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

[2025] SGHC 151

Originating Claim No 868 of 2023

Between

DMC

… Claimant

And

DMD

… Defendant

Counterclaim of Defendant

Between

DMD

… Claimant in Counterclaim

And

DMC

… Defendant in Counterclaim

JUDGMENT

[Contract — Contractual terms — Scope of contractual duties of subcontractor]
[Contract — Terms — Liquidated damages clause]

[Building and Construction Law — Statutes and regulations — Building and Construction Industry Security of Payment Act 2004 — Waiver by election for inconsistent rights]

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v
DMD

[2025] SGHC 151

General Division of the High Court — Originating Claim No 868 of 2023
Kwek Mean Luck J
25–28 March, 1–3 April, 31 July 2025

6 August 2025 Judgment reserved

Kwek Mean Luck J:

Introduction

1 The claimant, DMC, is the main contractor for a project to do road markings ("Project") by way of a contract with the Employer. DMC appointed the defendant, DMD, as its sub-contractor for the Project. This is by way of two sub-contracts dated 28 June 2021, for the painting of road marking works for the East sector (the "East Sub-Contract") and for the West sector (the "West Sub-Contract"). They will be referred to collectively as the "Sub-Contracts".

2 In HC/OC 868/2023 ("OC 868"), DMC alleges that DMD failed to perform a large part of its obligations under the Sub-Contracts. This resulted in DMC having to step in to complete the Project on time. DMC claims against DMD for backcharges arising from work done by DMC or third parties hired by DMC, as well as for liquidated damages. DMD in turn counterclaims for unpaid work done under the Sub-Contracts.

Background Facts

3 On 15 October 2020, the Employer published a tender for the painting of road markings ("Tender"). DMD was interested in this project but did not meet the criteria. DMD spoke with DMC around the end of October 2020 about participating in the Tender. The Project was eventually awarded to DMC around 16 June 2021 under two main contracts ("Main Contracts"). This was followed by DMC signing the Sub-Contracts with DMD on 28 June 2021.

4 The contract sums of the East Sub-Contract and West Sub-Contract were stated to be $10,186,054.00 and $9,808,289.00 (both excluding GST), respectively, less 5% which was chargeable as an administrative fee by DMC to DMD.[1] There was a total of 685 locations for road marking listed under the East Sub-Contract, and a total of 572 locations listed under the West Sub-Contract.

DMC's Case

5 DMC claims that DMD breached its obligations under the Sub-Contracts. In particular, DMD failed to: (a) submit programmes for the work scope that is set out in Section 2 of the Sub-Contracts ("Sub-Contract Works"); (b) prepare and submit Pre-Condition Reports ("PCR") and Job Proposal Sheets ("JPS") in a timely manner; (c) deploy sufficient manpower and resources for the Project; (d) perform the Sub-Contract Works with diligence and due expedition, formulate adequate recovery plans and catch up on its delays, and comply with the DMC's instructions; (e) carry out fifth month field tests ("Fifth Month Field Test(s)") in various locations; and (f) provide a full-time Project Manager / Engineer and Work Safety and Health Officer ("WSHO").

[1] Agreed Chronology of Undisputed Facts ("Chronology") at S/N 3.

6 DMC avers that DMD's delays and lack of progress were evidenced, amongst other things, by the limited number of locations that it was able to complete each month. DMD only started carrying out physical road marking works in the East and West sectors on or around 23 September 2021 and 2 or 5 October 2021, respectively, almost three months after the start of the Sub-Contracts.[2] Mr Yow Jia Wen ("Mr Yow"), a staff of DMC and Project Manager for the East Sub-Contract, gave unchallenged evidence that:[3]

(a) As at end-December 2021, more than six months after the commencement of the Sub-Contracts, DMD had only carried out physical road marking works in around eight and nine locations under the East Sub-Contract and West Sub-Contract, respectively.

(b) As at end-June 2022, more than 12 months after the commencement of the Sub-Contracts (past the halfway mark of the Project), DMD had only carried out physical road marking works in around 47 and 69 locations under the East Sub-Contract and West Sub-Contract, respectively.

(c) As at end-March 2023, more than 21 months after the commencement of the Sub-Contracts, DMD had only carried out physical road marking works in around 212 and 184 locations under the East Sub-Contract and West Sub-Contract, respectively.

7 DMC issued numerous reminders, warnings, and notices to DMD to put on record DMD's delays and lack of progress. Similar notices were also issued by the Employer to DMC. DMD acknowledged its difficulties in obtaining

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2 Chronology at S/N 5.

3 Affidavit of Evidence in Chief ("AEIC") of Mr Yow Jia Wen ("Mr Yow") at para 76.

manpower and resources to complete the Sub-Contract Works.[4] DMC asked DMD to increase its resources and to propose recovery plans to address the delays.

8 However, DMD could not increase its resources or propose acceptable recovery plans that would allow timely completion of the Sub-Contract Works.[5] DMC had to step in to ensure that the Project could be completed on time. DMC deployed its own manpower and resources and engaged third parties, to carry out physical road marking works in locations that DMD could not proceed with, in 328 locations.[6] DMC also supplemented DMD's workforce and equipment for some of the 444 locations where DMD carried out road marking works.[7]

9 DMC claims for the cost of undertaking work that DMD ought to have done under the Sub-Contracts and for 15% profit and attendance on the costs of carrying out works on behalf of DMD, pursuant to cl 3.10 of Section 5 of the Sub-Contracts ("General Conditions"), read with cl 24.2 of Section 2 of the Sub-Contracts ("Section 2"). Section 5 is titled "General Conditions", while Section 2 is titled "Subcontract Scope of Works and Particular Requirements". DMC claims the following:

> (a) Backcharge 1: $4,949,193.76 (excluding GST), inclusive of 15% profit and attendance, for costs incurred by DMC up to 27 June 2023 in taking on DMD's scope of works for 125 locations under the East Sub-Contract and 186 locations under the West Sub-Contract;

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4 AEIC of Mr Lee Siew Loung ("Mr Lee") at para 69.

5 AEIC of Mr Yow at para 100.

6 AEIC of Mr Yow at para 80.

7 AEIC of Mr Yow at paras 77–78.

(b) Backcharge 2: $250,511.34 (excluding GST), inclusive of 15% profit and attendance, for costs incurred by DMC in engaging third parties to take on DMD's scope of works for nine locations under the East Sub-Contract and eight locations under the West Sub-Contract;

(c) Backcharge 3: $305,551.37 (excluding GST), inclusive of 15% profit and attendance, for costs incurred by DMC in bringing the Sub-Contract Works to completion in the period after 27 June 2023 to December 2023, when the Sub-Contract Works, including all Fifth Month Field Tests, were substantially completed;

(d) Backcharge 4: $748,800.00 (excluding GST), for the costs of deploying personnel that DMD was contractually obliged to provide under the Sub-Contracts;

(e) Backcharge 5: $92,900.00 (excluding GST), for the costs of assisting DMD with the preparation of PCRs and JPSs;

(f) Backcharge 6: $320,517.49 (excluding GST), for the 15% profit and attendance on backcharges that were previously taken into account and deducted, and to which DMD had agreed: (i) $876,063.55 (excluding GST) under the East Sub-Contract; and (ii) $1,260,719.76 (excluding GST) under the West Sub-Contract. These backcharges are for work that DMC had carried out on DMD's behalf; and

(g) liquidated damages as a result of DMD's failure to complete the Sub-Contract Works, including conducting the Fifth Month Field Tests, by 27 June 2023. Liquidated damages continued to accrue until the Sub-Contract Works were substantially completed by DMC on DMD's

behalf on 6 December 2023 and 11 December 2023 for the East Sub-Contract and West Sub-Contract, respectively.

10 DMC claims in total the net amount of $3,391,652.86 (excluding GST), after taking into account deductions for the value of the Sub-Contract works and charges that DMC is entitled to.

DMD's Case

11 In its defence, DMD broadly submits that:

(a) the backcharges claimed by DMC include items that are not in DMD's contractual scope of work;

(b) DMC is not entitled to charge 15% profit and attendance for the work done by DMC;

(c) DMC is precluded from claiming Backcharge 3 due to the suspension of works pending payment, under s 26 of the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) ("SOPA");

(d) some backcharges are excessive;

(e) DMC is not entitled to liquidated damages; and

(f) DMC is precluded from making these claims because of payments DMC has received from the Employer.

12 DMD counterclaims for the sums of $533,767.18 (including 8% GST) and $679,007.94 (including 8% GST), for the value of works carried out by DMD under the East and West Sub-Contracts, respectively.

Issues Arising

13 The following ten issues arise for determination:

(a) Issue 1: Whether DMC is required to give notice to DMD to do work in specific locations, before it is entitled to backcharge for work not done by DMD in such locations, pursuant to Section 2 cl 24 or DMC's general right to damages.

(b) Issue 2: Whether parties agreed at the 14 June 2022 meeting that:

(i) the three categories in items 1.7.1 to 1.7.3 in the 14 June 2022 minutes of meeting[8] ("14 June 2022 Minutes") apply only to certain agreed backcharges, or if they also apply to the backcharges claimed by DMC in OC 868.

(ii) the phrase "3rd Party" in item 1.7.4 of the minutes, refers only to third parties, or also includes DMC.

(c) Issue 3: Whether DMC is entitled to claim the expenses in Backcharge 1.

(d) Issue 4: Whether the amount claimed in Backcharge 2 is excessive.

(e) Issue 5: Whether s 26 of the SOPA is a defence to Backcharge 3.

(f) Issue 6: Whether Backcharge 4 falls within Section 2 cll 8.1 and 8.4.1 of the Sub-Contracts.

8 AEIC of Ms Tang Shu Shan ("Ms Tang") at p 57.

(g) Issue 7: Whether DMC is estopped from claiming for Backcharge 5 because it instructed DMD not to proceed via DMC's 4 January 2022 email.

(h) Issue 8: Whether DMC is entitled to liquidated damages for delay.

