Ho Pak Kim Realty Co Pte Ltd *v* Revitech Pte Ltd
[2010] SGHC 106

Case Number : Suit No 36 of 2006

Decision Date : 08 April 2010

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Thrumurgan s/o Ramapiram (Thiru & Co) for the plaintiff; Tito Shane Isaac, Justin Chan Yew Loong and Wayne Ong Zhenhui (Tito Isaac & Co LLP) for the defendant

Parties : Ho Pak Kim Realty Co Pte Ltd — Revitech Pte Ltd

Contract

8 April 2010 Judgment reserved.

Lai Siu Chiu J:

1 This is yet another chapter in the on-going dispute between Ho Pak Kim Realty Co Pte Ltd ("the plaintiff") and Revitech Pte Ltd ("the defendant") over the construction of 22 units of flats by the former for the latter situated at No 80 Kovan Road, Singapore ("the project").

2 There were two previous tranches in the trials relating to this dispute. In the first tranche (in October 2006) heard by another court, the plaintiff's claim for the balance payment outstanding under the construction contract was adjourned in the midst of trial because of the last minute change in its stance, which necessitated amendments to its pleadings.

3 In the second tranche heard in May 2007 (see judgment at [2007] SGHC194), this court determined the scope of works of the plaintiff and what comprised the contractual documentation between the parties. This judgment should therefore be read together with the judgment for the second tranche. To recapitulate, the consultants involved in this project were:-

(a) ACME Architects (ACME);

(b) BKP Associates Pte Ltd ("BKP") who were the quantity surveyors:

(c) HY M&E Consultancy Services Pte Ltd ("HYME") who were the mechanical and electrical engineers:

(d) PEC Consultant ('PEC") who were the civil and structural engineers.

4 In this third tranche, the plaintiff proceeded on its substantive claims for: (i) outstanding progress payments certified by the architect; (ii) under-valuation of works carried out and (iii) damages for wrongful termination. The defendant on its part proceeded on its defence and counterclaim against the plaintiff for liquidated damages for delay in the construction works and cost of rectification of defective works. (I should point out that the plaintiff changed solicitors for this third tranche of the hearing).

5 Hearing of the third tranche took twelve days during which the plaintiff's director Ho Soo Fong also known as Benson Ho ("Ho") continued his testimony from the second tranche while on the defendant's part Abishek Murthy ("Murthy") its director was recalled together with the project's architect from ACME, Nguyen Trung Chon ("the architect") as well as the engineer from PEC, Samuel Kuan ("Kuan"). The plaintiff had two while the defendant had three expert witnesses and some of the consultants who worked on the project testified for either the plaintiff or the defendant. The defendant also called a director Chong Hai Wah ("Chong") from Harico Construction Pte Ltd ("Harico") to testify. Harico was the contractor engaged by the defendant to rectify some defects in the plaintiff's works.

6 For expediency and costs consideration, I had directed the parties on the first day of hearing of this third tranche, to limit evidence on building defects to those valued at $10,000 and above while defects of lesser values should be addressed in their closing submissions. In the course of trial, the court was informed that the parties had reached agreement on various items of variations and omissions found in an exhibit (HSF-38) in Ho's second supplemental AEIC, which resulted in a net sum of $8,234.69 being payable by the plaintiff to the defendant after adjustments. The breakdown for the $8,234.69 is to be found in para 72 of the defendant's closing submissions dated 26 October 2009.

7 Consequently, for this tranche the court was tasked to determine the following:

(a) the plaintiff' claim for $771,630.97 for non-payment of certified progress claims;

(b) the plaintiff's claim for undervalued works amounting to $239,337.50;

(c) the plaintiff's claim for damages for wrongful termination of the construction contract;

(d) the defendant's claim for $73,606.62 overpaid to the plaintiff;

(e) the defendant's claim for liquidated damages for delays; and

(f) the defendant's claim for rectification of the plaintiff's defective works.

With regards to item (a), the defendant did not dispute that the amount had been certified by the architect but disputed the plaintiff's entitlement to be paid on the basis of its counterclaim. Consequently, there was no need for the plaintiff to prove item (a) of its claim, only items (b) and (c).

The evidence

8 Apart from the remaining two items of the plaintiff's claim, the evidence that was adduced at trial particularly from the parties' experts focussed on the defendant's counterclaim for defects in the plaintiff's works in three main areas *viz* (i) the roof which the defendant alleged was not waterproofed in accordance with contract specifications; (ii) omission of works for the basement and roof parapet walls; (iii) faulty installation of windows and sliding doors.

The plaintiff's case

9 The plaintiff's main witness of fact was again Ho, whose testimony in the second tranche had previously been criticised by this court. As the plaintiff did not appeal against this court's judgment for the second tranche referred to in [3] above, Ho quite correctly (and repeatedly) said he would

accept and abide by the court's findings therein.

The plaintiff's claim for undervalued works amounting to $$239,337.50

10 In his second supplemental AEIC filed on 12 December 2008, Ho had deposed that the architect had in interim certificate no. 25 (at AB2878), certified that work to the value of $4,109,267 had been carried out. The architect then certified that a net amount of $3,903,803.65 was due to the plaintiff after deducting 5% ($205,463.35) retention sum. Ho claimed that because of the supplemental agreement dated 2 December 2003 ("the Supplemental Agreement") (at AB521), payment terms between the parties were varied such that:

(a) the plaintiff was entitled to full payment of $570,000 of work certified;

(b) the next $494,375 of the works would be paid once the Temporary Occupation Permit ("TOP") was obtained;

(c) the remaining works certified less GST would be financed by the defendant's loan from Hong Leong Finance Limited;

(d) clause 3 of the Supplemental Agreement removed the defendant's right to withhold retention monies under cl 31(6) of the Conditions of Contract.

11 Ho contended that as TOP had been obtained on 18 August 2005, the sum of $4,109,267 was due to the plaintiff under certificate no. 25. However the defendant only paid the plaintiff $3,287,636.03 plus a further $50,000. Ho claimed the defendant still owed the plaintiff $771,630.97 ($4,109,267.00 – [$3,287,636.03 + $50,000]).

12 The defendant disputed Ho's contention pointing out that as of 26 May 2005, certificate no. 25 valued payments to the plaintiff at $3,903,803.65. Consequently, the actual sum payable to the plaintiff then was $616,167.62 ($3,903,803.65 - $3,287,636.03 paid). However, the plaintiff owed the defendant back charges of $95,399.34. Further, the defendant was also entitled to withhold $494,375 until TOP under the Supplemental Agreement as set out in [10(b)]. The two sums totalled $589,774.34. The amount of GST on $2,839,428.65 (($3,903,803.65 less [$570,000 + $494,375]) was $141,971.43 which the defendant was entitled to withhold under cl 3.3 of the Supplemental Agreement ([10(d) above].

13 Additionally, in a letter dated 31 May 2005 to the defendant, the architect had pointed out that the 5% retention sum of $205,463.35 deviated from the contract requirement of 10% retention sum whilst liquidated damages due from the plaintiff then totalled $394,000 (@ $2,000 per day x 197 days) based on the architect's delay certificate dated 16 November 2004 ("the Delay Certificate"). Counsel for the defendant conceded that the figure of $394,000 was incorrect as liquidated damages were calculated at $1,500 per day and should therefore amount to $295,500.

14 Consequently the defendant contended, nothing was owing to the plaintiff under certificate no. 25. In fact, the plaintiff had overpaid the defendant $73,606.62 as of 26 May 2005 based on the following computation:-

Amount certified	$3,903,803.65
Amount already paid to the plaintiff	$3,287,636.03
Withheld pursuant to the Supplemental Agreement	($ 494,375.00)

Back charges	($ 95,399,24)
GST (approximate)	($100,000.00)
	($ 73,606.62)

If the defendant's argument is accepted, the correct GST amount (calculated at 5%) should be $141,971.43 and the sum overpaid to the plaintiff would increase to $115,578.05.

The plaintiff's claim for additional works

15 The plaintiff claimed that it had done extra work for the defendant for eleven months after 24 March 2005 which work was not certified, until the plaintiff's services were terminated on 1 February 2006. Ho attributed the non-payment to the fact that following BKP's resignation on 1 June 2005 (after it had issued certificate of payment no. 25), the defendant failed to appoint another quantity surveyor. Ho claimed that when he approached the architect for assistance, he was rebuffed with the excuse that without the appointment of a quantity surveyor, the latter could not certify the plaintiff's work.

16 The defendant refuted the plaintiff's allegations. It was pointed out that the presence or absence of a quantity surveyor would have no practical effect on the valuation of the plaintiff's work because the plaintiff was then in negative territory when it came to payment and there were no further works left to value.

