IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 53

Civil Appeal No 63 of 2016

Between

CAA Technologies Pte Ltd

… *Appellant*

And

Newcon Builders Pte Ltd

… *Respondent*

JUDGMENT

[Building and Construction Law] — [Building and construction contracts]

[Building and Construction Law] — [Sub-contracts] — [Compensation for delays]

[Building and Construction Law] — [Terms] — [Implied terms]

[Contract] — [Contractual terms] — [Implied terms]

[Contract] — [Discharge] — [Ground for termination of contract]

[Damages] — [Appeals] — [Causation]

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CAA Technologies Pte Ltd
v
Newcon Builders Pte Ltd

[2017] SGCA 53

Court of Appeal — Civil Appeal No 63 of 2016
Judith Prakash JA, Tay Yong Kwang JA, Steven Chong JA
3 July 2017

18 September 2017 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 This appeal arises from the decision of the High Court Judge ("the Judge") in *CAA Technologies Pte Ltd v Newcon Builders Pte Ltd* [2016] SGHC 246 ("the GD"). The Judge found that the respondent, Newcon Builders Pte Ltd ("Newcon"), the main contractor of a medical technology hub project in Jurong ("the Project"), was entitled to terminate the sub-contract ("the Sub-Contract") with the appellant, CAA Technologies Pte Ltd ("CAA") for the design, production and installation of pre-cast concrete hollow core slabs ("HCS"). The termination was found to have been justified on the grounds that CAA was in breach of an express term of the Sub-Contract relating to the contractual delivery schedule as well as breaches of implied terms to proceed with due diligence and expedition. CAA was ordered to pay various heads of damages including the *entire* sum of liquidated damages which was paid by

Newcon to the employer of the Project, Jurong Town Corporation ("JTC") notwithstanding the fact that Newcon was unable to directly link the liquidated damages to CAA's breaches.

2 The Sub-Contract was evidenced by a Letter of Intent dated 2 November 2012 ("the LOI"), the terms of which were brief because the LOI had provided that both parties would subsequently enter into a more detailed contract to be set out in a Letter of Acceptance ("the LOA"). The specific provision in the LOI which Newcon relied on to justify the termination and which the Judge accepted was the requirement for CAA "to follow the site progress and including any revisions to construction programme schedule for [the] Sub-Contract Works".

3 However the LOA was never signed. Nonetheless, Newcon's notice of termination dated 25 March 2013 was purportedly served pursuant to the terms of the unsigned LOA which the Judge found had no contractual force. What then is the effect of such a notice of termination? Can the termination be justified on grounds beyond that stated in the notice? We should state at the outset that this "defect" in the notice of termination was neither pleaded nor raised by CAA in the court below or on appeal.

4 At the time of the termination, CAA had started delivery of the HCS though Newcon contended that the delivery was not in accordance with the construction programme schedule (as subsequently revised pursuant to the provision stated above at [2]). Whether this would permit Newcon to terminate the Sub-Contract would in turn depend on, *inter alia*, whether the revised construction programme schedule was a condition of the Sub-Contract and/or whether the breach had deprived Newcon of substantially the whole benefit of the Sub-Contract. The Judge found in favour of Newcon on both scores.

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5 As the Judge also found that terms as to due diligence, expedition and time being of the essence were to be implied into the Sub-Contract, this judgment will examine when and whether such terms should be implied, particularly in circumstances where one of the parties had specifically contemplated that such terms would be incorporated into an express contract but for whatever reason eventually failed or omitted to execute the same.

Background facts

6 Newcon was awarded the Project by JTC sometime in 2012. On 2 November 2012, through the LOI, Newcon sub-contracted the production and delivery of the HCS to CAA.

7 The key clause of the LOI for present purposes is cl 2, which provided that:

> 2) Overall main contract period shall be from 1st Nov 2012 to 31st Jan 2014 (15 months). You have agreed to follow the site progress and including any revisions to construction programme schedule for your Sub-Contract Works.

8 A construction schedule was attached to the LOI ("the LOI Schedule"). In particular, the LOI Schedule provided that as part of the superstructure works of the Project, the HCS in respect of the second storey were to be *installed* between 26 February 2013 and 17 March 2013. CAA signed and returned the LOI on 17 November 2012. It is of significance to note that it was contemplated from the outset that the HCS for the second storey would be the first batch of the HCS to be delivered under the Sub-Contract. It is implicit, as was found by the Judge, that the HCS would have to be *delivered* before 26 February 2013 (GD at [92]).

