IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1999] SGCA 77

CA 45/1999, 46/1999

Between

Chuang Uming (Pte) Ltd

… *Appellant*

And

Setron Ltd and Another
Appeal

… *Respondent*

GROUNDS OF DECISION

Building and Construction Law — Architects, engineers and surveyors — Duties and liabilities; Building and Construction Law — Architects, engineers and surveyors; Building and Construction Law — Damages — Damages for defects

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Chuang Uming (Pte) Ltd v Setron Ltd and Another Appeal

[1999] SGCA 77

CA 45/1999, 46/1999
Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
01 November 1999

1 (delivering the judgment of the court): These two appeals before us pertain to the defective tiling works carried out on the fa+ade of a seven-storey light industrial building known as `Haw Par Technocentre` (`the building`) located at the junction of Commonwealth Avenue and Tanglin Halt Close. As both the appeals raise substantially the same issues, we propose to deal with them together in this judgment.

2 ***Facts***

3 Setron Limited (`the owners`), a subsidiary of Haw Par International Ltd, are the owners of the building. The architects engaged by the owners to design the building were Lee Sian Teck Chartered Architects (`the architects`), and the terms of their engagement were governed by the Singapore Institute of Architects` Conditions of Appointment and Scale of Professional Charges 1985. The main contractors engaged in the construction of the building were Chuang Uming (Pte) Ltd (`the contractors`). The building contract between the owners and the contractors was made on or about 8 February 1991 and was governed by the Articles and Conditions of Building Contract (3rd Ed) published by the

Singapore Institute of Architects. The contract period was 50 weeks from 14 November 1990, and the agreed date of completion was 30 October 1991. However, completion of the construction was delayed, and the works were practically completed only on 20 March 1992 and the certificate of practical completion was issued by the architects on 28 April 1992.

4 The fa+ade of the building was tiled with ceramic tiles, and the tiling works were carried out by a specialist tiling sub-contractor, Siwahin Decoration Contractors, engaged by the contractors and covered a period of 21 weeks from September 1991 to February 1992.

5 A clerk-of-works, Mr Tan Deng Wee, was engaged to supervise the construction of the building including the tiling works on the fa+ade. His emoluments were paid by the owners.

6 In mid-May 1992, approximately two months after the tiling of the fa+ade had been completed, some tiles began to `pop-out` or `debond` and fall onto the ground. At first, the debonding was sporadic, but the situation worsened progressively and became a cause for great concern. For a period of nearly a year, from June 1992 to May 1993, various meetings were held between the parties to discuss how to deal with the problem. Experts were consulted and reports were obtained, but nothing concrete was done to remove the potential hazards. In the words of the trial judge, `the parties ... were in a state of flux and having consulted their respective legal counsel and obtained expert reports as to what could have caused the debonding, started pointing fingers at each other, the [contractors] blaming the [architects] for the poor design and the [architects] maintaining that it was poor workmanship by the [contractors] that had brought about the fiasco.`

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7 During this period of time, numerous requests were made by the owners and the architects to the contractors to remedy the defective fa+ade, but the contractors refused to comply. They maintained that the defects were caused by the architects` poor or defective design and by the fact that the tiles used were selected by the owners and were unsuitable. They took the position that they would only carry out the necessary repairs, if such repairs would be considered as additional works under the building contract for which they would be paid extra. The owners refused to concede this, and in mid-1993, the owners engaged a firm of contractors, Dokota Private Ltd, to remove the debonded tiles and put up safety nets around the building as a precautionary measure to prevent any accident or injury to persons from the falling tiles.

8 By December 1993, negotiations between the parties had irreparably broken down, and the owners engaged another firm of contractors, Brilliant General Building Construction (Pte) Ltd, to strip the entire fa+ade of all the tiles and coat it with a spray finish called `Eleganstone`. This was completed some time in July 1994. All in all, approximately 7748 out of 90,490 tiles or 8.6% of the tiles had debonded before all the tiles were removed.

9 ***The interim certificates***

10 While the dispute over the falling tiles was ongoing, the architects, during the period between February and May 1993, issued several interim certificates in favour of the contractors relating to the release of retention monies held by the owners. As these certificates were pertinent to the contractors` claim, it is necessary to set out briefly the facts in relation to them.

11 On 19 February 1993, the architects issued an Interim Certificate No C18 certifying that $580,933.10 was due from the owners to the contractors,

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being the release of the first amount of the retention monies and other interim payments. However, the architects later took the view that the amount certified was incorrect as it failed to take into account the defects in the tiling of the external wall. At this point in time, they took the view that 5% of the tiling was defective, and on 31March 1993 issued a revised certificate, Interim Certificate No C19, in which they deducted $49,500, which meant to represent 5% of the defective works, from the amount certified in the Interim Certificate No C18, resulting in the amount of $531,433.10. No payment was made by the owners pursuant to this certificate. Subsequently, the architects considered that the tiling of the whole fa+ade was defective, and on 5 May 1993 issued a further certificate, Interim Certificate No C20, which made a further deduction of $750,000 from the amount certified in the Interim Certificate No C19, as a result of which an amount of $218,566.90 was then due from the contractors to the owners under this certificate. The figure of $750,000 was the architects` estimate of the cost of rectifying the defects in the tiling of the fa+ade. Finally, on 13 May 1993, the architects issued yet another certificate, Interim Certificate No C21 on the basis that the $750,000 in the Certificate No C20 had been erroneously deducted and they certified that the contractors owed the sum of $40,259.40 to the owners. This final sum was arrived at by deducting the amount of retention moneys of $580,933.10 due to the contractors from an amount of $621,192.50 which represented the cost of the tiling of the fa+ade.

12 ***The proceedings***

13 In the meanwhile, on 24 April 1993, the contractors commenced proceedings in Suit. 883/93 against the owners claiming the sum of $580,933.10 as certified under the Interim Certificate No C18, or in the alternative, the sum of $531,433,10 as certified under the revised Interim Certificate No C19. The owners in their defence averred that on account of the defective fa+ade they

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were not obliged to make the payments certified as due, and counterclaimed against the contractors damages for breach of contract and/or for negligence. The contractors by their reply and defence to the counterclaim sought to attribute the liability for the defective works to the architects. Arising from this defence, the owners joined the architects as the third party for the purpose of seeking damages and an indemnity from the architects.

14 The action was tried before Rubin J. At the conclusion of the trial, the learned judge dismissed the contractors` claim and allowed the owners` claim for damages against the contractors and the architects, holding that the contractors and the architects were jointly liable for the defective tiling of the fa+ade and awarded damages in the sum of $1,979,526.18 after deducting the sum of $580,933.10 due to the contractors as retention moneys. Liability for the sum awarded was then apportioned as between the contractors and the architects inter se in the proportions of 20% to the contractors and 80% to the architects, the parties having recourse to each other for contribution to the extent of their respective liabilities. In addition, since the owners had retained the sum of $580,933.10 which, but for the defects, would have been due solely to the contractors and which was deducted in the award of damages, the contractors were entitled to claim by way of contribution from the architects 80% of this sum. The contractors and architects were also ordered to pay the owners interest on the sum due and their costs, in both cases in proportion to their respective liabilities.

15 ***The appeals***

16 The contractors and the architects separately appeal against the decision of the learned judge. In the appeal filed by the contractors, CA 45/99, only the owners were joined as the respondents. However, the architects obtained an

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order declaring that they were a party affected by the appeal and directing that all the cause papers be served on them and that they be at liberty to file a case, as if they were a respondent. In that appeal, the contractors challenge the decision below on several grounds. First, they argue that the proportion of liability attributed to them, ie 20%, was too high. Secondly, they argue that whatever be the correct proportion, liability in this case should be separate and not joint. Thirdly, they argue that the learned judge erred in the assessment of damages. Fourthly, they raise a procedural point relating to a claim for interest on the `second retention sum`, which was paid to them by the owners after the action had commenced.

