SKK (S) Pte Ltd *v* Management Corporation Strata Title Plan No 1166
[2011] SGHC 215

Case Number : Suit No 1022 of 2009

Decision Date : 26 September 2011

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Sunita Sonya Parhar (S S Parhar & Co) and Sankar Saminanthan with Tan Heng Khim (Sankar Ow & Partners) for the plaintiff; Tan Liam Beng and Sandra Tan Pei May (Drew & Napier LLC) for the defendant

Parties : SKK (S) Pte Ltd — Management Corporation Strata Title Plan No 1166

Contract – breach – Building and Construction law – Building and Construction Contracts

26 September 2011 Judgment reserved.

Lai Siu Chiu J :

1 This was a claim by SKK (S) Pte Ltd ("the plaintiff") against the Management Corporation of Strata Title Plan No 1166 ("the defendant") which manages the Mandarin Gardens Condominium ("the estate"). The plaintiff, a paint manufacturer, had supplied paint and carried out repainting as well as repair works ("the Works") at the estate in 2008 but did not receive full payment in accordance with the contract concluded between the parties.

The facts

2 The estate was approximately 26 years old as of January 2007; it consists of 17 blocks of high rise and low rise apartments. There were numerous complaints from residents of spalling concrete falling from balconies and air-conditioning ledges etc within the estate. According to regulations implemented under the Building Control Act (Cap 29, 1999 Rev Ed), the estate was required to be repainted after every five years. In February 2007, various paint manufacturers (including the plaintiff) were invited for a site inspection and to quote for the Works.

3 Members of the 21st council ("the Council") which was then in charge of the defendant were advised in April 2007 by the estate's condominium manager Catherine Ng ("Catherine") that it would be more cost effective for the repainting exercise to be carried out at the same time as repairs of the spalling concrete. The Council by a majority decision accepted Catherine's recommendation. The Council had/has a separate service and maintenance committee ("the SMC") to take charge of building matters and it was the SMC who instructed Catherine to take steps to carry out the Works.

4 Catherine sourced for and appointed professional engineers Castello Consultant ("Castello") to carry out a visual structural inspection. After an inspection that lasted four months, Castello produced a report that showed that the spalling concrete problem was widespread and needed to be attended to urgently especially as there were incidents of chunks of loose concrete falling off high rise blocks onto common areas. Besides spalling concrete, the defects reported by Castello included cracks and water seepage.

5 At a council meeting on 27 September 2007, it was decided that professional building surveyors

be appointed as project manager for the Works. At a meeting of the SMC on 3 November 2007, CC Building Surveyors Pte Ltd ("CCBS") was recommended for the job. Subsequently, the Council accepted the SMC's recommendation on 15 November 2007. The representative of CCBS was/is Crispin Casimir ("Casimir") who is a chartered building surveyor.

6 Casimir invited eight contractors (including the plaintiff) for a site show-around on or about 12 December 2007. The tender closed at noon on 31 December 2007. The plaintiff submitted a price of $2,631,960.00 as its tender.

7 On the morning of 2 January 2008, members of the Council and the SMC were invited to witness the opening of the tenders. The sealed envelopes containing the tenders were opened by Philip Tan ("Philip"), the defendant's property officer, in the presence of the Council's chairman Neoh Chin Chee ('Neoh") and Catherine. Philip tabulated the quotations and Casimir was asked to attend a meeting on 3 January 2008 to evaluate the tenders. The 3 January 2008 meeting of the SMC was attended by Neoh, Catherine and three other Council members. There was a discussion on the different types of paints that were available, the colours and the timeframes for the Works while Casimir provided an analysis of the differences in tenders submitted by contractors after which he recommended the plaintiff to carry out the Works. In making his recommendation, Casimir highlighted that the plaintiff was reliable, had quality paints and he had worked with the plaintiff`in the past without problems. Casimir brought to the attendees' attention a letter from the plaintiff dated 31 December 2007 (see [10]).

8 Neoh inquired of Casimir why Casimir had recommended paint type SS 345 if SS 500 was acceptable. Casimir replied that the main concern was whether there was a waterproofing warranty. Since the plaintiff was willing to provide a five year warranty, there was no risk in accepting its recommendation to change the paint type from SS 500 to SS 345. The SMC agreed to accept the plaintiff's tender with the five variations set out in the plaintiff's letter dated 31 December 2007.

9 The contract itself was not controversial. It was subject to the Singapore Institute of Architects Articles and Conditions of Building Contract ("the SIA Conditions"). The dispute in this case concerned the plaintiff's long letter dated 31 December 2007 under the reference MG/SKK/RO/001/07-12 that Casimir referred to at the meeting on 3 January 2008. The plaintiff contended (which the defendant disputed) that its five proposals therein were accepted by the defendant as evidenced in the subsequent supplementary report prepared by Casimir (see [12] below). The plaintiff had written two letters to the defendant on 31 December 2007: the longer one which was signed by its managing-director and a much shorter letter under the reference LL/NP/RO/07/953 which was signed by its sales manager Ong Tuan Hwa ("Ren"). (Henceforth, the long letter will be referred to as "the 31 December letter" while the shorter letter of the same date will be referred to as "the shorter letter").

10 As the 31 December letter is central to the dispute between the parties, it is necessary to set out the contents in full. The letter (with numbering added for ease of reference) reads as follows:-

> **Tender for repair and repainting works to Mandarin Gardens along Siglap Road Singapore**
>
> A Reference to the above-mentioned tender, we are pleased to submit our tender offer at a lump sum amount of S$2,613,960.00 excluding GST with a completion duration of 42 weeks and as per according to the requirement and specifications of the tender document.
>
> B In addition, we would like to request for some waiver or amendments pertaining to the above tender exercise and they are as follows:

1 SKK would like to request for a deposit of 25% of the total contract sum upon receipt of the official confirmation or award of the tender.

2 Spalling repairs to the plastered and concrete surfaces of all balconies shall be based on lump sum basis and not provisional sum.

3 For the painting system to the entire external wall façade, we would not recommend that SS 500 to be used as the 2nd intermediate coat due to the fact that should there be any water ingress from within side of the wall surfaces or any leakage through the wall surfaces, it will caused (sic) a lot of bubbling effect and thus it will be very unsightly and we shall not be responsible. As such, we would strongly recommend the paint system as follows:

(i) One (1) coat of SKK Biofine Sealer or Rewah Indupact penetrative sealer.

(ii) Two (2) coats of SKK Super Biofine SS 345 weather-shield acrylic water resistant breathable paint as final coats.

4 For the covered car park with metal roofing and steel frames, wee do not recommend the specified conventional paint system but shall use a much better paint system as follows:

(i) One (1) coat of SKK Mirac #100 two-pack high grade epoxy as primer coat.

(ii) Two (2) coats of SKK PU enamel two-pack polyurethane as final coats.

5 All other paint systems and terms and conditions shall remained (sic) the same as per according to the tender specifications and requirements.

C We trust the above is in order and shall be looking forward to your favourable reply for the outcome of the above tender soonest possible. However, if you do need any clarifications, please feel free to contact us and we will do our best to be of service to you.

11 The plaintiff's proposal in item 2 to charge a lump sum price for spalling concrete repair was attractive to the Council as it was not known how extensive the problem was and the Council wanted to ensure that all areas of spalling concrete were dealt with at a fixed cost including areas that may not have been highlighted in Castello's report or detected.

12 In contrast to the 31 December letter, the shorter letter stated:

Tender Submission for Mandarin Gardens repair and repainting works

With reference to the above, we would like to offer our tender price of S$2,613,960.00 excluding GST on the above mentioned for your kind reference.

We would like to request on the total duration to be extended to 42 weeks instead of 34 weeks, and shall be subject to weather increment (sic) & site condition.

Terms of Payment

1 We would like to request 25% deposit upon award of contract and the balance of payment to be follow (sic) as per tender document.

2 Validity Date: 90 days

We trust that the above is in order, should you require query, please do not hesitate to contact the undersigned.

13 On 4 January 2008, Catherine emailed all the Council's members attaching Casimir's analyses of the quotations ("the attachment") and sought their approval to appoint the plaintiff as the contractor. Separately, Catherine hand-delivered or posted copies of her email with the attachment to all Council members, specifically informing them that due to the thickness of the tender documents, details of the same were available for perusal at the management office. Between 4 and 9 January 2008, approval was received from the majority of the Council members (including Neoh) for the plaintiff's appointment. On 9 January 2008, CCBS was instructed to award the contract for the Works to the plaintiff which Casimir did by his letter of award dated 11 January 2008.

14 The contract with the plaintiff was subsequently signed in January 2008 by Neoh on the defendant's behalf. Under Appendix D to the contract, the plaintiff had 34 weeks from the date of confirmation of award to complete the Works but as the plaintiff's request of 42 weeks had been acceded to, the completion deadline was extended to 5 December 2008. The plaintiff was to provide a defects liability period of twelve months from the date of completion. The contract also provided for liquidated damages of $500 per day and for the plaintiff to be paid by progress claims.

15 Casimir prepared a supplementary tender report dated 10 January 2008 ("the supplementary report") recommending the plaintiff's appointment which he submitted to the Council at its meeting on 11 January 2008. At this meeting, it was decided that the plaintiff and CCBS would hold an exhibition to highlight to the estate's residents the type of paints that would be used and to address their concerns if any.

16 On 16 January 2008, the defendant paid the plaintiff the 25% deposit requested in the 31 December letter. The exhibition in [15] was held on 27 January 2008. The plaintiff furnished a performance bond of 10% of the contract value by a bank guarantee dated 31 January 2008 for $261,396 issued by The Bank of Tokyo-Mitsubishi UFJ ("the performance guarantee") and commenced the Works sometime in February 2008.

17 On 23 May 2008, the Works at Block 3 were completed and inspected. The feedback from residents of that block was positive save for minor defects/complaints which the plaintiff attended to.