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9 The LOI also envisaged that a letter of acceptance would be executed. The last sentence of the LOI stated, "[t]he Letter of Acceptance for the Sub-Contract Works shall be sent to you for execution in due course".[1]

10 On 11 January 2013, the LOA (dated 28 December 2012) was sent from Newcon to CAA for signature. The LOA was a lengthy document comprising 153 pages with a 23-page main body. It is not disputed that at the time when the Sub-Contract was entered into, both parties did not know what the eventual terms of the LOA would be.[2] Clause 7.10 of the LOA set out a "tentative delivery schedule" ("the LOA Delivery Schedule"), with the first delivery of the HCS for zones one, two and three in respect of the second storey to be from 18 February to 28 February 2013. There were also clauses providing Newcon with a right to terminate following an unremedied breach (cl 7.13) and a right to liquidated damages for delays caused by CAA's default (cl 7.15). As observed earlier at [3], the LOA was never signed by CAA.

11 JTC required that its representatives witness the first casting of the HCS by CAA. To this end, on 30 January 2013, Newcon asked CAA to submit various items before commencing the production of the HCS, including its schedule for the first casting. In this email, Newcon also stated that it required the first batch of the HCS to be delivered by "mid Feb 2013". No response from CAA was received to this email or to the subsequent reminders sent by Newcon on 4, 7 and 8 February 2013.

12 The first casting finally took place on 26 February 2013. The Judge rejected CAA's argument that the witnessing of the first casting was repeatedly

1 Appellant's core bundle ("ACB") Vol II at p 105.

2 Appellant's skeletal arguments at [55]; Respondent's Case ("RC") at [69].

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postponed at Newcon's request. He found, and we agree, that given CAA's failure to respond to any of Newcon's email messages to schedule the first casting, the delay was clearly caused by CAA (GD at [170]). As it turned out, no HCS was delivered in the month of February 2013. As such, CAA did not comply with the LOI Schedule as well as the LOA Delivery Schedule.

13 On 1 March 2013, Newcon sent CAA an email containing a revised schedule for the delivery of the HCS ("the 1 March Delivery Schedule"). Under the 1 March Delivery Schedule, the first delivery date was 8 March 2013, and the HCS for "area 2a" (part of the second storey) was to be delivered first. It is pertinent to note that the 1 March Delivery Schedule was issued to provide CAA with an extension of time to deliver the HCS given that it had failed to comply with the LOI Schedule as well the LOA Delivery Schedule.[3] However, delivery of the HCS only commenced on 16 March 2013. Even then, these HCS were of the type required for area 2b, not for area 2a, which was not in conformity with the sequence stipulated in the 1 March Delivery Schedule. The HCS for area 2a were instead only delivered on 18 March 2013, but there were only five such HCS, out of the 57 required for the works at area 2a.

14 On 21 March 2013, Newcon sent CAA another email containing a "proposed delivery schedule" ("the proposed 21 March Delivery Schedule") for delivery of the HCS in respect of gridlines 1-4/A-D (which corresponds to area 2a) by 28 March 2013. This email was effectively a proposal to grant CAA a further extension of time for the delivery of the HCS under the LOA Delivery Schedule and the 1 March Delivery Schedule. In this email, Newcon also

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[3] RC at [46] and [48].

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proposed a meeting the next day or the day after to go through the delivery schedule for the HCS.

15 This meeting took place the next day, on 22 March 2013 ("the Meeting"). What transpired at the Meeting is disputed. Newcon claims that CAA's representatives stated that it was unable to meet the proposed 21 March Delivery Schedule, and that Newcon's representative raised the possibility of termination. CAA, on the other hand, claims that neither the proposed 21 March Delivery Schedule nor the possibility of termination was discussed at the Meeting. Nothing much turns on the precise matters which were raised or discussed at the Meeting. Besides, the proposed 21 March Delivery Schedule was merely a proposal.