17 The architects in their appeal, CA 46/99, in which the contractors and the owners were joined as first respondents and second respondents respectively, raised the following grounds. First and foremost, they argue that the defects were caused mainly by the bad workmanship on the part of the contractors and accordingly the proportion of liability attributed to them (the architects) should be minimal and in any event the apportionment of 80% of the liability to them was much too high. Secondly, like the contractors, they argue that their liability to the owners should be separate and not jointly with the contractors. Thirdly, they argue that the owners failed to mitigate their losses in respect of the claim for the loss of rentals. Finally, they say that they should not have been held liable for a lack of supervision of the contractors` works. In the alternative, they say that if there were any lapses in the supervision, these were committed by the clerk-of-works who was in the employ of the owners and who was present when the tiling works were being carried out, and that they should not have been held liable for the acts and omissions of the clerk-of-works.

18 ***Trial judge`s finding***

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19 At the outset, it should be noted that neither the contractors nor the architects contest the owners` claim that the external wall tiling was defective. The disputes are mainly between the contractors and the architects on the issue of liability, and between them and the owners on the quantum of damages. On liability, the dispute is where the blame should lie, and on this issue, the learned judge took a simple approach, namely, that the dispute boiled down to the question of whether the defects in the tiling of the fa+ade were caused by defective workmanship on the part of the contractors (or sub-contractors, for which the contractors were responsible), or by defective design and the lack of supervision of the tiling works on the part of the architects. He made the following findings:

20 (a) The tiles debonded at random at various locations and the debonding began not long after completion of the tile installation and worsened with the passage of time. This supported the view that there were more than one cause of debonding.

21 (b) Debonding taking place near the expansion joints was most likely caused by inadequate provision of expansion joints to accommodate thermal expansion and moisture movement. Tiles falling from the topmost storeys indicated probable negligence or careless construction and supervision to meet a tight deadline. On the other hand, debonding taking place in sheltered areas may eliminate thermal expansion as the primary cause of the debonding at such locations but did not rule out expansion and shrinkage of the cladding system due to changes in moisture. Bulging, cracking and `tenting` of tiles in the interior panels could only have been caused by the inability of the narrow rigid `tile-to-tile joints` to accommodate moisture and thermal movements.

22 (c) The main causes of debonding were:

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23 (i) poor bedding of tiles;

24 (ii) inadequate provision of joints in the tiling system;

25 (iii) poor construction details at the window sills and roof parapet coping; and

26 (iv) voids in the adhesive.

27 (d) The poor bedding of tiles was principally due to:

28 (i) excessive open time; and/or

29 (ii) insufficient pressure in applying the tiles to the adhesive.

30 (e) In the long term, the tile adhesive in the bonding would bound to degrade due to infiltration of water and inability of the tiling system to accommodate temperature and moisture changes.

31 (f) The infiltration of water and consequent degradation of the tile adhesive in the bonding were the result of:

32 (i) bad details at the window sills for which the architects and the contractors were jointly responsible, the former in failing to supply important details and to supervise the implementation of such details, and the latter, in adopting unsound methods of construction in the absence of guidance from the architects;

33 (ii) voids in the adhesive which allowed the rapid infiltration of water in the system.The adverse effects of the voids on the bonding were much more

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severe than those due to the bad details at the window sills and the parapet coping

34 (g) The specifications of the architects for the joints fell far short of the Australian and British Standards. Although deviations from the British (and Australian) Standards do not always result in a failure, in the case of the building they unquestionably did. Of the main causes of the tile debonding the failure to provide a proper jointing system was the most serious.

35 Having made the foregoing findings, the learned judge came to the following conclusion at [para] 187 (13):

> *In fine, the tile debonding was ultimately due to a combination of incorrect specification and design and defective construction, the former namely incorrect specification and design playing a major role. In my opinion, having considered all the factors, the third party`s [the architects`] responsibility for the failure both as respects defective design and failure to exercise proper supervision shall be 80% and the responsibility of the plaintiffs on account of bad workmanship shall be 20%.*

36 In arriving at this apportionment of liability, the learned judge took into consideration the lack of inspection and supervision which he found on the part of the architects. The learned judge expressed his opinion thus at [para] 188-189:

> 188 ... In my opinion, had the architect taken due care to inspect at random how the workmen had been carrying out their work on the external wall, he might well have come across the lapses on their part. This apparently was not the case ...
>
> 189 ... I cannot overlook the aspect that the declared stand of the third party [architects] at para 3(2) of their defence was that they were not to be held responsible for the design as opposed to the aesthetic qualities of the external tiling. This leads me to conclude that the third party did not at the design stage really pay attention to the effects of the specified width of the tile joint

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> and that they were only concerned with the aesthetics of the external fa+ade.

37 ***The contractors` arguments***

38 Before us, both the contractors and the architects challenged the trial judge`s apportionment of liability. Mr Ibrahim for the contractors argues that the 20% liability attributed to them is excessive. His only ground for saying this is that the learned judge failed to take into account the evidence of the clerk-of-works, Mr Tan Deng Wee. On this point, it is best to set out verbatim his argument as reflected in the case for the contractors:

> 75 Tan was very clear in his evidence that he was of the view that 20% of the tiling works were bad and therefore, he asked that it be rectified. After rectification, Tan said that he was 80% to 90% satisfied. That translates to a mere 4% defective works at the maximum. If that wasn`t enough, the last count by the architect of the fallen tiles amounted to only 8.6% of the total fa+ade. Alternatively, if it was workmanship only under scrutiny, then based on TP12 the debonding of tiles only at the brick fa+ade are attributable to workmanship. If so, that percentage of 0.29% of the total is substantially less than 1%. As such diminimis. Mundell also said that at maximum, workmanship was 10% to blame but even perfect workmanship would not have prevented debonding as the design was defective.

39 It is unclear how counsel has arrived at the conclusion which he did. In addition to Mr Tan`s evidence, counsel also relies on the evidence of the contractors` expert, Mr Paul Mundell, who testified that `at maximum, workmanship was only 10% to blame`. However, the learned judge did not accept Mr Tan`s evidence; nor did he accept Mr Mundell`s evidence in his determination of the issue of apportionment. More will be said of this issue shortly.

40 ***The architects` arguments***

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41 On the other hand, Mrs Teh for the architects submits that the apportionment of 80% liability to the architects was far too high. She has two grounds for saying this. First, she says that the learned judge misapprehended the role of the tile joints in the tiling system. Second, she says that the tile failure was due primarily to the poor workmanship on the part of the contractors.

42 The first argument advanced relates to the role of the tile joints (i.e. the spaces between the tiles) in the tiling system. On this argument, it is necessary to say a word of explanation on the joints provided in the tiling system and on what the learned judge found. The design for the tiling as provided by the architects specified two types of tile joints. First, there were the joints between the individual tiles called the tile-to-tile joints (`TOT joints`). The width of the TOT joints was specified by the architects to be 3 mm. Second, the tiles were installed in panels, and the design specified two different panel sizes. They were 10.8 m horizontally by either 5.4 m or 4.8 m vertically. Between the panels there were larger joints to cater for expansion or movement within the tiling system called `expansion (or movement) joints`. These joints are referred to as either vertical or horizontal expansion joints, depending on whether they run vertically or horizontally. The width of both the vertical and horizontal expansion joints was specified by the architects to be 16 mm.

43 The Australian and British Standards applicable to the installation of ceramic wall tiles are as follows. The Australian Standard `Ceramic Tiles - Part 1: Guide to the installation of ceramic tiles (1991)` published by the Standards Association of Australia states:

> *5.4.6* ***Tile finish and joints...***

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> (c) Joint widths should be consistent throughout the installation unless otherwise specified. The recommended joint widths are as follows:
>
> (ii) Walls:
>
> (A) Dust-pressed tiles 1.5 mm.
>
> (B) Extruded tiles. 6 mm.
>
> Wider joints may be required to accommodate larger tiles, dimensional irregularities in the tiles, to maintain modular discipline, or to provide a decorative effect.

44 Part 2 of the same standards further states:

> *4.3.4.2* ***Joint widths*** *As a general rule, joint widths are defined by the manufacturing tolerances of the tiles. In order to present a straight line, the width of thejoint should be wide enough to accommodate the variances in size of the tiles.*
>
> *As a guide, joint widths should be approximately 1 mm for each 50 mm of tile width. For most applications, the following joint widths would be suitable.*
>
> *...*
>
> (b) Walls ... extruded tiles: 6 mm.