18 On 8 June 2008, the Annual General Meeting of the defendant was convened and a new 22nd Council ("the new Council") was elected. Some members of the (previous) Council were re-elected to the new Council including Lee Kow Yee (also known and referred to as "Bernard Lee") while Joe Goh replaced Neoh as chairman of the new Council and Chan Kum Kit ("Chan") assumed the vice chairmanship. (Chan subsequently became the chairman of the 23rd and 24th Councils). Some members of the new Council were unhappy with the repainting works and questioned CCBS as to why payment for the spalling concrete repair under the contract had been changed to a lump sum basis and why it had made provision for 2,000 balconies when the number stated in the tender document was 1,000 balconies. The new Council also questioned the type of paint that had been used and why Casimir had agreed to the change of paint from one coat each of SS 345 and SS 500 to two coats of SS 345.

19 The new Council decided to and did appoint a clerk of works Ng Cheng Siong ("Peter") in August 2008 to oversee the Works. Peter was to be the liaison person between the defendant and CCBS.

Unfortunately, the flow chart implemented by the new Council for approval of the plaintiff's repair lists of spalling concrete after Peter's appointment caused delays to the plaintiff's progress. The flow chart was as follows:

Plaintiff →CCBS →Peter → SMC → CCBS →Plaintiff

20 Instead of being ahead of schedule as of July 2008, the plaintiff became progressively behind schedule, with the situation exacerbated by inclement weather. By 19 December 2008, the Works were 16 weeks behind schedule.

21 On 23 October 2008 ([131] *infra*), the plaintiff gave formal notice of a claim for extension of time ("the EOT claim"), purportedly in accordance with cl 23 of the SIA Conditions.

22 By a letter dated 15 October 2008 to the plaintiff copied to CCBS, the defendant alleged that the plaintiff had committed breaches of the contract which it had failed to rectify. On 24 October 2008, the plaintiff wrote to the defendant complaining about non-payment of its progress claims and slow approval of its repair lists. Between 25 October 2008 and 13 November 2008, four other similar letters were written by the plaintiff. The delays encountered by the plaintiff were also reflected in site meetings as well as in letters from CCBS to the defendant prior to the termination of the latter's services. According to the chairman of the SMC of the new Council one Kuladeva s/o Kulathungam ("Kula"), the defendant did not respond to any of the plaintiff's letters.

23 Instead, by a letter dated 6 November 2008 addressed to CCBS, the defendant gave its views on how the contract should be administered. On 3 December 2008, the defendant's solicitors wrote to CCBS alleging *inter alia* that Casimir had failed to discharge his duties as contract administrator and demanded that he take steps to comply (by 17 December 2008) with the defendant's list of required actions attached to the letter.

24 Before Casimir could evaluate the EOT claim and revert to the plaintiff, the services of CCBS were terminated on 31 December 2008. In place of CCBS, the new Council appointed Building Appraisal Pte Ltd ("BAPL") with effect from 2 January 2009. Its managing-director was/is Chin Cheong ("Chin"), a key witness for the defendant.

25 Subsequent to BAPL's appointment, the plaintiff informed Chin of the EOT claim and submitted to him full details thereof on 14 April 2009.

26 Progress claims submitted by the plaintiff in December 2008 were not paid as of May 2009 despite the plaintiff's letter dated 6 May 2009. Instead, on 11 May 2009, Chin issued the plaintiff Building Surveyor's Direction no. 4 requiring the plaintiff to comply with his previous Direction No 2 dated 23 February 2009 to carry out rectification works. On 13 May 2009, Chin replied to the plaintiff's letter dated 6 May 2009 claiming there were valid grounds to withhold payment on the progress claims.

27 The plaintiff submitted its final claim on 15 May 2009 for $678,702.02 which included agreed variation works of $105,671.50. By then, works to the value of $307,479.02 had been certified but not paid.

28 On 21 May 2009, the defendant called on the performance guarantee and obtained payment thereto of $261,396 even though the plaintiff asserted that by 8 May 2009, it had completed the Works. It was the plaintiff's pleaded case that the call by the defendant on the performance guarantee was wrongful/*mala fide* and an abuse of process as the defendant owed a contract sum of

$936,865.09 to the plaintiff at the time the call was made. Further, on 16 June 2009 and 22 June 2009, the defendant had paid the plaintiff $258,163.07 which sum was almost equal to the value of the performance guarantee.

29 On 17 July 2009, Chin issued a Delay Certificate to the plaintiff extending the period for completion by 179 days to 17 July 2009 and certified completion had taken place that day. However, he withdrew the Delay Certificate on 20 August 2009.

30 The plaintiff commenced this suit in December 2009 after its claims had been unpaid for more than a year, despite its reminders and the exchange of correspondence between the parties' solicitors. The plaintiff maintained that it had carried out the Works in accordance with the contract as varied by the 31 December letter whilst the defendant contended that the plaintiff had breached the contract in using two coats of SS 345 paints.

31 By the date of the trial, the 24th council of the defendant had taken over the management of the estate from the 23rd council. Some members of the 22nd and 23rd councils (including Chan and Kula) continued to serve in the 24th council.

The pleadings

32 The plaintiff's (amended) claims were essentially for the following sums:

(a) $649,878.63 being the balance of the contract sum for work done of which $307,479.03 had been certified;

(b) $398,788.52 for prolongation costs due to delay in works caused by the defendant;

(c) $261,396 being the sum received by the defendant under the performance guarantee.

33 In regard to the prolongation costs, the plaintiff put the blame on the defendant's approval process after Peter was appointed as the clerk of works (which itself was cited as a breach of contract as it was not part of the terms). The statement of claim particularised 34 occasions where the plaintiff submitted repair lists to the defendant for approval and in eight instances the approval process took 3 to 6 weeks.

34 The plaintiff had an attendant claim for damages for breaches by the defendant and for the wrongful call on the performance guarantee. The plaintiff also pleaded as an alternative claim that it was entitled to an extension of time and prolongation costs as the Works were delayed by 54 days due to inclement weather.

35 In its (amended) defence, the defendant alleged that the contract between the parties only contained two variations *viz*: (i) extension from 34 to 42 weeks for completion of the works subject to inclement weather and site conditions, and (ii) a deposit of 25% of the contract value to be paid upon award of the tender to the plaintiff. The defendant contended that the 31 December letter did not form part of the contract. The defendant *inter alia* alleged that the plaintiff was in breach of the contract in failing to: (i) use SS 500 paints as the top coat for the repainting works; (ii) ensure the

spalling works at the balconies were charged on a provisional instead of a lump sum basis; (iii) carry out and complete the repainting work to workmanship standards required under the contract; (iv) comply with Chin's Directions nos. 1, 2 and 4 and the Final Notice issued under the contract and (v) complete the project by 5 December 2008 instead of on 17 July 2009 with a resultant delay of 223 days.

36 The defendant asserted that its call on the performance guarantee was made in good faith and was not unconscionable and that at all times it was prepared to account for the monies paid thereunder.

37 As for the plaintiff's claim for prolongation costs, the defendant contended that the plaintiff had no grounds under cl 23 of the SIA Conditions to be entitled to an extension of time. Alternatively, the defendant contended that the plaintiff failed to discharge the requirements under cl 23(2) and (4) of the SIA conditions and was not entitled to an extension of time.

38 The defendant counterclaimed the sum of $357,379 from the plaintiff for loss and damage suffered from the plaintiff's breaches of the contract (after accounting for the performance guarantee sum) which included the cost of rectification works to repaint Blocks 1, 3 and 7. In the alternative, the defendant counterclaimed $24,040.84 (after deducting the performance guarantee sum) for loss and damage net of the sums certified and due to the plaintiff.

39 The parties had tendered a Scott Schedule to the court before trial. When trial commenced, the court was informed that the defendant no longer disputed that the plaintiff's quotation of $320,400 for spalling concrete repair of 1,000 balconies if it was a lump sum contract. Further, counsel for the defendant informed the court that the nominated subcontractor Hydro Seal Engineering Pte Ltd ('Hydro Seal") did not carry out the spalling repair works as they were done by the plaintiff's own subcontractor General Waterproofing Repair. As such, the plaintiff should not claim 10% for profit and attendance. This was not denied by the plaintiff.

40 A total of 15 witnesses testified at the trial of which nine (including two who were subpoenaed) testified for the plaintiff. The plaintiff's witnesses comprised of two members of the Council *viz* Neoh, Thomas Chia Ching Kwang ("Chia"), Catherine, Casimir, two experts in the persons of Kenneth Jones ("Jones") and Szetho Foon Wah ("Szetho") as well as the plaintiff's sales and project managers Ren and Neo Poh Low ("Neo") respectively. Casimir was one of the plaintiff's two subpoenaed witnesses with the other being Tan Hong Kian ("Tan") from Setsco Services Pte ('Setsco").

41 Trial lasted almost nine days during which at the parties' behest and in the presence of their representatives and solicitors, the court visited the estate on the morning of 29 March 2011 to look at the state of the Works.

(i) The plaintiff's case

42 Casimir (PW1) was asked to testify because the defendant refused to agree to dispense with formal proof of certain documents before the court in particular, photographs showing spalling concrete and repair lists that Casimir co-signed with Peter, site minutes he had prepared and faxes/letters that Casimir had sent to the defendant, some of which dealt with the delay in approving repair lists submitted by the plaintiff.

43 Casimir confirmed that he prepared the supplementary report at [12] which made specific reference to the 31 December letter (see [10]). At para 3.0 therein under the heading SKK (S) Pte Ltd, Casimir referred to the 31 December letter and to the plaintiff's proposed four amendments to its

tender *viz* (i) a request for 25% deposit; (ii) repair of spalling concrete to be on a lump sum basis; (iii) top coat paint system to comprise of two coats of SS 345 paint and (iv) an alternative paint system employing epoxy primer and polyurethane paint for the car park areas.

44 A further document disputed by the defendant was Casimir's minutes of site meeting no 1 dated 22 February 2008 which he had subsequently amended (of which more will be said later). Casimir was subsequently recalled on the 8th day of trial to testify on the letter dated 3 December 2008 (see [20]) from the defendant's solicitors and his reply to the same dated 24 December 2008. Although Casimir was obviously reluctant to come to court as evidenced in his having to be subpoenaed, his testimony was nonetheless fair and balanced.