17 After BKP's resignation, the plaintiff submitted three further progress claims numbered 26, 27 and 28 on 28 April 2004, 28 May 2005 and 28 June 2005 respectively. The defendant pointed out that by progress claim no. 23, the plaintiff had claimed for almost 100% of the works done. Further there was no significant difference between the plaintiff's progress claims no. 25 and no. 28, according to Ho's testimony under cross-examination (at N/E 1183). That being the case, logically there was nothing significant to be certified.

18 In the course of Ho's cross-examination, the defendant adduced evidence that in progress claim no. 23 dated 28 January 2005, the plaintiff had claimed 100% of the works carried out save for kitchen appliances, doors and wardrobes. As of progress claim no. 25 dated 28 March 2005, the plaintiff claimed 100% for the works with the exception of kitchen appliances (same as for progress claim no. 23), preliminaries at 99% and additional works at 96%. For progress claim no. 26, the plaintiff's claim remained at 95% for kitchen appliances and 99% for preliminaries. Similarly, for progress claim no. 27, the claim for kitchen appliances was unchanged while preliminaries were increased to 100%. In progress claim no. 28, the plaintiff claimed 100% for everything except for kitchen appliances, which remained at 95%.

19 During cross-examination (at N/E 1184-1185), Ho gave the impression that he was entitled to claim for work done so long as his materials were delivered on-site. Ho initially claimed (unconvincingly I would add) that he was unable to carry out the work after his materials were delivered to site due to obstruction from either the defendant or its consultants (which allegation was not proven). Subsequently, after repeated questioning by the court (at N/E 1185), Ho admitted that the plaintiff had claimed for work it did not carry out. Even so, the defendant paid the plaintiff an additional $50,000 in October 2005 as otherwise the plaintiff refused to do any more work; the plaintiff promised that in exchange for the payment, it would complete all outstanding works (but it did not).

The plaintiff's claim for wrongful termination

20 The plaintiff asserted that the defendant had no basis to terminate its services on 1 February 2006 by a termination certificate ("the Termination Certificate"). In his supplemental AEIC, Ho no longer maintained the plaintiff's initial stand that the first Completion Certificate issued by the architect dated 18 March 2005 was the correct completion date. He accepted the architect's explanation that the date 18 March 2005 was a typographical error. However, Ho challenged the architect's subsequent certification on 27 December 2005 that completion was only achieved on 18 August 2005, that being the date of issue of the TOP. Ho also abandoned his original position that the variation works claimed by the plaintiff were to be valued by market rates. He agreed that the works should be valued based on the rates of CPG Consultants Pte Ltd.

21 Ho agreed that the architect issued the Delay Certificate but disputed its validity, contending that the plaintiff was not responsible for the delay. He relied on the report of his expert Chin Bay Fah ('CBF") for what should have been the completion dates and why the plaintiff should have been granted extensions of time ('EOT") to complete the project. Ho maintained that under cl 4 of the letter of award dated 21 November 2002 ("the Letter of Award"), completion was achieved when all pre-TOP clearances were obtained and not when TOP was actually issued by the authorities.

22 It was common ground that the original completion date of 11 March 2004 had been revised and extended to 28 August 2004 under the Supplemental Agreement. It was subsequently further extended to 15 November 2004 at a site meeting held on 29 June 2004.

23 The defendant not surprisingly disputed the plaintiff's entitlement to EOT and disagreed with Ho's interpretation of cl 4 of the Letter of Award. The defendant contended that the Termination Notice had been rightfully issued by the architect under cl 32(3)(d) of volume 1 of the contract.

24 For ease of reference, I shall set out cl 32(3)(a) to(h) in full; it reads:

> The Architect may issue a Termination Certificate on any of the following grounds:
>
> (a) If the Contractor fails or refuses, after receipt of one month's written notice given by the Architect at any time after a date 14 days before the Contract Commencement Date, to submit sufficiently detailed Programme pursuant to clause 4 of these Conditions or a sufficiently detailed Make-Up of Prices pursuant to clause 5 of these Conditions.
>
> (b) If the Contractor assigns to another person or permits vicarious performance by another person of his principal functions or if he assigns the right to receive monies due under the Contract without consent contrary to clause 15(1) of these Conditions.
>
> (c) If the Contractor fails or refuses, after receipt of one month's notice in writing from the Architect requiring him to do so, to dismiss or expel from the Site, a sub-contractor against whom the Architect has made reasonable objection pursuant to clause 15(2) of the Conditions or a person whose dismissal has been required pursuant to clause 6(3) of the Conditions.
>
> (d) If the Contractor has wholly suspended work without justification or is failing to proceed with diligence and due expedition, and following expiry of one month's written notice from the Architect to that effect has failed to take effective steps to recommence work or is continuing to proceed without diligence or expedition, as the case may be.
>
> (e) If the Contractors has failed or unreasonably delayed in complying with a written direction of the Architect requiring the removal and replacement of any work, materials or goods under

sub-clause 11(1) or (3) of these Conditions, or with any written direction or instruction of the Architect under clause 11(2) of these Conditions, and following receipt of 14 days notice in writing from the Architect has failed to take any effective steps to do so.

(f) If the Contractor has removed plant, goods or materials from the Site without the consent of the Architect contrary to clause 16 of these Conditions, in a case where the Architect was reasonably entitled so to refuse consent under the terms of that clause and the Contractor has failed or refused to comply within 14 days' written notice from the Architect requiring him to return the said plant, goods or materials to the Site.

(g) If the Contractor has previously received a valid and justified written notice under paragraph (d) hereof with which he has complied at the time but at any time thereafter had again suspended work or failed to proceed with due diligence and due expedition.

(h) If the Contractor has refused or failed following one month's written notice by the Architect to comply with any written direction or instruction of the Architect which he is empowered to give under any clause of these Conditions.

25 Before issuing the Termination Certificate, the architect had written to the plaintiff on 13 March 2003 ("the Warning Letter") (at AB232), the salient portions of which read as follows:

1 We have yet to receive the information as required and Architect Direction ADO1 dated 4th March 2003 and as of our site visit with Mr S Selvankumar of Revitech Pte Ltd today, the work is still approximately two months behind schedule. Kindly submit to us a catch-up programme immediately for our consideration.

3 Under clause 32(3) of the contract, this letter will serve as a notice to you for failure to comply with an AD/our requirement and that the 1 month expiry mentioned under this Clause shall commence from the date of this letter.

26 It was the defendant's case that even before the Warning Letter, the plaintiff had been told at the first and second site meetings held on 16 December 2002 and 16 January 2003 respectively, that preliminary works on site should but had not been, carried out. Indeed, during his cross-examination (N/E 1298), Ho agreed that those preliminary works remained outstanding even as of March 2003. Yet the plaintiff still failed to submit a revised master programme. That prompted the architect to issue an earlier termination certificate on 27 June 2003 (the First Termination Certificate), certifying that the defendant was entitled to terminate the plaintiff's services under cl 32(3)(a),(d), (g) or (h) of the contract.

27 The architect subsequently issued an Architect's Direction ("AD") dated 18 March 2005 ("AD13") requiring the plaintiff to complete the works set out in an attached schedule for purposes of obtaining TOP and practical completion. The plaintiff failed to comply with AD13 even though it was then more than four months late in its works. This prompted the architect to issue the (second) Termination Certificate on 1 February 2006 under cl 32(4); it reads:

Pursuant to clause 32(4) of the Conditions of Contract, I hereby certify that the Employer is entitled to terminate the employment of the Contract under this Contract on the grounds stated in paragraph (g) or (h) of Clause 32(3) of the Conditions of Contract. in that the Contractor is in default in the following respects:

1 Failing to proceed with the work diligently and due expedition.

2 Failing to hand over the site to client as per the condition stated in the completion certificate.

28 The defendant pointed out that although TOP was obtained on 18 August 2005, the project was not completed as the following works were still outstanding when buyers took possession of and occupied their units:

(a) wardrobe doors;

(b) kitchen cabinet drawers;

(c) parking ramp lights;

(d) penthouse master bath;

(e) glass shelves.

29 The defendant said that instead of completing the above outstanding works, Ho insisted he would take over conduct of the handover of units to buyers. Given the pressing circumstances, the defendant felt it had no choice but to agree. However, Ho handled the handover badly causing at least one dissatisfied purchaser to tell the defendant to stop all remedial works and another purchaser to engage lawyers to demand that defects in his unit be rectified. Ho even locked one homeowner out of his unit and insulted another who complained of water leakage from the air-conditioner in his master bedroom. The last straw was Ho's withholding from the defendant keys to unsold units thereby preventing the defendant's property agent from showing the unsold units to prospective buyers.

30 It was against the above backdrop that the architect issued the Termination Certificate. It was only after the Termination Certificate was issued that Ho returned the keys to unsold units by which time the defendant had already incurred the expense of replacing all the sets of locks.

