is the later. The other half of the Retention Sum shall be released after the issue of the Maintenance Certificate by the Contractor.
>
> …

259 In Julian Bailey, *Construction Law Volume II* (Informa Law, 2011) at paras 12.12 and 12.13, it is explained that:

> 12.12 The point at which retention money is required to be paid to a contractor (assuming it has not been called upon) depends upon the precise terms of the applicable contract.

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266 AC in CA 125 at paras 114 to 115.

267 JROA Vol V Part A at p 65.

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> Typically, a construction or engineering contract which contemplates the use of money retention as a form of security will mandate payment of one-half of the retention money upon practical completion of the works, with the remaining half of the money being released at the end of the defects liability period, and upon final completion of the works. The payment of retention money may be conditional upon the owner, the contract administrator or a third party being satisfied that the contractor's works have been performed properly, and expressing that satisfaction by way of a certificate or other communication. The right to obtain retention money may, however, be conditional upon matters occurring, for example the whole of a development being certified as defect free for a particular period of time.
>
> 12.13 In the event of the contractor's employment being determined, it may be permissible for the owner to retain and utilise retention money for the purpose of funding the completion of the remaining works. An owner is not, however, permitted to keep all of the retention money where the owner's recoverable loss is less than the money held on retention. The owner is not entitled to make a profit from retention money. It must account to the contractor for any surplus.

260 In relation to the property of such retention money, *Law and Practice of Construction Contracts* at paras 8.58 and 8.63 state:

> 8.58 The general position under common law is that until such time when the sum withheld as the retention fund is actually applied towards disbursing the employer for the rectification of defects, the property in the fund - even while it is being held by the employer - resides with the contractor. Thus, in a contract where the amount retained is 10% of the value of the works executed, the House of Lords held that while a contractor was entitled to be paid only 90% of the value of work executed on the date of the certificate, this should not be understood as suggesting that the contractor was only entitled to only 90% of the value of the work: see *FR Absalom Ltd v Great Western Garden Village Society* (1933).
>
> …
>
> 8.63 Consequently, the position as laid down in *Nam Fang Electrical Co Pte Ltd v City Developments Ltd* is that, on the terms of the particular main contract and the subcontract, while the employer may have recourse to the retention sum to meet claims against the contractor under the contract, the beneficiary interest of the contractor in the retention money remains.

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261 The purpose of cl 5 of the Subcontract is to protect ZK's commercial interest by holding on to the Retention Sum to incentivise DG to complete the Project successfully and also allow ZK the option to utilise the Retention Sum to fund necessary expenditure or works for which DG is liable if the Project is not completed successfully. However, DG retains beneficial interest over the Retention Sum, which is part of the payment due from ZK to DG for work already done. It is held against any sums that may be incurred by ZK for DG's defective works or other backcharges or damages incurred by ZK caused by DG's breaches of contract. Since the Subcontract has been terminated and the disputes between DG and ZK are adjudicated and being resolved finally in these proceedings, the Retention Sum should be accounted for by setting it off against any damages awarded to ZK. If they have all been accounted for, then the balance has to be returned to DG. There is no reason for the Retention Sum to be withheld by ZK indefinitely in these circumstances.

DG's counterclaim for the remainder of the Subcontract

262 We turn now to address DG's counterclaim for the remainder of the Subcontract. The Judge held that DG was not entitled to the remainder of the Subcontract (*ie*, $127,982.85 which was calculated from the contract value of $561,019.90 excluding payments received of $339,136.60, the Retention Sum, which the Judge erroneously took to be $28,051, and the sum of the disputed VOs 6 and 8, which amounts to $65,849.45) or general damages because DG's basis of claiming for the reminder of the Subcontract, that ZK had breached the contract by creating a persistent course of payment delays allowing it to terminate the contract, had failed (Judgment at [248]).