(i) Issue 9: Whether DMC is precluded from its claims because it has already received payments from the Employer, and any further recovery from DMD would give rise to unjust enrichment.

(j) Issue 10: Whether DMD is entitled to its counterclaim, in relation to 20% of the contract sum for the 156 locations that DMD said it had carried out Fifth Month Field Tests for, as well as the retention sum held by DMC.

Issue 1: Whether DMC is required to give notice to DMD before it is entitled to backcharges

14 The first issue is whether DMC is required to give notice to DMD to do work in specific locations, before it is entitled to backcharges for work not done by DMD in such locations, pursuant to either Section 2 cl 24 or DMC's general right to damages.

15 DMD relies on *Pro-Active Engineering Pte Ltd v Prime Structures Engineering Pte Ltd* [2023] SGHC 205 ("*Pro-Active*"). There, the court (at [102]) quoted *Impact Painting Ltd v Man-Shield (Alta) Construction Inc* [2018] AWLD 582 ("*Impact Painting*"), which held that the onus is on the party claiming a back charge to prove, amongst other things, that prior to incurring the charge, "the general contractor gave notice to the subcontractor of its default and a reasonable opportunity to cure it". In this case, no work schedule or

written notice was given to DMD to carry out road marking works at the specific locations that DMC is claiming backcharges for.

16 DMC submits that no such notice is required for DMC's entitlement to any backcharge to arise. Nothing in the wording of Section 2 cl 24.1 or 24.2 imposes any requirement of notice on DMC's part. In any event, DMC had issued numerous reminders, warnings and notices recording DMD's delays and lack of progress. DMC also informed DMD that DMC would have to intervene by taking its own steps to progress the Sub-Contract Works.

(a) Mr Toh Hock Seng ("Mr Toh"), who is the director of DMD, agreed that from the correspondence between Mr Yow and DMD's Mr Jeffrey Ho on 30–31 May 2022, DMD was already aware as of that date that DMC would be taking over works for certain locations and that DMC would need to take back its workers from DMD to do so.[9]

(b) DMD met with DMC on 14 June 2022 to discuss DMD's lack of progress. Item 1.7.4 of the minutes of that meeting records that "3rd part[ies]" would have to carry out works which DMD could not carry out on its own. DMD was clearly put on notice that there was a need for others to take over its works.

(c) DMC's notice of 11 August 2022 stated that if DMD could not provide an acceptable recovery plan to catch up on delays, DMC would have no choice but to engage third parties to carry out works on DMD's behalf and "back charge all related costs due to [DMD]".[10]

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9 1 April 2025 Hearing Transcript at p 89 line 5–p 95 line 20; AEIC of Mr Yow at p 1756–1767.

10 AEIC of Mr Yow at p 1819.

Decision

17 DMD relies on *Pro-Active*. There, the High Court cited *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 ("*Vim*") and *Impact Painting* and applied the *Impact Painting* requirements, including the notification requirement, in considering whether the backcharges there were proven.

18 In *Vim*, the Appellate Division endorsed at [102], the approach of Burrows J in *Impact Painting*, as a pragmatic approach to the issue of whether a claimant is able to discharge its evidentiary burden in relation to the legal question of causation. Burrows J set out four requirements, one of which is the provision of notice:

> In my view, the onus is on the party claiming a back charge to prove that:
>
> ….
>
> 4. Prior to incurring the charge, the general contractor gave notice to the subcontractor of its default and a reasonable opportunity to cure it.

19 As the citation from *Impact Painting* was made in *Vim*, it will be useful to examine the analysis in *Vim* in greater detail. In *Vim* at [80], the court noted that:

> … while failure to comply with a stipulation to provide notice in a defects clause may preclude an employer from relying on the defects clause as against the contractor … in the absence of clear and express words or by a clear and strong implication from the words used, the employer's right to damages in respect of the cost of repairs is not extinguished

However, the court expanded on this analysis to note at [81], that:

> … [w]here no notice is given and such remedial work is carried out, it is open to the subcontractor to argue that it should not be liable for the greater cost of remedial work but only to the

> lower cost it would have incurred in carrying out such remedial works if due notice had been given.

20 With the above analytical framework from *Vim* in mind, I turn to the facts on hand. I find that the lack of specific notices from DMC for DMD to work in particular locations does not bar DMC from imposing backcharges for work done in such locations, for three reasons.

21 First, in *Vim*, the Appellate Division found that the material clause imposed a requirement to notify the subcontractor of the defective or non-conforming subcontract work; at [84]. In contrast, there is no requirement in Section 2 cl 24 for notice to be given before backcharges can be imposed. Hence, it could not be said that DMC failed to comply with the requirements of Section 2 cl 24, when it did not give notice before carrying out the catch up works or before imposing the backcharges. For completeness, although neither parties raised this, I note that General Conditions cl 3.10.1 appears to contain a notice requirement for backcharges.

22 Second, as set out in *Vim*, even if there was a notice requirement in Section 2 cl 24 or General Conditions 3.10.1 which DMC did not comply with, that does not extinguish DMC's general right to damages in respect of the costs of repairs, in the absence of clear and express words in the contract or by clear implication from the words used. In this case, there is no such language in the Sub-Contracts. Nor has DMD argued that due to the lack of notice, it should only be liable for the lower costs it would have incurred in carrying out such remedial works if due notice had been given. DMD has also given no such evidence.

23 Third, and moreover, I find on the evidence, that while DMD was not given specific notices to carry out works in particular locations prior to DMC

taking over, DMD was nevertheless, given *sufficient* written notice by DMC that it would be stepping in to take over DMD's works due to DMD's lack of progress.

24 DMD was forewarned that DMC would be carrying out such catch up works. Mr Yow gave evidence of numerous correspondence from DMC or the Employer, from around 24 January 2022 to 25 April 2023, setting out concerns with the delays and in which DMC threatened to take over the works if DMD did not catch up.[11]

25 DMD did not challenge this evidence. Instead, DMD's contention was that was no specific notice from DMC to DMD to carry out works at particular locations before DMC took over or hired third parties to do so.

26 Mr Chin Kim Lung ("Mr Chin"), the Managing Director of DMC, and Mr Yow, accepted that there was no such notice. Their explanation is that DMC did not do so, as by then, DMC had already issued numerous correspondence and had many discussions with DMD throughout the course of the Project about their lack of progress, and DMC had informed DMD that DMC would have to take over if DMD did not catch up. Mr Yow testified that DMC did not issue instructions to DMD for all the locations that DMC took over or hired third parties to take over on as DMD was already unable to fulfil the works for those locations that DMC had given instructions on.[12] This is evidenced by the multiplicity of reminders, warnings and notices issued by DMC and/or the

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11 AEIC of Mr Yow at para 100.

12 26 March 2025 Hearing Transcript at p 17 line 25–p 18 line 13; AEIC of Mr Yow at paras 91 and 95–96.

Employer to DMC regarding the unsatisfactory rate at which the Project was progressing (which was duly conveyed to DMD).[13]

27 Mr Yow also accepted that DMD did accelerate their works after November 2022, but he was of the view that there were still delays. Although the Employer did not issue any further written warnings since early November 2022, the Employer pressured DMC staff when they communicated. The large extent of delay then could be seen from the Employer's 3 November 2022 letter, where the Employer noted that "[t]he contract left about 7 months, but your progress is only about 23% completed".[14] Ms Leong Yoke Fong ("Ms Leong"), Administrative Manager of DMD, also testified that there were substantial locations outstanding even as of 17 March 2023.[15]

28 Ms Leong claimed that nevertheless, if notice had been given to DMD and it had been given the opportunity to continue works during the period April to June 2023, DMD could have completed the locations outstanding as of 17 March 2023. She based this on her extrapolation from DMD's performance in January to March 2023. From this, she asserted that DMD could have completed the outstanding locations over the next three and a half months from 18 March 2023 to 27 June 2023. On Ms Leong's calculations, there were 184 outstanding locations as at 17 March 2023, comprising 98 for the East Sub-Contract and 86 for the West Sub-Contract.

29 However, Ms Leong's evidence on this was badly shaken during cross-examination. She accepted that her calculations and figures were not accurate.

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13 AEIC of Mr Yow at para 100.

14 AEIC of Mr Yow at p 1827.

15 AEIC of Ms Leong Yoke Fong ("Ms Leong") at paras 19 and 25.

(a) First, she accepted that she had used the wrong figure for comparison. Ms Leong extrapolated from what DMD had completed from January to March 2023 for both the East and West Sub-Contracts, which is about 106 locations in total.[16] This works out to about 35 locations per month. She then applied this rate of 35 locations per month to assess if DMD could complete the outstanding locations under the East Sub-Contract. She also applied the same figure of 35 locations per month to compare with the outstanding locations under the West Sub-Contract. Ms Leong accepted during cross-examination that she should not have done so. Since 35 locations per month was what had been achieved by DMD for *both* Sub-Contracts, it should be around half that figure when used to compare with the outstanding locations under each *individual* Sub-Contract. This would mean that even on the figures used by Ms Leong, DMD could not complete all the outstanding locations.

(b) Second, Ms Leong testified that the balance locations involved straightforward works, with, for example, pedestrian crossings being able to be completed within a day. However, the data, which Ms Leong did not dispute, shows that while some pedestrian crossings were completed within a day, there were others that took up to three or three and a half days.[17] In a letter to DMC dated 18 June 2022, DMD stated that it took an average of four days to complete road marking works for locations which contained either a pedestrian or zebra crossing.[18]

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16 AEIC of Ms Leong at paras 21 and 27, read with 2 April 2025 Hearing Transcript at p 33 lines 4–9.