31 The defendant criticised as evasive Ho's testimony on the termination issue as he sought to distance himself from the plaintiff's pleaded case. Ho had admitted in the course of cross-examination (at N/E 1304-1305) that he had no knowledge of the clauses upon which he based his case that the defendant's termination was *ultra vires*.

32 The defendant highlighted other instances of Ho's unreliability, one (at N/E 1192) being where he prevaricated and claimed ignorance when questioned if an item already included in the contract can be considered a variation. Ho replied in the negative only after being pressed by the court for an answer. Ho was equally evasive when questioned whether an omission should be deducted from the contract value, until the court pointed out that he had already agreed that the item (landscaping) was an omission. Other instances of Ho's evasiveness were highlighted in the defendant's closing submissions (at paras 228 to 230). The defendant therefore argued that Ho's testimony should be rejected by the court.

The defendant's counterclaim

The defendant's counterclaim

33 Having dealt with the plaintiff's claim, I turn my attention now to the defendant's counterclaim.

(a) The overpayment of $73,606.62 to the plaintiff

34 The computation for this claim has been set out at [14]. It will not be necessary to dwell on it further.

(b) Delays in the project

35 The defendant complained that from the outset, the plaintiff failed to provide an acceptable master construction programme, notwithstanding its requirement under cl 4(1) of the contract; it states:-

> Following acceptance of his tender, and without prejudice to any requirement to do so earlier in his tender or the other Contract Documents, the Contractor shall, not later than 14 days before the stipulated date for the commencement of work, submit for approval by the Architect a programme related to the contract period showing the order or sequence in which he proposes to carry out the various parts of the Works and any proposed temporary works or methods of working which may be relevant to progress. The Contractor will not be permitted to commence work until 14 days after submission of a sufficiently detailed programme, notwithstanding the passing of the stipulated Contract Commencement Date and no extension of time shall be given in respect of any delay so caused.

36 Despite repeated requests from the architect at the first, second and third site meetings held on 16 December 2002, 16 January 2003 and 19 May 2003 respectively, the plaintiff failed to come up with a realistic and/or proper master construction programme as critical dates for testing, commissioning, inspection and handing over were omitted from the programmes he submitted.

37 Even so, based on the plaintiff's own construction programme, the architect's letter dated 4 March 2003 (at AB228) warned the plaintiff that it was two months behind its schedule and the plaintiff needed to submit a "catch-up" programme by 11 March 2003 for the architect's consideration.

38 Notwithstanding the plaintiff's inexcusable delay, the architect granted three extensions of time to the plaintiff as follows:

(a) 13 March to 11 June, 2004;

(b) 12 June to 28 August, 2004;

(c) 29 August to15 November, 2004;

despite which the plaintiff was unable to meet the completion deadline of 18 August 2005.

39 At this juncture, I need to address the various reasons put forward by Ho for the plaintiff's delay in construction and the defendant's responses thereto.

40 Ho had alleged that the plaintiff was obliged to purchase "Majan" marble tiles from Sinbor Company Pte Ltd ("Sinbor") although it was not a contractual requirement. However, in the course of his cross-examination, CBF (the plaintiff's expert) was told that "Majan" marble had in fact been pre-selected by the architect prior to commencement of works, as evidenced in the architect's letter to the plaintiff dated 17 January 2003. This was subsequently confirmed in the architect's letter of 4 March 2004. The plaintiff however refused to accept "Majan" tiles or to advise the supplier Sinbor Co Pte Ltd the quantity required. Instead, the plaintiff proposed a cheaper alternative. Eventually, the defendant purchased "Majan" tiles direct from the said supplier (which comprised one item of its backcharges against the plaintiff). The plaintiff completed the marble installation on 18 July 2005. I note that CBF did not grant an extension of time for the plaintiff's alleged delay in receiving the "Majan" tiles.

41 The plaintiff also complained that HYME's late application to the Public Utilities Board ("PUB") for approval of sewage connection caused delay in completing the work. The plaintiff alleged it was obliged to construct an additional sump for the manhole to comply with PUB's requirements. This was necessitated by the fact that the level of the manhole of PUB's existing sewage system was lower than the sewage connection constructed by the plaintiff based on the architect's drawings. The difference in levels was only discovered after PUB's approval had been obtained.

42 However, according to the defendant, the fault (conceded by CBF in cross-examination) lay with the plaintiff. As the contractor, the plaintiff should have but failed to check the actual levels/dimensions on-site against the architect's drawings. Had the plaintiff done so much earlier, it would have discovered that the on-site measurements were deeper than those shown on the drawings. The plaintiff only had itself to blame for the resultant delay in completing the sewage connection.

43 The plaintiff alleged that another reason for the delay in TOP was due to the late start in external works caused by the consultants'/the defendant's alleged delay in obtaining the approvals from PUB, National Environment Agency, National Parks Board and the Land Transport Authority. The defendant pointed out this was again an untrue allegation because the plaintiff had commenced work before receiving the requisite clearances from the relevant authorities.

44 The plaintiff further alleged that there was a delay in the defendant's consultants obtaining approval from the Singapore Civil Defence Force ("SCDF") for the ducting and fire sprinkler systems. That resulted in the delay in obtaining TOP.

45 The defendant disputed this allegation pointing out that the plaintiff knew as early as the second site meeting (on 16 January 2003), that HYME would be forwarding to the plaintiff the guidelines for the sprinkler system to enable the plaintiff to design and build the same. In fact the minutes (at item 4.02) of that site meeting (AB207) went further to say that the plaintiff was to follow-up with HYME on the matter which it did not. According to the AEIC (para 16) of Loke Kok Kei ("Loke"), a director from HYME, approval from SCDF was not required. Loke's testimony was not disputed by the plaintiff. Consequently, the plaintiff's complaint was again groundless.

46 The plaintiff then alleged that the architect's variations (made on 21 December 2004 and 4 January 2005) to walk-in wardrobes caused a delay in the obtaining of TOP. It further alleged that the architect's revision to the kitchen cabinet layout (on 29 November 2004 and further revisions on 24 February 2005) further contributed to the delay. This excuse was rebutted by the architect who pointed out that the delay was due to the plaintiff's poor management of his subcontractors and late payment to suppliers, as evidenced in a complaint on non-payment by Vivo in July 2004 that the

plaintiff's wardrobe and cabinet subcontractor Young Rich had not paid for the items Vivo fabricated after making a deposit of $4,500, although the items had been completed and were sitting in Vivo's warehouse. The plaintiff replaced Young Rich with another subcontractor, thereby aggravating the delay.

47 It was the architect's evidence that when the changes and variations were made for both the wardrobes and the kitchen, the plaintiff had yet to start work on either item. Indeed, the plaintiff had yet to fabricate the wardrobes, although the plaintiff's letter to the architect dated 11 August 2005 (AB1744) stated that the same would be completed in two weeks' time *viz* by 25 August 2005. Yet, in the plaintiff's progress claim no. 24 made on 28 February 2005 (at AB2894), the plaintiff had claimed 100% completion of the kitchen cabinets and wardrobes in the amount of $155,000.

48 The defendant pointed out that the architect's variations to the wardrobe design were meant to assist the plaintiff who was already in delay at the material time. The amendments were to cater to the plaintiff's poor workmanship in construction of the brick walls, which rendered the architect's original design no longer feasible.

49 Next, the plaintiff alleged that the defendant was late in making full payment of the deposit to PUB which resulted in late turn-on of water supplies to unit owners. The evidence adduced before the court showed that HYME applied for water turn-on on 11 April 2004. The defendant paid the deposit in September 2004 and made good the shortfall in payment in October 2004 when notified by the PUB. However, even as of November 2004 the plaintiff had not completed the water works. HYME applied for the turn-on to be made only after it certified that the water works were completed on 8 April 2005. Any shortfall in payment of the water deposit could be made good only after PUB's notification, which could not be given before the water works were completed.

50 Yet another reason given by the plaintiff for the delay in completion was the late installation of the decentralised fire alarm monitoring system (known as "DECAM"). The defendant countered that as early as October 2004, the defendant had applied to Cisco Technology Pte Ltd ("Cisco") for a DECAM system. The plaintiff had alleged in its pleadings that the defendant only applied to Cisco for the system on 1 March 2005 and that the system was only approved by the registered inspector ("RI") on 9 May 2005. The defendant pointed out however that the plaintiff failed to install the fire alarm panel by October 2004 without which the defendant could not install the DECAM system, which late installation in any case did not delay issuance of the TOP.

51 The plaintiff's last allegation related to the late application for TOP. Again, it was the defendant's case that this delay was of the plaintiff's making. The defendant highlighted the plaintiff's poor management of the site as the reason. It appeared that the architect could not apply for TOP because the site was unsafe and looked like a construction site. Clearance for the household shelter could not be obtained and the project's premises did not look safe for occupation.