45 The crux of Casimir's testimony (as stated earlier at [42]) was to formally prove documents the defendant disputed in particular the (amended) minutes of the first site meeting and his supplementary report (at 2AB123) where it was recorded:

> It was noted that SKK (Pte) Ltd had submitted a letter dated the 31st December 2007, at the time of tendering in respect of certain amendments, as follows:

Casimir then listed the four amendments in the 31 December letter (set out earlier (at [10]) in items B.1 to B.3. In answer to the court's question (see N/E 30-31), Casimir explained that he had met members either of the defendant or of the SMC on 3 January 2008 to discuss the 31 December letter and the defendant had agreed to the change in paints (from one coat of SS 500 to two coats of SS 345) before he issued the supplementary report a week later. Casimir confirmed he had seen the 31 December letter as well as the shorter letter when he collected the tender documents from the defendant's office that morning after the close of tenders.

46 As for the minutes of the first site meeting on 22 February 2008 (see PCB64-66) item (j) therein recorded:

> A copy of the required colour scheme had been passed to the contractor by the Managing Agent. (It was noted that the common lift lobbies would be painted with SS: 345 paint, and that the external elevations would be painted with a combination of SS: 345 and SS: 500.

Contrary to the stand taken by the defendant, Casimir confirmed (at N/E 27-28) that he prepared the amended minutes to correct the error he had made in the original minutes on item (j) to reflect what transpired at that site meeting which he attended along with representatives (2) of the plaintiff, one Ms Chiew from the defendant and Catherine.

47 Two other witnesses *viz* Neoh and Catherine corroborated Casimir's testimony that the terms of the 31 December letter were incorporated into the contract between the parties.

48 Neoh (PW3) testified that he had witnessed the opening of the sealed tenders on 2 January 2008. The tenders were then tabulated and discussed at a meeting that he attended with Casimir and members of the SMC on 3 January 2008. At the meeting, Casimir had specifically referred to the 31 December letter. When Neoh was given the contract to sign on the defendant's behalf, he had pointed out to Catherine that some of the changes proposed by the plaintiff in the 31 December letter had not been incorporated. Catherine had assured him she had been informed by Casimir/CCBS that a supplementary tender report would be issued setting out the amended terms.

49 Catherine (PW5) corroborated Neoh's testimony in [48]. In her affidavit of evidence-in-chief ("AEIC"), Catherine deposed that the new Council insisted that the plaintiff had used the wrong paint

for the Works even though she and Casimir had explained that the specifications had been changed. Casimir then suggested that a meeting be held between members of the Council and the new Council to determine what had been agreed with the plaintiff. However, the meeting never took place.

50 Catherine deposed she was never queried by the new Council on why the 31 December letter did not have a date stamp (although it was the gravamen of the defendant's case). She explained that she had specifically informed Kula, the chairman of the SMC of the new Council, that none of the tender documents were stamped as they had arrived in sealed envelopes. Hence, only the envelopes were stamped. After the sealed envelopes were opened on 2 January 2008, all the tender documents were returned to the receptionist to stamp the dates on the tender quotations in accordance with the dates and times stamped on the envelopes. In the process however, the 31 December letter was overlooked although the plaintiff's tender document was stamped. However the new Council refused to accept her explanation.

51 I should point out that besides Neoh, another member of the Council Chia testified for the plaintiff. Chia (PW4) was also a member of the Council's SMC. Chia deposed he attended the meeting on 3 January 2008 where the various tenders submitted were discussed before the SMC decided to award the contract to the plaintiff. He recalled coming across the 31 December letter amongst the documents presented to the attendees. After reading the 31 December letter, Chia had turned to Casimir and requested the latter's comments on the variations in the type of paints proposed by the plaintiff. Chia deposed he was satisfied with Casimir's views and hence he recommended the appointment of the plaintiff for the Works.

52 Chia disclosed that sometime in September 2009, he received a call from various members of the new Council who asked to meet with him. Chia met with some members of the new Council (including Bernard Lee) on 6 September 2009 and when asked, confirmed that he had seen the 31 December letter at the SMC meeting on 3 January 2008 prior to the award. Chia referred to his email dated 9 January 2008 which he had forwarded to Catherine and to members of the new Council (including Bernard Lee) stating he had agreed with Casimir's recommendation to award the contract to the plaintiff. He added that the plaintiff had also submitted the lowest tender. In his email, Chia (in referring to the various tenders submitted) had said:-

> 2 ...The scope of work for all bids were consistent. There were no significant variations, except for a request for extension of period of execution from about 36 weeks to about 42 weeks or so.
>
> 3 This was also consistently requested by most bidders.

53 I move next to look at the testimony of the plaintiff's staff starting with Ren (PW6). Ren explained how the two letters dated 31 December 2007 came to be sent to the defendant. He had prepared the plaintiff's tender and drafted both letters dated 31 December 2007. That morning, on his instructions, the plaintiff's administrative clerk was to have attached the plaintiff's tender to the 31 December letter and submitted the documents in a sealed envelope to the estate. The plaintiff's tender was submitted by the plaintiff's project manager Neo Poh Low ("Neo") that morning. Subsequently, Neo telephoned Ren to inquire whether the tender submitted included the 31 December letter. Ren called his administrative clerk for confirmation only to be told she had submitted the shorter letter instead. Ren immediately printed out the 31 December letter from a computer and personally submitted it himself to the estate in a sealed envelope before the noon deadline.

54 Ren recounted the problems the plaintiff faced with the new Council after it took office in June 2008. The new Council not only questioned the Works at Blocks 1 and 3 but also queried Casimir on the number of balconies for repair work for spalling concrete which the members contended should be

for 1,000 units of flats (with 2 balconies each) and not 2,000 units. The new Council was also unhappy with the lump sum basis of calculation for the spalling concrete repairs and the change of external paints from one coat each of SS 500 and SS 345 to two coats of SS 345. The position taken by the new Council was that the plaintiff had conspired with CCBS/Casimir, the 21st Council's members and Catherine to cheat the defendant. He pointed out that at no time did the new Council contend that the contract did not incorporate the amendments in the 31 December letter; the members were merely unhappy with the changes to the contract.

55 Ren pointed out that even if the plaintiff had applied one coat of SS500 and SS 345 instead of two coats of SS 345, the savings would only be $2,500 for Blocks 1 and 3 and $10,500 for the entire estate. On a goodwill basis, the plaintiff was willing to credit the sums saved to the defendant. However, this did not appease the new Council. In a letter dated 8 July 2008, the defendant required the plaintiff to proceed with repainting of Blocks 5 and 7 using one coat of SS 500 and one coat of SS 345. Purely out of goodwill, the plaintiff acceded to the request. However, the plaintiff informed the defendant that it would not provide a guarantee for the intermediate coat of SS 500.

56 Ren revealed that without the plaintiff's prior knowledge, the defendant arranged for tests to be conducted on the plaintiff's paintwork by one Dr Lim Chooi Seng ("Dr Lim") of TUV SUD PSB Pte Ltd ("PSB"). The plaintiff was only informed of the same on 5 February 2009 at the 38th site meeting. The test results were made known to the plaintiff at the 41st site meeting on 25 February 2009. Ren did not accept the test results and informed Chin/BAPL that the plaintiff would conduct its own tests. That resulted in the appointment of and the tests done by Setsco whose representative (Tan) was subpoenaed to testify for the plaintiff.

57 It would not be necessary to advert to Ren's testimony of the events that escalated the dispute between the parties into these proceedings as they have been adequately (albeit briefly) set out earlier.

58 Nothing turns on Neo's testimony as he largely repeated Ren's evidence. Neo (PW7) deposed that it was for cost considerations that the plaintiff did not appoint the nominated subcontractor Hydro Seal to carry out the spalling repair works. Instead, the plaintiff appointed General Waterproofing Repair.

59 Neo gave the reason for the change of paints from one coat of SS500 and one coat of SS 345 to two coats of SS 345. He deposed it was because SS 500 was/is an elastomeric paint which would not allow water to seep out but would trap it under the paint and this would cause bubbling. Bubbles would render the painted surface unsightly. On the other hand, applying two coats of SS 345 would allow water underneath the paint to seep out and avoid the formation of bubbles. (In this regard, Jones had opined that the rate of permeability of SS 500 was much slower than that of SS 345. Cross-examined (at N/E 710) on this aspect, Bernard Lee was unable to challenge Jones' opinion.

60 Neo disclosed that the plaintiff (upon reviewing the tender specifications), noted that the metal frame and roof of the covered car park lots were to be painted with one coat of etching primer and two coats of top gloss. As the estate was close to the sea and to the East Coast Expressway, it meant that the paintwork would come into contact with salt and fuel emissions from vehicles respectively, both of which would affect the durability of the enamel paints specified. Neo said the plaintiff therefore proposed, which the defendant accepted, the use of one coat of SKK Mirac primer and two coats of SK PU enamel finish; the latter included a hardener that would protect the paint surface from the elements.

61 Since the contract for spalling repairs was on a lump sum basis, the plaintiff only submitted to Casimir for approval lists containing the units it intended to repair without providing measurements. Once Casimir had signed the lists, the plaintiff proceeded with the work. Claims for spalling concrete repairs were submitted, evaluated and paid based on the number of units repaired, not on the number of balconies. This was never disputed by Casimir or the defendant.

62 Finally, Neo referred to another aspect of the plaintiff's work, that of cleaning and roughing the surface of air-conditioning ledges in preparation for coating. The plaintiff then had to re-form top surfaces to fall to a new outlet with epoxy repair mortar. However, Neo noticed on site that the air-conditioning ledges already had a gradient albeit it was inadequate, resulting in water stagnation. The plaintiff proposed an alternative method of work to Casimir which comprised of installing a new PVC drain-pipe and constructing a new kerb to channel water to the new PVC pipe. It was approved and work proceeded on that basis without complaints from Casimir or the defendant until the new Council came into the picture and started fault-finding the plaintiff. Neo deposed that if the new Council or the 23rd or 24th councils of the defendant were unhappy with the decision made by the (21st) Council over the choice of paints or that the spalling concrete repairs were done on a lump sum basis, that was a matter between the various councils' members and had nothing to do with the plaintiff.

63 Neo revealed that he kept daily site records of the weather for the duration of the contract in which he logged the hours of rain per day that prevented the plaintiff from proceeding with the Works. (Neo's records were partly the basis for the plaintiff's claim for extension of time).