17 AEIC of Ms Tang at p 12 S/N 48–50 and p 16 S/N 110.

18 AEIC of Mr Lee at p 3269.

(c) Third, Ms Leong accepted that her figures do not take into account machinery breakdown. There were undisputed reports of fairly substantial machinery breakdowns in the period of April to May 2023, that affected the ability of DMD to wholly carry out operations.[19]

30 In addition, I note that there is no contemporaneous correspondence from DMD that suggests that it could have carried out additional works at any time during this period. On 25 April 2023, DMC asked DMD to submit a revised catch-up program due to disruptions in DMD's works. DMD did not respond to this request to deny the disruptions or to say that it had the capacity to complete work for more locations beyond those already assigned by DMC.[20]

31 Mr Toh himself acknowledged on the stand that he saw DMC carry out works and accepted it:[21]

> The project is already delayed, I'm really stressed … so when I see [DMC] doing works, I acknowledge in silence, I say that, okay, he did his part, he does his part, I do my part; okay? … I do not want to pursue any further. The aim and the objective is to finish the works, to finish the works every day and to expedite the works.

32 In light of the above, I find that DMD has not demonstrated that it could have completed the locations outstanding as of 17 March 2023, on its own, before 27 June 2023.

33 In summary, there is clear evidence before the court:

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19 AEIC of Mr Lee at pp 101–102.

20 AEIC of Mr Yow at pp 1836–1841.

21 1 April 2025 Hearing Transcript at p 86 lines 4–13.

(a) that DMD was very much behind in completing the required road marking works; and

(b) of extensive correspondence stretching over almost three quarters of the Project about such delays, the need to catch up, and DMC or third parties having to step in if DMD did not sufficiently recover.

34 I hence find that DMD was in any event, given sufficient notice by DMC that it would be stepping in to take over DMD's works.

Issue 2: Agreements at the 14 June 2022 meeting

35 The second issue relates to agreements made at the 14 June 2022 meeting between the parties, which affects Backcharge 6. In particular, there are two sub-issues.

36 First, whether the three categories in items 1.7.1 to 1.7.3 in the 14 June 2022 Minutes apply only to the agreed backcharges that are the subject of adjudication determinations in SOP/AA 174 of 2023 ("SOP 174") and SOP/AA 175 of 2023 ("SOP 175"), or if it extends to other backcharges that are claimed by DMC in OC 868.

37 Items 1.7.1 to 1.7.3 of the 14 June 2022 Minutes state that DMC and DMD discussed the backcharges and agreed that there would be no admin charges imposed for: (a) "Manpower supply due to lack of manpower if manpower is provided by [DMC]"; (b) "Engagement of Certis Cisco Auxiliary Police Services"; and (c) "Engagement of Ultra High pressure water blasting specialist".

38 Ms Tang Shu Shan ("Ms Tang"), a Quantity Surveyor of DMD, attended the 14 June 2022 meeting. She testified that the agreement on items 1.7.1 to 1.7.3 was only in relation to certain backcharges that had already been agreed to between the parties and which were the subject of SOP 174 and SOP 175. They did not have any application to other backcharges, which are the subject of OC 868.[22] Despite her evidence as a DMD witness, DMD submits that the agreement on 14 June 2022, on the face of the minutes, applies to other backcharges involving these three categories. DMC disagrees and relies on Ms Tang's evidence.

39 The second sub-issue is whether the phrase "3rd party" in item 1.7.4 of the 14 June 2022 Minutes refers only to third parties hired by DMC, or whether it also includes DMC. Item 1.7.4 states that the "15% Admin charges would applies [*sic*] for those works involves 3rd party which [DMD] cannot provide". Parties agree that the 15% admin charge mentioned here refers to the 15% profit and attendance charge under Section 2 cl 24.2.

40 DMC submits that "3rd party" in item 1.7.4 includes DMC. This was Mr Chin's interpretation. DMC submits that in any event, even if "3rd party" in item 1.7.4 excludes DMC, there was no agreement to preclude DMC from relying on Section 2 cl 24.2 for imposing the 15% charge on works done by DMC.

41 DMD submits that "3rd party" does not include DMC, relying on Mr Toh and Ms Tang's evidence. Ms Tang testified that if the intent was to include DMC, parties would have stated so. In addition, DMD submits that Section 2 cl 24.2 only applies if DMD is unable to comply with "specific

[22] 3 April 2025 Hearing Transcript at p 43 lines 10–15.

requirements". This phrase, however, is not defined in Section 2. The word "specific" means "the detailed, precise, or particular requirements that are explicitly stated in the contract and not all the requirements" [emphasis in original omitted].[23]

Decision

42 I turn to the first sub-issue. The wording of items 1.7.1 to 1.7.3 of the 14 June 2022 Minutes is wide enough to accommodate both DMC and DMD's interpretation. As the document in question is a set of minutes recording a certain agreement of the parties, the parties' understanding of the agreement is particularly important.

43 Ms Tang is DMD's witness. She was present at the 14 June 2022 meeting. DMD did not apply to impeach her credibility as a witness. There is also no contrary evidence from any other witness. Consequently, I find no reason to reject Ms Tang's evidence on what was agreed to in respect of items 1.7.1 to 1.7.3. I therefore find that the agreement on the three categories set out in items 1.7.1 to 1.7.3 of the 14 June 2022 Minutes is only in respect of the backcharges that had already been agreed to by the parties in relation to SOP 174 and 175. They do not apply to the other backcharges claimed by DMC in OC 868.

44 The second sub-issue is in respect of item 1.7.4. I am inclined towards DMD's interpretation that the phrase "3rd party" in item 1.7.4 excludes DMC. I accept Ms Tang's evidence that since DMC was the main contractor, it would be odd for the parties to have referred to DMC as a third party in the minutes. I also note that the minutes make specific reference to "DMC" at various places.

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[23] DMD Closing Submissions at para 49.

In view of this, the absence of "DMC" from item 1.7.4 suggests that there was no intention for the phrase "3rd party" to include DMC.

45 However, I agree with DMC that item 1.7.4 as worded, only states that the 15% charge would apply to third parties. It does not go further to *exclude* the operation of Section 2 cl 24.2, which entitles DMC to 15% profit and attendance on backcharges imposed by DMC for works that DMD is unable to provide or which DMC carries out on behalf of DMD. I note that DMD did not provide a response to this in its written submissions.

46 DMD's submission regarding the phrase "specific requirements" in cl 24.2 does not help its case. The fact that the other provisions in Section 2 do not contain the explicit phrase "specific requirements", does not mean that cl 24.2 does not apply to any of them. As DMD itself submits, the word "specific" means particular requirements that are explicitly stated in the contract.[24] Such particular requirements are found in the Section 2 provisions which DMC relies on for its entitlement to the backcharges.

47 Consequently, while I find that the parties only agreed in item 1.7.4 that the 15% profit and attendance applies to third parties, there was no recorded agreement that DMC is dis-entitled from relying on cl 24.2 to impose a 15% profit and attendance on works that DMC carried out on behalf of DMD.

Issue 3: Whether DMC is entitled to claim the expenses in Backcharge 1

48 The third issue relates to DMC's entitlement to claim the expenses in Backcharge 1.

[24] DMD Closing Submissions at para 49.

49 DMD submits that DMC is not entitled to claim the following Site Expenses in Backcharge 1:

(a) Depreciation expenses ($230,544.65): this is not in the nature of a backcharge because it is a direct, out-of-pocket expense incurred in the performance of works or as a result of any actions taken during works. It is simply an artificial allocation of the cost of an asset over its useful life.

(b) Dormitory, refreshment, and entertainment expenses ($166,375.57): there is already a labour charge for DMC's workers. This should include the cost of their housing and meals.

(c) Workers' ancillary expenses: DMC already imposes a labour charge for its workers. DMC should not backcharge for components that are ancillary to its labour charges, such as:

(i) Safety accessories for the workers ($16,390), comprising safety vests, safety boots, gloves, helmets, shirts, and earplugs. These are usual items found in a worker's kit for construction work which are provided by employers. They should not be charged separately.

(ii) Sundry expenses ($30,404.30), comprising catering for 7th month (*ie*, Hungry Ghost Festival), batteries, lights, transport, postage, might be for the workers but should not be included as a separate charge.

(iii) Medical fees ($12,099.58), which are related to routine medical expenses or Covid related expenses have to be provided by an employer in any event.

(iv) Staff and workers welfare ($16,989) which comprise air tickets, meals and uniforms that have to be provided by an employer in any event.

50 DMC submits that its claim for depreciation costs is essentially its method for recovering the costs of machines, vehicles and equipment ("MVEs") that DMC had specifically acquired and deployed to take over DMD's works, without unduly penalizing DMD. It is not disputed that DMC spent approximately $1.2m in acquiring MVEs that were required for it to carry out road marking works. Mr Toh accepted that DMC would not have needed to purchase water blasting machines in "normal circumstances"[25] and that DMC bought them because DMD was in delay.[26] Ms Leong conceded that there was a limited demand for water-blasting machines and that it would be difficult to sell them within their limited lifespan.[27] Despite this, DMC is only claiming for a fraction of the costs it incurred for acquiring such MVEs, based on their deployment period for the Project. Ms Leong agreed that it was fair for DMC to take this approach,[28] and for DMC to depreciate the costs of machines/equipment and vehicles over five years and 10 years, respectively. Ms Leong agreed that this resulted in a lower claim for depreciation costs compared to the amount that DMC could have claimed if DMD's depreciation policies of three years for machines/equipment and five years for vehicles were applied.[29]

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25 1 April 2025 Hearing Transcript at p 57 line 21–p 58 line 3.

26 1 April 2025 Hearing Transcript at p 84 lines 17–21.

27 2 April 2025 Hearing Transcript at p 97 lines 4–24.

28 2 April 2025 Hearing Transcript at p 92 line 14–p 93 line 7.

29 2 April 2025 Hearing Transcript at p 105 line 1–p 108 line 6.

51 Mr Lee testified that the claim for worker costs only covers salary related components.[30] DMC should also be entitled to the dormitory, refreshment, and entertainment expenses and other expenses that DMD terms as workers' ancillary expenses.

(a) Mr Lee explained that additional food expenses were incurred to encourage its workers who were working in difficult conditions for long hours to "push through" the Project. The refreshments were needed to cool down their bodies so that the works could be carried out properly and safely.[31] Such expenses would not have to be incurred if DMC did not have to carry out works for substantial locations within an expedited timeline. The expenses are directly attributable to DMD's severe delays.