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263 On appeal, DG clarifies that it is not making any claim for the remainder of the Subcontract.[268] It is simply asking that if its appeal against the Judge's dismissal of VO 6 and VO 8 is allowed, the Security Sum of $211,044 paid by ZK (see [33] above) should be released to DG. If the Judge's decision to dismiss VO 6 and VO 8 is affirmed, then the sum of $160,168.50 (being $211,044 less $50,875.50, the total sum allowed in AA 339 for VOs 6, 8 and 18) should be paid to DG with accrued interests.[269] We note, as an aside, that DG's submission is erroneous because if we agreed with the Judge's decision to dismiss VO 6 and VO 8, the sum that ought to be paid to DG would be $165,256.50 (being $211,044 less $32,602.50 and $13,185, the sums allowed in AA 339 for VOs 6 and 8).

264 As noted above, DG obtained an order to enforce the AD as a judgment debt and served a statutory demand on ZK (see [30] above). ZK did not make payment and DG applied to wind up ZK in CWU 95 (see [31] above). In the meanwhile, ZK had commenced two actions, S 917 and later S 1282 to make its claims against DG, including disputing the AD (see [23] and [28] above) and separate proceedings, OS 223, to set aside the AD. The High Court heard both OS 223 and SUM 1577 together; it dismissed OS 223 but allowed SUM 1577 and stayed CWU 95 until the determination of the Consolidated Suit and any appeal therefrom (see [32] and [33] above). DG's appeal against the stay was dismissed but the Court of Appeal ordered ZK to pay the Security Sum of $211,044 as security for the judgment debt (see [33] above). As referenced above, the Consolidated Suit (comprising S 917 and S 1282, see [29] above), is the action from which these appeals arise.

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268 AC in CA 125 at para 150.

269 AC in CA 125 at paras 142 to 149.

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265 It is therefore appropriate in this case to treat all these proceedings recounted above as, in reality and in all practicality, one comprehensive set of proceedings, especially the Consolidated Suit, to finally resolve and determine all the disputes between the parties. This includes our making such orders as are necessary in CWU 95 as it would be a waste of time, money and resources for another court to deal with the necessary consequential and other orders required in CWU 95. In our view, given that ZK's underlying challenge to the AD has been finally resolved in these proceedings, we agree with DG that in principle, the sum of $211,044 paid into court by ZK should be used to satisfy any outstanding sum owed by ZK to DG, if indeed that is the net position after setting off all sums due from one party to the other in their disputes arising out of this Subcontract, with the balance, if any, being paid out to ZK. If the net position is, as we suspect, that there is a sum owing from DG to ZK, then it is only right that the Security Sum of $211,044 should be paid out to ZK. Upon settlement of all sums due as between the parties and payment out of the Security Sum of $211,044, DG is to file a notice of discontinuance for CWU 95 without any undue delay and in any case, not more than fourteen days after the ascertainment of the net position between the parties. We will therefore make the necessary orders below at [282] in respect of CWU 95.

DG's counterclaim for legal costs associated with the AD

266 We now turn to DG's counterclaim for legal costs associated with the AD. To recapitulate (see [26] above), in AA 339, DG claimed $264,789.08 for outstanding sums under the Subcontract and was awarded $197,522.83, *ie*, 74.6% of the claimed amount. The adjudicator allowed costs of the adjudication, being the adjudication application fee of $642 (inclusive of 7% GST) and the adjudicator's fee of $12,945.93 (inclusive of 7% GST); ZK was ordered to bear 80% and DG to bear 20% of the adjudication costs respectively.