45 The British Standard `Code of practice for wall and floor tiling - Part 2: External ceramic wall tiling and mosaics (1978)` published by the British Standards Institution states:

> *16.2.3* ***The design of joints*** *... the size and nature of the joints has to allow for variation in tile size, protection from outside water penetration, and passage of any water vapour from the wall to the outer atmosphere.*
>
> *Joints between extruded tiles are usually approximately 10 mm wide to allow for the variations in size and tolerance, whilst joints between dust-pressed tiles may be considerably less. Where it is necessary to provide for adequate release of water vapour to the atmosphere, such as where there is no impervious layer or ventilation cavity in the wall, the area of jointing should be about 10% of the total tile area....*

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46 The learned judge found that the width of the TOT joints specified by the architects was inadequate, and further that the vertical expansion joints were too far apart and this resulted in the tiling system being unable to accommodate thermal expansions and moisture movements. This was a defect in the design and was the `most serious` of the main causes of the debonding.

47 Mrs Teh submits that the learned judge misinterpreted the Australian and British Standards. According to her, the TOT joints are not meant to accommodate moisture and thermal movements in the tiling system, such movements being accommodated by the expansion (or movement) joints. She says that the TOT joints are primarily for aesthetic purposes, although the TOT joints are, in addition, meant to cater for dimensional irregularities in the tiles. In support, she points out that the British Standard relied on by the learned judge was superseded in 1991 by `British Standard: Wall and floor tiling - Part 2 Code of practice for the design and installation of external ceramic wall tiles and mosaics (including terra cotta and faience tiles) (1991)`, which states:

> *16.3.3 Design of joints*
>
> *Width of joints between tiles will be influenced by the variations in tile size and the depth of joint required. With extruded tiles the joint width should usually be 8 mm to 10 mm, whilst joints between dust-pressed tiles can be less, depending on size tolerance. The nominal joint width selected should allow for some setting-out adjustments during fixing so that variations in joint width, required to accommodate tile size tolerances, will not be too evident in the finished tiling.*
>
> *Joints should be sufficiently wide to enable the joint-filling material to be inserted, without undue difficulty, to the full depth of the joints and thus achieve solid joints as far as practicable without voids or cavities where water could collect ...*
>
> *If it is intended to allow for the passage of water vapour through the tile bed via the joints, the vapour permeability of the jointing, bed and background should be carefully considered as well as the proportion of the surface area of the joints in the finished tiling. Wall surfaces being tiled should have a ventilated cavity*

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> *behind them or a vapour check between the wall and the interior of the building.*

48 The second argument of Mrs Teh is directed at the poor workmanship which she contends was the primary cause of the tile debonding. In this respect, she draws our attention to the learned judge`s finding that the tiles were poorly bedded which according to her was principally due to an excessive `open time` of the adhesive mixture, and insufficient pressure in applying the tiles to the adhesive. She also points out that the learned judge found that water had infiltrated the tiles and caused the degredation of the tile adhesives, and in her submission that was due to bad workmanship occasioned at the window sills, creating voids in the adhesive. Finally, she argues that there was insufficient curing and drying of the concrete cast and the screed, that the tiles were not installed `top-down` as was required by the building contract, and that the screed mixture was grossly at variance with specifications in that it contained no sand, and in any event it was too thick.

49 ***Issue of apportionment of liability***

50 In order to determine the issue of apportionment of liability, it is necessary to consider the evidence given by the experts called by the parties. First, there was the evidence of one Mr N Narendranathan (`Mr Nathan`) who was called by the contractors. He is a civil engineer by training and, according to the trial judge, reportedly a person with considerable experience in the construction industry in Singapore, Brunei and Sri Lanka. He examined the site and the materials available to him and prepared two reports which set out his opinions and findings. The relevant parts of these reports were referred to by the learned judge extensively. Mr Nathan`s conclusion was that the cause of the tile debonding was due to insufficient TOT joints spacing and inadequate spacing of the movement joints. He went on to say that there was no basis to

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conclude that workmanship errors caused the debonding of the tiles. He relied also on a report of one Mr Richard Bowman of the Commonwealth Standards and Industrial Research Organization of Australia. That report was produced and admitted at the trial. It said, inter alia, the following:

51 1 The failure is due to differential movement between the tile and the concrete substrate, where the adhesive, as applied, was incapable of withstanding the stresses due to moisture expansion of the tile, shrinkage of the concrete and applied render, shortening of the building and any other structural movements, in combination with any superimposed reversible thermal and moisture movements.

52 2 The tiling system was not designed to accommodate the above stresses in that there was a lack of expansion joints, the 1 to 3 mm wide joints were far too narrow, particularly given that an incompressible grout material was used.

53 3 Moisture expansion of the tile has significantly contributed to the failure, since the magnitude of the estimated expansion in the seven months service before the initial failure (0.025%) is considered unacceptable, particularly given the amount of additional irreversible expansion that would have occurred over the design life of the fa+ade.

54 4 Thermal expansion of the tiles would have contributed to the failure of the tiling system.

55 5 There is no acceptable evidence to suggest that the render was the cause of the failure.

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56 6 While anything less than perfect workmanship would contribute to the failure of the system, it is unlikely that the tiling workmanship has made a significant contribution to the failure.

57 Mr Nathan conceded that there were areas on the wall where the adhesive had not been fully applied and there were also a few joints which had not been fully grouted. But these were found only on a few locations. He confirmed that on his inspection he found that the space at the tile joints varied between 1 mm and 3 mm and that in order to provide the requisite space for the joint, the tiler would use a spacer lug. On being told that toothpicks were in fact used for the purpose, he said that such toothpicks might well serve the functions, provided that they were used with caution. The trial judge`s impression of Mr Nathan`s evidence was that he was unwilling to fault the contractors` tilers; nor would he concede that there was any bad workmanship on their part. We entirely agree with the learned judge, and in our view, Mr Nathan was undoubtedly partisan of the contractors` case.

58 The next expert called by the contractors is one Mr Paul Mundell, the regional manager of the company, RAK Material Consultants Pte Ltd. His evidence was to the effect that the contributory factors for the debonding of the tiles were: (i) inadequate expansion joints and TOT joints, (ii) poor bedding in some of the tiles, and (iii) poor detailing of the window sills. In his opinion, `the primary cause of the problem [was] without doubt the lack of adequate provision for the thermal movement`, although it may be exacerbated by the narrow tile joints and poor bedding of tiles.

59 The owners called one Mr Cyril Venning as their expert to give evidence on the cause of the failure of the wall tiles. Mr Venning has had considerable experience in civil and structural engineering and has held senior positions in

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Singapore, Malaysia, Indonesia, the United Kingdom and Australia. His testimony was that the tile failure was primarily caused by poor workmanship and the thermal expansion was not the prime cause and was not of any significance. In his report he said that the photographs shown to him demonstrated that the fall of the tiles was related to other factors. He said:

> 25 First, the locations of tile falls are `random`, some occurring near to joints, some well between joints, others spanning completely over column and joint centres. In other cases, notably in the building entrance facing Commonwealth Drive, tiles have fallen from weather-sheltered locations; refer to photographs 5, 6 & 7.
>
> 26 Tiles have fallen from the soffits of overhangs on line 10 facing the car ramp and several tiles in similar locations were found hollow-sounding adjacent to column `E` and marked for removal.
>
> 27 There are several locations (see photographs 1, 2, 8, 11, 13, 14, 15 & 16) where tiling panels are considerably less than 10.8 m and some less than 4.5 m and yet tiles have fallen. The only consistency noticed is in the inconsistency of fall-pattern.
>
> 28 It was noted in both reports (RAK & Dr Ong) that the adhesive had not been compressed sufficiently to fill the raking-comb valleys or the frogs in the tiles.
>
> 29 There are a number of possible explanations for this, the most obvious being that insufficient pressure was applied by the fixers … Whatever the reason it may be observed that there were voids behind the tiles that have already fallen or have been removed and this is due to poor workmanship. Any of the close-up photographs where tiles have been removed will show this situation.