16 More HCS were delivered between 21 and 25 March 2013, though only 12 of those delivered then were suitable for area 2a. On 23 March 2013, Newcon sent CAA an email to put CAA on notice that Newcon was ready to receive the HCS at area 2a but that CAA had failed to deliver. A formal notice of delay, purportedly served under cl 7.13(a) of the LOA, was attached. The notice of delay directed CAA to respond by 25 March 2013 on how CAA could expedite its fabrication and delivery of the HCS according to Newcon's schedule.

17 On 25 March 2013 at 8.39pm, not having received *any* response from CAA, Newcon emailed CAA a letter of termination, purporting to terminate the Sub-Contract "[p]ursuant to Clause 7.12 and 7.13 in [the LOA]".[4]

18 Eventually, on 21 November 2013, CAA commenced Suit No 1063 of 2013 against Newcon. CAA claimed that Newcon breached the Sub-Contract

4 ACB Vol II, p 171.

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by failing to pay CAA sums due under the Sub-Contract, and in purporting to terminate the Sub-Contract without any proper basis. It thus claimed for damages to be assessed (including loss of profits that it would have made if the Sub-Contract was not terminated), and for payments accrued up to the date of termination.

19 Newcon counterclaimed against CAA for breach of contract, claiming liquidated damages under cl 7.15 of the LOA, costs for engaging an alternative supplier of the HCS, reliance costs (*eg*, in hiring workers and equipment in anticipation of CAA's punctual delivery of the HCS, which included costs for the hiring of a crawler crane and the rental of system formworks) and liquidated damages that Newcon had to pay to JTC for the delay to the Project.

Decision below

20 The main issue before the Judge was whether Newcon was justified in terminating the Sub-Contract. The Judge found that the termination was justified on three broad bases (GD at [191]).

21 First, CAA breached cl 2 of the LOI, and this breach was a repudiatory breach under the common law (either because cl 2 of the LOI was a condition of the Sub-Contract, or because CAA's breach of cl 2 of the LOI deprived Newcon of substantially the whole benefit of the Sub-Contract) (GD at [188] and [190]).

22 Second, CAA breached an implied term of due diligence and expedition ("the Due Diligence Implied Term"), and this breach was a repudiatory breach under common law for the same reasons (GD at [189]–[190]).

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23 Third, CAA breached both the Due Diligence Implied Term, and an implied term that time was of the essence in relation to the Due Diligence Implied Term ("the Time Implied Term"). To elaborate, the content of the Time Implied Term was stated by the Judge to be as follows (GD at [154]):

> [The Time Implied Term gave] Newcon the right to terminate the contract if CAA were guilty of persistent breach of its obligation of due diligence and expedition which evinces either an inability to perform its contractual obligations or an intention no longer to be bound by the contract.

24 Before turning to the specific heads of claims, it is also important to note that the Judge ruled that the LOA itself did not have contractual effect. However, the *LOA Delivery Schedule* had contractual effect "as a delivery schedule brought to CAA's attention post-contractually, precisely as the [LOI] envisaged" (GD at [95]).

25 The Judge thus found in favour of Newcon's counterclaim. He granted most of Newcon's counterclaims, including claims for liquidated damages that Newcon paid to JTC, and costs incurred by Newcon for the crawler crane and the system formwork. He disallowed Newcon's claims for liquidated damages under cl 7.15 of the LOA (since the LOA was found not to have contractual effect) and a small part of the reliance costs claims. Damages awarded to Newcon totalled about $990,000 (GD at [202]–[214]).

26 As a consequence, the Judge dismissed CAA's claims for damages to be assessed, but allowed its claims only for payments accrued up to the date of termination which he assessed to be about $20,000 (GD at [215]–[216]). CAA appealed.

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Cases on appeal

27 CAA appeals against the entire decision of the Judge, arguing that Newcon was not justified in terminating the Sub-Contract, and in any event the Judge erred in his award of damages.

28 In response, Newcon argues that the Judge's decision should be affirmed. Notably, Newcon does not seek to affirm the decision on the other grounds not relied upon or rejected by the Judge,[5] including the submission that the LOA had contractual effect *per se*. This is of some significance because it precludes Newcon from relying on the termination and liquidated damages clauses in the LOA.

Issues before this Court

29 The key issues before us are:

(a) Whether Newcon was justified in terminating the Sub-Contract. In addressing this issue, we will examine the propriety of implying the disputed terms in the context of the Sub-Contract.

(b) Whether the Judge erred in his award of damages.