64 As the expert testimony of both parties is of considerable importance in this case, I shall deal with it separately later and turn now to consider the testimony of the defendant's factual witnesses.

(ii) The defendant's case

65 I start my review of the defendant's evidence with the testimony of Bernard Lee [18]. Bernard Lee was both a member of the 21st and 22nd Councils of the defendant. His contention that the contract did not incorporate the terms in the 31 December letter was based entirely on the fact that he only saw the shorter letter and not the 31 December letter at the defendant's office and on the fact that the latter document did not have a date and time stamp unlike the shorter letter. To reinforce his argument (with which Chia disagreed), Bernard Lee referred to Chia's email of 9 January 2008 in which Chia only referred to the two conditions set out in the shorter letter and not to the five terms set out in the 31 December letter. Bernard Lee concluded that the 31 December letter was never received by the defendant at the time the tenders closed.

66 Besides Bernard Lee, two other Council members testified *viz* Kula and Chan [32]. Kula was a member of all three councils (*viz* 21st, 22nd and 23rd Councils). He was also the chairman of the SMC of the new Council. Kula's AEIC deposed to disparities between the work done by the plaintiff and the sums it had claimed and which were certified. Kula claimed the new Council's concerns were raised at meetings that were attended by Neoh and Catherine but neither of them made any attempts to clarify matters. Consequently, the new Council decided to take matters into its own hands by reviewing the contract documentation. In so doing, it noticed that the paints applied by the plaintiff differed from those specified in the contract. Kula deposed it was also inconsistent with the minutes of the first site meeting on 22 February 2008.

67 Kula complained that Casimir had certified payments totalling $189,000 for repairs to 288 balconies when the provisional sum of $450,000 was for work for over 800 balconies. The plaintiff's claim equated to 42% of the provisional sum. Kula deposed that the defendant had highlighted the

discrepancies between the works carried out and the progress claims of the plaintiff and alleged that Casimir had agreed there were errors. Casimir subsequently revised/reduced the sums he had certified for the plaintiff's claims. Kula claimed that the defendant's representatives also met with the plaintiff's managing-director on or about 26 August 2008 to express its concerns but the plaintiff did not address the issue.

68 On 20 June 2008, the new Council met up with Casimir and Ren. Kula alleged that Casimir informed the attendees that he (Casimir) was not on site most of the time and Casimir had not inspected and signed off each coat of paint when completed (as required under the contract) before he certified payment. Kula (in his capacity as chairman of the SMC) followed up the meeting with a letter dated 24 June 2008 to CCBS requesting particulars of Casimir's project management methodology and processes in verifying and certifying the quantity and location of spalling concrete repairs.

69 Like Bernard Lee, Kula asserted that the terms in the 31 December letter did not form part of the contract. He noted that the plaintiff had a specific reference in the 31 December letter viz MG/SKK/RO/001/07-12 whereas the shorter letter contained a general reference (LL/NP/RO/07/953). Kula deposed that it was "common sense" that a company would not create a project file (and therefore have a specific project reference) for a job until it was awarded the same. He therefore surmised that the 31 December letter must have been issued by the plaintiff after the letter of award (in [13]) was issued by CCBS. The defendant did not have as part of its records for the contract, a copy of the 31 December letter. Kula added that neither Catherine, Casimir nor the plaintiff had highlighted the 31 December letter or its amended terms to him or the other members of the Council. This statement was patently untrue as Casimir had briefed attendees at the first meeting of the SMC of the new Council on 26 June 2008 which Kula chaired.

70 Kula said the appointment of Peter (from Colsult Consultants) as clerk of works was to monitor the project so as to avoid further disputes with the plaintiff/CCBS. In that regard, a procedure for repair works (set out earlier in [19]) was approved by the plaintiff, the defendant and CCBS around 8 August 2008. Kula alleged this was necessitated by the plaintiff's breaches and its inaccurate records/claims for work done. It was also to maintain proper cost control. He denied that the approval procedure delayed the plaintiff's works and entitled it to claim prolongation costs for 29½ weeks. In his AEIC (para 44), Kula set out 35 repair lists and the length of time the SMC took to approve each list. Approval time ranged from 0 to 47 days. Where the SMC approval took longer than 1-2 weeks (there were nine instances altogether) Kula sought to put the blame on the plaintiff alleging it was due to lack of clarity in the latter's submissions while some repair lists were submitted in a haphazard manner necessitating either Peter or the defendant having to seek clarification. If indeed there was a delay, he contended it would be during the interval when CCBS's services were terminated and before BAPL took over as project manager. His excuse was that Chin/BAPL needed time to review the project; the repair lists were approved late consequentially.

71 Kula complained that by October 2008, the paintworks of the plaintiff started peeling and 'bubbling' appeared. The defendant engaged (without the plaintiff's knowledge) PSB to inspect the paintworks and to carry out tests. The tests were conducted by Dr Lim in February and August 2009.

72 Chan corroborated Kula's testimony that the 31 December letter could not have been part of the contract. Chan added there were no records in the defendant's documents of the amended minutes of the first site meeting on 22 February 2008 made by Casimir. Indeed he and other members of the new Council only saw the amended minutes for the first time on or about 28 April 2009 when the plaintiff forwarded a copy to Chin.

73 It is noteworthy that neither Kula, nor Bernard Lee nor Chan attended the 7th meeting of the Council on 14 January 2008 chaired by Neoh (which Chia and Catherine attended) at which Casimir presented the supplementary report. The project was discussed (at item 3.1.5 of the minutes at 3AB220) and it was minuted that the SMC had deliberated and supported the recommendation of Casimir that the plaintiff be awarded the contract. Their belief that Casimir had backdated the supplementary report was unfounded as the document had the date 11 January 2008 stamped on it.

74 Chan contended that the plaintiff was not entitled to prolongation costs as it had failed to first comply with the 28 days notice period stipulated under the SIA rules. I shall return to this issue later.

75 Chan also defended the defendant's call on the performance guarantee claiming that the defendant had incurred costs relating to the engagement of Peter and Chin due to the plaintiff's late completion of the project. Costs were also incurred in engaging PSB to conduct tests on and to prepare a report of the plaintiff's paintwork. He accused the plaintiff of refusing to comply with Chin's direction to repaint Blocks 1, 3 and part of 7 with one coat of SS 500 paint and a finishing coat of SS 345. He claimed the plaintiff's non-compliance would have resulted in the defendant having to incur rectification costs of $370,000. Consequently, the defendant was justified in calling on the performance guarantee which sum was only for $261,396. He claimed that at the time the defendant called on the performance guarantee on 22 May 2009, it did not owe any monies to the plaintiff. Subsequent progress claims were certified on and after 11 June 2009. Chan also relied on Chin's final certificate to assert that the plaintiff had been overpaid $308,671.84 not including the defendant's loss and damage of another $642,010 which excluded the costs of engaging Peter and Chin.

76 The defendant relied heavily on Chin's testimony for its defence and counterclaim. I should point out that Chin was called as a factual not an expert witness by the defendant whose only expert was Dr Lim. The plaintiff on the other hand had two expert witnesses in Jones and Szetho.

77 It may be appropriate at this juncture to review Chin's testimony before I move on to address the expert testimony of the parties. Chin's AEIC comprised eight ring files and sixteen voluminous exhibits.

78 In its closing submissions, the plaintiff criticised Chin's testimony as unreliable and inconsistent and accused him of blatant lying. The plaintiff contended that Chin failed miserably in his duty as contract administrator in not acting fairly and equitably. In support of such criticism, the plaintiff highlighted various portions of Chin's cross-examination where his allegation of breaches of the contract by the plaintiff was proved to be unfounded.

79 During cross-examination, Chin was taken to task by counsel for the plaintiff for his opinion that the plaintiff had no contemporaneous records for the inclusion of the amended terms in the 31 December letter into the contract. Counsel had pointed out to Chin (who conceded) that the contemporaneous record was reflected in the supplementary report itself. To circumvent Chin's admission, the defendant's closing submissions [at para 92] urged the court to disregard the supplementary report on the basis that it did not form part of the contract and the document recorded nothing more than the views of CCBS on the plaintiff's tender amendments in the 31 December letter (citing *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029. I shall return to this misconceived argument later.

80 Other instances cited by the plaintiff of Chin's unsatisfactory conduct and partiality towards the defendant included the fact that he omitted to hand a copy of PSB's first report to the plaintiff when he received the same from the defendant in August 2009. (The plaintiff was also unaware of PSB's second report and saw it for the first time during the discovery process in these proceedings).

Chin also omitted to furnish a copy of his statement of final accounts dated 18 September 2009 to the plaintiff. His unsatisfactory explanation was that he thought it very unlikely that he would have received any response from the plaintiff.

81 Chin further did not inform the plaintiff of his inspection of the air-conditioning ledges from which he determined that the plaintiff had failed to re-form top surfaces to fall to new outlets for drainage. Neither did Chin inform the plaintiff that its work was unsatisfactory. Chin had in fact certified that the air-conditioning ledges were 95% complete before reversing his certification to zero in his final account.

82 Other than the above instances, Chin's conduct in administering the contract came in for severe criticism by the plaintiff. It bears repeating that after Chin had issued a Delay Certificate and certified completion had taken place on 17 July 2009, he did a *volte face* and reversed his decision on 20 August 2009. Cross-examined, Chin was unable to provide any cogent let alone satisfactory explanation, for his action. All he could say repeatedly when questioned by the court (in the course of his re-examination) was that he had made a "mistake" in the completion date when he issued the Delay Certificate. He maintained his unconvincing answer notwithstanding being reminded that he had appeared before this court in another construction case as an expert and he was probably more familiar with the SIA Conditions than anyone else involved in this dispute.

83 Counsel for the plaintiff had drawn Chin's attention to a number of progress claims where Chin had acted contrary to his certification. For progress claim no.7, Chin had certified $102,976.91 as being due to the plaintiff on 13 May 2009. His certification included 78% completion for the air-conditioning ledges. Similarly in progress claims nos 8 and 9, Chin had certified that the plaintiff had completed 81% and 95% of work on the air-conditioning ledges on 13 May 2009 and 19 June 2009 respectively. He had also certified 95% completion for progress claim no 10 of the plaintiff. (Certification of 95% completion meant in effect that the plaintiff had completed 100% of the work because the 5% balance was actually the retention sum). Yet, on 11 May 2009, Chin had issued his Building Surveyor's Direction No 4 requiring the plaintiff to redo the air-conditioning ledges in accordance with contract specifications. Chin could not explain his inconsistent actions.