(b) No DMD witness challenged DMC's claim for medical fees and for staff and workers welfare expenses, nor were any DMC witnesses cross-examined on them.

(c) DMD did not dispute that items for batteries, lights, transport and postage were required for the works. The 7th month catering items which DMD referred to are no longer being claimed by DMC. In addition, DMD had included under sundry expenses, the costs of Closed-Circuit Televisions ("CCTV") set up for the Employer to monitor the road marking works. This is not related to labour costs and should thus be charged separately.

(d) DMD was required to provide the safety accessories. Section 2 cl 21.6 requires DMD to provide safety vests (note finding below at

30 AEIC of Mr Lee at para 99–108.

31 27 March 2025 Hearing Transcript at p 52 line 12–20.

[90]). Section 2 cl 21.4 requires DMD to take all necessary precautions to ensure safety of the works.

Decision

52 I accept DMC's explanation regarding the depreciation costs of $230,544.65 for the MVEs. This is DMC's approach to attributing to DMD the partial cost of DMC acquiring the MVEs, instead of charging DMD for the full amount. It is not disputed that this is the first time that DMC is doing road works, and that DMC acquired such MVEs for the purpose of the road works that it was carrying out on behalf of DMD. It is only right that DMD bears that cost. I consider it fair for DMC to arrive at the partial cost through depreciation timelines of five years for machines/equipment and 10 years for vehicles. As Ms Leong had accepted, this results in less cost to DMD than if DMC had applied DMD's shorter depreciation timelines.

53 In their closing submissions, DMD disputes the dormitory expenses ($166,375.57), and refreshment and entertainment expenses ($17,013.39) on the ground that DMC's labour charge for their workers should include the costs of their housing and meals. However, DMD did not raise objections to the dormitory expenses in their pleadings, AEICs or during the cross-examination of DMC's witnesses. Moreover, the invoices submitted by DMC in support of this claim are not duplicative, as they do not include the cost of housing and meals. In explaining this labour charge, Mr Lee had set out on affidavit how they were derived.[32] His evidence on this was unchallenged. The labour costs claimed by DMC comprises five components: Worker Wages/Site – Foreign Worker Levy, Medical Fees, Site – Staff and Worker Welfare, Site – Training

[32] AEIC of Mr Lee at paras 99–113.

and Course Fees, and Site – Dormitory Rental.[33] Each individual component does not overlap with the others and are expenses which are necessary to operate the works that were done.

54 DMD does not dispute these expenses on the ground that the quantum is unreasonable nor has it provided any evidence to support such a submission. DMD's objection to what it categorises as "ancillary" expenses for the workers, is that because DMC already has a labour charge for the workers, these expenses are ancillary to the labour charge and should be excluded. However, Mr Lee had testified that DMC's claim for worker costs only covers salary related components. This evidence was not challenged by DMD. More specifically:

(a) I note that safety accessories are required under Section 2 cll 21.4 and 21.6. DMD also accepts that these are part of the usual kit for construction work which employers provide.

(b) I accept Mr Lee's explanation that DMC provided refreshments for its workers to sustain longer hours of work. Such hours of work are attributable to the need for DMC to carry out works expeditiously due to DMD's delays.

(c) Even in its written submissions, DMD accepts that the dormitory and sundry expenses are for the workers. DMD also accepts that medical fees and the staff and workers welfare expenses have to be provided by an employer in any event. In addition, the reasons for incurring these expenses have been explained by Mr Lee.[34]

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33 AEIC of Mr Lee at Tab 8(g).

34 AEIC of Mr Lee at paras 23, 97 and 110–113.

55 In summary, I find that the disputed expenses in Backcharge 1 are reasonable expenses which were incurred by DMC in executing the work done on DMD's behalf. DMD has not raised any valid objections. DMC is entitled to claim for these expenses in Backcharge 1.

Issue 4: Whether Backcharge 2 is excessive

56 The fourth issue is whether Backcharge 2 is excessive. DMC claims the sum of $250,511.34 (excluding GST), inclusive of 15% profit and attendance, for engaging two third party sub-contractors ("3P") to carry out physical road marking works in 17 locations.

57 DMD submits that Backcharge 2 is excessive. Mr Toh carried out sample site inspections at three different sites where works had been done by 3P around April and May 2023.[35] Mr Toh's inspections took place more than one and a half years later around 15 and 16 January 2025. Taking an average across the differences in percentage values between what DMC has claimed for, and the measurement of actual works done on site by Mr Toh, DMD submits that there is overclaiming by an average of 49.76%.[36]

58 DMC submits that the amounts are not excessive. They are supported by quotations, progress claims and invoices submitted by 3P. Mr Toh did not invite any DMC representative to attend his sample site inspections. It is clear from the documents that Mr Toh produced from his inspections, that he simply wrote his own measurements on top of documents that set out the quantities verified and approved by the Employer. There is no basis for questioning the Employer's numbers. The Employer paid DMC on the basis of such verified numbers.

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35 AEIC of Mr Toh Hock Seng ("Mr Toh") at paras 68–75.

36 Defendant Opening Statement at [46].

Decision

59 In *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 ("*Jia Min*"), it was held at [71] that the burden of proving that the loss has not been mitigated lies squarely on the party in breach. The burden of proving that Backcharge 2 is excessive is thus on DMD. If the party in breach intends to contend that the claimant has failed to act reasonably in mitigating damages, notice of such an assertion ought to be pleaded. In assessing the reasonableness of the claimant's conduct, the court will take cognisance of the fact that the claimant is "'not bound to nurse the interests of [the party in breach]' … but, at the same time, [it] cannot disregard the defaulting party's interests": *Jia Min* at [72].

60 I find that DMD has not satisfied its burden of proof. Mr Toh did not put forward reliable evidence that the claims in Backcharge 2 are excessive.

61 First, DMC was not aware of nor was it invited to observe Mr Toh carrying out his measurements, which took place over one and a half years after 3P carried out the works. There is hence no independent verification that Mr Toh's measurements were correct.

62 Second, Mr Toh's measurements are at odds with measurements that the Employer has verified. As the Employer based its payments to DMC on these measurements, there would have been an incentive for the Employer to get them correct. There is no evidence to suggest that the Employer erred in carrying out its measurements. When this was posed to Mr Toh on the stand, he said that the Employer did not actually do the measurements. However, as this allegation was not in his AEIC, DMC did not have the opportunity to call the Employer to verify. In any event, Mr Toh was unable to substantiate his allegation that the Employer did not do the measurements.

63 In their closing submissions, DMD submits that Mr Chin accepted that a different method of calculation was used between the Employer and DMC, as compared to the method used between DMC and DMD.[37] DMC submits that the different methods were for the sake of profiting from DMD's works. The Employer paid DMC $7,599,781 in Payment Certificate No. 24 for the provisional quantities and variation orders for work done under the West and East Contracts.[38] After deducting the 5% that DMC was entitled to under the Sub-Contracts, the amount would be $7,219,792.05. There is a discrepancy of about $124,000 between this and the amount stated in Mr Chin's AEIC,[39] where he stated that if DMD had fulfilled all of its obligations under the Sub-Contracts, such that it was not necessary for DMD to take over the remaining works, DMD would only have incurred S$7,095,016.97 (excluding GST).

64 This point was not pleaded by DMD. It is not explained in any of the AEICs of DMD's witnesses. Nor were any of DMC's witnesses asked during cross examination about the relationship between this particular discrepancy and the methods of calculation used in arriving at Backcharge 2. Furthermore, any discrepancy arising from the differences in calculations methods of the parties is not material to this issue, since in any event, Mr Toh himself accepted that the 3P's measurements were identical to the Employer's.[40] In other words, the Employer verified 3P's measurements. This is in stark contrast to Mr Toh's measurements, which were conducted one and a half years after the works were done by 3P, in the absence of verification by any independent party.

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37 25 March 2025 Hearing Transcript at p 143 line 6–25.

38 Core Bundle of Documents Vol 5 pp 797 and 1739.

39 2nd AEIC of Mr Chin Kim Lung ("Mr Chin") at para 22.

40 28 March 2025 Hearing Transcript at p 106 line 18–p 107 line 8.

Issue 5: Whether s 26 of the SOPA is a defence to Backcharge 3

65 The fifth issue is whether s 26 of the SOPA is a defence to Backcharge 3. DMC claims the sum of $305,551.37 (excluding GST), for the costs incurred by DMC in bringing the Sub-Contract Works to completion in the period after 27 June 2023 to December 2023, when the Sub-Contract Works, including all Fifth Month Field Tests, were substantially completed.

66 DMD had earlier brought claims against DMC under the SOPA regime for interim payments. This resulted in the adjudication determinations in SOP 174 and SOP 175. DMD submits that it is not liable for Backcharge 3 as works are suspended under s 26(1)(*d*) of the SOPA because "the claimant has not been paid the adjudicated amount". The suspension commenced on 16 September 2023 for West Sub-Contract and 21 September 2023 for East Sub-Contract, which are the dates that DMD gave notice to DMC of the suspension of works. DMD accepts that the suspension does not apply to works done before these dates.

67 DMC submits that as it is DMD's evidence that it continued to carry out Fifth Month Field Tests during the suspension period, DMD had made an unequivocal election to waive the protections under s 26 of the SOPA. While *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 ("*Audi Construction*") was concerned with waiver of rights to raise objections to payment claims in adjudication proceedings, the same principle should apply to waiver of suspension rights asserted under s 26 of the SOPA.

68 DMC submits that even if DMD were entitled to suspend its Sub-Contracts Works on those dates, the period of suspension would have been terminated on 7 November 2023, when the parties recorded consent orders in HC/OA 929/2023 and HC/OA 946/2023 ("Consent Orders") for, amongst other

things, stays of execution on the enforcement of the adjudication determinations made in SOP 174 and 175 pending the final determination of the dispute between the parties.