60 The learned judge`s impression of Mr Venning was that he was not as dogmatic as some other experts who had testified at the trial and that he readily conceded many points when sound propositions were put to him. It seems to us that the learned judge found that Mr Venning was the most objective expert, amongst the experts who had testified at the trial.

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61 The architects` expert is Dr Henry Ong Wah Kim, a former Associate Professor in the Faculty of Science of the National University of Singapore. He is a building consultant and has been frequently engaged in the building industry to investigate work defects in building construction and oversee rectification works. His evidence was that thermal expansion and moisture movement were not all that important, as the tiles in sheltered areas and areas located close to the expansion joints and at the edge of the walls where stresses were expected to be minimal had also debonded. Therefore, the positioning and size of the expansion joints were not that important and not the main causes of the tile debonding. He said:

> 100 If the tile-adhesive bonds were strong and the tiles were fully bonded, thermal and moisture movement would usually cause (1) cracking of the tiles and (2) an explosive, expansive tile debonding. Substantial number of these tiles would then come off altogether. The tiles on the Haw Par Technocentre walls hardly cracked, and there were no massive and/or explosive debonding reported.
>
> …
>
> 103 The only logical conclusion must be that bonding of the tile was inadequate. The adhesive and the workmanship had contributed to the tile debonding problem at the Haw Par Technocentre building.

62 In the light of the evidence we have considered, we are unable to accept the proposition advanced on behalf of the architects that the TOT joints were intended mainly for aesthetic purposes and were not also for providing thermal and moisture expansion or movement. None of the experts called by the parties said anything to that effect. Even the architects` own expert, Dr Henry Ong, did not say so. What he did say, however, was that the inadequate provisions of the joints, i.e. the TOT joints and expansion joints at the end of each panel of tiles, were not important in relation to causation of the debonding of the tiles; so did

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Mr Venning. That, of course, was quite different from what has now been contended on behalf of the architects. The learned judge found that the architects` specification of 3 mm width for the TOT joints fell far short of the recommendations of the relevant Australian and British Standards, and that there were inadequate provisions of expansion or movement joints to accommodate the movements of the tiles. He found that the inadequate provision of the joints in the tiling system was one of the main causes of the debonding of the tiles. In our judgment, the learned judge was fully justified in arriving at these findings.

63 Whilst we agree that the inadequate joint specifications were a serious and inherent design flaw, we do not think that in this case it should be regarded as an overriding one. The one feature which stands out in our minds is the randomness of the locations where the tiles debonded: some near the joints, some well between the joints, even at weather-sheltered locations, some from soffits of overhang and others at locations spanning over columns and joint centres. As observed by Mr Venning, the locations of tile debonding were random, and the only consistency was the inconsistency of the fall-pattern. The learned judge found, and in our view, rightly that the causes of debonding were multifarious and had differing effects on the tiles, and some of these effects would be apparent in the short term, while others would emerge only with the passage of time.

64 There was ample evidence before the learned judge of various types of defective workmanship, such as the failure to butter the tiles properly with adhesive; using toothpicks as tile spacers; insufficient curing; variations in the adhesive and screed compositions; failure to use sand in the adhesive; making excessively thick screed without any reinforcement; using incorrect trowels and incorrect trowelling; and `bottom up` construction. The debonding at the

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topmost storeys was due to poor construction, and the debonding in sheltered areas could not have been due to thermal expansion, but rather implied that in those areas water had seeped into the substratum and caused substantial moisture expansion. This latter defect was clearly due to poor bedding of tiles, poor construction of window sills, voids in the adhesive, or a combination of all three.

65 We are unable to accept the proposition pressed on us by Mr Ibrahim that, even if there were no defects in the methods of construction, the poor design would, in any event, have caused the tile failure. He relies heavily on **RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v MCST Plan No 1075** [1999] 2 SLR 449 , which he says bore striking resemblance to the facts of this case. We are unable to agree. The crucial difference between that case and the one before us is that in that case the trial judge found that the primary causes of the failure of the wall claddings were design inadequacies and that bad workmanship in the sense of inadequate numbers of wall tiles being used in the brick panels did not contribute to the failure, and further, that even if the walls had been built to the utmost quality they would still have collapsed because of the poor design. This finding of the trial judge was accepted by this court (at [para] 57). In this case, the learned judge found that bad workmanship of the contractors also contributed to the debonding of the tiles. There was overwhelming evidence of unsound and bad workmanship. On the other hand, equally, we are unable to accept the converse proposition advanced on behalf of the architects, namely, that even if the design had not been defective, the extent of the poor and shoddy construction would necessitate a complete overhaul of the tiles in any event.

66 In our judgment, the defective design on the part of the architects and the defective workmanship on the part of the contractors would each have had

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substantially deleterious effects on the tiles over a period of time. Admittedly, there was a substantial overlap in the effects of the different defects on the tiles, such that it was impossible to identify and isolate the damage caused by each party. Nevertheless, we think that the contractors` and architects` defaults can be viewed as two different causes working independently of each other, each of which would have been sufficient to cause the damage complained of. At this juncture, it is convenient to turn to the question of lack of supervision on the part of the architects, which the learned judge found was a relevant consideration in the apportionment of the liability between the contractors and the architects.

67 ***Inadequate supervision***

68 It seems to us that the learned judge in arriving at his apportionment of liability relied to a great extent on the lapses in supervision on the part of the architects. He said as follows at [para] 188:

> *In arriving at the foregoing proportion of liability [ie 80% to the architects and 20% to the contractors] court has also taken into consideration the inspection-supervision elements which were found to be lacking on the part of the third party. In my opinion, had the architect taken due care to inspect at random how the workmen had been carrying out their work on the external wall, he might well have come across the lapses on their part. This apparently was not the case.*

69 The duty to supervise stems from the architects` contract with the owners, and cll 1.8 and 1.9 of the contract provide:

> ***Inspection***
>
> 1.8 Included as part of the basic services the Architect shall inspect the works at such periodic intervals as the Architect may consider necessary to satisfy the Architect that the works are being executed in accordance generally with the building

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> contract and to enable the Architect to certify in accordance with statutory and other requirements the completion of various stages of the works.
>
> 1.9 Constant or daily inspection does not form any part of the basic services of the Architect. The frequency or degree of inspection shall be decided by the Architect from time to time.

70 Thus under these provisions there was a duty to inspect and supervise the works carried out by the contractors, not constantly or daily, but certainly periodically, from time to time. How frequent or regular should such inspection and supervision be must, of course, be left to the good sense of architects and must depend on the nature of the work for the time being carried out by the contractors. Where the construction works were important or critical, obviously closer and more frequent inspection and supervision was necessary, and in other areas of work, which were not that important or critical, less frequent inspection and supervision was called for.

71 That there was a lack of supervision in this case is not seriously challenged by Mrs Teh on behalf of the architects. For example, the insufficient curing and drying time of the concrete and screed, the poor construction of the window sills (which was contrary to the building design) and the careless mixing and laying of the screed were all manifest and were easily detectable by periodic inspections. However, Mrs Teh makes two submissions on the lack of supervision. First, she argues that under the architects` contract, there was no duty of supervision owed by the architects by reason of cll 1.6 and 1.7, which read as follows:

> ***Contractors, sub-contractors and suppliers***
>
> 1.6 The Client will employ a main contractor under a separate agreement to undertake construction or other works relating to the Project. The Client will hold the contractor, and not the

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> Architect, responsible for the contractor`s operations and methods and for proper execution of the works.
>
> 1.7 If a specialist, contractor, sub-contractor, tradesman or artist is employed by the Client or if a supplier is designated by the Client, the Architect shall not be liable for the negligent act or omission of the person so employed or defect in the articles supplied by the designated supplier.

72 On the basis of these clauses Mrs Teh submits that the owners should look to the contractors for the poor workmanship, and that the supervisory role of the architects does not cover any acts or omissions of the contractors. We cannot accept this submission. All that these two clauses, in effect, say is that the architects will not be responsible for the `contractor`s operations and methods and for proper execution of the works` and that the architects will not be liable for the `negligent act or omission` of those persons employed by the owner. The intention and purport of these two clauses is to make clear that there was no vicarious responsibility on the part of the architects for any act or omission - negligent or otherwise - of the contractors. As between the owners and the contractors, the latter would be responsible for any shoddy and poor workmanship, but under cll 1.8 and 1.9 the architects owe a duty to the owners to inspect and supervise the works to satisfy themselves that they are being executed in conformity with the building contract, although the inspection and supervision under these provisions does not require or entail a regime of constant or daily inspection and supervision. In our opinion, cll 1.6 and 1.7 do not have the effect of negating or in any way diminishing the duty of inspection and supervision under cll 1.8 and 1.9. It is clear that neither of the former provisions relieves the architects from their duty of inspection and supervision under cll 1.8 and 1.9.