84 As observed earlier at [75], the defendant had relied wholly on Chin's testimony for its counterclaim. One item was the loss and damage of $314,000 to rectify the painting works at Blocks 1, 3 and 7 on the basis that the plaintiff was in breach of contract in applying two coats of SS 345 instead of one top coat of SS 500 and one finishing coat of SS 345. In the course of his cross-examination, Chin disclosed that his figure of $314,000 was based on a quotation dated 22 March 2011 of Jotun Coatings to paint Blocks 1 and 3 and part of Block 7 with SS 345 paints. An earlier quotation dated 5 May 2009 that he had obtained from the same supplier quoted a figure of $370,000. Chin estimated that the cost difference between SS 500 and SS 345 paints was $1.00 per sq.m. He further assumed that 40% of the repainting work had been carried out by the plaintiff *viz* 40% of 126,000 sq m or 50,400 sq m. There was no quotation as such from Jotun Coatings that specified the cost of SS 345 and SS500 paints alone. In any event, should the court find that the terms in the 31 December letter were indeed incorporated into the contract, the defendant's claim for this item must fail. It would then follow that Chin had no basis to issue his Building Directions Nos. 2 and 4 requiring the plaintiff to redo the painting works.

85 Another aspect of Chin's testimony that pointed to his unreliability related to Dr Lim's testimony. Counsel for the plaintiff had inquired of Chin if he had ever met Dr Lim to discuss this case. Chin testified he had met Dr Lim once but could not recall the date. However, Dr Lim (who testified earlier than Chin) said he had never met Chin prior to the trial. Cross-examined, Chin admitted Dr Lim was correct but was unable to give any reason why he would lie even on such a trivial matter. If Chin lied

on such an unimportant point, could he be expected to have been truthful on far more important matters? I think not, as can be seen from the following observations.

86 It was noted that:

(a) despite his voluminous AEIC and exhibits, Chin neither referred to the 31 December letter nor to the amended minutes of the first site meeting that the plaintiff had provided to him. Chin was selective in his choice of exhibits or references and only relied on those that were favourable to the defendant's case;

(b) Chin's choice of language in his letters and minutes of site meetings was unfortunate (as the court pointed out to him at N/E 871) and clearly showed he was beholden to the defendant, who was his paymaster. In his letters to the plaintiff, it was noted that Chin repeatedly used the word "we" instead of "I" in referring to himself. That can only mean he was adopting the stand (however unreasonable or unfounded) of the new Council and in particular persons like Kula and William Tey (who he revealed instructed him);

(c) Chin did not contact either Casimir or members of the Council to verify what had been agreed between the parties on the choice of paints and whether the spalling contract works were agreed on a lump sum basis;

(d) Chin chose to accept what the defendant told him without verifying the accuracy thereof. This can be seen from his testimony (at N/E 873) that unlike the 31 December letter, the shorter letter had MSCT stamped on it with an initial when clearly there was no stamp thereon and he could not even identify the signatory of the initial;

(e) Chin issued Building Surveyor's Directions Nos 2 and 4 (dated 23 February 2009 and 11 May 2009 respectively) requiring the plaintiff to repaint Blocks 1, 3 and 7. Instructions as opposed to Directions, would have been the appropriate mode of communication as the plaintiff was entitled to claim additional payment for carrying out extra works after they had satisfactorily completed the painting works to those blocks in accordance with Casimir's instruction;

(f) Chin was unable to offer any coherent/satisfactory explanation (despite repeated questioning by the court as to why he withdrew the Delay Certificate over a month after its issuance, apart from his supposed "misunderstanding" (which was unbelievable) of the extended completion date. If indeed he had made a mistake as to the actual date of completion *viz* that it should be 5 December 2008 instead of 31 December 2008, then he should have added 26 more days (6 to 31 December 2008) to the 197 days he extended to the plaintiff to complete the Works by 17 July 2009, to make a total of 223 days' extension instead of withdrawing the extra 197 days he had granted;

(g) Chin's AEIC was factually inaccurate – although he claimed to having sought clarification from both sides' experts (his para 71), cross-examination revealed that Chin had only clarified with the defendant's expert Dr Lim. Yet he insisted that PSB's reports by Dr Lim were more reliable;

(h) Chin's figures which made up the defendant's counterclaim were inflated and/or unjustified.

The expert testimony

87 I turn next to the expert evidence of the parties. As the plaintiff's experts were called to rebut

the testimony of the defendant's experts, I shall deal with this evidence in reverse order and first address the testimony of the defendant's expert Dr Lim (DW5) from PSB.

88 In order to carry out his tests, Dr Lim deposed he took paint samples from Blocks 1, 3 and 7 at the estate. In his test report dated 12 February 2009 ("the PSB first report"), Dr Lim concluded that the plaintiff had applied two coats of SS 345 instead of one coat of SS 500 and one coat of SS 345. Dr Lim took further paint samples from various parts of the estate for his second report dated 18 August 2009 ("the PSB second report"). He concluded that some of the SS 500 and SS 345 paints used fell short of the thickness expected of such paints. He said the average thickness of one layer of both types of paint was 94.5 microns which was below the tender specification of 94.6 microns. In fact, some samples of the three coats of paint he tested had average thicknesses that ranged from 19.40 to 88.88 microns. As was noted earlier at [56], the plaintiff was unaware that Dr Lim had taken samples of their paintwork for testing until much later.

89 During cross-examination, Dr Lim estimated at the court's request that a piece of tissue paper produced in court by counsel for the plaintiff was about 100 microns in thickness. That was to be contrasted with his results that one coat of paint he tested measured only 15.49 microns which according to counsel for the plaintiff meant it "would be like water". If the PSB first and second reports were accepted, it meant that the average thickness of the paints applied by the plaintiff to Blocks 1, 3 and 7 in the estate was thinner than an ordinary piece of tissue paper. I should point out that one micron is one-thousandth of a millimetre.

90 At this juncture I turn my attention to the expert testimony of the plaintiff starting with that of Jones (PW8). Jones from Robinson Jones Associates Pte Ltd, was tasked with carrying out a survey inspection as well as assessing the various items of the defendant's counterclaims.

91 Jones' findings were contained in his report dated 21 December 2010. To arrive at his findings, Jones inspected the estate on 7 July 2010 (during which he took 341 photographs) and took into account the following:

(a) the PSB first report;

(b) Setsco's test report;

(c) the technical specifications of the paints SS 500 and SS 345;

(d) the minutes of the first site meeting and the amended version; and

(e) other documents relevant to the subject matter and dispute.

92 In his inspection of the paintworks, Jones found that the finish was excellent as the paint had been evenly applied, had solid cover and was neatly cut-in. There was no evidence of peeling or flaking and the tonality was even with no apparent colour variations.

93 Jones could not carry out a close-up inspection of the spalling concrete repair works as he had no access to individual units in the estate. He relied on a visual inspection from the ground level using binoculars. Randomly selected soffits above balconies viewed from that level showed that the finish was smooth and even, which indicated to Jones that the work was properly carried out. Unfortunately, due to the entire repair works having been completed and painted over, Jones was unable to calculate the quantum of the total area of spalling concrete that had been repaired.

94 In regard to the dispute on whether the repair works should have been carried out on a lump sum basis as opposed to on a provisional sum basis, Jones opined that it would be difficult in a tender exercise to estimate the values of provisional sums to be included in tender documents. Jones added that quite often provisional sums included in a tender exercise are found to be inadequate when the full extent of the previously unknown quantum of the work covered under a provisional sum becomes apparent as work progresses. He opined that it was generous albeit foolhardy on the plaintiff's part to carry out the spalling work on a lump sum basis, given the size of the estate and the extent of the spalling problem. In so doing, the plaintiff assumed the very real risk that the spalling could be much more extensive than what Casimir had envisaged or assumed. Had he acted for the defendant, Jones would have advised it to accept the spalling work on a lump sum basis.

95 Noting that the spalling repair works had been completed for more than a year with no instances of failure by the time of his inspection, Jones concluded that the works had been properly carried out by the plaintiff.

96 Jones opined that the quality of the finishing coat used for the metal frame and roof of covered car park lots was superior in performance to the gloss paint specified under the tender.

97 Jones went on to review the defects list prepared by BAPL/Chin. On the alleged blistering of the paintwork, he pointed out that the photographs upon which Chin relied did not show this defect or it was not apparent. Some instances of alleged blistering were actually unevenness of the substrate and not blistered paint. Further, many instances of alleged blistering and paint discolouration was due to moisture trapped in the substrate. In addition, the cause was due to an inherent defect in the structure and fabric of the building, noting that the estate had a history of seepage from external walls over the years. He noted that there were cracks in the plaster but it was not certain whether they were in the new plaster or originated from the old plaster of previous painting works.

98 Jones concluded that the defects list of BAPL had been based on an inspection by persons who did not possess sufficient knowledge to accurately identify the nature of the conditions they observed. Moreover, repeated items in the defects list meant that site recordings were inaccurate and there had been an attempt to falsely increase the magnitude of the alleged defects recorded.

99 Szetho (PW4) was the plaintiff's other expert witness who testified on the issue of the plaintiff's claim for prolongation costs due to the delay in approval of repairs lists by the defendant. Based on the workflow chart at [19] implemented by the defendant and the records he had been given of the time the defendant took to approve repairs lists submitted by the plaintiff, Szetho opined that the plaintiff was entitled to an extension of time under clause 23 of the SIA Conditions. He was also of the view that the plaintiff's letter dated 23 October 2008 (see [131] *supra*) complied with clause 23. Szetho revealed he had assisted the plaintiff to prepare the documentation to support its claim for extension of time. In the process, he interviewed the project manager (Neo), perused the minutes of site meetings as well as Neo's daily progress reports.