69 DMD submits in response that payment into court is not the same as the claimant being "paid the adjudicated amount" under s 26 of the SOPA. DMD relies on ss 36(1) and 36(2) of the SOPA to argue that the consent order does not bring the suspension period to an end. Section 36 of the SOPA states that the provisions of the SOPA have effect despite any provision to the contrary in any agreement. In addition, DMC's actions after payment into Court are inconsistent with the rights they are now seeking to enforce. There was no demand made from DMC to DMD for DMD to re-start works or to produce the Fifth Month Testing reports.

70 DMC makes three submissions in response to DMD's reliance on s 36 of the SOPA. First DMC relies on [4.36] of Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 3rd Ed, 2022) ("*Security of Payments*"), to submit that s 36 of the SOPA is an anti-avoidance provision that protects a contractor's rights to progress payments and recourse to adjudication. The Consent Orders are not hostile to either of these two aims. Second, the SOPA does not state that contractors have an unfettered, right to enforce adjudication determination. Third, while the ability to suspend works under s 26 of the SOPA is a right conferred by statute, such a right can be given up by the party entitled to exercise it. This is what DMD did by agreeing to the Consent Orders, or by acting inconsistently with its asserted right of suspension.

71 Arising from the parties' submissions, the following sub-issues arise:

(a) first, whether DMD elected to waive its entitlement to suspend works under s 26 of the SOPA when it continued with the works during the suspension period; and

(b) second, if DMD had not waived its entitlement to suspend works, whether the period of suspension terminated on 7 November 2023 when parties recorded the Consent Order.

Decision

72 DMD relies on s 26(1) of the SOPA for its entitlement to suspend works. This states that:

> (1) Subject to the provisions of this Act, a claimant may suspend the carrying out of construction work, or the supply of goods or services, under a contract if, and only if —
>
> (*a*) the claimant has served on the respondent the notice mentioned in section 23(1)(b);
>
> (*b*) a copy of the notice has been served by the claimant on the principal (if known) and the owner concerned;
>
> (*c*) 7 days have elapsed since the notice was served on the respondent, the principal (if known) and the owner, or since the last of them was served the notice; and
>
> (*d*) **the claimant has not been paid the adjudicated amount**.
>
> …
>
> [emphasis added in bold]

73 I begin with the first sub-issue. DMC submits that DMD is precluded from relying on s 26 of the SOPA to suspend works, because DMD has made an unequivocal election to waive the protections under s 26 of the SOPA through its continuance of works. DMD communicated its election to forgo its right to suspend works when it revealed through Ms Leong's AEIC at para 79

that DMD supposedly continued to carry out various Fifth Month Field Tests from September to December 2023, including during the period of alleged suspension of works. DMD's counterclaim for work done also includes a portion representing the value of the Fifth Month Field Tests it allegedly carried out during this period.

74 DMC relies on the doctrine of waiver by election. This arises where a party has by words or conduct, communicated clearly and unequivocally that it has elected not to exercise one of two inconsistent rights. Once an election is made, it is final and binding, and the party will be taken to have abandoned the right it has elected not to exercise. It is immaterial that the communication by DMD of the election was not made contemporaneously with the time that DMC incurred the costs for the Fifth Month Field Tests. This is because unlike the doctrine of waiver by estoppel, detrimental reliance is not a pre-requisite for the doctrine of waiver by election: *Audi Construction* at [54] and [57].

75 DMD's response is that it cannot be said to have elected to waive its statutory entitlement to suspend works pursuant to s 26 of the SOPA. This is because while it is undisputed that it continued to carry out the Fifth Month Field Tests, these tests were not handed over to DMC. The withholding of DMD's Fifth Month Field Tests is consistent with DMD's position that it is entitled to suspend works pursuant to s 26 of the SOPA.

76 In *Audi Construction*, the Court of Appeal explained the doctrine of waiver by election at [54] and [57]:

> [54] … This doctrine [of election] concerns a situation where a party has a choice between two inconsistent rights. If he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party.

> …
>
> [57] Waiver by election is often distinguished from what is sometimes called waiver by estoppel … A party making an election is communicating his choice whether or not to exercise a right which has become available to him. By contrast, a party to an equitable estoppel is representing that he will in future forbear to enforce his legal rights. And as the Judge observed, this doctrine is premised on inequity, not choice, hence the requirement of reliance …

77 In this case, there were two sets of inconsistent rights before DMD. First, the right to suspend works pursuant to s 26 of the SOPA. Second, the right to continue the works and to claim for the value of such works. Choosing to continue the works is plainly inconsistent with the right to suspend the works. DMD not only chose to continue the works, but also to claim for the value of such works. By counterclaiming for the Fifth Month Field Tests that were carried out during the alleged period of suspension, DMD makes it abundantly clear that it has elected to abandon the other inconsistent right, which is the right to suspend works. Indeed, DMD continues to assert its position that it is counterclaiming for such Fifth Month Field Tests in its Closing Submissions[41] and Reply Submissions.[42] Furthermore, as was pointed out by the Court of Appeal in *Audi Construction* at [57], unlike the doctrine of waiver by estoppel, detrimental reliance is not a pre-requisite for the doctrine of waiver by election. It is therefore not essential that the communication by DMD of its election was made after DMC had incurred the costs for the Fifth Month Field Tests.

78 The fact that DMD has not produced evidence of such tests by handing the test reports over to DMC only goes towards whether DMD has adduced sufficient evidence to support its counterclaim. It does not detract from the fact

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41 DMD Closing Submissions at paras 103–104.

42 DMD Reply Submissions at para 73.

that DMD is asserting through its counterclaim, a right that is wholly inconsistent with its right to suspend works under s 26 of the SOPA.

79 I therefore find that pursuant to the doctrine of waiver by election, DMD has elected to waive its rights to suspend works under s 26 of the SOPA, and DMD consequently cannot rely on this as a defence to DMC's claims for Backcharge 3.

80 In view of the clear position taken by DMD to waive its right to rely on s 26 of the SOPA, it is not necessary to consider the second sub-issue.

Issue 6: Whether Backcharge 4 falls within Section 2 cl 8.1 and 8.4.1 of the Sub-Contracts

81 The sixth issue is whether the claim in Backcharge 4 falls within the Sub-Contracts. In Backcharge 4, DMC claims the sum of $748,800 (excluding GST), as the cost of deploying personnel (Project Managers / Engineers and WSHO / Coordinators) that DMD was contractually obliged to provide under the Sub-Contracts.

82 There are two sub-issues arising:

(a) First, whether the personnel costs claimed in Backcharge 4 are expressly provided for in the Sub-Contracts.

(b) Second, whether the phrase "Contractor" in Section 2 cl 8.1 and 8.4.1 of the Sub-Contracts means DMC rather than DMD.

83 In respect of the first sub-issue, DMD submits that the project management personnel that are claimed in Backcharge 4 are part of DMC's scope of work in the Preliminaries under the Main Contract and not part of

Section 2 of the Sub-Contracts.[43] Evidentially, Mr Chin admitted during cross-examination that DMC had engaged project managers, engineers and WSHO manager as part of the project management for the execution of the road marking works. Mr Chin also admitted during cross-examination that DMC was responsible for planning, managing and supervising the road marking works.[44]

84 DMC submits that the planning obligations imposed on DMD are expressly provided for in Section 2 cl 7.1 and General Conditions cl 3.3.1, while the personnel obligations are expressly provided for in Section 2 cl 8.1 and cl 8.4.1. Mr Chin did not make the admissions alleged by DMD.

85 In respect of the second sub-issue, DMD submits that "Contractor" in Section 2 cl 8.1 and 8.4.1 refers to DMC rather than DMD. In support of this, DMD notes that DMC is understood to be "Contractor" in Section 2 cl 24.2, while DMD is "Sub-Contractor".

86 DMC submits that Section 2 cll 8.1 and 8.4 apply to DMD. The entire work scope in Section 2 is intended to apply to DMD. The term "Contractor" there cannot be meaningfully read as referring to DMC. Mr Chin explained that Section 2 of the Sub-Contracts is an extract from the Particular Specifications in the Main Contracts. In preparing the Sub-Contracts, DMC decided to include this as part of its own Sub-Contracts with DMD, without modifying the language used in the Particular Specifications, except for cl 24. Thus, although Section 2 refers to the Employer as the "Authority" and DMC as the

43 DMD Closing Submissions at para 14.

44 DMD Closing Submissions at paras 17–18.

"Contractor", these were taken as references to DMC and DMD, respectively, in the Sub-Contracts.[45] This is why only cl 24 refers to "Sub-contractor".

87 In addition, DMD's conduct showed that it was aware of these obligations. Mr Toh testified that DMD tried to submit the program to DMC but was rejected.[46] Mr Toh also testified that one of his staff formulated a plan to complete the road marking works within 1.5 years.[47] Mr Toh had also offered himself and another person as project manager. They were rejected as they did not comply with the Employer's requirements. Furthermore, based on DMD's submissions, it acknowledges that some of the provisions in Section 2 apply to DMD.[48] However, DMD has not provided any intelligible basis for cll 8.1 and 8.4.1 to be set apart.

Decision

88 I turn to the first sub-issue. DMD's submission, on whether the planning and personnel obligations are found in the Preliminaries under the Main Contract, is beside the point. The key issue here is whether these obligations are found in the Sub-Contracts. I find that the planning obligations are expressly provided for in Section 2 cl 7.1 and General Conditions cl 3.3.1, while the personnel obligations are expressly provided for in Section 2 cl 8.1 and cl 8.4.1.

89 The two alleged admissions of Mr Chin that DMD rely on, deal with different matters and do not aid DMD's case.

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45 1st AEIC of Mr Chin at para 27.

46 AEIC of Mr Toh at para 52.

47 28 March 2025 Hearing Transcript at p 15 line 3–22.