73 Next, Mrs Teh advances an alternative argument. She submits that even if it is correct that the architects should have noticed (which they did not) some

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of the instances of poor workmanship, they would still not be liable, because in this case the on-site supervision was left to the clerk-of-works, Mr Tan Deng Wee, who was employed by the owners, and the owners were therefore vicariously liable for the negligent acts or omissions of Mr Tan. The architects were not his employers and would not be liable for his negligent acts or omissions. In seeking to place emphasis on this point, Mrs Teh draws our attention to the fact that it was the owners who selected Mr Tan for this job, not the architects.

74 We are unable to accept this submission. The central question here is whether the architects are entitled to be excused from their contractual duty of inspection and supervision by relying on the clerk-of-works or any other person. In our opinion, it matters not that the clerk-of-works was, strictly speaking, employed by the owners in the sense that his emoluments were paid by them. The position here clearly was this. The architects approved - or must have approved - the appointment of Mr Tan as the clerk-of-works, and again whether Mr Tan was nominated by the owners or the architects is immaterial. In the performance of his duty, Mr Tan was under the control and direction of the architects and was the `ears and eyes` of the architects in respect of the day to day on-site supervision of the construction works, and he reported to the architects and not the owners. Indeed, he was duty bound to report to the architects of any defect or shortcomings in the construction works. On the appointment of a clerk-of-works, cl 1.11 of the architects` contract provides:

> *Where frequent or constant supervision of the Works is required, a Clerk-of-Works may be employed either directly by the Client or the Architect. Where a Clerk-of-Works is to be employed directly by the Client, the Clerk-of-Works shall be nominated or approved by the Architect and be under the Architect`s direction or control. If the Architect appoints the Clerk-of-Works, the Client shall nevertheless pay for the services of and all incidental expenses connected with such Clerk-of-Works in accordance*

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> *with Section 5.3.5 of these Conditions. The Clerk-of-Works may be employed on conditions recommended by the Architect.*

75 In our judgment, the architects cannot deflect any liability for a lack of supervision by pointing a finger at the clerk-of-works, and say that the presence of the clerk of work at the site who would attend to on-site supervision would negative their contractual duty to the owners.

76 That having said, it is important to bear in mind that the architects` duty under cll 1.8 and 1.9 is owed to the owners and not the contractors. Where, as here, the contractors are liable to the owners for their shoddy and poor workmanship in respect of the works carried out, the architects` failure to carry out proper or adequate inspection and supervision does not render the contractors less liable to the owners. In other words, their liability remains, whether or not the architects had or had not breached their contractual duty of supervision owed to the owners. It should also be borne in mind that the architects` duty under their contract does not entail daily and constant supervision. In our opinion, as between the architects and the contractors, such breach of duty on the part of the architects should not operate as a significant factor in the apportionment of liability between them. On this point, we respectfully differ with the learned judge.

77 Reverting again to the judgment below, the learned judge found that the main causes of the tile debonding were (i) poor bedding of the tiles, (ii) inadequate provision of joints in the tiling system, (iii) poor construction details at the window sills and roof parapet coping, and (iv) voids in the adhesive. Of the main causes, `the most serious` was the failure to provide a proper jointing system. It seems to us that the failure of the architects to provide a proper jointing system was a fundamental or basic design fault, and we think that probably in that sense the learned judge considered that it was `most serious`.

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However, in terms of the contributory effect to the failure of the tiles, it is rather difficult to say which of the main causes was in fact the primary cause. The opinions of the experts were divided: Mr Nathan and Mr Mundell said that the main or primary cause of the tile failure was the design fault, while Mr Venning and Dr Ong said that the tile failure was primarily due to poor workmanship and that thermal expansions and moisture movements were not of any significance. The learned judge had not expressed his opinion as to whose evidence he found most credible. In the light of the experts` evidence and the evidence that the debonding of the tiles took place shortly after completion of the tiling works and the randomness of the locations at which the tiles debonded, it is extremely difficult to say which of the main causes contributed most to the failure of the tiles.

78 The general principle governing the apportionment of liability is found in ss15(1) and 16(1) of the Civil Law Act (Cap 43, 1991 Ed) which provide:

> 15(1) Subject to subsections (2) to (5), any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)....
>
> 16(1) Subject to subsection (3), in any proceedings for contribution under section 15, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person`s responsibility for the damage in question.
>
> ...

79 These provisions are, in all material respects, the same as ss 1(1) and 2(1) of the Civil Liability (Contribution) Act 1978 of the United Kingdom. In ***Fitzgerald v Lane & Ano*** r [1989] AC 328 at 339, Lord Ackner said:

> *In the contribution proceedings, whether or not they are heard during the trial of the main action or by separate proceedings, the*

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> *court is concerned to discover what contribution is just and equitable, having regard to the responsibility between the tortfeasors inter se, for the damage which the plaintiff has been adjudged entitled to recover.*

80 That passage was said in a case involving contribution proceedings in tort, but the same principle is applicable in cases, such as this, where the parties are found jointly liable in damages for breaches of their respective contracts.

81 For the reasons we have given, we find that both the contractors and the architects were equally to blame for the debonding of the tiles and in our opinion a just and equitable apportionment of the liability between them would be on an equal basis, i.e. 50% to each. We therefore substitute this apportionment for that ordered by the learned judge. The orders relating to the amounts recoverable between the contractors and the architects inter se, as well as the proportion of interest and the owners` costs which each party is to bear are to be varied accordingly.

82 ***Joint liability***

83 We now turn to the question whether a joint judgment or separate judgments should be entered against the contractors and the architects. The learned judge entered the judgment jointly against both of them. In so doing he relied on two cases. First, the decision of the New Brunswick Supreme Court of Canada, Appeal Division, in **Nowlan v Brunswick Construction Ltd** [1973] 34 DLR (3d) 422. The facts of that case were as follows. The plaintiffs in 1962 entered into a contract with the defendant contractors to erect a residential house. The design of the house was provided by a firm of architects. After the house was erected, leaks occurred in the roof and it was subsequently discovered that dry rot had set in in the substructure of the roof. The plaintiffs sued only the contractors. The trial judge found that the major responsibility for the condition

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of the house rested with the architect whose plans were obviously defective, but he also found that there was evidence of bad workmanship on the part of the contractors. As the architect was not sued, the trial judge took the view that the contractors were not liable for damages resulting from the implementation of the defective plans. He dismissed the claim on the ground that there was not enough evidence to enable him to make a separate assessment which would reflect the damage attributable to the bad workmanship. The plaintiff appealed to the Appeal Division of the Supreme Court of New Brunswick, which reversed the decision of the trial judge and awarded to the plaintiff damages in the sum of $36,068.48. Limerick JA delivering the majority decision of the Appeal Division took the view that the contractors and the architect were jointly and severally liable as concurrent wrongdoers. He said at pp 425-426:

> *Where there are concurrent torts, concurrent breaches of contract or a breach of contract and a concurrent tort both contributing to the same damage, whether or not the damage would have occurred in the absence of either cause, the liability is a joint and several liability and either party causing or contributing to the damage is liable for the whole damage to the person aggrieved …*

84 The contractors then appealed to the Supreme Court of Canada, which by a majority dismissed the appeal.

85 The second case was **Victoria University of Manchester v Hugh Wilson & Ors** [1984] 2 Con LR 43, the facts of which bore a striking similarity to those of the present case. There, the plaintiffs were the developers of a `Precinct Centre` in northern Manchester. The first and second defendants were the architects and contractors of the Precinct Centre respectively. The architects` design called for a building of reinforced concrete (which was not waterproof) to be clad partly in red Accrington bricks and partly in ceramic tiles. The tiles were in fact laid by sub-contractors who were under the main contractors`