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267 In its counterclaim,[270] DG avers that because of ZK's blatant withholding of its payment claims under the subcontract, DG was forced to take out the adjudication application and incurred legal costs in doing so, which are different from the adjudication application fee and the adjudicator's fee. DG therefore claimed for "… losses and damages in the form of legal costs incurred as a result of [ZK's] actions, which could have been avoided if [ZK] had not breached its obligations to pay".[271]

268 However, DG does not set out what amount they are claiming or stipulate what sums they are entitled to. In its pleadings,[272] DG only asked, rather vaguely, for "losses and damages to be assessed" in respect of this claim. In DG's particulars under para 45 of its Defence and Counterclaim, DG pleads that "[b]ut for [ZK's] flagrant breach of the contract, [DG] would not have taken up the Adjudication Application and incurred the legal costs that came with it". In its Appellant's Case, DG characterised this as ZK's deliberate under-certification of payment claims, thereby forcing DG to take up the adjudication application; and since DG was substantially successful in being awarded $197,522.83 in AA 339, "… DG should be awarded its legal costs incurred in AA 339".[273] The Judge below treated this as referring to "..the legal costs associated with the AD …" (see Judgment below at [249]). It is not clear whether DG is also counterclaiming for its 20% of the adjudication application fee and the adjudicator's costs it was ordered to bear. As this has not been clearly pleaded, we shall not deal with it. The Judge understood the issue to be, (and we agree with his view on the pleadings), whether DG is entitled to claim its

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270 JROA Vol II at pp 45 and 46, Defence and Counterclaim, para 45

271 *Ibid*.

272 AC in CA 125, at para.151

273 AC in CA 125 at para 151.

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legal costs for the adjudication as part of its loss and damage as a result of ZK's breach of contract.[274]

269 We deal first with the legal costs of an adjudication. The SOPA first came into operation on 1 April 2005. Section 30 of the SOPA states that:

> **Costs of adjudication proceedings**
>
> **30.** — (1) A costs of any adjudication must not exceed such amount as the Minister may prescribe.
>
> (2) An adjudicator must, in making a determination in relation to any adjudication application, decide which party must pay the costs of the adjudication and (where applicable) the amount of contribution by each party.
>
> (3) Where an adjudicator is satisfied that a party to an adjudication incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs.
>
> (4) A party to an adjudication shall bear all other costs and expenses incurred as a result of or in relation to the adjudication, but may include the whole or any part thereof in any claim for costs in any proceeding before a court or tribunal or in any other dispute resolution proceeding.

270 In the *Singapore Parliamentary Debates, Official Report* (16 November 2004), vol 78 at cols 1116–1117 (Mr Cedric Foo Chee Keng, Minister of State for National Development), it is stated that the SOPA provides for adjudication as a "faster and less costly process to resolve payment disputes". The "adjudicator will determine the amount to be paid by the respondent to the claimant, the pay-by date and the adjudication fees payable by both parties" and the "fees will be capped so that adjudication will remain affordable".

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274 AC in CA 125 at para 151.

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271 Pursuant to ss 28(4)(*d*) and 30(2) of the SOPA, Building and Construction Industry Security of Payment Regulations 2006 reg 12 and the Fee Schedule of the Singapore Mediation Centre, the "costs of the adjudication" at the adjudication stage only refers to:

> (a) the adjudication application fee payable to the Singapore Mediation Centre, which is currently a fixed sum of $642 (inclusive of GST); and
>
> (b) the adjudicator's fee, which is subject to three caps; first, an hourly rate which cannot exceed $321 per hour (inclusive of GST); second, a maximum of eight hours to be chargeable per day; and third, an overall limit up to 10% of the claimed amount.[275]

Under s 30 of the SOPA, the adjudicator has no power to order any other costs for an adjudication.

272 This limited power is consistent with the nature of the SOPA as a quick, efficacious, non-cost inhibitive procedure for a downstream party to resolve disputes on interim payments and enables the downstream party to receive payment promptly. However, as an adjudication determination only carries temporary finality, in that the merits of the dispute may be reconsidered subsequently by a court or arbitral tribunal before which there is a final resolution of all the claims between the parties, whether related to the adjudication determination or not, it would make little sense for an adjudicator to have to possibly issue awards for significant sums for legal costs and

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[275] Building and Construction Industry Security of Payment Regulations 2006 reg 12; Singapore Mediation Centre Building and Construction Industry Security of Payment Act Fee Schedule < https://www.mediation.com.sg/wp-content/uploads/2019/12/Fee-Schedule-15-Dec-2019.pdf> (15 December 2019) at para 2.1.