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5 Respondent's skeletal arguments at [7].

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Our Decision

Whether Newcon was justified in terminating the Sub-Contract

Clause 2 of the LOI

(1) Letter of termination and its failure to refer to cl 2 of the LOI

30 As noted above at [17], in the letter of termination, Newcon purported to terminate the Sub-Contract pursuant to the LOA. The LOA has been found by the Judge to be of no contractual effect, and thus the ground expressly relied on by Newcon was in fact not a basis upon which Newcon could rely to terminate the Sub-Contract. In addition, the letter of termination did not refer to cl 2 of the LOI. This raises the question (which has not been pursued by CAA below or on appeal) of whether Newcon can now rely on CAA's breach of cl 2 of the LOI to justify terminating the Sub-Contract, when this point was not specifically raised in the letter of termination.

31 The law in this area was settled by this court in *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 ("*Alliance Concrete*"). Although the innocent party must justify an election to terminate for breach of contract by the other party, any ground of termination which existed at the time of election may subsequently be relied upon, unless one of the two exceptions to this rule applies (at [63]). First, where the innocent party's conduct was such that it would be unfair or unjust for him to later rely on a different ground for termination. This exception is premised on the traditional doctrines of wavier and estoppel (at [65]). Second, where the party in breach could have rectified the situation had it been afforded the opportunity to do so (at [67]).

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32 Applying the principles in *Alliance Concrete* to the present case, we find that Newcon is entitled to rely on CAA's breaches of cl 2 of the LOI to terminate the Sub-Contract. Neither exception set out in *Alliance Concrete* applies. While the termination letter did not expressly refer to cl 2 of the LOI, it made clear that the substance of Newcon's complaint was that the "deliveries of the [HCS] panels are far behind [the] schedule and [CAA's] slow progress in delivery of the [HCS] panels had caused serious delay to the progress of [Newcon's] structural works".[6] The alleged breaches of cl 2 of the LOI also relate to CAA's failure to supply the HCS according to Newcon's schedules as may be revised from time to time. Given the substantial overlap between the contents of the termination letter and the ground of termination under cl 2 of the LOI, there is no room for the doctrines of estoppel or waiver to operate, or for CAA to complain that it could have rectified the situation if Newcon had instead referred to cl 2 of the LOI in its letter of termination, as opposed to the clauses of the LOA.

33 We also note for completeness, that although Newcon's primary case in the court below on its right to terminate the Sub-Contract was based on the LOA, it has nevertheless adequately pleaded its alternative argument that it was also entitled to terminate the LOA on account of CAA's breach of cl 2 of the LOI. Newcon pleaded in its Defence and Counterclaim (Amendment No 2) that "as at 25 March 2013, [CAA] was in material breach of the Sub-Contract and that [Newcon] was fully entitled to terminate the Sub-Contract".[7] The particulars provided for this pleading alleged that CAA's failure to comply with

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6 ACB Vol II, p 171.

7 Defence and Counterclaim (Amendment No 2) at para 29 (Record of Appeal ("ROA") Vol II p 108).

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various delivery schedules amounted to breaches of cl 2 of the LOI,[8] and also pleaded that:[9]

> Further and / or in the alternative, [Newcon] avers that they were entitled to terminate the Sub-Contract as [CAA] had clearly demonstrated their intention not to be bound by their Sub-Contract obligations and had repudiated the Sub-Contract.

34 Accordingly, we are satisfied that Newcon is entitled to rely on CAA's alleged breaches of cl 2 of the LOI to justify its termination of the Sub-Contract, notwithstanding the lack of its specific reference in the letter of termination.

(2) Clause 2 of the LOI and the delivery schedules

35 For convenience, we reproduce cl 2 of the LOI, which provided as follows:

> 2) Overall main contract period shall be from 1st Nov 2012 to 31st Jan 2014 (15 months). You have agreed to follow the site progress and including any revisions to construction programme schedule for your Sub-Contract Works.

The Judge interpreted cl 2 to mean that CAA was obliged "to meet a delivery schedule which the letter of intent envisaged would be provided, supplemented and revised from time to time, as Newcon performed its own obligations under the main contract" (GD at [94]).The Judge found that cl 2 of the LOI was breached because CAA had failed to meet the following delivery schedules (GD at [158]–[160]):

(a) the LOA Delivery Schedule, which stipulated a delivery date of 18 February 2013 for the first batch of the HCS; and

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8 Defence and Counterclaim (Amendment No 2) at para 29(xii) (ROA Vol II p 111).