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supervision. In due course many of the tiles fell off and the appearance of the fa+ade became marred. Eventually, the plaintiffs adopted a remedial plan which involved the erection of brick cladding with a cavity between bricks and tiles and with the brick walls attached to the structure by steel ties, i.e. the tiles were not replaced. The plaintiffs commenced an action claiming damages against both the architects and the contractors for breach of contract and/or negligence. The contractors and architects then served notices on each other seeking contributions under the Law Reform (Married Women and Tortfeasors) Act 1935. On the fifth day of the trial, the plaintiffs and the architects reached a settlement, and so the trial continued with the plaintiffs claiming effectively only against the contractors. The question then arose as to whether the contractors should be made liable for the entire damage. Judge Newey QC held as follows at p87:

> *... the law is clear: if two or more defendants have each committed breaches of the same or different contracts with the plaintiff and as the result of each defendant`s breach the plaintiff has suffered the same damage he may recover the whole amount of it from any of the defendants.*

86 Reverting to the present case, the learned judge, having referred to these passages of the judgments, concluded thus at [para] 204:

> *In the case at hand, although the fault of the breach by the contractor/plaintiffs is measurably less than that of the designer/third party, their faults or breaches indisputably overlap and interweave. Both contributed to the same damage. In the circumstances, having regard to the principles expressed in* ***Nowlan*** *as well as in* ***Victoria University of Manchester****, I am of the opinion that judgment in this case shall have to be joint and consequently be entered in favour of the defendants against the plaintiffs and the third party jointly.*

87 Mr Ibrahim`s main argument on this point is that the `damage` was done by separate breaches of contract: the contractors` breach relating to the workmanship, and the architects` breach relating to the design of the building

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and supervision. Therefore, there should be separate judgments against them, each for an amount representing their proportionate liability. He relies heavily on The **Koursk** [1924] All ER 168, a case involving the collision between three ships, K, I and C. At the material time, all the three ships were steaming in a convoy in line abreast. Due to negligent navigation, K ran into C, which in turn collided with I. The owners of I sued the owners of C and the latter sued the owners of K. The two actions were tried together, and it was decided that as between K and C, they were both partly to blame for the collision, and that as between C and I, C alone was to blame for the collision between the two vessels. The owners of I recovered part of their losses from the owners of C, as the liability of the owners of C was limited to a statutory sum. The owners of I then brought a claim against the owners of K. To this claim, the owners of K pleaded that the damage complained of was the result of the joint tort committed by those in charge of K and C, and that the judgment recovered against the latter was a bar to the action against the owners of K. This plea was rejected by Hill J who held that there were two acts of negligence committed: one by K and the other by C, and it was the combined effect of these two separate acts of negligence which produced the damage to I. Accordingly, the rule that a judgment obtained against one joint tortfeasor was a bar to an action against another did not apply in that case. The defendants appealed and the Court of Appeal dismissed the appeal, holding that K and C were not joint tortfeasors of the same tort, but separate tortfeasors of two different torts which produced the same damage and the action instituted could therefore proceed. The point that was decided in that case was that by virtue of the fact that the torts committed by two ships, K and C, were separate and different torts, the owners of I who had recovered against the owners of C were entitled to proceed against the owners of K. In other words, the judgment obtained by the owners of I against C was no bar to an action by them against the owners of K, as K and C were not

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joint tortfeasors. It is apparent to us that The Koursk dealt with a different point and is of no assistance to us.

88 Mrs Teh also argues that the finding of joint liability was erroneous. She distinguishes ***Nowlan*** and ***Victoria University of Manchester*** cited above. In relation to ***Nowlan*** , she argues that although the Supreme Court of Canada by a majority dismissed the appeal, the majority did not endorse the reasoning of Limerick JA and instead concurred with the judgment of Bugold JA who decided the appeal on a different ground. In relation to ***Victoria University of Manchester*** , she points out that the statement of Judge Newey relied on by learned judge was obiter since in the end the judge, Judge Newey, found that each party had caused different damage and liability was therefore not joint.

89 Mr Maniam for the owners argues that the judgment in this case should be joint. He submits that both breaches caused the tiling on the fa+ade to be defective, and the learned judge was unable to distinguish which portion of the damage should be attributed to the contractors and which portion to the architects. He refers to ***Keating on Building Contracts*** (6th Ed), in which the learned author says that although the present law is unclear, where an employer claims damages against two defendants, eg for defects caused both by the architect`s defective design and the contractor`s defective work, the plaintiff should succeed in full against either of the defendants or both of them, provided he establishes that the relevant cause or causes at least materially contributed to the loss.

90 In cases, such as this, where the damage or injury was occasioned by more than one party, the question whether there should be a joint judgment or separate judgments depends essentially on the facts and in particular on the damage caused. Where the damage caused can be so identified and isolated as

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to be attributable to the negligent act or the breach of contract of each party, then a separate judgment in respect of that damage can be entered against each of the parties. Where, however, the damage caused by the parties cannot be so identified and isolated, and in reality forms indivisible parts of the entire damage, we do not see how separate judgments can be entered against them separately. Reverting to the facts in this case, clearly both the defective workmanship and the defective design contributed to the debonding of the tiles. We are in agreement with the learned judge that the breaches of the contractors and the architects `indisputably overlap and interweave` and both contributed to the same damage. In such a case, a joint judgment is the natural result as there is no reason, in principle, to limit the owner to recovering only part of the loss from one party and the remaining part from the other. The apportionment of the liability between the contractors and the architects in percentage terms is not a logical corollary of the separate breaches of contract, but a device to ensure that justice is done as between the contractors and the architects ***inter se*** .

91 ***Damages***

92 The learned judge awarded damages to the owners in the total amount of $1,979,526.18. This sum comprised various items of direct and consequential losses, which, among others, were (i) $40,259.40 as the amount due to the owners from the contractors under the Interim Certificate No C21, (ii) $690,290.34 for the costs relating to the new `Eleganstone` fa+ade, and (iii) $917,533.65 for the loss of rentals. Mainly these three items are now being challenged before us.

93 ***Interim Certificate No C21- $40,259.40***

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94 The award of $40,259.40 certified as due under the Interim Certificate No C21 was arrived at on the basis as follows. The learned judge found that the entire tiled fa+ade was defective and allowed the owners to recover the entire costs of the tiling works, which amounted to $621,192.50. The breakdown of the amount allowed is as follows:

(i)	Cost of the tiles	$	319,458.00
(ii)	Installation cost of the tiles	$	238,154.50
(iii)	Preliminaries	$	29,580.00
(iv)	Cost of associated works - expansion joints	$	34,000.00
		$	621,192.50

95 The owners themselves had retained the first amount of retention monies in the sum of $580,933.10 which was due to the contractors. The learned judge in giving judgment set off this amount against the amount of $621,192.50, thus resulting in a balance of $40,259.40.

96 Mr Ibrahim objects to this award on two grounds. First, he says that by awarding the amount under the Interim Certificate No C21, the learned judge allowed the owners an improper benefit of a `set-off` between them and the contractors for the amount of $580,933.10. By virtue of this `set-off` they, the contractors, were made to pay 100% of the amount of $580,933.10, when they should have paid only 20% of it (as apportioned by the learned judge). This argument is unsound. In so arguing, he has failed to take into account the relevant order of the court in this case, which states:

> 4 As between the plaintiffs and the third party inter se, liability (for the sum of $1,979,526.18 referred to in para 3 above and the sum of $580,933.10 claimed by the plaintiffs) shall be

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> apportioned 20% to the plaintiffs and 80% to the third party, and the plaintiffs and the third party will have recourse to each other for contribution to the extent of their respective liabilities.

97 Under this term of the order, the contractors are entitled to recover from the architects 80% of the sum of $580,933.10. We have been informed that the payments made by the contractors and the architects had been duly apportioned on the basis of the sum awarded below. There is therefore no reason for this court to make any order in this respect, and there has been no injustice occasioned to the contractors.