48 DMD Closing Submissions at paras 13–14.

(a) The alleged admission of Mr Chin regarding DMC's engagement of project personnel was in response to questions about an item in the Preliminaries in the Main Contract between DMC and the Employer, and not in relation to obligations of DMD under the Sub-Contract between the parties.[49]

(b) The alleged admission of Mr Chin that DMC was responsible to plan, manage and supervise the road marking works was made in response to a question from counsel for DMD as to who from DMC supervised the road marking work. Mr Chin named two persons as his project managers and as the ones supervising.[50] It is unremarkable that as the main contractor, DMC would have personnel who are supervising the sub-contractor, DMD. Mr Chin did not admit that DMC was responsible for the obligations in Section 2 cll 8.1 and 8.4.1.

90 On the second sub-issue, I accept Mr Chin's explanation that Section 2 was incorporated unchanged from the Main Contract except for cl 24. This explains why only cl 24 contains references to "Sub-Contractor", and "Contractor" there refers to DMC. It is clear that Section 2 sets out the Sub-Contract work scope for DMD. Mr Toh accepted this.[51] There are references made to "Contractor" throughout Section 2, and no references to "Sub-Contractor (with the exception of cl 24). If "Contractor" does not refer to DMD, but to DMC, Section 2 would not be meaningful. It would not achieve its intent in setting out the work scope of DMD. Moreover, DMD accepts in its written submissions that other clauses in Section 2 are applicable to DMD. This

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49 25 March 2025 Hearing Transcript at p 25 line 1–p 26 line 7.

50 25 March 2025 Hearing Transcript at p 25 line 1–p 25 line 9.

51 27 March 2025 Hearing Transcript at p 114 line 20–p 115 line 3.

includes cll 4.3 and 9.1.8, which also refer to "Contractor". DMD provided no explanation as to why the phrase "Contractor" in cll 8.1 and 8.4.1 should be read differently. I hence find that the word "Contractor" in Section 2 cll 8.1 and 8.4.1 must be referring to DMD rather than DMC. The obligations therein, are consequently those of DMD's.

Issue 7: Whether DMC is estopped from claiming for Backcharge 5

91 The seventh issue is whether DMC is estopped from claiming for Backcharge 5 because it instructed DMD not to proceed via an email dated 4 January 2022 from DMC ("4 Jan 2022 Email").

92 In Backcharge 5, DMC claims the sum of $92,900 (excluding GST) as the costs of assisting DMD with the preparation of PCR and JPS. As general background, Mr Yow testified that JPS needed to be submitted early to the Employer, as the Employer may take time to consider it before instructing DMC to proceed with particular locations. The JPS also allows the Employer to assess if actual works are needed or if locations can be omitted. In total, DMC and DMD submitted 1212 JPS to the Employer.[52]

93 DMD submits that in the 4 Jan 2022 Email from DMC to DMD, DMC instructed DMD not to proceed with the preparation of Pre-Condition Surveys ("PCS") (which are site surveys conducted in order to prepare the PCR) and JPS. The first sentence states that "[w]e will do the precon for West Sector (Qtr 1 T – Junction Part 2)" [emphasis in original omitted].[53] This was followed up by further emails dated 18 January 2022 and 4 February 2022 instructing DMD

52 AEIC of Mr Yow at p 211.

53 AEIC of Mr Yow at p 1624.

not to proceed with works in the West sector. DMC is therefore estopped from claiming for Backcharge 5.

94 DMC submits that it did not, at any time, instruct DMD not to proceed with the preparation of PCR and JPS for the West Sub-Contract. The context to the 4 Jan 2022 Email was explained by Mr Yow.[54] In that email,[55] DMC asked DMD not to proceed with the PCS and JPS for 15 locations in the West sector as DMC would be attending to the same. The purpose of DMC's email was therefore to coordinate with DMD and ensure that there was no duplicative work. The email was sent around the time that DMC started to step in and assist DMD with carrying out PCS, and preparing PCR and JPS in various locations, particularly those under the West Sub-Contract. However, this did not relieve DMD from its contractual obligations. DMD in fact continued to carry out PCS and prepare and submit JPS for multiple other locations in the West sector after January 2022.[56]

Decision

95 On a plain reading of the 4 Jan 2022 Email, there was no instruction from DMC for DMD not to proceed with the preparation of PCR and JPS for the West Sub-Contract as a whole. Inexplicably, counsel for DMD chose to cite only a part of the first sentence of the email, which when read in its entirety, clearly refers only to specific locations. The second sentence states, "[p]lease don't proceed for the following location". I accept Mr Yow's explanation of this email.

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54 AEIC of Mr Yow at para 70(c).

55 AEIC of Mr Yow at pp 1624–1625.

56 AEIC of Mr Yow at pp 183–187.

96 Contrary to DMD's submission, neither do the emails from DMC dated 18 January 2022 and 4 February 2022 contain instructions to DMD not to proceed with works in the West sector as a whole.[57]

97 Notably, DMD's characterisation of these emails is not supported by the evidence of any of its witnesses. None of them attested to such characterisation of the emails.

98 Moreover, there is unchallenged evidence that DMD continued to submit JPS for other locations in the West sector after January 2022. If DMD indeed regarded the 4 Jan 2022 Email as an instruction not to prepare JPS for the whole of the West Sub-Contract, there is no reason, certainly none surfaced by DMD, why it would continue with such work.

Issue 8: Whether DMC is entitled to liquidated damages

99 The eighth issue is whether DMC is entitled to liquidated damages ("LD") for delay.

100 DMC seeks to impose LD on DMD based on cl 8.5 of the General Conditions.[58] The material portion of cl 8.5.1 states:

> If the Subcontractor fails to complete the Subcontract Works or a Subcontract Section within the relevant Subcontractor's Time or Duration for Completion, the Subcontractor shall pay to the Contractor the relevant sum stated in the Appendix to Conditions as liquidated damages for such default (i) for every day or part of a day which shall elapse between the end of the relevant Subcontractor's Time for Completion and the date stated in the Subcontract Completion Certificate for the whole of the Subcontract Works and (ii) for every day or part of a day which shall elapse between the end of the relevant

57 AEIC of Mr Yow at pp 1623–1624.

58 AEIC of Mr Toh at p 103.

> Subcontractor's Time for Completion and the date stated in the Subcontract Completion Certificate for the relevant Subcontract Section, subject to the limit (if any) stated in the Appendix to the Conditions. …

101 The contractual completion date is 27 June 2023. The works that were uncompleted after this date relate to the Fifth Month Field Tests. DMC avers that LD continued to accrue until the Sub-Contract Works were substantially completed by DMC on DMD's behalf on 6 and 11 December 2023 for the East Sub-Contract and West Sub-Contract, respectively.

102 In the Appendix to the General Conditions of the Sub-Contracts, LD is stated as accruing at $2,700 per day. DMC claims in total the sum of $888,300.00 in LD from DMD.

103 There are three sub-issues:

(a) First, whether the Fifth Month Field Tests must be finished by the contractual completion date of 27 June 2023.

(b) Second, whether DMD can dispute the LD on the ground that it was impossible for the Fifth Month Testing to be completed by the contractual completion date of 27 June 2023.

(c) Third, whether the clause for LD at cl 8.5 of the General Conditions amounts to an unenforceable penalty.

104 In respect of the first sub-issue, DMC submits that on a proper contractual interpretation of the relevant provisions Sub-Contracts, the contractual work scope that has to be completed by 27 June 2023 includes the Fifth Month Field Tests. This is consistent with the evidence of Mr Toh. While Mr Chin's testimony at parts seems to suggest that under both the Main

Contracts and Sub-Contracts, the Fifth Month Field Tests did not have to be completed by 27 June 2023, there is no clear and unequivocal admission from him on this and his statements should be taken in the context of his exchanges with counsel for DMD.

105 DMD does not dispute DMC's contractual interpretation or Mr Toh's evidence, but notes the inconsistency of Mr Chin's testimony with DMC's case.

106 In respect of the second sub-issue, DMD submits that LD should not apply as due to the manner in which the Sub-Contracts were carried out, it was outside the realm of possibility for any of the Fifth Month Testing to be completed before the contractual completion date of 27 June 2023.

107 In response, DMC submits that though the Employer's approval was needed before work commenced on particular sites, this did not affect the delays. DMC has adduced evidence of DMD's delays and lack of resources for the Project.

108 In respect of the third sub-issue, DMD submits that cl 8.5.1 is a penalty clause. There is no genuine pre-estimate of loss. The number of defaults is not material to the imposition of LD which is fixed at $2,700 a day. DMD submits that this falls afoul of the Single Lump Sum Test in *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 ("*Denka*"), and the presumption of penalty should arise. All works except the Fifth Month Testing were completed by 28 June 2023. The Fifth Month Testing simply checks if the paint work is still intact. There is also no correspondence from the Employer imposing LD on DMC.

109 In response, DMC submits that following *Denka* and *Eco World – Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd* [2021] EWHC 2207 (TCC) ("*Eco World*"), any presumption arising from the application of the Single Lump Sum Test is easily rebuttable because the LD rate in the Sub-Contracts ($2,700 per day for both Sub-Contracts) is slightly less than those in the Main Contract ($2,700 per day for the East sector and $2,800 per day for West sector). This was designed to ensure that any LDs imposed under the Sub-Contracts would be sufficient to cover DMC's own potential exposure vis-à-vis the Employer under the Main Contracts. The LD rate of $2,700 per day is in no way extravagant and unconscionable in comparison with the greatest loss that DMC could conceivably suffer in the event of a delay in the completion of the Sub-Contract Works, which would be any LDs imposed by the Employer, plus DMC's own costs of seeing the Project through to completion. The Greatest Loss Test, which is defined as the comparison between the sum stipulated and the greatest loss that could conceivably be proved to have followed from the breach, is hence satisfied. As such, even if the Sub-Contracts do not contain any gradated LD mechanism based on the degree of incomplete work, the LD provision in the Sub-Contracts do not amount to a penalty.

110 DMC also submits that it is irrelevant whether DMC has suffered actual losses due to DMD's delays and/or whether the Employer actually imposed LD on DMC under the Main Contracts. The purpose of LDs is to facilitate the recovery of damages without the need for proving actual damage: *Sunrise Industries (India) Ltd v PT OKI Pulp & Paper Mills and another* [2023] SGHC 3 ("*Sunrise*") at [79]; *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd and another* [2020] SGHC 165 ("*Comfort Management*") at [61]–[63].