100 Szetho assessed that the plaintiff's work had been delayed by 46 days (6.42 weeks) at which time it had completed 57% of the work and needed another 13 weeks to complete the balance 43%.

Added to the delay of 46 days/6.42 weeks, that meant that the plaintiff's claim for extension of time totalled 19.42 weeks.

101 Szetho also assessed the plaintiff' claim for extension of time due to inclement weather based on site records and arrived at a figure of 54 days. He noted that there were several changes of condominium managers which caused further delays due to lack of continuity.

102 The plaintiff's final expert witness was Tan from Setsco [41]. For his report dated 21 April 2009, Tan (PW2) took paint samples from the lobby areas of various floors of Blocks 1, 3 and 7 to test for the number of layers and the thickness within the coats which were all of SS 345 paints.

103 Tan's tests results showed there were three to five layers of paints and the minimum and maximum thickness of the paints (in microns) can be seen from the tables below:-

Sample reference spots	**Final layer**	**1st layer**	**2nd layer**	**3rd layer**	**Based coat layer**	**Total**
Level 1 lobby D (min thickness)	50	30	10	10	80	235
Level 1 lobby D (max. thickness)	85	70	30	35	130	295
Blk 1 lobby A #09-01 (min. thickness)	40	55	___	___	150	315
Blk 1 lobby A #09-01 (max. thickness)	80	130			200	350
Blk 1 lobby B #05-06 (min. thickness)	50	60	20	30	100	280
Blk 1 lobby B #05-06 (max. thickness)	80	85	50	50	120	340
*Blk 3 lobby F #03-22 (min. thickness)	60	50	40	85	70	420
*Blk 3 lobby F #03-22 (max. thickness)	100	90	70	140	100	535
Blk 3 lobby G airwell (min. thickness)	50	40	20	20	40	195
Blk 3 lobby G airwell (max. thickness)	60	50	30	35	60	220
Blk 7 lobby Q #22-63 (min. thickness)	50	50	50	90	95	375

Blk 7 lobby Q #22-63 (max. thickness)	70	80	70	120	110	410
Blk 7 lobby R #07-66 (min. thickness)	40	40	20	20	90	200
Blk 7 lobby R #07-66 (max. thickness)	80	60	40	40	110	260

*The skim coat layer has been omitted from the above table as it did not apply to the other tables. The figures in the last column were also not the total of the cumulative figures in the preceding columns. Unfortunately, the court is none the wiser as Tan was not examined/cross-examined on the issue.

104 Tan's tests were only on SS 345 paints. His report is to be contrasted with that of Dr Lim at [89] which seemed to suggest that some of the paints applied were thinner than tissue paper which had a thickness Dr Lim estimated to be about 100 microns. Like Tan, Dr Lim had tested a sample of paint from lobby A of Block 1 #09-01. His paint thickness was 15.49 microns whereas Tan's result showed it was 350 microns. Tan found that one coat each of SS 345 and SS 500 was below 100 microns and the average thickness of two coats of SS 345 was between 235 and 295 microns. Dr Lim on the other hand found (in PSB's second report) that the average thickness ranged from 71.9 to 115.8 microns.

105 Cross-examined on the vast discrepancies between his and the test results carried out by Tan, Dr Lim had no answer except to speculate that Setsco's machinery might have been wrong when Tan conducted the tests. It was Jones' opinion that both experts' reports should be excluded in view of their vast differences in findings; I agree. Jones had also recommended (quite sensibly I would add) that new tests should be conducted by a third independent expert instead.

The issues

106 Based on the pleadings and the evidence adduced in court, the court must determine the following issues:

(a) were the terms set out in the 31 December letter part of the contract between the parties?

(b) was the plaintiff in breach of its contractual obligation in using two coats of SS 345 paints for external areas?

(c) was the contract for spalling contract repairs agreed on a lump sum or provisional sum basis?

(d) was the plaintiff entitled to an extension of time for completion?

(e) was the plaintiff entitled to prolongation costs for the defendant's alleged delay in approving repair lists?

(f) was the defendant' call on the performance bond wrongful?

(g) is the defendant's counterclaim justified and if so, which items?

The findings

(i) Were the terms in the 31 December letter part of the contract?

107 I entertain little doubt on the evidence that the proposals of the plaintiff in the 31 December letter (at [10]) were accepted by the Council and formed part of the contract between the parties. In this regard, I believe and accept the testimony of Casimir, Catherine, Neoh and Chia all of whom corroborated the evidence of the plaintiff's witnesses Ren and Neo.

108 The defendant had argued against the incorporation of the 31 December letter into the contract because the defendant did not have a copy in its records, the document did not have a date stamp and it contained a reference number even though the plaintiff had yet to be awarded the contract.

109 At the commencement of trial, I had taken to task counsel for the defendant for not agreeing to dispense with the authenticity of numerous documents purely because his client did not have copies of the same even though some of those documents emanated from the defendant. That showed that the defendant maintained poor record-keeping at its management office. Just because the defendant could not find a copy of the 31 December letter and other correspondence (including minutes of site meetings) did not mean that the plaintiff did not send that or other letters or that the defendant did not receive the same or that the documents did not exist.

110 It bears remembering that members of the Council had seen the 31 December letter which was also referred to in Casimir's supplementary report dated 10 January 2008. Members of the Council had received and discussed the supplementary report a day later. According to Casimir (and corroborated by attendees Neoh and Chia), he had previously discussed the tenders at a meeting with the SMC (on the evening of 3 January 2008) after he had collected the tender documents that morning.

111 What is most telling and damning of the defendant was an email sent to Neoh by the honorary secretary of the defendant (Jeanette Chong Aruldoss) on 15 July 2008 (at 2AB149) that said:

> Need your help.
>
> Just wanted to check if SMC was aware of SKK's letter dd 31 Dec 07 (attached), or at least the contents of such letter, before Council voted via email to award the tender to SKK. (The approval by email was obtained between 4 and 10 Jan 08). To jog your memory, there was a SMC special meeting held on 3 Jan 08 at 7.30pm attended by Thomas, yourself, Nitin and Jaime.
>
> It is not clear from the MG Office records whether SKK's letter was found inside the Tender Box clipped together with their Tender at close of Tender (31 Dec 07), or whether SKK sent their letter shortly after close of Tender (which is still alright as long as SMC is aware of the proposed

variations before deciding to award to SKK).

In the light of the above email, it did not lie in the mouth of the defendant's witnesses to claim that members of the new Council were unaware of the existence of the 31 December letter until much later when disputes arose with the plaintiff. It bears noting that Kula was the chairman of the SMC of the new Council and was a member of all four councils (21st to 24th). He knew or ought to have known of the terms and conditions of the contract between the plaintiff and the defendant at the time it was negotiated by persons like Neoh and Chia with the plaintiff, as well as Casimir's recommendations and advice. As will be seen later, the court was unimpressed with Kula as a witness.

112 In respect of the missing date stamp, Catherine had given a credible explanation for its omission on the 31 December letter. Bearing in mind that all the tenders came in sealed bids, it would have been surprising if any bids were date stamped. The dates were stamped on the bids and the shorter letter after the bids were opened on 2 January 2009. It was an inadvertent but unfortunate omission that whoever was tasked with stamping the dates on all the bids and the letters had omitted to do so on the 31 December letter.

113 As for the defendant's third reason in [108], it is strange that the defendant who was not the maker thereof was in a position to speculate on what the reference used by the plaintiff on the 31 December letter meant.

114 The defendant's reasons for refusing to accept the 31 December letter as being part of the contract were frivolous and baseless. Consequently, I hold that the contract between the parties incorporated the following four amendments set out in that letter:-

(a) a completion period of 42 instead of 34 weeks;

(b) two coats of SS 345 paints to be applied instead of one coat each of SS 500 and SS 345 for the entire external walls;

(c) one primer coat of SKK Mirac and two final coats of SKK PU enamel for the metal frame and roof of the covered car-parks;

(d) spalling repairs to plastered and concrete surfaces were to be charged on a lump sum basis.

As for *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* ([80] *infra)*, that case has no application whatsoever to our case. The plaintiff was not attempting to import extrinsic evidence to interpret the contract between the parties as the plaintiff/respondent in the case sought to do. The plaintiff's case was that the 31 December letter varied the contract between the parties as found in the tender documents, which I hold it did.

(ii) Was the plaintiff in breach of contract in using two coats of SS 345 paints instead of one coat each of SS345 and SS 500?

115 In the light of my finding in (i) that the proposals in the 31 December letter formed part of and varied the contract, the plaintiff was not in breach of the tender specifications in not providing one coat of SS500 and SS345 instead of applying two coats of SS345 together with one coat of primer sealer.

116 It would be pertinent at this juncture to return to the testimony of Ren and Chin on this issue.

Ren had testified (see [55]) that if one coat of SS 500 and one coat of SS 345 had been applied instead of two coats of SS 345, the costs savings would only have amounted to $10,500 for the entire estate, or a sum of $2,500 for Blocks 1 and 3.

117 The defendanthad disavowed the amended minutes of the first site meeting (item (j) at [47]) that recorded that the paint to be used for external elevations would be two coats of SS 345 instead of one coat each of SS 500 and SS 345. However, no evidence was presented by the defendant to contradict Casimir's testimony that he made the amendment (which the Council accepted) to reflect the discussion on site. No objections by the defendant were recorded anywhere on the choice of paints before the new Council took office.

118 In the course of proceedings, after being pressed by the court, counsel for the defendant confirmed that his client was not making a claim for paint blistering. The court required clarification of this issue as, during the site inspection on 29 March 2011, many instances of paint blistering/bubbling) were pointed out by the defendant's representatives.

119 I note that the quality of the plaintiff's painting works was recorded favourably by a Council member Jaime Chiew at site meeting no. 5 on 28 March 2008. On the other hand, apart from complaints by its witnesses, the defendant produced not one iota of evidence to support its claim that it had complained of defective paintworks. Further, when the handover inspection of Block 3 took place on 23 May 2008, no complaints were made to the plaintiff on its workmanship save for the usual touch-ups and minor rectification works required by Casimir.

120 I should also point out that at the first meeting of the SMC of the new Council held on 26 June 2008 at which Casimir was present, the subject of the change in paint specifications was raised and discussed.