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expenses incurred by the parties only to have it set aside or varied at the final resolution stage. Furthermore, having to deal with such costs will not only delay an adjudication determination but also defeat the aim of a speedy, non-cost inhibitive procedure.

273 If we move on to s 30(4) of the SOPA, we see that it contains two distinct principles. First, it reiterates that a party to the adjudication "… shall bear all other costs and expenses incurred as a result of or in relation to the adjudication" thereby making it clear that, other than those costs provided for in s 30(2), all other costs and expenses must first be borne by that party. Hence, the adjudicator has no power to order legal costs in relation to the adjudication.

274 Secondly, however, s 30(4) goes on to provide that that party may seek to recover those other legal costs and expenses incurred in an adjudication, within its claim for costs in any proceedings before a court or arbitral tribunal that finally determines all the disputes between the parties in any other dispute resolution proceedings.

275 In *GA Engineering Pte Ltd v Sun Moon Construction Pte Ltd* [2020] SGHC 167 ("*GA Engineering*") at [250], Vinodh Coomaraswamy J accepted that the operation of s 30(4) of the SOPA allows a party to an adjudication to claim for legal costs incurred by them as damages. However, he did not allow the defendant in that case to claim the costs of the adjudication as the defendant did not successfully defend all of the plaintiff's claims.[276]

276 In our judgment, s 30(4) of the SOPA affords great latitude to the court or arbitral tribunal finally determining all disputes between the parties, to decide

[276] ABOA (2922.04.07) at p 252.

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whether it is appropriate to allow a claim for legal expenses or costs incurred as a result of or in relation to an adjudication, whether within its claim for costs under s 30(4) or as damages. It is not desirable that anything other than very general observations should be made in the present judgment, given that the issue of whether such legal expenses or costs may be awarded is extremely fact sensitive and falls within the discretion of the court or the arbitral tribunal or any other dispute resolution body finally resolving the dispute.

277 We can say, generally speaking, that the extent to which the party seeking to claim legal costs incurred for the adjudication had *ultimately succeeded* in respect of the claims in the adjudication and before the court or arbitral tribunal will be of relevance, though it need not be determinative. Whether costs should follow the event or the ultimate outcome or whether it should be considered issue by issue or claim by claim in considering the number and quantum of the claims which the claiming party had succeeded in to determine the extent to which the claiming party had succeeded in the adjudication is best left to the judge or arbitral tribunal seised of the disputes between the parties. We would imagine, again speaking very generally, that all else being equal, if the respondent to an adjudication defends the claimant's claims and succeeds in setting aside a significant number of claims comprised in the adjudication determination, then the respondent may be able to recover his legal costs for the adjudication. However, if the respondent only sets aside some of the items comprised in the adjudication determination, it may not be able to recover the legal costs of the adjudication. The analysis may differ if the respondent succeeded in setting aside only some of the items comprised in the adjudication determination but those items account for almost the entire sum claimed in the adjudication.

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278 Ultimately, the court or arbitral tribunal hearing the final dispute will exercise its discretion in the interests of justice between the parties. There may be circumstances where it may be inappropriate to allow a claim for legal costs even if all or a substantial amount of the claims comprised in the adjudication determination are subsequently set aside. One situation could possibly be where the respondent did not file any response in the adjudication proceedings. In such circumstances, the court or arbitral tribunal may well exercise its discretion of not allowing the respondent to recover its costs. Another situation could be where the court or tribunal is satisfied that there was frivolous or vexatious conduct on the part of the claiming party or if there were unfounded submissions made in the adjudication which contributed to wastage of time and costs in the adjudication. This approach accords with common-sense, the scheme of the SOPA and the justice of the case. This is especially so when the claims in the adjudication are huge and require a large number of documents.