(c) The claim for liquidated damages arising from delay

52 The defendant quantified its claim for liquidated damages at $414,000 in its defence and counterclaim (calculated at $1,500 per day for 276 days). In other words, it was the defendant's case that the plaintiff delayed the project for more than 9 months (between 16 November 2004 and 18 August 2005).

53 The claim for liquidated damages is inextricably tied to the issue of the plaintiff's requests for EOT. It follows that if the plaintiff succeeds in its claim for EOT, the defendant will fail in its claim for liquidated damages. Conversely, the plaintiff will fail in its claim for EOT if the defendant succeeds in

its claim for liquidated damages. Both issues will therefore be dealt with together.

54 The gravamen of the defendant's argument that no EOT should be granted was the plaintiff's non-compliance with cl 23(2) of the contract. The clause states:

> It shall be a condition precedent to an extension of time by the Architect under any provision of this Contract including the present clause (unless the Architect has already informed the Contractor of his willingness to grant an extension of time) that the Contractor shall within 28 days notify the Architect in writing of any event or direction or instruction which he considers entitles him to an extension of time, together with a short statement of the reasons why the delay to completion will result. Upon receipt of such notification, the Architect shall inform the Contractor in writing within 1 month of its receipt whether or not he considers the event or instruction or direction in principle entitles the Contractor to an extension of time.

55 The defendant pointed out that there was no evidence before the court that Ho/the plaintiff had made any written requests to the architect for EOT. The defendant also submitted that the plaintiff's contention (in para 6 of the Reply and Defence to the Counterclaim) that the completion date was not 18 August 2005 but "at large" was untenable.

56 The architect (DW3) had testified he considered applications for EOT on a case by case basis. He said by the time the plaintiff applied to him for EOT, it was already in delay as regards the sewage connection, the sprinkler works and installation of the marble tiles. The architect was cross-examined (at N/E 1359) on the plaintiff's letter dated 28 November 2004 ("the 28 November letter") (see AB1281) which the plaintiff contended (but which the defendant disagreed) amounted to a request for EOT. The architect testified that he did not accede to the plaintiff's request for EOT for the reason that the aforementioned outstanding works should all have been done much earlier, around June-July 2004 followed by TOP inspection in August 2004 and not by October-November 2004. However, the plaintiff had left those works to the last minute and then requested for EOT. The architect revealed this was also the plaintiff's *modus operandi* for other items of work. The architect did not consider the 28 November letter to be a valid request for EOT because of the plaintiff's delay. In any case he pointed out, the plaintiff's alleged delays did not affect the critical path of the project. The architect's reply dated 3 December 2004 (at AB 1303) to the 28 November letter pointed out to the plaintiff that there were other outstanding works that were in delay. It was the architect's evidence that sometimes he did not even understand the plaintiff's many letters, which contained a constant refrain that the plaintiff was short-paid on its progress claims.

57 The architect refuted the plaintiff's contention that he had issued the Delay Certificate in bad faith and/or with improper pressure/interference by the defendant. He had a litany of complaints against the plaintiff in general and against Ho in particular which he testified ultimately drove him to issue the Delay Certificate. In this regard I refer to paras 7 to 21 of my judgment at [2007] SGHC 194 for the events that transpired from the commencement of work until the architect's issuance of the Delay Certificate.

58 In his AEIC, the architect revealed that the plaintiff was appointed the main contractor by the defendant against his advice. He had seen the plaintiff's workmanship in an on-going project of which the plaintiff was both the developer and main contractor. The architect felt that the quality of the plaintiff's work was below industry standards and lacked co-ordination. However, the architect's views were disregarded by the defendant, presumably because the plaintiff submitted the lowest bid (of $4,257,500) for the project. Unfortunately as things turned out, accepting the plaintiff's bid turned out to be a proverbial case of penny wise and pound foolish for the defendant.

59 It was the architect's evidence that the plaintiff was late from day one of the project. The plaintiff did not commence work on the project 14 days from the date of the letter of award (21 November 2002) *viz* on 5 December 2002 or when the permit to commence work was obtained (which was on 12 December 2002) whichever was the later, in accordance with the letter of award. Instead, Ho requested at the first site meeting that the commencement date be adjusted to two weeks after the permit was issued; the architect refused. Even so, the plaintiff did not commence work until late March 2003.

60 In its closing submissions, the plaintiff argued that the issue of its late start in construction work was not pleaded by the defendant. That may be so but the plaintiff's delay in commencement of works was a relevant fact as it sequentially pushed back the completion date.

61 The architect's AEIC also recounted the plaintiff's refusal/inability to come up with an acceptable master programme despite the architect's repeated requests/reminders since the first site meeting. This made it difficult for the architect to administer the project and check the plaintiff's progress on site. The plaintiff's repeated failure *inter alia* to produce a viable master programme, to comply with his instructions, to furnish a performance bond and even to attend site meetings prompted the architect to issue ADs Nos. 1 to 3 between 4 March and 3 June 2003. The ADs had no effect on the plaintiff resulting in the issuance of the First Termination Notice.

62 The plaintiff did not take issue with the First Termination Notice but disputed the grounds. The plaintiff requested for a joint inspection to ascertain the amounts due for the work it had done. After the joint inspection, the plaintiff disputed the architect's assessment of the quantum of work done. Although the architect refuted the plaintiff's allegations of undervaluation, he nonetheless wrote to the defendant on 8 July 2003 to recommend that instead of finding a replacement contractor, it would be better to give the plaintiff an incentive to perform and speed up the work by paying the latter *ex-gratia* an additional sum of $250,000 for structural works, as "we know that [the plaintiff's] price was ridiculously low".

63 The defendant heeded the architect's advice resulting in the execution of volumes 1 and 2 of the contract documents (on or about 20 November 2003) followed by the signing of the Supplemental Agreement on 2 December 2003. It should be noted that the Supplemental Agreement granted an extension of time to 14 August 2004 to complete the project against the original completion date of 11 March 2004 and, the defendant further agreed to waive liquidated damages for the period 12 March 2004 to 28 August 2004.

64 The architect finally received a revised master programme from the plaintiff at the sixth site meeting held on 7 January 2004. The architect noted therefrom that the plaintiff had set impossible timelines – the plaintiff scheduled the casting of roof slabs and the corresponding removal of formworks by end June/early July 2004. Thereafter the plaintiff would complete all other works within the next two months. The architect accordingly wrote to the plaintiff on 12 January 2004 expressing his concerns. He further noted that the revised master programme left out important details such as the dates for inspection by the RI, for the household shelter and by the BCA.

65 Even after the execution of the contract documents and the furnishing of the revised master programme, the architect still encountered problems as the plaintiff failed to provide suitable facilities and safety equipment on site as well as safe means of access to the site. The various shortcomings of the plaintiff were recorded in site meetings and/or in the architect's letters. Notwithstanding the problems encountered by the architect with the plaintiff and on-site, the parties agreed at a meeting held on 22 June 2004 at the defendant's office that the TOP would be in mid-November 2004. However, TOP was not issued in mid-November 2004 prompting the architect to issue the Delay

Certificate (on 16 November 2004). TOP was eventually obtained in August 2005.

66 The architect refuted the plaintiff's allegations that the blame for late completion was due to other factors and was not the fault of the plaintiff. Earlier (at [40], [46] to [48]), I had addressed the plaintiff's complaints regarding the late installation of the marble tiles, the wardrobes and the kitchen cabinets respectively.

67 I turn next to the plaintiff's complaint that the architect's instructions for the enlargement of the gymnasium caused a delay. The architect explained that this variation was requested by the defendant. While this request was indeed made in the later part of the project, this item was not on the critical path of construction and the delay occurred concurrently with other delays particularly the external drainage works, for which the architect granted an EOT. In any case, the late request regarding the gymnasium's enlargement was taken into consideration by the architect in his assessment of the plaintiff's delay.

68 Another delay raised by the plaintiff related to instruction for construction of the encasement of the rainwater down pipes being given only in May 2003. The architect pointed out that his letter to the plaintiff dated 28 May 2003 was a reminder to carry out the work previously agreed, it was not a new instruction. Instead of raising the issue early, the plaintiff due to lack of site co-ordination, did not run the pipes in a manner that would avoid exposing unsightly M&E pipe works. This was reinforced in the architect's letter to the plaintiff dated 11 August 2004 where it was recorded that the drawings for the down pipes had been faxed to HYME and the plaintiff on 30 September 2004, faxed again on 1 October 2004 and handed to the plaintiff at the site on 8 March 2005.

69 As for the alleged delay in obtaining TOP, the architect pointed out that the responsibility for getting the site ready for TOP inspection lay with the plaintiff, not the architect or the defendant. The bulk of the work for the project had to be completed 6-8 weeks before the scheduled inspection for issuance of TOP. Normally, an inspection date for TOP would be booked one month in advance of the actual inspection.