121 It seems to me from the evidence that the new Council was bent on finding fault regardless with the plaintiff of what had transpired and agreed previously between the plaintiff, Casimir/CCBS and the defendant when the Council was in charge. This can be seen from the defendant's solicitors' letter dated 3 December 2008 to CCBS where the solicitors alleged that Casimir had

> ...deliberately taken a position that SS 345 paint shall be applied as the 2nd coat contrary to the express terms of the Contract requiring SS 500 pain to be applied…

I note in this regard that the defendant did not respond to the plaintiff's lengthy letter dated 11 July 2008 giving the history of the plaintiff's tender and how the selection of paints came about. In the same letter, the plaintiff had also touched on the delay by the SMC in approval of the repair lists as well as the defendant's non-payment of its progress claim no. 2 even though it was certified on 9 June 2008. The defendant did not respond to the letter.

122 As was noted earlier (at [22]), this was not the only letter from the plaintiff to which the defendant failed to reply. In cross-examination, Kula was unable to given any (satisfactory) explanation for the defendant's silence on the plaintiff's repeated complaints in its several letters.

Were the repairs for spalling concrete a lump sum or provisional sum contract?

123 Neo (the plaintiff's project manager) had referred to repair lists that only stated the units that needed repairs, not the areas. Casimir had approved those lists prior to the termination of CCBS' services. The defendant did not challenge Neo's evidence. No complaints were made against the plaintiff either at site meetings or in correspondence for its claims for repairs being made on a lump

sum basis, prior to the new Council taking office.

124 I would make the same observation in regard to the defendant's complaint on the plaintiff's work relating to the air-conditioning ledges.

125 In any event, as the plaintiff's witness Neo said, whatever differences the new Council's members may have had with the 21st Council was a matter between them and did not/should not concern the plaintiff – it was contractually obliged to and did, carry out the instructions of the defendant as given by its contract administrator Casimir/CCBS at the material time.

(iii) Was the plaintiff entitled to an extension of time for completion?

126 It was the evidence of the plaintiff's witnesses Ren and Neo that the late approval from the SMC of the plaintiff's repair lists caused the delay in works. This was recorded in numerous letters from the plaintiff to the defendant to which there were no replies (as admitted by Kula). The plaintiff's evidence was supported by none other than Kula himself whose AEIC (at para 44) set out a table listing at least nine instances of undue delay by the SMC in granting approval. In court however, Kula changed tack and claimed that Peter had been authorised from 16 September 2008 to approve the repair lists.

127 Peter on the other hand claimed he had not been so authorised even as of November 2009. Indeed, when he was questioned by the court (at N/E 812), Peter not only disclaimed authority but revealed that he was specifically instructed by a new Council member not to sign off painting works after October 2008. Peter had initially denied his duty was to approve the painting works until he was confronted with a set (at 1AB2489-2661) of repair/repainting lists that he had signed off. While minutes of site meetings recorded that both Casimir (before January 2009) and the plaintiffs' representatives complained of delayed approvals by the SMC, there were no minutes that recorded the plaintiff and/or Casimir being told that Peter was authorised to approve the repair lists submitted by the plaintiff. As Kula's own records showed, the approval process took 46-47 days in two instances. Questioning by the court revealed that Peter was as unreliable a witness as Kula.

128 Undoubtedly there were delays on the part of the defendant/the SMC that entitled the defendant to an extension of time for completion. Even Chin was forced to admit after prevaricating (at N/E 944), that if the delays were caused by slow approvals from the SMC (which I find it was), then the plaintiff was entitled to extensions of time.

129 The defendant in its closing submissions (at paras 169-175) argued that the plaintiff was not entitled to its EOT claim (by its letter dated 23 October 2008) as it had failed to comply with the condition precedent in cl 23.2 of the SIA Conditions. It would be appropriate at this juncture therefore to look at the clause.

130 Clause 23.2 of the SIA Conditions 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 he 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 that which he considers entitles him to an extension of time together with a sufficient explanation of the reasons why delay to completion will result. Upon receipt of such notification the Architect, within one month of a request to do so by the Contractor specifically mentioning the sub-clause, shall inform the Contractor whether or not he considers the event or instruction or direction in

principle entitles the Contractor to an extension of time.

131 For ease of reference, I shall also set out the full text of the plaintiff's letter dated 23 October 2008 (at 2AB166) to CCBS. It states:-

> Dear Sir,
>
> Re: REPAIR & REPAINTING WORKS TO MANDARIN GARDENS AT SIGLAP ROAD
>
> Reference to the above caption, please be informed officially in this letter that SKK formerly (sic) request for an Extension of Time as at October 2008 based upon the valid following reasons:
>
> 1 Excessive inclement weather which badly affects the progress of the external repair and repainting works.
>
> 2 Failure to receive timely instructions and required information of all repair works which also hindered the progress of the repainting works in order to complete the contracted works accordingly.
>
> 3 Breach of the agreed Contract by the MSCT in relation to the contractual obligations of the delay of the contracted works and the payment terms caused by the Management Council.
>
> In lieu of the above, we shall look forward to your early confirmation and assessment of the additional costs incurred by SKK (S) Pte ltd pertaining to the claim for Extension of Time.

132 In its closing submissions, the plaintiff contended that Casimir supported the plaintiff's request for an extension of time save that he had not decided on the period of the extension. This was evidenced in numerous minutes of site meetings as well as in Casimir's own letters to the defendant. The plaintiff had submitted that the defendant could not rely on the plaintiff's purported non-compliance with cl 23.2 of the SIA Conditions as it was not pleaded in the defence and counterclaim, relying on the following extract from *Singapore Civil Procedure 2007* (at p 267):-

> ...a general averment of the due performance of all such conditions precedent is implied in every pleading and therefore it need not be alleged (para (4)). It follows that the onus is on any party contending that some condition precedent has not been duly performed to state with proper particularity what that condition was, and to plead its non-performance; otherwise its due performance will be presumed. See *Amixco Asia Pte Ltd v Bank Bumiputra Malaysia Bhd* [1992] 2 SLR 943 at 954, where Selvam JC said: By O 18 r 7(4)of the Rules of the Supreme Court 1970, a condition precedent necessary for the case of a p is to be implied in his pleadings. The defendant must therefore raise in his defence the point of non compliance with a condition precedent: O 18 r 8(1)…

133 Order 18 r 8(1) of the Rules of Court (Cap 322, r 5 2006 Rev Ed) states:

> A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;

134 In the light of O 18 r 8(1) of the Rules of Court, the defendant is precluded by the omission in its pleadings from raising the defence that the plaintiff had failed to comply with the condition

precedent in cl 23.2 of the SIA Conditions for the EOT claim.

135 The EOT claim was not only based on the SMC's delayed approvals of the plaintiff's repair lists but also based on inclement weather. This aspect of the plaintiff's claim was much less controversial as Neo had maintained daily records of the weather conditions throughout the project which the defendant did not challenge. The subject of inclement weather was also recorded in the minutes of site meetings. Chin himself agreed that the plaintiff was entitled to an extension of time since his Delay Certificate gave an extension of 197 days for completion (before he purported to withdraw it). Szetho assessed that the plaintiff was entitled to 54 days extension due to inclement weather. Szetho's calculations (see his exhibits ST-6 and ST-7) were based on a comparison of Neo's log entries for the period 1 March 2008 to 13 January 2009 with the records of the meteorological department of the National Environment Agency.

136 The defendant did not produce any contrary evidence to challenge the evidence of Neo or Szetho's calculations. Instead, in its closing submissions, it relied on the Malaysian case *Bina Puri Sdn Bhd v MUI Continental Insurance Bhd (formerly known as MUI Continental Insurance Sdn Bhd)* [2010] 1 MLJ 347 for its argument that the plaintiff had failed to prove a causal link between the 54 days of inclement weather and the delay in the Works. The defendant submitted that the delaying event must have affected the critical path of the Works and have a knock-on effect on the completion date to justify the granting of an extension of time. The defendant argued that inclement weather being a neutral cause of delay, "it was trite that the contractor bears the risks of such costs. In such instances, even if an extension of time is awarded, no prolongation costs are claimable by the contractor" (para 179 of its submissions).

137 The defendant further contended that cl 23(1)(b) of the SIA Conditions allows an extension of time to be granted based on "exceptionally adverse weather" whereas the plaintiff had in its pleadings referred to "inclement weather"(the plaintiff argued the phrase was used synonymously with "exceptionally adverse weather"). Citing passages from the textbooks *Delay and Disruption in Construction Contracts* (Keith Pickavance 4th ed at p 149) and Chow Kok Fong's *Law and Practice of Construction Contracts* (2004 at p 420-421), the defendant submitted that there was no basis for Szetho's opinion that 2 hours of rainfall in a day was considered exceptional. Szetho should have ascertained whether the rainfall logs (of Neo) exceeded the statistical average as recorded by the meteorological department instead of comparing Neo's records with those of the meteorological department. Szetho's "overly simplistic method" of assessment ignored the fact that Singapore's tropical climate meant that heavy rain was not unforeseeable much less exceptional. The defendant added that the plaintiff being experienced contractors in a wet tropical climate ought to have factored in days for which work could not be carried out due to rain *viz* a "float".

138 I do not accept the defendant's foregoing arguments. Painting works in Singapore would invariably be subject to the vagaries of the weather. It bears noting again that the original completion date of the contract was 5 December 2008 before the full onset of the seasonal rainy weather in December. Had it not been for the defendant's conduct which resulted in completion being delayed by five months to May 2009, the plaintiff would have completed the Works on time or ahead of schedule which meant a "float" would have been factored into the completion period bearing in mind the plaintiff are experienced, as a paint supplier as well as a paint contractor. Moreover, Szetho's assessment of 54 days inclement weather was less than the 70 days of rain recorded by the meteorological department.

139 The defendant's submission (like its argument on the need for the Works' critical path to be affected by a delaying event before an extension of time can be granted) completely ignored the fact that the Works were primarily a painting exercise of the external elevations of the blocks in the

estate. The contract was not a construction contract per se. A critical path programme was inapplicable and/or unnecessary in this case. Even if the rainfall was unexceptional, exterior painting works would be affected by rain, bearing in mind that the plaintiff's working hours were 8am to 5pm daily. As Szetho noted (paras 45-49 of his AEIC), painting cannot be carried out once it rains as wall surfaces would be damp. The plaintiff would have to wait (4 hours normally) for the moisture to dry as paints that are applied to moist surfaces will not bond to the wall. Even interior areas like corridors and lobbies would be affected by moisture from rain.