279 In this case, the Judge held that DG was not entitled to an award of the legal costs associated with the AD (as part of damages) because it was unsuccessful in respect of close to half the amount claimed in the adjudication application. DG was entitled to only $146,647.33 ($197,522.83 less $50,875.5) out of the claimed amount of $264,789.08 (Judgment at [250]). However, we note that the Judge had mistakenly deducted the sum for VO 18 when this VO claim had been allowed (Judgment at [241]). The Judge should therefore have allowed DG $151,735.33 ($197,522.83 less $45,787.50) instead of $146,647.33.

280 As we have allowed DG's claims for VO 6 and VO 8, DG is now entitled to $197,522.83 (the sum of $151,735.33, $32,602.50 and $13,185.00) out of the claimed amount of $264,789.08. This amounts to approximately 74.6% of the claims it made in the adjudication and DG had succeeded in the majority of

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claims it made. There is no suggestion by ZK that any of the claims that DG was unsuccessful in were unfounded or frivolous or vexatious in any way. Thus, in principle, and on the evidence before us, it appears that DG should be entitled to its legal costs for the adjudication, whether as part of its costs under s 30(4) or as damages under *GA Engineering*. As noted above at [268], DG has asked for its loss and damage to be assessed. No one seems to have taken objection to DG's alternative prayer in relation to its legal costs of the adjudication. We also note that pursuant to the Order of Court dated 7 January 2022, the costs of the Consolidated Suit consolidated suit and the trial of the action was reserved pending the outcome of these appeals. We therefore remit the question of DG's entitlement to its legal costs for the adjudication as well as the quantum back to the Judge for his determination. If the Judge is not available, parties may write to this court to make the determination.

Conclusion

281 For the above reasons, we allow DG's appeal in CA 125 in part and ZK's appeal in CA 129 in part, and we make the orders stated above at [7].

282 As for CWU 95, we make the following orders:

(a) If upon setting off all the sums owed to each other and ascertainment of the net position between the parties, there is a balance owing from ZK to DG, then all or so much of the Security Sum as shall satisfy the balance owed to DG shall be paid out to DG and the remaining balance, if any, shall be paid out to ZK;

(b) If upon setting off all the sums owing to each other and ascertainment of the net position between the parties, there is a balance owing from DG to ZK, then the Security Sum shall be paid out to ZK;

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(c) Upon the ascertainment of the net balance as between the parties in accordance with (a) or (b) above, DG shall file a notice of discontinuance of CWU 95 without delay and in any case within 14 days of the ascertainment of the net position as between the parties;

(d) There shall be no order as to costs in CWU 95; and

(e) There shall be liberty to apply.

283 As DG has succeeded for the most part in CA 125 and ZK has failed for the most part in CA 129, the costs of both appeals should be awarded to DG, to be agreed or failing agreement, to be fixed by the court. In the event that the parties are unable to agree on costs, each party is to file its written submissions on costs for the appeal, limited to six pages, within fourteen days from the day hereof.