70 The architect explained that TOP must be issued by various authorities that included *inter alia* the BCA (for the household shelter), Fire Safety Department, the Defence and Science Technology Agency. Inspection by RI from the fire safety department would be part of the clearance process before the BCA would consider issuing TOP. He pointed out that it was of no benefit to any consultant involved in the project to delay the obtaining of TOP as the plaintiff alleged.

71 The architect felt that the project was incomplete even at the TOP stage although some unit-owners had by then moved in. The architect understood from Murthy that the plaintiff had agreed to rectify defects and complete outstanding works after the handover to unit-owners. This process took three months due to Ho's misconduct as set out earlier at [29].

72 The architect revealed that after issuance of the TOP, the plaintiff put pressure on him to issue the Certificate of Completion ("COC") which in the normal of events would follow within weeks of the issuance of the TOP. The architect was unwilling or unable to issue the COC because by then, the plaintiff had still not rectified the building defects and as late as 21 December 2005, Singapore Post advised that letterboxes for unit-owners complying with its requirements had not been installed. Further, Ho was making a nuisance of himself on site.

73 The architect decided the best and fairest solution to the plaintiff and the defendant under the circumstances was to issue a conditional COC which he did on 26 December 2005 stating as follows:

1 TOP attained on 18 August 2005;

2 Tenants have moved in since TOP;

3 Most of the incomplete/outstanding minor works (as per Outstanding/Incomplete Works checklist attached to AD -13 dated 18 March 2005) remain incomplete upon tenants' occupation.

4 Both Revitech Pte Ltd and Ho Pak Kim Realty Pte Ltd still have not reach [*sic*] an agreement with regard to resolving these incomplete work/outstanding work matters. This issue remains unresolved until now after (130 days).

In view of the above the date for practical completion shall be of the TOP date of 18 March 2005.

In the best interest of the project, we issue this Completion Certificate with the recommendation that Ho Pak Kim Realty formally hand over the site to Revitech Pte Ltd.

As per the contract, 50% of the retention sum is to be released to Ho Pak Kim Realty and any amount due and owing for works completed, less the estimated amount required to be paid to complete the outstanding/incomplete works (to be verified by the appointed QS).

74 There was an obvious error in the conditional COC as TOP was obtained on 18 August not 18 March 2005. The architect corrected his mistake the following day. The error is now a non-issue as the plaintiff has accepted it.

75 As regards the Termination Certificate, the architect denied he had colluded with the defendant to issue the same in order to defeat the temporary finality of the architect's interim certificates of payment. The architect pointed out that he had earlier issued the First Termination Certificate, which was similarly based on the plaintiff's conduct and was equally justified. Contrary to the plaintiff's accusations, the architect maintained he had not issued the Termination Certificate in bad faith but had always acted in a non partisan fashion in his role as the architect administering the project.

(c) The claim for rectification of the plaintiff's defective works

76 I turn my attention now to the last item of the defendant's counterclaim for which it relied on the testimony of its three experts *viz* building surveyor David Fidler ('Fidler"), Serge Mathieu Meur ("Meur"), a glass and façade expert and Martin Anthony Riddett ("Riddett") a chartered quantity surveyor.

77 Fidler (PW5) had conducted an on-site survey of the completed project in April 2006 and updated his first survey by revising the site in December 2008. Based on his April 2006 survey, Fidler's first report contained the following significant findings as regards the roof:

(a) the waterproof coating of the reinforced concrete slab had not been applied correctly – it was too thin and did not comply with the Singapore Code of Practice and the contract's specifications;

(b) the parapet wall was too low to be used as a common area and it was not constructed of reinforced contract as stipulated in architectural drawings;

(c) plastering of the roof and parapet wall (including paintwork) was poorly done and steel

reinforcements appeared to be wrongly positioned;

(d) the lighting protection system had not been completed as the vertical straps were not waterproofed; and

(e) the generator and cable trays showed signs of premature corrosion.

78 As for the basement car-park, Fidler made the following findings:-

(a) the concrete finish of the walls and soffits (ceilings) were of a very low standard; rough plywood had been used as shuttering and no attempts were made to remove foreign matter or to scrape off foreign material;

(b) no plaster was applied to the walls and soffits, there was only a poor paint finish;

(c) reinforced steel was visible in several places without the specified cover of 25mm without which cover corrosion would set in and result in spalling;

(d) there was a hole in the soffit (presumably for access) that needed to have a cover installed;

(e) ventilation grilles that were installed needed to have sealants applied around them to stop water ingress and polythene sheeting needed to be removed to allow for air-flow.

(f) painting of conduit pipes was extremely poor and no primer seemed to have been applied;

(g) there were signs of water ingress which appeared to be partially arrested by the presence of grouting which was insufficient/incomplete;

(h) the water tank in the swimming pool pump room leaked and a bolt was missing from the bolt assemblies;

(i) the consumer switch room had incomplete paintwork with missing or disconnected door closers and plywood could be seen embedded in the concrete;

(j) the sprinkler pump room had water ingress through its walls and ceiling;

(k) the pipe-work was poorly painted and there appeared to be leaks.

79 As for the sliding doors of apartment units, Fidler opined that those doors leading to the balconies were not fitted with toughened glass and no drainage was provided for the runners with the result dampness was beginning to appear inside some of the doorways.

80 At his site revisit in December 2008, Fidler discovered that apart from the application of sealant to some areas of the membrane in an attempt to arrest the leaks, no other works had been done and no insulation had been provided to the roof. He found some grouting work had been undertaken in the basement car-park which work had stopped some of the leaks but no other works were carried out to the walls, floors or soffits. Lights had been fitted along the walls of the ramp but plastering and painting of the walls had not been done.

81 Fidler additionally noted that in the outside areas such as the toilet for the disabled, the gymnasium and the external walls, no rectification or repair works were undertaken since the first site

inspection in April 2006.

82 Meur's report dated 14 September 2006 was confined to defects in the windows, sliding doors, balconies, balustrades and trellis. Meur (DW6) visited the site on 13 September 2006 during which he inspected three flats, took photographs (which were exhibited in his report) and conducted random water tests (at several locations) of bedroom windows as well as carried out laboratory tests on stainless steel balustrade supports. Meur identified numerous defects in the aluminium windows including substandard glazing, inadequate glazing rebate heights, glass rebates that were too small, insufficient clearance between the inner face of the glass and the aluminium extrusions and inadequate/poorly installed gaskets.

83 Meur noted there was no proper drainage or weep slots on the windows resulting in unequal failure of pressure equalisation and preventing water from draining out. He shared Fidler's views on the defects in the sliding doors; Meur noted that the locks on the sliding doors did not function as they were meant to do and some were starting to corrode and rust due to the fact that the locks were meant for internal partitions not external use. The thickness of the glass was 6mm whereas the architectural drawings stipulated 10mm.

84 Meur noticed there were no gaskets on the sill, head and vent frames of the sliding doors to prevent water penetration.

85 As for the glass balustrades, the glass panels were substandard in quality and poorly installed. The stainless handrails and fittings supporting the glass panels were grossly misaligned. Fixing of the glass panels was either incomplete or poorly/not properly done. The same observation of poor/defective installation was made by Meur of the aluminium trellis.

86 The defendant's last expert Riddett (DW7) was tasked with evaluating the plaintiff's variation works, quantifying the defendant's cost of rectifying the plaintiff's defective works and calculating the liquidated damages payable by the plaintiff for late completion. In making his September 2006 report, Riddett inspected the project on 27 February and on 24 August 2006 and also had a copy of Fidler's first report dated 30 March 2006.

87 Riddett assessed the plaintiff's variation claims (supported by Architect's Instructions) at $10,023.49 (against its claim of $33,770) and disallowed its claim for variation works totalling $332,064.50 that were not supported by Architect's Instructions. In Appendix C to his report, Riddett gave a breakdown of the costs of rectifying the plaintiff's defective works or completing its outstanding works. The items numbered 541 and the amounts totalled $1,717,992.73 excluding $92,859.43 that the defendant had already spent in rectifying defects in units already sold. Riddett assessed $414,000 for liquidated damages. Finally, Riddett quantified the defendant's claim for back-charges as $189,348.78 for materials supplied to or payments made for and on behalf of, the plaintiff. A number of the backcharge items were not supported by invoices or other documents (see Appendix D in Riddett's report).

88 I turn my attention next to the plaintiff's experts. CBF was tasked by the plaintiff to assess its claims for EOT and damages as well as the defendant's claim for liquidated damages. CBF (PW5) had opined that the actual completion dates were either 16 June 2005 (date of application of TOP) or 7 June 2005 (the date when clearance from Building and Control Authority for the household shelter was obtained) or 9 May 2005 (if the request for EOT for household shelter was granted).