9 Defence and Counterclaim (Amendment No 2) at para 29(xiv) (ROA Vol II p 112).

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(b) the 1 March Delivery Schedule, which stipulated a delivery date of 8 March 2013 for the first batch of the HCS.

36 CAA contends that the delivery schedules were not binding. It draws a distinction between a "construction programme" (which was explicitly referred to in cl 2 of the LOI), and a delivery schedule (which was not referred to).[10]

37 However, this is a disingenuous distinction as it is inconsistent with the testimony of CAA's General Manager, Mr Chen Linhui ("Mr Chen"). At the trial, Mr Chen agreed that "the construction programme schedule for the [S]ub-[C]ontract works refers to the delivery schedules that were given from time to time during the project".[11] At the oral hearing before us, counsel for CAA, Mr Edwin Lee ("Mr Lee") also accepted that there was no contemporaneous correspondence from CAA to Newcon to state that CAA did not consider the delivery schedules to be binding.

38 CAA further argues in the alternative that even if delivery schedules from Newcon were binding, this was subject to an implied obligation that revisions to the delivery schedules should be reasonable.[12] We are not prepared to consider this argument for several reasons. First, this is an entirely new and unpleaded point.[13] On appeal, CAA claims that the revision to the 1 March Delivery Schedule was unreasonable, *inter alia*, because Newcon *knew* that the first casting of the HCS had only taken place on 26 February 2013 and that the concrete needed 28 days to cure. The very essence of such a claim is fact-

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10 Appellant's Case ("AC") at [53].

11 ROA Vol III Part D, p 81 lines 21–24; RC at [27].

12 AC at [59].

13 RC at [50].

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sensitive in nature, and therefore it should have been pleaded to afford Newcon the opportunity to respond to such allegation and for such allegation to be tested in cross-examination. The failure of CAA to plead or even raise this point below is sufficient to dispose of this new allegation. Second, issues of reasonableness typically arise for determination where the revisions to the construction programme seek to "*accelerate"* and thereby shorten the original schedule as was found to be the case in *Lim Chin San Contractors Pte Ltd v Sanchoon Builders Pte Ltd* [2005] SGHC 227 at [42] and [50]. Such revisions would generally make performance more onerous for contractors as compared to the original schedule. Here, the time for delivery of the HCS in the various delivery schedules was *extended* for the benefit of CAA. In fact, as stated at [13] above, the 1 March Delivery Schedule was issued precisely because of CAA's failure to deliver in accordance with either the LOI Schedule or the LOA Delivery Schedule.

39 CAA submits that the 1 March Delivery Schedule had changed the sequence of the HCS to be delivered, such that it would have to produce the 360mm HCS first under the 1 March Delivery Schedule, when it was to produce the 325mm HCS first under the LOA Delivery Schedule. According to CAA, this change in sequence caused delay as CAA had to recalibrate its machines to enable the machines to produce the 360mm HCS instead of the 325mm HCS.[14]

40 It is indeed not incorrect that the 1 March Delivery Schedule partly changed the sequence of the HCS to be delivered. Under the LOA Delivery Schedule, the first batch of HCS to be delivered was for installation in zone 1 of the second storey, which required the 325mm HCS. Under the 1 March

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[14] AC at [24] and [55].

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Delivery Schedule, the first batch of HCS to be delivered was for area 2a (which is a part of zone 2 under the terminology used in the LOA Delivery Schedule, and not part of zone 1). Area 2a required both the 325mm HCS and the 360mm HCS.

41 However, the crucial point is that under the LOA Delivery Schedule, the 360mm HCS had to be delivered by 23 February 2013 as part of the delivery for zone 2 for the second storey. Therefore, the 1 March Delivery Schedule, in extending the delivery date for *both* the 325mm and 360mm HCS to 8 March 2013, had in fact benefited CAA by giving it more time to deliver the 360mm HCS.

42 As such, we cannot see how the revisions to the delivery schedule can conceivably be said to be unreasonable. We should also add that there was no contemporaneous reaction whatsoever from CAA that the 1 March Delivery Schedule either in terms of time or sequence was unreasonable. CAA's silence is all the more telling especially given the repeated reminders from Newcon to expedite the delivery of the HCS in a particular sequence.