284 We encourage parties to promptly resolve all issues on costs without incurring more costs.

285 The usual consequential orders will apply.

Woo Bih Li
Judge of the Appellate Division

Quentin Loh
Judge of the Appellate Division

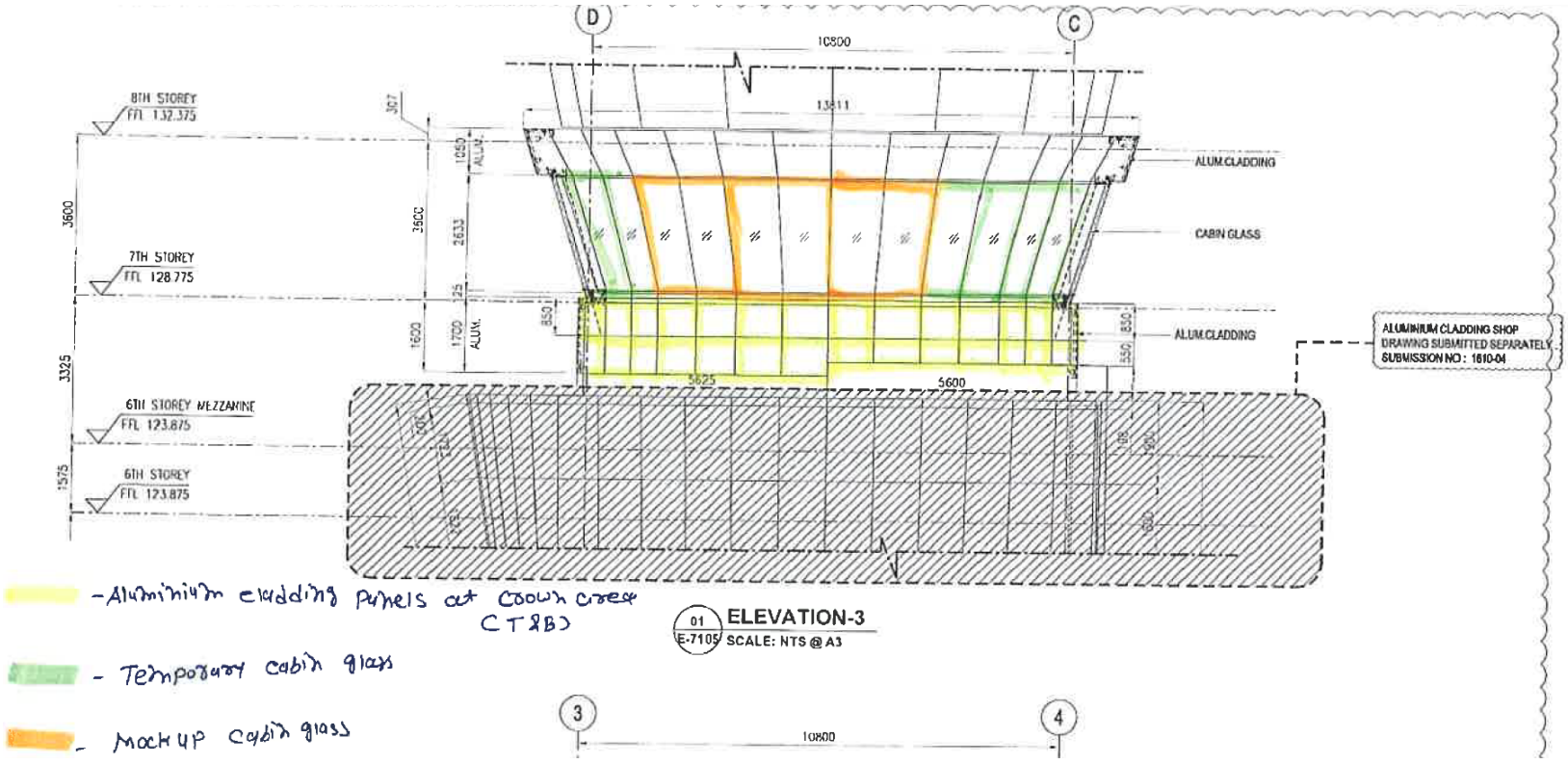
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Hoo Sheau Peng
Judge of the High Court

Chan Kah Keen Melvin and Yong Wei Jie Timothy (TSMP Law Corporation) for the appellant in Civil Appeal No 125 of 2021 and the respondent in Civil Appeal No 129 of 2021;
Kris Chew Yee Fong and Isabel Su Hongling (Zenith Law Corporation) for the respondent in Civil Appeal No 125 of 2021 and the appellant in Civil Appeal No 129 of 2021.

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Annex A



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