89 The defendant roundly criticised the expertise as well as the report of CBF. The defendant submitted that CBF was not qualified to comment on EOT as he was not a "qualified' person or

engineer, he had never visited the site and was therefore in no position to comment on such matters as whether external works commenced before clearances and approvals were obtained. Further, it was revealed during his cross-examination that CBF was not given all relevant facts, information and documentation by the plaintiff. Consequently, during cross-examination (at N/E 741, 743, 791), CBF departed from his AEIC and conceded that the plaintiff was not entitled to any EOT for (i) marble flooring works; (ii) change in wardrobe design; (iii) changes to the gymnasium and the toilet for the disabled; (iv) additional encasement for rainwater downpipe and (v) ducting and sprinkler works.

90 The same criticism was levelled by the defendant against the plaintiff's other expert Chin Cheong ("Chin"). The defendant pointed out that Chin (PW6) was a chartered building surveyor not a QS. He was not an expert on glass fixtures in buildings nor was Chin a specialist of aluminium extrusions despite which he rendered his expert opinion (in two reports) on how the plaintiff's defective window gaskets and frames should be rectified. The defendant accused Chin of making guesses (at N/E 901) instead of accepting he had no specialist knowledge of recommended weep holes in windows and on the proper drainage of windows. Chin was also unaware that a water tightness test had been conducted in the first tranche of the trial by the then presiding judge and it was found that six sets of windows (in three different units on three floors) upon which water was sprayed all leaked.

91 The defendant argued that Chin's recommendations of rectification of the plaintiff's defective works ignored (a) contractual specifications, (b) aesthetics and (c) durability of the rectification works. As an example of (b), the defendant referred to the court's exchange with Chin (at N/E 931-932) where the latter had recommended the installation of an additional catch (plus use of silicon sealants) to resolve the water seepage problem of casement windows. The court had pointed out to Chin that to add another catch below the existing catch of windows would render the windows aesthetically unattractive.

The finding

The plaintiff's claim for underpayments and undervalued works

92 It is telling that nothing was said in the plaintiff's closing submissions on the defendant's refutal of the plaintiff's claim for underpayments and additional works. Based on the computations set out in [12] to [14] and the evidence adduced in court from Ho and his admitted habit of submitting or resubmitting claims for works not done or already done and paid for, it would appear that the defendant not only did not owe any money to the plaintiff but that in fact it had overpaid the latter. Consequently, the plaintiff's claims in [7](b) for $239,337.50 is dismissed save for the sum of $10,023.49 for variations supported by Architect's Instructions as found by Riddett (for which the plaintiff had claimed $33,770).

93 I therefore need only deal with the issue of whether the defendant is entitled to setoff the plaintiff's (undisputed) claim of $771,630.97 against its counterclaim and whether the plaintiff's services were wrongfully terminated so as to entitle it to damages.

(i) Was the letter of 28 November 2004 a valid request for extension of time?

94 Much was said by both sides on whether the letter dated 28 November 2004 (signed by Ho) did or did not amount to a request for EOT. It would be appropriate at this juncture to set out the relevant extracts from the same (at AB1281-1283):

> ..we disagree to your letter of Delay certificate dated 16th of November 2004. We believed that

> your office forgot that during the meeting at Revitech office dated 22nd of June 2004 or to refer to our later letter to your office and Revitech, we did informed [*sic*] all parties that in order [for] us to complete the project with TOP by November 2004, we needed $300,000/- to $400,000/- monthly progress payment from June to November 2004 to a total sum of $1.7 to $1.8 million to be release[d] in order [for] us to completed [*sic*] the project but your office or your teams has forgot to do so.

It is noted therefrom that the plaintiff complained of the alleged persistent shortfalls in certification (by the architect) and progress payments (by the defendant) and blamed the delay in construction on late approval of drainage and sewage connections and late supply of marble and granite tiles. The plaintiff concluded the 28 November letter as follows:-

> We trust and hope your office can see on to the above seriously and release further payment certificate in order us to complete the project. As regard whether the Contractor HPK are to responsible to your letter of Delay certificate dated 16th of November 2004. Please consider carefully.

95 Counsel for the plaintiff had relied on the following extracts in his cross-examination of the architect (at N/E 1357) for his contention that the architect had agreed that the 28 November letter was sufficient notice of a claim for EOT:

> Q You knew when you received this letter that here is the plaintiff saying that the delay is not his fault. It's due to the fault of the consultants. Agree?
>
> A Yes
>
> Q Okay
>
> A I mean that's what the letter said.
>
> Q Right. And if there was a delaying event which would entitle the contractor to an extension of time and if that delaying even had occurred within 28 days from this letter of 28th November 2004, would you accept that this is sufficient notice?

96 With respect, counsel's argument is misconceived. The architect's 'agreement' had been taken out of context, as can be seen from another extract from his cross-examination (at N/E 1359-1360) where in referring to the 28 November letter the architect said:-

> ..you got to look into the context of what this letter and what its relevance yes. In..in this where he highlighted all this, erm, in his opinions that is delay or result from consultants. If you follow the normal construction programme…or even according to the programme that's scheduled out, all this work supposed to be done much earlier, not by November or October, yah…….the completion date was extended from August to November……Benson or the contractor left it till the last minute and then when...when, you know he leave it to the last minute and just turned around and said 'Well, you know, now I need it and so we're still waiting for this. So therefore, you know, I'm entitled to claim extension of time'. He does not entitle to extension of time because.. he did not plan for this work. He left it to the last minute and it's the same with s lot of the items, you know….
>
> ...

> But that's our view, I mean that's our view, Like I said, I mean there's a lot of correspondence back and forth but a lot of the time when we read, you know, the contractor, erm, letters, some of it doesn't make sense. We don't even know what he's talking about, you know. And I can't – we can't entertain to reply to, erm, you know, I mean claims.
>
> ...
>
> …you know, as far as I'm concerned it's not valid…

97 As was pointed out in the defendant's reply submissions, the plaintiff's letter did not even mention let alone make a request for EOT, it made no reference at all to cl 23(2) of the contract set out earlier at [54], which compliance is a condition precedent to a request for an EOT. Further, a request for EOT must be submitted to the architect within 28 days of an event or direction or instruction which the plaintiff considered entitled him to an EOT. Even if the 28 November letter can be said to amount to a request for EOT, it is noteworthy that it was sent to the architect twelve days *after* the issuance of the Delay Certificate, which fact (as the defendant contended) showed that the same was an afterthought.

98 While I agree no particular format for an EOT is required under the contract, it must be clear to the architect that the plaintiff was making a request for an EOT. I cannot see how the 28 November letter can be said to amount to a request for EOT especially when Ho's concluding paragraph therein seemed to suggest that he was requesting the architect to reconsider the Delay Certificate.

99 Consequently, I reject the plaintiff's argument that it had applied for an EOT by the letter dated 28 November 2004. It bears noting that before the issuance of the Delay Certificate, the plaintiff had been granted three EOT by the architect as set out earlier at [38].

100 I should add that contrary to the plaintiff's contention and the architect's own evidence, the architect did not ignore but did reply (on 3 December 2004) (at AB1303) to the 28 November letter as set out in [56] above. The architect's reply put on record that the plaintiff had been paid all progress claims in accordance with the contract. As for the wardrobes and cabinet works, he stated that the plaintiff and its subcontractors had not installed the same according to drawings and specifications. He concluded his reply with a reminder to the plaintiff that its work had been delayed and it was responsible for continuing delay.

101 The plaintiff's submissions had complained at length that the architect was influenced in his decision-making by one Pandian, an employee of CKM. The plaintiff alleged that the architect had in earlier correspondence agreed that the plaintiff was entitled to EOT but changed his mind after he spoke to Pandian. The plaintiff alleged that Pandian reported to Murthy even though the defendant claimed Pandian was seconded to PEC. The plaintiff pointed out that when Kuan of PEC was recalled to the witness stand, Kuan (PW1) denied Pandian had been seconded to his company (at N/E 1643) and the defendant did not challenge his testimony. The plaintiff further submitted that Pandian should have been but was not called as a witness by the defendant.

102 The defendant did not deny that the architect consulted Pandian on the plaintiff's request for EOT because the architect in his professional judgment relied on someone who was more qualified and with a better understanding of the aspect of works (*viz* civil and structural engineering) to decide whether an EOT should be granted. Moreover, the architect also had the benefit of site visits and consultations with HYME before making his decision. The defendant rightly pointed out that the plaintiff could have but failed to question Kuan (its own witness) on whether he would have granted the plaintiff an EOT.

103 The plaintiff's allegation regarding Pandian's influence was never put to the architect nor was it pleaded by the plaintiff. It was raised for the first time in the plaintiff's submissions. If indeed the plaintiff felt that Pandian was a crucial witness, it could have subpoenaed him to testify when the defendant failed to do so bearing in mind there is no proprietary right by a party to any witness.