(3) Whether cl 2 of the LOI was a condition of the Sub-Contract

43 A term is a condition of a contract where the "intention of the parties to the contract was to designate that term as one that is so important that any breach, regardless of the actual consequences of such a breach, would entitle the innocent party to terminate the contract" [emphasis omitted]: *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR(R) 413 ("*RDC*") at [97].

44 In determining whether a term is a condition, the context of the transaction is a relevant factor. For example, in the context of mercantile

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transactions, the courts are more likely to classify contractual terms as conditions, especially where they relate to timing: *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 at [173]. Conversely, as regards construction contracts, *Keating on Construction Contracts* (S Furst & V Ramsey eds) (Sweet & Maxwell, 10th Ed, 2016) ("*Keating (10th Ed)*") at para 8-008 takes the view that unlike mercantile contracts, "the normal rule is that time is not of the essence in construction contracts, unless it is expressly so provided".

45 Despite having referred to the foregoing passage from *Keating (10th Ed)* at an earlier part of the GD (at [122]), the Judge nevertheless found cl 2 of the LOI to be a condition of the Sub-Contract because he found that "CAA's eventual breach of cl 2 resulted precisely in the anticipated consequences" (GD at [188]). With respect, we do not agree that this is the proper approach to take when determining whether a term is a condition. It does not appear to us that parties intended any breach of cl 2 of the LOI, however minor, to entitle Newcon to terminate the contract. The contract period was 15 months long. In the context of a fairly long contract, it is not likely that the parties intended that any failure to meet any interim timeline would give Newcon the right to terminate.

46 The Judge reasoned that the "commercial purpose of the contract was for CAA to deliver slabs to Newcon for installation, on time and in sequence" and that "[b]oth parties knew that timely delivery of the slabs was necessary to ensure that Newcon could adhere to the main contract timeline set out in the construction schedule" (GD at [188]). While this may be correct, it does not follow that the parties thought that *any* late delivery of the HCS would prove fatal to Newcon's ability to meet its obligations to JTC and entitle Newcon to terminate the Sub-Contract. In fact, by issuing the 1 March Delivery Schedule

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after CAA had failed to meet the LOA Delivery Schedule, Newcon's conduct at that point in time demonstrated that it could still meet or at least cope with its obligations to JTC.

47 For the foregoing reasons, we find that the Judge erred in finding that cl 2 of the LOI was a condition of the Sub-Contract.

(4) Whether Newcon was deprived of substantially the whole benefit of the Sub-Contract

48 In the court below, Newcon argued that it was deprived of substantially the whole benefit of the Sub-Contract by CAA's breaches of cl 2 of the LOI, because:[15]

(a) Time was of the essence.

(b) CAA's actual production sequence and deliveries of the HCS had no bearing to the sequence of delivery as set out in the 1 March Delivery Schedule. This suggested that CAA had deliberately decided and was determined to perform the Sub-Contract in a manner substantially inconsistent with its obligations. Relying on *RDC* at [95] and [113], Newcon submitted that such conduct justified termination of the Sub-Contract.

(c) CAA's breaches had severe consequences for Newcon as it put Newcon at risk of incurring liquidated damages to JTC. This ultimately materialised to the tune of $407,000.

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15 ROA Vol III Part H pp 58–60.

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49 The Judge held that CAA's breaches of cl 2 of the LOI had deprived Newcon of substantially the whole benefit of the Sub-Contract (GD at [190]). While the Judge did not elaborate on this aspect of the GD, he did find that CAA's breaches evinced "either an inability to perform its contractual obligations or an intention no longer to be bound by the [Sub-Contract]".