Decision

111 I begin with the analysis of the first sub-issue. Both parties proceed on the basis that: (a) the contractual work scope of the Sub-Contracts includes the Fifth Month Field Test; (b) the contractual completion date of the Sub-Contracts is 27 June 2023 and LD began to accrue on 28 June 2023.

112 I accept DMC's submission that on a proper contractual interpretation of the Sub-Contracts, the work scope of the Sub-Contracts includes the Fifth Month Field Test, and that such work must be completed by 27 June 2023.

(a) Section 2 cl 3.1 states that the "Contract period for the Whole of the Works is 24 months" [emphasis in original omitted].

(b) Section 2 cl 4.3(e) requires "[s]upply and lay thermoplastic road markings in accordance with … specification as described in Technical Specification Appendix I" [emphasis in original omitted]. Section 2 cl 4.3(h) refers to the conduct of "the *following additional* field tests at 12th month" [emphasis added], which suggests that there are prior tests, such as the Fifth Month Field Tests.

(c) Parties agree that the reference to "Technical Specification Appendix I" in Section 2 includes "Section 6: II-Appendices to Technical Specification", "Thermoplastic Road Marking" ("Section 6"). Section 6 cl 1.5.2 states that DMD "shall carry out the required field tests (at initial and at five (5) months)". This would be one of the specifications that must be met, pursuant to section 2 cl 4.3(e).

(d) Section 6 cl 1.5.3 also states that 80% of the payment shall be made on the passing of the first test, and the remaining 20% paid on passing of the second test (five months after installation). In addition, it

is stated that payment for the third field tests on the 12th month at selected locations shall be priced "*separately over and additional of the standard field performance requirements* of SS 589 : 2013" [emphasis added]. This reference to the 12th month test as being "over and additional" to standard field performance requirements, as well as the fact that it is being priced separately, suggests that the initial and Fifth Month Field Tests are indeed part of standard field performance requirements.

(e) Section 2 cl 18.2 states that "[p]ayment of thermoplastic road markings shall be as per Clause 1.5.3 of Technical Specification Appendix I". As the payment provision of the Sub-Contracts refers to the clause which requires the passing of the Fifth Month Field Tests, this reinforces that the Fifth Month Field Tests are part of the thermoplastic road markings requirements.

113 In light of the contractual provisions set out above, I find that the scope of works for the 24-month period set out in Section 2 cl 3.1 includes the Fifth Month Field Tests.

114 I note that General Conditions cl 8.4.1 allows DMD to give notice for issuance of the Completion Certificate if under cl 8.4.1.1 "the whole of the [Sub-Contract] Works is complete" and "has satisfactorily passed all tests specified in the [Sub-Contract]". This clause does not affect the above analysis. It is reasonably construed that:

(a) the first limb of cl 8.4.1.1, which refers to the whole of the Sub-Contract works, includes the Fifth Month Field Tests;

(b) the second limb of cl 8.4.1.1 which refers to the passing of all tests, is included as a catch all provision to cover tests such as the 12th Month Field tests, which DMD can instruct DMD to carry out for selected locations under Section 2 cl 4.3(h).

115 DMD's evidence at trial is also consistent with the above contractual interpretation of the work scope of the Sub-Contracts. Mr Toh gave evidence that Mr Tin Chee Kong ("Mr Tin") from DMD had planned for physical road markings to be completed within one and a half years, even though the Project duration was two years.[59] This is consistent with the schedules that Mr Tin sent to DMC via email on 2 and 12 January 2022.[60]

116 Mr Chin appeared to suggest at parts of his testimony, that the contractual completion date of 27 June 2023 only applies to the physical road marking works, and not the Fifth Month Field Tests. However, when his evidence is viewed as a whole, it is not clear that this is indeed his position:

(a) First, Mr Chin continues to maintain at parts of his testimony that the Fifth Month Testing must be finished before there is "full completion".[61]

(b) Second, at the parts of his testimony where he appears to make the suggestion that the Fifth Month Field Tests need not be completed by the contractual completion date of 27 June 2023, he uses phrases such as "due date" and "expired".[62] It is plausible in the context of the

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59 28 March 2025 Hearing Transcript p 15 line 13–22 and p 21 line 10–p 22 line 25.

60 28 March 2025 Hearing Transcript p 23 line 1–p 26 line 14.

61 25 March 2025 Hearing Transcript at p 132 line 25–p 133 line 1.

62 25 March 2025 Hearing Transcript at p 132 line 10–23 and p 165 line 3–8.

exchanges, that Mr Chin was thinking of when the Fifth Month Field Tests were *due* to be completed after the road marking was done, which would be five months after the actual physical road markings, rather than thinking of whether the contractual completion date of 27 June 2023 includes the completion of *all* the Fifth Month Field Tests.

(c) Third, Mr Chin testified during his re-examination that the Employer may have had the right to impose LD on DMC, but may have been lenient after seeing DMC's efforts and DMC's completion of all the works.[63]

117 Consequently, it could not be said that there was clear evidence from Mr Chin that contradicted the legal case of both parties and Mr Toh's evidence. Following from this, I find in respect of the first sub-issue, that the Fifth Month Field Tests had to be finished by the contractual completion date of 27 June 2023.

118 I turn next to the second sub-issue. DMD did not plead concurrent delays, nor did it provide any evidence in support of its argument that the Fifth Month Tests were physically impossible to complete on time. DMD has also not surfaced any legal authority to support its submission that LD does not apply because of the physical impossibility of completing the works on time. DMD alludes to the timing of works being subject to the approval of the Employer. However, there is no evidence that there is any lateness in approval by the Employer that resulted in the delays to the road marking works. In contrast, as set out above, there is abundant evidence that DMD lacked sufficient manpower and machinery and was very much in delay right from the early stages of the

63 25 March 2025 Hearing Transcript at p 162 line 9–22.

project. If it was not possible to complete the works by the contractual timeline of 27 June 2023, this was very much due to how DMD had mismanaged its obligations under the Sub-Contracts.

119 The third sub-issue is whether General Conditions cl 8.5.1 is a penalty clause. The proper analytical approach has been established by the Court of Appeal in *Denka*. At [185], the court held:

> The focus is whether the clause concerned provided a genuine pre-estimate of the likely loss at the time of contracting. In this regard, the *only* "*legitimate interest*" *which the Penalty Rule is concerned with is that of* ***compensation***.
>
> [emphasis in original]

120 DMD submits, relying on *Denka* at [303], that because the LD in this case consists of a single lump sum payment, there is a presumption that the LD is a penalty. DMD notes that in *Denka* at [306], the court observed that the LD formula there was gradated according to the remaining duration of the contracts from the date of termination. This was one factor that saved the LD formula from being regarding as a truly indiscriminate lump sum to be paid upon a breach of any sort. In contrast, there is no gradation to the LD formula here.

121 In analysing DMD's submission, it is useful to examine *Denka* at [303] and [305]. There, the court stated that where there is a single lump sum that is payable on the occurrence of one or more of several events, some of which may occasion serious damage and others but trifling damage, there is a rebuttable presumption that the LD is a penalty. In that case, the LD was triggered on termination of the contract, which could apply "upon a breach of any sort": *Denka* at [306]. These factors, namely that the LD could be triggered upon a breach of any sort, even where trifling damage may result, were material to the court's analysis in *Denka*.

122 In contrast, the LD in cl 8.5.1 is only triggered on the sub-contractor DMD's failure to complete the works within the contractual timelines. The LD rate in cl 8.5.1 of the Sub-Contracts is the same or slightly below that in the Main Contract, which could be imposed by the Employer on the main contractor DMD if there is no timely completion of the works. Consequently, the LD rate in cl 8.5.1 is not extravagant or unconscionable in comparison with the greatest loss that DMC could conceivably suffer in the event of a delay in the completion of the works.

123 When this is taken into consideration together with the costs that DMC would have to expend to bring a delayed Project to completion, the Greatest Loss Test is clearly satisfied, even though cl 8.5.1 does not otherwise contain a mechanism for variance based on the number of locations uncompleted. As was held in *Denka* at [305]:

> Where the court has found that the LD clause is not extravagant or out of all proportion to the greatest loss that could arise under the contract, this *should* lead the court to the conclusion that the LD clause is a genuine pre-estimate of loss and not a penalty.

124 I hence find that the LD clause at cl 8.5.1 is a genuine pre-estimate of loss and not a penalty.

125 I also accept DMC's submission that whether the Employer has imposed LD on DMC under the Main Contract is immaterial. There is clear authority, in *Sunrise* at [79] and *Comfort Management* at [61]–[63], that the purpose of LD is to facilitate the recovery of damages without the need for proving actual damage. DMD has not provided any legal authorities to the contrary nor set out any substantial legal analysis to support its case or in response.

126 Following from the above, I allow DMC's claim for LD, for the sum claimed of $888,300 (excluding GST), from 28 June 2023 to 6 December 2023 for the East Sub-Contract and from 28 June 2023 to 11 December 2023 for the West Sub-Contract.

Issue 9: Whether DMC is precluded from claiming because of unjust enrichment

127 The ninth issue is whether DMC is precluded from its claims against DMD, because DMC had already received payments from the Employer, and any sum recovered from DMD would amount to unjust enrichment.

128 DMD submits that as DMC has already been fully compensated by the Employer, any recovery from DMD would constitute an unjust enrichment. Unjust enrichment in construction matters has been accepted in *Comfort Management*. There, the court awarded part payment of works done as it recognized that Comfort had benefited from works done by OGSP in the form of payment from the upstream contractor: at [128]–[130]. Here, DMC had already been paid by the Employer. To allow DMC's claims against DMD would be tantamount to double recovery and would result in DMC obtaining a windfall. DMD submits that *quantum meruit* principles, as outlined in *Comfort Management*, should be used to quantify that part of DMD's scope of work performed by DMC that has been paid by the Employer but yet is claimed against DMD. In particular, preliminaries done by DMC under the Main Contract amount to $748,000 for project management personnel and programme for the works. This is part of Backcharge 4. This sum should be excluded from DMC's claim against DMD.