104 I move onto the concurrent issue of the Delay Certificate. The plaintiff contended it was invalid (relying on *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [2000] 1 SLR(R) 495 ("*Lian Soon* ") and therefore no liquidated damages could be payable by the plaintiff) because (a) as at the date of the Delay Certificate (1 February 2006), there were factors that entitled the plaintiff to EOT; (b) neither the architect nor the defendant's other witnesses offered any evidence of the factual matrix leading to their rejection of the plaintiff's claims for EOT; (c) the defendant's pleadings were at odds with the case it pursued at trial. I note that the factual matrix in *Lian Soon*'s case was very different. There, the contractor did make a request for EOT from the architect which request the architect had failed to consider. Instead, the architect issued a delay certificate a year later.

105 The plaintiff's argument in [104](a) completely ignored the evidence that was adduced in court. I had ruled that the letter dated 28 November was not a valid request for EOT as it did not comply with cl 23(2) of the contract set out at [54] above. The plaintiff's submission on its entitlement to EOT was (wrongly) premised on the 28 November letter being a proper request for EOT which it was not. More significantly, the plaintiff contended it was entitled to EOT but did not specifically plead that it had actually submitted an application for EOT by the letter dated 28 November. In this regard, I reject the plaintiff's argument that Order 18 rule 7(4) of the Rules of Court (Cap 322, R 5 2006 Rev Ed) implies that all conditions precedent necessary for a case is to be implied in that party's pleadings. The condition precedent for the operation of cl 23(2) of the contract was for a request to be made by the plaintiff before the event that caused the delay; it has nothing to do with the plaintiff's failure to plead the condition precedent.

106 The architect's testimony (which was corroborated by contemporaneous correspondence such as site minutes, his issuance of the Warning Letter and first Termination Certificate), the three EOT he had granted to the plaintiff, coupled with the inconsistent and often contradictory evidence of Ho, left the court in no doubt that the plaintiff's lack of a master programme, delay in commencement of works, lack of site co-ordination, lack of resources (not paying its subcontractors) as well as lack of manpower, were the causes for its delay of 276 days in competing the project. The project should have been completed in 15 months but was eventually completed 9 months later. Under the circumstances, the architect had every justification to issue the plaintiff with the Delay Certificate and the subsequent Termination Certificate. Consequently, the plaintiff's argument in (b) at [104] is untenable while argument (c) is unfounded. The defendant did not depart from its pleaded case at trial.

107 There was a marked difference between the findings of the defendant's three experts and those of the plaintiff's experts CBF and Chin, one reason being that unlike the defendants' experts, CBF and Chin were only given selective documents by the plaintiff for their assignments and in CBF's case, he did not even inspect the site to see the actual condition of the plaintiff's works. Further, although the plaintiff provided CBF with copies of the AEICs of most of the witnesses (for both parties), the pleadings, the drawings, the progress claims and interim certificates 1 to 25, he was not given copies of:-

(a) the relevant correspondence between the architect and the plaintiff;

(b) any of the plaintiff's master programmes;

(c) the ADs especially AD13;

(d) minutes of site meetings;

(e) the Warning Letter, the three EOT granted to the plaintiff, the Delay Certificate, the first Termination Notice dated 27 June 2003, the Termination Certificate and the (revised) Completion Certificate.

all of which would have given him a far more accurate picture of the facts and the plaintiff's progress of construction. CBF was also unaware that the plaintiff had commenced external drainage works before approvals and clearances were given by the relevant authorities when he opined that the plaintiff should be granted EOT for this item. Due to the plaintiff's undoubtedly deliberate withholding of documents, CBF did not have a balanced picture of the dispute in giving his report. His admissions on his own shortcomings are captured at N/E 749 to 823.

108 In Chin's case, while he did have the complete set of contract documents including the Supplemental Agreement as well as the drawings referred to in the Supplemental Agreement, he was only given some of the pleadings (the statement of claim and the defence and counterclaim) and none of the documents listed in [107](a) to (e). He was unaware of the contract specifications for the roof construction and that the plaintiff had failed to furnish warranties for many items of work. Because of the plaintiff's deliberate withholding of relevant documents from him, Chin was equally handicapped like CBF. Chin could not properly determine rectification of the plaintiff's defective works and omissions as he was unaware of the extent of the plaintiff's actual obligations to complete outstanding works.

109 Consequently, the views offered by CBF and Chin on EOT, liquidated damages and on rectification of defects cannot be accepted by the court, not to mention that I entertain doubts on whether they had the necessary expertise for the tasks they undertook on the plaintiff's behalf. It follows that the defendant succeeds in its claim for liquidated damages of $414,000 based on the Delay Certificate, for the period of delay from 16 November 2004 to 18 August 2005 (276 days x $1,500) (see [52]) above.

(ii) The counterclaim for defects

110 In his closing submissions, counsel for the plaintiff criticised the testimony of the defendant's witnesses (especially the architect) as unreliable and described the defendant's counterclaim for rectification of defects as "outrageous". He also alleged that the defendant had not proven its loss of $2,340,482, citing *Robertson Quay Investment Pte Ltd v Steen Consultants Ltd* [2008] 2 SLR(R) 623. This argument of the defendant's loss not being proven goes against the grain of Chin's own report where he had priced for defects for which the plaintiff had admitted liability. It is also unsustainable in the light of the voluminous documentary evidence presented in court and the testimony of the defendant's aforementioned three experts. Counsel's reliance on *Robertson Quay Investment Pte Ltd v Steen Consultants Ltd* was a misreading of the case.

111 The plaintiff's submissions pointed out that after the resignation as quantity surveyor ("QS") of BKP on 31 May 2005, the defendant failed to appoint a replacement consultant. The plaintiff alleged that the defendant intentionally avoided appointing a replacement QS in order to deny the plaintiff's subsequent works (between June 2005 and 2 February 2006) from being certified after BKP's last certification on 26 May 2005. The plaintiff further accused the defendant of a collateral purpose in terminating the plaintiff's services on 1 February 2006, pointing out that the plaintiff's services were terminated less than a week after the plaintiff commenced this suit (on 23 January 2006). It claimed

the defendant's conduct was to avoid giving finality to the interim certificates of payment. This allegation like the one on Pandian, was never put to the defendant's key witness Murthy or to his father Dr Murthy and is accordingly disregarded.

112 The defendant in any case countered the above complaint by pointing out that the plaintiff did no further work that warranted valuation after progress claim no. 25. Consequently, the absence of a replacement QS after BKP's resignation did not materially affect valuation of the plaintiff's progress claims. Even so, as noted earlier (at [19]), the defendant paid the plaintiff another $50,000 in October 2005 as an incentive to the plaintiff to finish the project.

113 It is noteworthy that the plaintiff's closing submissions (at para 41, 43 and 44) admitted liability for (a) the defendant's payments to third party contractors engaged to rectify its defective works; (b) the list of defects highlighted by the management corporation of the project and (c) the omissions of works from the contract. The defendant pounced on these admissions to submit that the plaintiff was entitled to final judgment in the sum of $130,850.71 for the cost of repairs effected by its contractor Harico [5] arising from complaints by purchasers of 18 units of flats.

114 The plaintiff had cited the Court of Appeal decision in *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] SLR(R) 80 as authority for the proposition that the defence of setoff or counterclaim is not available to an employer for payment of interim certificates of payment under cl 31(11) of the contract. That submission is incorrect. The relevant portion of cl 31(11) of the contract states:

> No certificate of the Architect under this Contract shall be final and binding in any dispute between the Employer and the Contractor, whether before an arbitrator or in the courts, save only that, in the absence of fraud or improper pressure or interference by either party, full effect by way of Summary Judgment or Interim Award…,be given to all decisions and certificates of the Architect…until final judgment or award, as the case may be,...

As the parties are at the stage of final accounts/judgment, cl 31(11) on giving full effect to interim certificates no longer applies.

115 I am of the view that the defendant has amply proven its claim for defects, based on the testimony of its three experts. It bears remembering that earlier (at [6]), the plaintiff had conceded that a sum of $8,234.69 was due to the defendant after adjustments. The defendant is entitled to be reimbursed the actual sums already expended on repairs. The defendant (and their expert Riddett) relied on Harico's invoices in the bundle marked 3AB3–68, 73–75,77 and 78 for seeking final judgment for this item of claim.

116 As for the plaintiff's submission that the defendant no longer retained any interest in the project as to be entitled to make this claim (having sold off the units), *Prosperland Pte Ltd v Civic Construction Pte Ltd* [2004] 4 SLR(R) 129 (affirmed on appeal in *Chia Kok Leong & Anor v Prosperland Pte Ltd* [2005] 2 SLR(R) 484) is the authority that says the defendant retains an interest as it remains liable to the management corporation and in turn to the subsidiary proprietors for the plaintiff's defective works.