50 At the oral hearing, counsel for Newcon, Mr Lok Vi Ming SC ("Mr Lok"), sought to persuade us that as at the point of termination, CAA's track record in supplying the HCS indicated that it would not have been able to comply with its obligations under the Sub-Contract. CAA only managed to supply 53 HCS over ten days, which was about 10% of the HCS required for the second storey of the Project. Mr Lok also referred us to an email sent by Newcon to CAA on 26 March 2013 (a day after the Sub-Contract was terminated), where Newcon stated that CAA's rate of progress of about five HCS a day meant that it would take CAA almost 96 days before it could deliver the more than 480 HCS required for the second storey alone.[16]

51 In response, Mr Lee submitted that Newcon's argument assumes an unchanged production rate. This assumption was not realistic because CAA had spent two months on the design and casting of the HCS with no active production. After the first casting on 26 February 2013, the first delivery took place on 16 March 2013. According to CAA's calculations, as stated in its letter to Newcon on 26 March 2013, it would have been able to complete its supply of the HCS for the whole of the Sub-Contract within 75–149 days, depending on whether it cast one or two lines of the HCS per day.[17]

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16 ACB Vol II p 157.

17 ROA Vol 5 Part B pp 31–32.

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52 There is merit in Mr Lee's argument that the assumption of an unchanged production rate was unrealistic, given that CAA did have to expend resources on design[18] and casting[19] in the early stages of the Sub-Contract. Nevertheless, we are satisfied that CAA did not perform the Sub-Contract as agreed. First, the point that CAA would have been able to "catch up" in general, and its calculations in particular, was not relied upon by CAA at the trial.[20] Second, its calculations were purportedly made on the basis that CAA had already produced a substantial quantity of the HCS (worth $177,189.60) at the time of the termination, but was not yet delivered before termination. The short answer to this submission is that CAA was unable to adduce *any* credible evidence of the production of those HCS in the court below (GD at [195]).

53 Having rejected this submission, what we are left with is merely CAA's dismal record of delayed deliveries and its conspicuous silence in the face of Newcon's repeated chasers. Even if CAA intended to continue supplying the HCS, it would not have been able to do so in the timely manner as agreed under the Sub-Contract.

54 We note that in *RDC* at [95]–[96], this court considered that if a party evinces an intention to perform a contract in such an inconsistent manner, it was arguably *renouncing* the contract. This court then expressed its tentative view that it was preferable *not* to analyse such an argument under the category of renunciation (*ie*, Situation 2 in the framework set out in *RDC*), but instead to analyse it within the framework of whether the term that was breached was a

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18 AC at [11].

19 AC at [23].

20 RC at [110]; ROP Vol III Part F pp 3–42 (Plaintiff's closing submissions).

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condition or a warranty, and if the term breached was a warranty, then whether the innocent party was substantially deprived of the whole benefit of the contract (*ie*, Situations 3(a) and 3(b) in the framework set out in *RDC*). The court also noted that the "*same* result, in *substance*" would be achieved under both approaches.

55 In the present case, the differences in both approaches have not been expressly addressed in both parties' submissions. Both parties appear content to treat the issue of whether CAA had evinced an intention to perform the Sub-Contract in an inconsistent manner as one aspect of the inquiry into whether Newcon was substantially deprived of the whole benefit of the contract.[21] We are satisfied that CAA had indeed evinced an intention to perform the Sub-Contract (to borrow the language in *RDC* at [96]) "in a manner substantially inconsistent with its contractual obligations", and we take this into account for the purposes of determining whether CAA's breaches substantially deprived Newcon of the whole benefit of the contract.

56 In addition, we are mindful that the nature and actual consequences of the breach was central to the inquiry as to whether Newcon was substantially deprived of the whole benefit of the contract: *RDC* at [99].

57 In this regard, the Judge found that CAA's failure to deliver the HCS for area 2a had directly contributed to the delay in the main contract works. These HCS were on the "critical path" of Newcon's main contract works, in that it was an area on which additional stories would be built (GD at [180]–[183]). On appeal, CAA submits that the Judge erred in rejecting the evidence of CAA's

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[21] AC at [114]–[119]; RC at [109]–[114].

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chairman, Dr Chi Chao-Ton Tony ("Dr Chi"), who had testified that area 2a was not on the critical path. CAA submits that this fact was evident "on the face of the [building] plans before [Dr Chi]".[22]

58 It is apparent to us that the Judge had given due consideration to the building plans. As stated in the GD at [182]:

> During cross-examination, Dr Chi was shown the building plans for the 2nd and 3rd storeys. It was pointed out to him that columns were to be erected at gridline D on the plans. *It would not be possible for these columns to be erected if the slabs on the left side of gridline D were not first installed.* When confronted with these building plans, Dr Chi doggedly insisted that the slabs for area 2a did not lie on the critical path of the main contract works, without providing any explanation. [emphasis added]

59 We see no reason to disturb the Judge's finding of fact in this regard, and accept that CAA's failure to meet the delivery schedules had contributed to the delay in the main contract works (even though, as we go on to find at [83]–[86] below, Newcon has not proved that CAA's breaches were the *sole* cause of Newcon's payment of the liquidated damages to JTC. This is a separate inquiry which is dealt with below).