98 The second argument put forward on behalf of the contractors is that by awarding the amount of $40,259.40, the learned judge conceded that they were in fact entitled to the retention monies in the sum of $580,933.10 which they were claiming in the same suit. Since the learned judge conceded that that sum of retention moneys was due, he erred in dismissing their original claim. We do not accept this argument. We agree that the sum of $40,259.40 was arrived at by subtracting from the entire costs of tiling the facade the amount of retention monies that would have been due to the contractors, had there been no defects in the works. However, this is not a concession that the contractors had a good legal claim for the retention monies, but rather an application of the normal rule of set-off in the assessment of damages. The sum of $40,259.40 simply represented the owners` net loss in respect of the cost of the fa+ade which was subsequently found to be wholly defective. In any event, cl 31(4) of the building contract states:

> *The Architect shall have power to issue a further Interim Certificate at any time whether before or after completion, correcting any error in an earlier Interim Certificate (but not in any Delay, Termination of Delay, Further Delay or any certificate other than an Interim Certificate) or dealing with any matter of which he was not aware, or which should have been dealt with, at the time of an earlier Interim Certificate, or revising any decision or opinion on which that Certificate was based.*

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99 Under this clause, the architects were entitled to issue an interim certificate correcting errors in earlier certificate, which power they exercised in issuing the Interim Certificates Nos C19, C20 and C21. Once the Interim Certificate No C19 was issued, the sum due to the contractors under the Interim Certificate No C18 was superseded, and the contractors were no longer entitled to claim the amount under it. The same argument applies to the issuance of the Interim Certificates Nos C20 and C21. There was therefore no question of the contractors` claim under the Interim Certificates Nos C18 and C19 succeeding.

100 ***Costs relating to the new fa+ade - $690,290.34***

101 After stripping the fa+ade of the existing tiles, the owners chose not to re-tile the wall but to cover it with a new finish called `Eleganstone` instead. They did not, however, claim the cost of the new finish, which was $380,709.66. They merely claimed the consultants` fees in relation to the new finish amounting to $51,000 and the cost of preparation of the wall surface in the sum of $639,290.34. The learned judge allowed the claim, saying at [para] 224:

> *Whilst it is possible that the defendants might well have settled for a finish similar to the one provided to them earlier, the fact that they chose an entirely different finish does not disentitle them to claim a reasonable sum for it. Having noted that the defendants are not seeking to claim from the defaulters the costs of installing the new `Eleganstone` finish, I hold that the defendants are justified in claiming the costs of the consultants` fees as well as the cost of the preparation of surface for the fresh fa+ade works. In my view, the `Eleganstone` finish is strictly not a voluntary improvement. The sums therefore claimed, ie $51,000 and $639,290.34 are not in any way unreasonable or excessive and I therefore allow this sum in favour of the defendants.*

102 Counsel for the contractors argues that this claim should not have been allowed. In relation to the consultants` fees of $51,000, he submits that this figure was based on 5% of the total cost of installing the new fa+ade, and since

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the cost of installing the new fa+ade was not claimed, the owners should not be allowed to claim the consultants` fees either. In relation to the costs of preparation of the wall, it is argued that the owners should only be compensated in so far as they obtained replacement tiling. In particular, they say that the cost of installing a new tiled fa+ade would have been much lower than the cost incurred to prepare the wall for the `Eleganstone` finish, since the screed would not have to be removed. That being the case, that the owners` actions were unreasonable and the latter should not be able to recover anything under this head.

103 We are unable to agree. The owners have not acted unreasonably, as the learned judge held they were entitled to ascertain through consultants the best way to deal with the problem of failure of the defective tiling. Having done that they were entitled to adopt an alternative or substitute finish for the fa+ade of the building and were entitled to be compensated a reasonable sum for the costs incurred. The learned judge allowed the total of these two sums amounting to $690,290.34 which he considered reasonable. We do not think that the learned judge was wrong.

104 ***Loss of Rental - $917,533.65***

105 The owners claimed the sum of $917,533.65 in respect of moneys lost as a result of their being unable to rent out four shop units in the building: [num]01-01, [num]01-02, [num]01-04 and [num]01-05. The total floor area of all four units was 13,981 sq ft. The details of the losses for the unit are these.

106 In relation to [num]01-01 and [num] 01-02, the owners in December 1992 agreed to lease them to Fine Rattan Industries Pte Ltd and Novena Furnishings Pte Ltd respectively for $3.80 per sq ft per month for a period of

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three years from 3May 1993 to 2 May 1996. However, when the tile debonding problem became severe in or about March 1993, both tenants refused to proceed with the leases on the ground that the glass shop frontages were obscured by unsightly nets and scaffolding. Unit [num]01-01 (3,894 sq ft) then remained empty until 17 December 1994, when it was occupied by Regent Motors Limited at a rent of $4.50 psf/m. Unit [num]01-02 (3,555 sq ft) remained empty until 18 September 1994, when it was occupied by Singapore Automotive Engineering Ltd at a rent of $3.70 psf/m. Singapore Automotive Engineering Ltd remained in the premises until 4 July 1995, when the premises were taken over by AST at $4.50 psf/m. In relation to units [num]01-04 and [num]01-05 (6,532 sq ft), there had been no prospective tenants. Both units remained empty until they were let out on 17 August 1994 to Konica Singapore Pte Ltd at a lower rental of $3 psf/m.

107 The owners adduced evidence at trial to show that the main reasons for the failure to rent the units out were (a) the debonding tiles and (b) the unsightly nets and scaffolding which had been erected and which obscured the shop windows of the relevant units. The learned judge allowed their claim.

108 Both the contractors and architects now contend that the sum of $917,535.65 awarded was excessive because the owners had failed to take all reasonable steps to mitigate their losses.

109 In the main, counsel for the contractors say that the owners could have taken steps, and should have done so, to provide a structure which would not have obstructed the shop windows, such as `cantilevered brackets` with canopies. They could also have let the premises to tenants who did not require shop fronts. When the property manager of the owners, Mr Wong Fook Yuen, was questioned about this at the trial, he said:

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> *... I agree that there are many possibilities of doing these sorts of things, but I think the situation then was very different compared to a leisurely stroll along Orchard Road to digest designs. At the time, the urgency was to appease the sentiments of the occupiers and the safety as well. That was critical. We had no time to indulge in any other things except to put something up in the shortest possible time. I do agree that there are many possibilities but it did not cross my mind at that time.*

110 Counsel for the architects stresses the fact that the owners took a period in excess of a year to let each of the four units. The evidence in respect of this was that the owners were using M/s Jones Lang Wootton as marketing agents to let out the units, and that the agents had standing instructions to `fill up the building`. However, the owners themselves took no concrete steps to locate prospective tenants, whether for lower rent or otherwise; neither did they call for regular updates from the agents. When he was asked in cross-examination whether he had taken any steps on behalf of the owners to offer the empty units at a lower rental to other prospective tenants, Mr Wong Fook Yuen said:

> *No. With the aesthetics that were in place then, that is the patchiness of the building, I think it is very difficult for us to actually convince somebody to come in to take up a unit as a showroom, not so much the netting alone, it`s the overall building.*

111 Counsel cites several cases relating to the reletting of premises after a breach, and in particular relies on the decision of this court in **Klerk-Elias Liza v KT Chan Clinic Pte Ltd** [1993] 2 SLR 417 . In that case, the tenant of certain shop premises, one Mrs Klerk, wrongfully repudiated the tenancy and quit the premises on 31 January 1984. The landlord, one Dr Chan, eventually found another tenant on 9 November 1984 and claimed the loss of rental for the entire period of nine months and eight days. The trial judge allowed the claim for the rent over the period in question. On appeal, this court held that the landlord had not done enough to secure a tenant sooner. Karthigesu J (as he then was) delivering the judgment of the court said:

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> *The premises were vacant from the date Mrs Klerk vacated them on 31 January 1984 to 9 November 1984 when the new lease was granted to Blitz, ie a period of nine months and eight days. The learned judge was satisfied that Dr Chan had taken reasonable steps during this period of nine months and eight days to find a suitable tenant for the premises and had not shown an unreasonable attitude in holding out for the same rent he had leased the premises to Mrs Klerk and by attempting to let the premises as they were, made up of five separate units, instead of breaking them up and combining the units to make up more easily lettable smaller premises. With respect to the learned judge we think that Dr Chan had not done enough to find a tenant sooner than the nine months and eight days the premises were vacant. His advertisements were confined to notices in the Singapore Medical Association`s journals rather than advertisements in the press to the general public. We think there is substance in Mrs Klerk`s contention that had Dr Chan realised and accepted that rents of business premises were falling and that it would have been easier to get tenants for smaller premises than the premises which had an area of 1,700 sq ft he would have been able to relet the premises much sooner than 9 November 1984. We have no doubt that had Dr Chan done what he did to secure Blitz as a tenant of the premises by advertising and engaging an agent he would have succeeded in reletting the premises much sooner.*

112 We accept that in this case there was a lengthy period of approximately one and a half years during which the shop units were left vacant. The learned judge, however, found as follows at [para] 230:

> *I considered carefully whether the tile failure on the external wall of a building should lead to damages being awarded for loss of rental of the premises. Upon review, I am of the opinion that the failure - albeit an external feature - would have naturally put off any prospective as well as committed tenants as was the case in regard to the defendants` building. In my opinion, it would have been well within the contemplation of the parties that if there was going to be a failure of this nature, it would indeed affect the rentability of the building substantially. In my view the casual link is clearly established and consequently the defendants` claim for lost rental in the sum of $917,533.65 is allowed.*

113 We do not think that the learned judge was wrong in reaching this conclusion. The problem of letting the units out at the time should be properly considered in the context of the circumstances then prevailing. Clearly, the

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owners were anxious about the tile debonding problem during the period of May 1993 to October 1993, and were trying intently to ascertain the cause of the problem with the architects and other external consultants. During that period, it cannot be said that the owners acted unreasonably in failing to look actively for tenants for the shop units, given that they were uncertain what steps would be required to remedy the defects. In this respect, the owners` inactivity should also be considered in the light of the respective stances taken by the architects and contractors. They were utterly unhelpful and acted irresponsibly. From May 1993 to July 1994, whilst the dispute was ongoing, the contractors and architects knew (or ought to have known) that the blame for the defects lay on them, and that their failure to remedy the defects would entail continuing losses on the part of the owners. Yet they refused to put their heads together to solve the problem.

114 For the period from November 1993 to July 1994, repair and reconstruction works were proceeding on the fa+ade. Initially, safety nets were erected, and subsequently, contractors sprayed the fa+ade with the new `Eleganstone` finish. These were clearly impediments to the renting out of the units. The facts of this case are removed from those in ***Klerk-Elias Liza*** , and in our judgment the argument that the owners should have mitigated their losses fails.

115 ***The contractors` claim for interest on the second retention sum***

116 The final matter which we need to consider is a curious claim raised by the contractors relating to interest on the `second retention sum` due under the building contract, which the owners paid to them in May 1998. The claim arose in the following manner.

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117 Some time in 1997, while the trial was ongoing, the contractors wished to make an amendment to their pleadings to include a further claim of $516,829.78 due as the second retention sum under their building contract. Letters were exchanged between the parties with respect to the proposed amendments but no agreement was reached and no application was made by the contractors to amend their pleadings. At that time, the arguments centred on the question whether under the building contract the issuance of a certificate by the architects was a condition precedent to the payment of this sum by the owners. Eventually, however, the owners waived the requirement of the architects` certificate and on 18 May 1998 (which was before the closing submissions of the trial) paid the contractors this sum in full, without prejudice to their position in the proceedings which were still ongoing. The contractors accepted the sum on 20 May 1998, also without prejudice to their position, and further requested for payment of interest on this sum at the rate of 6% per annum. The owners refused.

118 At the hearing of arguments on the question of costs, after the learned judge had delivered judgment, the contractors sought an amendment to their pleadings and argued that the amendment proposed should be allowed on the ground that the owners had admitted liability for the claim by paying the relevant sum and that they (the contractors) should be entitled to recover costs and interests on the sum. The learned judge dismissed this argument. In so doing, he agreed with one of the submissions of counsel for the owners that a new cause of action cannot be introduced, if it arises after the date of the writ. He said:

> *... I fully agree with the recent submissions by defendants` [the owners`] counsel that a new cause of action may not be introduced if it arises after the date of the writ. At any rate, it is ironic that the plaintiffs [the contractors] who are resisting an award of interest on the sum awarded to the defendants are*

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> *claiming interest on the retention sum. Having considered the submissions, I disallow the plaintiffs` claim for interest as well as costs on the second retention sum since this claim arose after the date of the writ.*

119 The contractors now claim that the learned judge erred in dismissing the claim for interest, and urge this court to award them interest and costs on the sum. They invite this court to depart from its previous decision in **The Jarguh Sawit** [1998] 1 SLR 648 , which approved the principle enunciated in the decision of the High Court in ***Saga Foodstuffs Manufacturing Pte Ltd v Best Food Pte Ltd*** [1994] 2 SLR 802 that a new cause of action may not be introduced by way of amendment to the pleadings, if it arises after the date of the writ.

120 Having regard to the facts of this case, we do not think that a review of the authorities is necessary. It is plain that the second retention sum was never at any time made the subject of the proceedings in the court below. No application to amend the pleadings was even made before or during the trial. The application for leave to amend was made only at the stage when parties appeared before the learned judge arguing on the question of costs. The whole purpose of the amendment was to ask the court to exercise its discretion to award interest on the second retention sum.

121 It is wholly unclear to us as to the basis on which the contractors claim interest on this second retention sum. Their counsel has not shown us any specific term in the building contract under which they are entitled to interest on such sum, for instance, a provision specifically allowing payment of interest on any belated payment due under the contract. Nor has counsel shown us any specific statutory provisions on which he relies in the claim for interest. Clearly s 12(1) of the Civil Law Act (Cap 43, 1999 Ed) has no application, as there is

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no `sum for which judgment is given` on which interest under that section can be awarded.

122 It seems to us that the only basis on which the contractors could proceed in this claim is to invoke the court`s power under para 6 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Ed), which confers a power on the court to direct interest to be paid in certain circumstances. Paragraph 6 of the First Schedule provides as follows:

> ***Interest***
>
> 6 Power to direct interest to be paid on damages, or debts (whether the debts are paid before or after commencement of proceedings) or judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the court.

123 Hence, this is the only provision, under which the contractors may invoke the powers of the court to award interest on the second retention sum. In **People`s Park Development Pte Ltd v Tru-mix Concrete (Pte) Ltd** [1982] 1 MLJ 3 , this court upheld the exercise by the High Court of its power to award interest under this provision. There, the interest was awarded on a sum which was part of the claim but for which no judgment was given, as the payment had been made just before the action came on for trial.

124 In the case at hand, the second retention sum was never part of the contractors` claim in the proceedings below and no application for amendment of their pleadings was ever made at the trial until the arguments on costs. Even if we were persuaded to depart from this court`s decision in ***The Jarguh Sawit*** , we would not be disposed to allow the amendment proposed by the contractors. Such an application for amendment is now much too late in the day and in any

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case has absolutely no merit. The second retention sum had been paid and there is no basis under the terms of the building contract on which the court would or should exercise its power to award any interest on that sum. The learned judge in exercise of his discretion had declined to award any interest. We likewise do so.

125 ***Conclusion***

126 The contractors` appeal in CA 45/99 is dismissed. The architects` appeal in CA 46/99 against the apportionment of liability is allowed to the extent as decided in [para] 44 above, but their appeal against the quantum of damages is dismissed. The owners would be entitled to costs of these appeals, but before we finally make an order as to costs, we would like to hear arguments from the contractors and architects, and they are invited to submit their arguments in writing within 10 days from this date hereof.

127 **Outcome:**

128 Order accordingly.

Chao Hick Tin JA
L P Thean JA
Yong Pung How CJ

Salem Ibrahim and Leong Why Kong (Salem Ibrahim & Partners) for the appellants in CA 45/99 and the first respondents in CA 46/99
Engelin Teh SC, David Kong and Thomas Sim (Engelin Teh & Partners) for the appellants in CA 46/99

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Andre F Maniam and Kirindeep Singh (Wong Partnership) for the respondents in CA 45/99 and the second respondents in CA 46/99

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