140 Attendant to the dispute regarding delays was Chin's withdrawal on 20 August 2009 of the Delay Certificate that he issued on 17 July 2009. It was the plaintiff's case that Chin could not withdraw the certificate and declare it null and void as that was expressly prohibited by cl 31(6) of the SIA Conditions (at PCB 46). The clause 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.

141 The defendant countered the plaintiff's submission by arguing that the plaintiff could not rely on cl 31(6) as it did not plead the clause in its statement of claim. The plaintiff on the other hand relied on *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 3 SLR(R) 518 to argue it was not necessary to do so. In that case, an architect issued two delay certificates three days before the hearing of the main contractor's application for summary judgment based on interim certificates issued by the architect. The court held that on the facts, the architect had failed to act upon the main contractor's application for extension of time when he left the matter ambiguous and uncertain for a whole year and no explanation was offered for such failure. The plaintiff highlighted the following passages from the case:-

> 24 As the architect's decisions on extensions of time have such significant financial implications on the parties, it seems that once he has made a decision, he is not permitted without exceptionally good reason to change it. This is implicit in cl 31(4) of the SIA general conditions which provides that a delay certificate cannot be corrected. It reads as follows:
>
> …
>
> 25 The position is illustrated in *Tropican Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 1 SLR (R) 591. There, the architect had in the course of the contract given the contractors extensions of time totalling nine months. Subsequently, when the contractors applied for summary judgment on interim certificates, the architect purported to change his decision on extension of time, reducing it from nine months to 17 days. He purported to then issue a delay certificate enabling the employers to deduct liquidated damages, with the effect of nullifying the contractors' claim on the interim certificates. It was held by LP Thean J (as he then was) that the purported revision of extension of time was invalid; so was the purported delay certificate.

142 Chin undoubtedly contravened cl 31(6) of the SIA Conditions and it is telling that he offered no credible reason for his withdrawal of the Delay Certificate. In this regard, the defendant's submission (at para 322) that Chin was entitled to correct "a plain and obvious error" is without merit.

143 However, I would need to address the defendant's argument that the plaintiff was precluded

from raising cl 31(6) SIA Conditions as that was not part of the plaintiff's pleaded case. I note that the plaintiff made no reference to the SIA Conditions in its statement of claim (although the Further and Better Particulars of the statement of claim did refer to cl 23(1)[b]). In its reply to the defence and counterclaim, the plaintiff pleaded cll 23(1)(b) 23(2) and 23(4) of the SIA Conditions but it did not refer to cl 31generally or to cl 31(6) specifically. The defendant on its part referred to cll 11(1), 23 and 31(4) of the SIA Conditions in its defence but not the condition precedent in cl 23(2). I am of the view that the plaintiff is precluded from relying on cl 31(6) of the SIA Conditions for its argument that Chin could not withdraw the Delay Certificate once it was issued. Like the defendant, the plaintiff is bound by its pleadings. Chin's breach of cl 31(6) should have but had not, been pleaded by the plaintiff.

(iv) Was the plaintiff entitled to prolongation costs for the defendant's delay in approval of the repair lists?

144 It follows from my earlier finding (that the plaintiff was entitled to an extension of time for completion), that the plaintiff was consequentially entitled to prolongation costs (based on Szetho's computation) for the defendant's delay in approving the repair lists. In this regard, I reject the defendant's submission that the plaintiff must go further to establish that the risk of the loss and expense resulting from the defendant's delayed approvals fell on the defendant as owner as opposed to the defendant as contractor. This was an unmeritorious argument in the light of the evidence (and admitted by Kula) that it was the defendant's repeated delays in approving the repair lists that caused the plaintiff from being ahead of schedule in July 2008 to being behind schedule by sixteen weeks in December 2008, after Peter's appointment in August 2008 and the implementation of the approval flow chart in [19].

(v) Was the defendant's call on the performance guarantee wrongful?

145 I find that there was no basis for the defendant to call upon the performance guarantee on or about 21 May 2009 as the plaintiff had completed the Works by 8 May 2009. Further, certified payments were due and owing to the plaintiff at the time of the call. Consequently, the plaintiff is entitled to a refund of the sum of $261,396 that the defendant obtained under the performance guarantee.

(vi) The defendant's counterclaim

146 In the light of the evidence adduced and my earlier observations, I find that the defendant's counterclaim has no merit.

The witnesses

147 It would be appropriate before I conclude to make my observations on the witnesses that were called by the parties.

148 Viewed as a whole, the testimony of the plaintiff's witnesses both factual and expert, was far more credible than the evidence presented by the defendant's witnesses. The members of the Council and Catherine were forthright in their testimony and so too were the plaintiff's representatives Ren and Neo.

149 As for the plaintiff's experts, the testimony of Jones and Szetho withstood the rigours of cross-examination. However, I decided to ignore the testimony of Tan (a subpoenaed witness) as recommended by Jones, since Tan's test results were greatly discrepant with those presented by the

defendants' expert. Dr Lim's testimony could not be accepted as it was absurd to accept that the paint applied to the exterior elevations of the estate could be thinner than the thickness of a piece of tissue paper. The court had viewed the various blocks at the estate on 29 March 2011 and had noted therefrom that the paints were thick if not too thick at some parts. The site inspection also revealed bubbling and blistering of paints at numerous locations particularly on Blocks 3 and 5. This defect vindicated the plaintiff as it corroborated Ren's and Neo's testimony at [59] (which Jones confirmed) that SS 500 paint had a lower permeability than SS 345 paint; the entrapment of water under SS 500 paint (which paint the defendant insisted the plaintiff must use despite the latter's advice) caused bubbles and blisters to form on the surface.

150 Needless to say and at the risk of repetition, I was not at all impressed by the defendant's witnesses Kula, Bernard Lee, Peter, Chan and least of all by Chin. Chin was not only blatantly biased in favour of the defendant but was found to have lied in the witness stand. I therefore give no credence whatsoever to his testimony. Notwithstanding my ruling in [143] that the plaintiff cannot rely on cl 31(6) of the SIA Conditions, I find that Chin had no basis as the contractor administrator to withdraw the Delay Certificate, an act that further added to his lack of credibility as the plaintiff was entitled to an extension of time for completion.

151 Like the defendant's other witnesses, Bernard Lee's testimony was equally suspect. He came close to being cited for contempt of court as, despite the court's repeated exhortation not to do so, Bernard Lee persisted in referring to a tape recording of what transpired at the last meeting of the Council held on 28 February 2008 although the typed minutes were before the court and the tape-recording was not admitted as evidence. Chan, Kula and Bernard Lee relied heavily on the fact that the defendant's records did not have copies of disputed documents including the 31 December letter and the amended minutes of the first site meeting. Their AEICs were short on personal knowledge and long on suspicions and/or speculations.

152 I should add that in the course of cross-examination, Chan's attention was drawn to several minutes of site meetings where it was recorded that the defendant had borrowed the plaintiff's files and it was put to him by counsel for the plaintiff (which he disagreed) it was because "the MSCT's files were in such a mess that many documents were missing". Chan's disagreement does not detract from the fact that the defendant's files were obviously incomplete.

153 None of the trio *viz* Kula, Bernard Lee or Chan was present at the SMC meeting on 3 January 2008 or at the Council meeting on 14 January 2008 so as to be able to refute the testimony of Neoh and Chia that the 31 December letter was indeed discussed and the plaintiff's proposals accepted there and then. The defendant could have tested Neoh's/Chia's veracity by producing the minutes of the SMC meeting on 3 January 2008 but it did not. What is noteworthy is that at the first SMC meeting of the new Council on 26 June 2008 (see [120]) which all three attended, Casimir had explained why SS 345 paint was preferred over SS 500 (the plaintiff would not provide a warranty against blistering and bubbling if SS 500 was used). Yet the trio chose to ignore his explanation as the contract administrator and persisted in their unreasonable stance that the defendant was bound by the original tender specifications. Their behaviour bordered on pettiness as reflected in their complaint (which proved to be unfounded) that the plaintiff had omitted to take site photographs for the repair works before the same were carried out. Their allegation that Casimir or the Council or Catherine had backdated the supplementary report was similarly baseless.

Conclusion

154 In the light of my earlier findings, the plaintiff is entitled to final judgment with interest (from the date of the writ) and costs (to be taxed or otherwise agreed) for the following sums set out in

the Scott Schedule:-

(a) Item 1 -- $307,479.02 payments certified but not paid (including the retention sum of $220,615.28);

(b) Item 2 - $342,399.60 for spalling concrete works not certified (ie $320,400 as the court found it was a lump sum contract and item 75 (balance $21,999.60) under cl 3.0 of Section C of the contract);

(c) Item 3 – refund of $261,396 on the performance guarantee.

155 The plaintiff is awarded interlocutory judgment with damages to be assessed by the Registrar for the claim for prolongation costs. The costs of such assessment with interest thereon are reserved to the Registrar. The defendant's counterclaim is dismissed with costs.

156 In the plaintiff's submissions (para 30), the defendant's case was described as being based on suspicions, speculation and theories. Having reviewed the evidence adduced in court, I agree. The alleged conspiracy between the plaintiff, Casimir, Catherine and the Council to cheat the new Council was nothing more than a figment of the imagination of members of the new Council especially its witnesses. Their conduct left much to be desired; they did not act in the interests of the subsidiary proprietors of the estate in resisting the plaintiff's claim and in launching what turned out to be a frivolous counterclaim.

157 Had the new Council abided by the contract, the plaintiff was obliged under the twelve months' defects liability period as well as its five year waterproofing warranty for SS 345, to attend to defects in the paintworks in the estate if called upon to do so by the defendant. Because the new Council of the defendant insisted on the change of paints from SS 345 to SS 500 and the plaintiff provided no warranty against blistering for the latter, the defendant only has itself to blame that it has no remedies for defective paintworks arising from usage of SS 500.

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