Items in the defendant's counterclaim

(i) Rectification costs

117 Harico's director Chong (DW8) had confirmed (at N/E 1592) that his company carried out

rectification works *vis-a-vis* air-conditioning, tiling, windows etc. Harico's invoices set out in the bundle marked 3AB totalled $123,738.52. This figure was not disputed by the plaintiff during cross-examination of either Chong or Riddett, who adopted the figure in his report. However, the figure is not fully substantiated by Harico's documents.

(ii) Future rectification of other defects

118 The plaintiff's closing submissions tacitly admitted (at para 43) it was at best liable for the list of defects set out in the letter dated 27 December 2007 (with attachments) (at 4AB 43-46) from the management corporation's managing agents to the defendant and these comprised of:

(a) basement car park;

(b) lift lobbies;

(c) perimeter walkways;

(d) parapet and fencing walls;

(e) external façade;

(f) roof level;

(g) staircase 1 and 2;

(h) outdoor shower;

(i) exit signage

all of which were addressed in Fidler's report (see [77] to [81] above).

119 Chin's second report (which contained a Scotts schedule) had labelled as "baseless" the defendant's allegation of lack of/inadequate waterproofing membrane for the roof. I am of the view that the waterproofing of the roof and its insulation needs to be improved due to water seepage/leaks. Rectification work does not however require the demolition of the existing roof and the construction of a new roof as the defendant contended (relying on Riddett's recommendation). Instead, the appropriate remedial works (as recommended by Fidler) would be the application of waterproofing membrane (including insulation and protective screed) in accordance with contract specifications. All M & E equipment on the roof would have to be removed and reinstalled in the process, which costs would have to be borne by the plaintiff. In this regard, I disbelieve Ho's testimony that the plaintiff had constructed the roof in accordance with revised details/drawings that the architect had accepted.

120 I hold that the existing roof parapet wall should be demolished and rebuilt as the plaintiff's construction was not in compliance with building control regulations and is unsafe. Chin had attempted to play down the risks from the unsafe wall by his comment: "even if the parapet had deviated from specifications, we are of the view that, there would only be a difference in cost of the construction between brickwall and reinforced concrete for the parapet walls". He did not dispute that the plaintiff had failed to construct the wall of reinforced concrete (and height) as specified in the contract drawings. It is trite law that the defendant is entitled to be compensated for what it bargained for and did not receive. Here, apart from that consideration, safety issues were involved in the fact that the structure was made from bricks instead of concrete and the load factor would be

inadequate. For Chin to say that the defendant was only entitled to be compensated for the difference in cost between a reinforced concrete wall and a brick wall is to my mind, highly irresponsible.

121 As for the windows, I disagree with Chin's opinion (and valiant attempts under cross-examination) that corrective action can be taken to improve on the plaintiff's existing faulty/poor workmanship (which included misalignments). His solutions (which included installing additional catches to close the casement windows and use of silicone sealants to resolve water seepage) were ad hoc, at best temporary and therefore unsatisfactory. I accept Meur's recommendations for rectification of the aluminium windows and sliding doors, glass balustrades and aluminium trellis. All these items should be replaced. I am however not prepared to accept the cost estimates of Riddett for windows and glass balustrade replacements. These items of claims must go for assessment.

122 Contract specifications of the walls of the basement car park and sprinkler pump room called for a plastered finish. Undoubtedly, in order to save costs, the plaintiff supposedly provided an off-form finish instead, which alternative had to be acceptable to the consultants. However, photographs of the plaintiff's actual workmanship showed drilling holes, there was water penetration and that the texture of the wall finish was not uniform or even. The same defects and more, were seen in the sprinkler room walls.

123 As for the basement floor, the contract specification called for a finish of monolithic power floated complete with Nitoflor hardtop. (Chin had admitted under cross-examination that he was unaware of the contract specifications). The plaintiff only provided a concrete finish.

124 There was water ingress into the basement car park (due to water seepage from the swimming pool) while the entrance ramp to the car park did not have a paint finish to its concrete slab and reinforced concrete bars were exposed in light fittings. (Ten light fittings noted by Fidler to be missing from the ramp have since been installed).

125 Rectification and provision of all the missing, omitted and poorly constructed items in the basement car park (see the Scotts schedule attached to Chin's second report) are to be carried out at the plaintiff's expense. The actual costs are recoverable by the defendant in the damages to be assessed.

126 The defendant is entitled to the sum of $5,166.04 for rectification costs of the defective marble flooring as assessed by Riddett since Fidler's finding on the defect was not challenged by the plaintiff in cross-examination.

127 Ho had admitted that he omitted to do landscaping for the project, which item was priced at $65,000 in the contract. This figure should be deducted from the plaintiff's claim of $771,630.97.

128 Fidler had noted about 650 unsightly holes in the plaster of the façade of the external walls. These have to be filled in and painted over at the plaintiff's cost, which cost is to be assessed by the Registrar.

129 Minor items of claim such [118](g),(h) and (i) are best left to the assessing registrar together with other items that may have been overlooked in this judgment.

130 Chin's many recommendations of rectification in lieu of replacements of items constructed by the plaintiff may well have been premised on the belief that the plaintiff provided warranties. However, a major omission of the plaintiff was its failure to provide warranties. Riddett's report

assessed $50,000 for this omission and $30,000 for the plaintiff's failure to provide "as built" drawings. While the defendant is certainly entitled to recover the cost of these omissions, I shall leave it to the assessing registrar to determine whether the figures requested are reasonable.

131 It cannot be disputed that the plaintiff totally failed to honour the defects liability period of twelve months after completion. The cost of this omission should be deducted from the plaintiff's claim of $771,630.97 which quantum is best left to the assessing registrar.

132 The defendant had claimed back charges for the cost of materials supplied to the plaintiff but paid for by the defendant. Riddett had assessed the sum at $189,348.78 in Appendix D of his report. However, not all the items listed in Appendix D were supported by invoices or were provided for in the contract. It would be best for this item to be assessed by the Registrar so that the defendant can be given an opportunity to find missing invoices if any to support certain items claimed and conversely, the plaintiff should be entitled to dispute unsubstantiated back charges.

Conclusion

133 It was clear from the evidence adduced in this and the second tranche of the trial, that the plaintiff put in a ridiculously low bid (to quote the architect's words) to ensure it would be awarded the contract for this project, contrary to the claim of Ho (in the second tranche), that he/the plaintiff did not want the job. Having secured the contract, Ho then attempted to disavow (unsuccessfully I would add) many items in the contract in the second tranche of this trial, in order to improve his cashflow and/or profit margin. He also attempted to cut costs by providing poor and/or substandard materials and workmanship.

134 The defendant on the other hand found the plaintiff's contract price of $4,257,500.00 irresistible although as I commented earlier (at [58]), its decision turned out to be a case of penny wise and pound foolish. Undoubtedly, the defendant also had financial constraints as reflected in the resignation of BKP on 31 May 2005 due to non-payment of its fees and the fact (despite its denial) that the defendant did not appoint a replacement QS thereafter. This suit which will eventually consist of four tranches after assessment, is a telling reminder of the folly of accepting the lowest bid from a contractor for a building project.

135 In the light of my findings, the position between the parties is as follows:

(a) the plaintiff shall have final judgment against the defendant in the sums of $771,630.97 and $10,023.49 (for variation claims);

(b) the plaintiff's claim for $239,337.50 for undervalued works is dismissed;

(c) the plaintiff's claim for wrongful termination is dismissed;

(d) the defendant shall have final judgment in the sums of $8,234.69 under [6] and $5,166.04 under [126];

(e) the defendant shall have final judgment in the sum of $414,000 for liquidated damages for the 276 days' delay in completion by the plaintiff;

(f) the defendant shall have final judgment for $65,000 for omission of landscaping works;

(g) the defendant shall have interlocutory judgment against the plaintiff with damages to be

assessed and costs reserved to the registrar for:

(i) the cost of rectification works already incurred;

(ii) defective construction of but not limited to (1) the roof and parapet wall; (2) the basement car park; (3) windows, sliding doors, glass balustrades and aluminium trellis (4) defective marble flooring (5) external walls (6) staircases (7) outdoor shower and (8) exit signages;

(h) the plaintiff's breach of contract in failing to provide warranties and not honouring the defects liability period of twelve months subsequent to completion;

(i) back charges incurred on the plaintiff's behalf; and

(j) the defendant is entitled to set off against the plaintiff's claims totalling $781,654.46 its claims of $8,234.69, $5,166.04, $414,000 and $65,000 as well as its overpayment in [14] (if proven) together with the damages when assessed.

136 I shall hear parties on the issue of costs on another day.

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