129 DMC submits that there is no question of unjust enrichment in this case. DMC only received what was due to it under the Main Contracts. The payments

that DMC received from the Employer were not "compensation", as the Employer was not compensating DMC for the losses that it had suffered under the Sub-Contracts.

Decision

130 DMD has not set out a clear or coherent case that there was unjust enrichment or double recovery. DMD had breached its obligations under the Sub-Contracts with DMC, who mitigated their losses by undertaking the outstanding work themselves or by engaging third parties. DMC are entitled to claim for the losses incurred pursuant to this. Any profits that DMC may have gained from their contract with the Employer arises under a wholly separate contractual bargain, between DMC and the Employer.

131 The only authority relied on by DMD is *Comfort Management* at [128]–[130]. However, DMD has not put forward any legal submissions or evidence to justify a claim in *quantum meruit*. The claim in *Comfort Management* was for work done outside the original scope of the contract - the works in question had not been performed pursuant to a valid variation because of a lack of written instructions for the variation. Hence, the facts there are materially different from those in this case, and without more, the *dicta* does not advance DMD's case.

Issue 10: DMD's Counterclaim

132 The tenth issue is whether DMD is entitled to its counterclaim. DMD counterclaims for the value of works carried out by DMD under both Sub-Contracts, before DMD was allegedly instructed to cease the works.

133 In its Closing Submissions, DMD submits that it is entitled to its counterclaim in relation to:

(a) 20% of the contract sum for the 156 locations that DMD claimed it carried out Fifth Month Field Tests for but did not submit to DMC as claims; and

(b) the retention sum that is withheld by DMC. This retention sum is for defects and no defects have been alleged.

134 DMC submits that there is no basis for DMD to claim for Fifth Month Field Tests that DMD did not submit claims for. DMD has provided no evidence of work done. Further, as DMD did not complete the works, it is not entitled to the retention sum, which DMC was entitled to deduct from progress payments and withhold under cl 18.3 of the General Conditions, read together with the Appendix.[64]

Decision

135 I deal first with DMD's counterclaim for the retention sum. While DMD submits that it is claiming for the retention sum as part of its counterclaim, it has not pleaded anything relating to a "retention sum" in its Counterclaim. DMD's claims there are confined to the sums of $533,767.18 (including 8% GST) and $679,007.94 (including 8% GST), due and payable by DMC to DMD for the value of works carried out by DMD under the East and West Contracts, respectively, before DMD was instructed to cease the works. None of DMD's witnesses said anything on retention sums in their AEICs. Neither did DMD's written submissions help. They only state that DMD had carried out the works and as no defects have been alleged, there is no basis for withholding the retention sum. However, this provides no clarity as to what DMD considers to

64 Core Bundle of Documents Vol 2 at pp 103–104 and 120.

be the retention sum, the amount, or the relevant contractual clause that governs the retention sum claimed.

136 I note that when DMD appeared before the adjudicator for the purposes of SOP 174, DMD submitted that it was entitled to the retention sum by virtue of Section 6 cl 1.5.3, which states that the "remaining 20% shall be paid upon passing of the 2nd test (five (5) months after installation)". If this is what DMD has in mind in OC 868, it is not apparent from its written submissions. In any event, reference to "retention sum" in such a manner would be legally immaterial and duplicative, since DMD is already counterclaiming for 20% of the contract sum for the 156 locations that DMD claims it carried out the Fifth Month Field Tests for.

137 I turn next to the main component of DMD's counterclaim. By the time of its written submissions, DMD had confined its counterclaim, from what was more broadly pleaded, to a claim for 20% of the contract sum for the 156 locations it allegedly did Fifth Month Field Tests for. However, DMD does not state what specific amount it is claiming under this component, nor has it referred to any evidence to support its claim that these Fifth Month Field Tests were indeed carried out.

138 DMC's assessment is that the total amount claimed by DMD for Fifth Month Field Tests is $233,704.60 ($114,623.81 for the East Sub-Contract plus $119,080.79 for the West Sub-Contract), based on figures tabulated by Ms Tang in the Annexes attached to her AEIC.[65]

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65 AEIC of Ms Tang at Annexes 3 and 6, under column "LCC HOLD 20% for 2nd field test report".

139 DMC submits that DMD is not entitled to the sum of $233,704.60, as DMD's representatives admitted that its reports for Fifth Month Field that were allegedly carried out after June 2023, were not submitted to DMC. This is a relevant consideration.

140 In addition, and more fundamentally, I note that none of DMD's witnesses testified in their AEICs that DMD carried out the Fifth Month Field Tests for the locations mentioned in the Annexes of Ms Tang's AEIC. In its submissions, DMD confirms that it has not adduced any of the Fifth Month Field Test reports for these locations to support its claim that it had carried out the tests there.[66] What DMD has produced, are figures tabulated by Ms Tang into a table. There is no evidence from DMD to support its claim that it actually carried out the Fifth Month Field Tests in the 156 locations.

141 I therefore dismiss DMD's counterclaim.

Conclusion

142 In conclusion, I allow DMD's claims for:

(a) Backcharges 1, 2, 3, 4, 5 and 6; and

(b) LD in the sum claimed of $888,300 (excluding GST).

143 DMD's counterclaim is dismissed.

144 DMC sought pre-judgment interest in respect of Backcharges 1 to 6 and the LD, at the rate of 5.33% per annum, pursuant to s 12 of the Civil Law Act, starting from the following dates:

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66 DMD Further Submissions at para 3.

Item Claimed	Interest start date	Basis
Backcharge 1, 2 and 4	From 28 June 2023 to the date of judgment.	DMD's costs for these backcharges had been fully incurred by the contract completion date of 27 June 2023.
Backcharge 3	From 12 December 2023 to the date of judgment.	All of DMD's costs for this backcharge had been incurred by the time when it completed all 5th month Field Tests on 11 December 2023.
Backcharge 5	From 29 March 2023 to the date of judgment.	The last JPS/PCR prepared by DMC was submitted on 28 March 2023.
Backcharge 6	From 7 June 2023 to the date of judgment.	The last item for the Agreed Backcharge was incurred on 6 June 2023, which was the day when DMD completed its last location of road marking works for the Project.
LD East Sub-Contract	From 17 September 2023 to the date of judgment.	Interest charged from the midway point between the time when LDs accrued on 28 June 2023 up to the time when all 5th Month Field Tests were completed by LCC for the East Sub-Contract (i.e: 6 December 2023).
LD West Sub-Contract	From 19 September 2023 to the date of judgment.	Interest charged from the midway point between the time when LDs accrued on 28 June 2023 up to the time when all 5th Month Field Tests were completed by LCC for the West Sub-Contract (i.e: 11 December 2023).

145 DMC supports its proposed start dates based on the following:

(a) Pre-judgment interest is generally awarded from the time when a claimant accrues its loss: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 ("*Robertson Quay Investment*") at [100] –[103];

(b) *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 sets out the situations where the court may exercise its discretion to depart from the general rule, and order pre-judgment interest to commence at a time after the date when loss accrued. For example, delay in bringing legal proceedings. These exceptions do not apply here.

(c) There would be practical difficulties in calculating interest on every individual line item contained in each category of backcharges from the respective dates when they were incurred. For ease of computation, DMC claims interest on the basis that it should start to accrue on the last day when all items in that category of backcharge would have been incurred.

(d) In *PT OKI Pulp & Paper Mills v Sunrise Industries (India) Ltd and another appeal* [2023] SGHC(A) 38 ("*PT OKI Pulp*"), the Appellant Division at [132] awarded pre-judgment interest on liquidated damages starting from the mid-point between the start and end date of the liquidated damages period. This is applied here to the LD.

(e) DMC will provide a deduction from the total sum of the pre-judgment interest as set out in the table above, to account for pre-judgment interest on the value of sub-contract work that has been

completed. This would be at the rate of 5.33% per annum, running from the completion date of the contract (i.e. 27 June 2023) to the date of the judgment.

146 DMD did not dispute DMC's claim for the pre-judgment interest sought above, or the rate of 5.33% per annum. However, DMD disputes the start dates from which the pre-judgment interest runs. DMD submits that DMC's claims under the backcharges have shifted a great deal from the start of the originating claim right up till trial. Hence, pre-judgment interest for any of DMC's claims (if any is awarded) should be from the date of the originating claim to the date of judgment.

147 I note that DMD does not contest the principle set out in *Robertson Quay Investment* that pre-judgment interest is generally awarded from the time when a claimant's loss accrues. While DMC's claims may have shifted following the filing of the originating claim, they were finalised by the time trial commenced. More pertinently, that does not affect the time when the loss accrues for the claims that are found to be successful. Neither does DMD contend that the exceptions as set out in *PT OKI Pulp* apply here.

148 I therefore award DMC the pre-judgment interest sought for Backcharges 1-6 and the LD, at the rate of 5.33% per annum, starting from the dates as proposed by DMC, and set out in the table above at [144]. There will be a deduction from this sum to account for pre-judgment interest on the value of sub-contract work that has been completed, in the manner proposed by DMC.

149 DMC also seeks post-judgment interest at the rate of 5.33% per annum on the amount awarded above, from the date of judgment until the date of full payment. DMD agrees. I so order.

150 As costs follows the event, DMC is awarded costs. If parties are unable to agree on the quantum of costs, they are to be fixed by me. In such event, parties are to file submissions on the quantum of costs, of not more than seven pages, within two weeks of this judgment.

Kwek Mean Luck
Judge of the High Court

Kirindeep Singh, Ang Wei Jing, Sheryl and Pang Haoyu, Samuel (Dentons Rodyk & Davidson LLP) for the claimant;
Lazarus Nicholas Philip and Elizabeth Toh Guek Li (Justicius Law Corporation) for the defendant.