60 Accordingly, applying the approach in *RDC*, we uphold the Judge's findings that Newcon was entitled to terminate the Sub-Contract as CAA's breaches of cl 2 of the LOI had substantially deprived Newcon of the whole benefit of the Sub-Contract (*ie*, Situation 3(b) in the framework set out in *RDC*).

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[22] AC at [46].

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Implied terms

61 We have found above (at [48]–[60]) that Newcon was entitled to terminate the Sub-Contract under common law as CAA's breaches of cl 2 of the LOI had substantially deprived Newcon of the whole benefit of the Sub-Contract. This finding alone is dispositive of the termination issue. Nevertheless, as the issue of implied terms was dealt with by the Judge and argued before us at some length, we believe it will be useful to record some observations on whether such terms ought to have been implied in the first place in the context of the factual matrix before the court.

62 Preliminarily, as we observed above (at [33]), Newcon's primary justification for terminating the Sub-Contract in the court below was premised on its express right of termination under the LOA (GD at [185]) (*ie* Situation 1 in the framework set out in *RDC*). After having rejected this submission, the Judge then proceeded to accept both of Newcon's alternative submissions that CAA's breaches of cl 2 of the LOI and the Due Diligence Implied Term (whether alone or in combination with the Time Implied Term) were both repudiatory breaches of the Sub-Contract (GD at [186]).

63 On appeal, Newcon initially ran its arguments based on the Due Diligence Implied Term and Time Implied Term in parallel with cl 2 of the LOI (as opposed to being an alternative argument). However, when queried during the appeal hearing, Newcon shifted its position.

64 In relation to the Due Diligence Implied Term, Mr Lok initially maintained that it was necessary to imply the Due Diligence Implied Term, even if this court were to accept that cl 2 of the LOI would oblige CAA to deliver according to the delivery schedules issued by Newcon. Subsequently, Mr Lok

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changed his position and accepted that the Due Diligence Implied Term would only be relevant in the event that this court holds either that cl 2 of the LOI was not a condition or that cl 2 of the LOI did not oblige CAA to deliver according to the delivery schedules issued by Newcon.

65 In relation to the Time Implied Term (which is reproduced above at [23]), Mr Lok also accepted that the Judge's narrow formulation meant that the rights under the Time Implied Term equate to the rights available at common law under the doctrine of repudiatory breach. In other words, the Time Implied Term was strictly not necessary.

66 The foregoing concessions diminishes the relevance of the Due Diligence Implied Term and the Time Implied Term to the present case. In any event, we have reservations over the implication of these implied terms in the context of construction contracts in general. Before we discuss these concerns, it is useful to recall the process for the implication of terms under Singapore law. The position in law was settled by this court in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp*") at [101]:

> (a) The first step is to ascertain how the gap in the contract arises. Implication will be considered only if the court discerns that the gap arose because the parties did not contemplate the gap.
>
> (b) At the second step, the court considers whether it is necessary in the business or commercial sense to imply a term in order to give the contract efficacy.
>
> (c) Finally, the court considers the specific term to be implied. This must be one which the parties, having regard to the need for business efficacy, would have responded "Oh, of course!" had the proposed term been put to them at [the] time of the contract. If it is not possible to find such a clear response, then, the gap persists and the consequences of that gap ensue.

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67 The question of whether a term of due diligence and expedition should be implied in fact into *construction contracts* is a controversial one. In *Leander Construction Ltd v Mullalley and Company Ltd* [2011] EWHC 3449 (TCC) ("*Leander*"), Coulson J (as he then was) recognised at [30] that "[t]here has long been a difference of approach to this topic in the two leading textbooks on construction law." The two leading textbooks referred to in *Leander* are *Hudson's Building and Engineering Contracts* (N Dennys, M Raeside & R Clay eds) (Sweet & Maxwell, 12th Ed, 2011) ("*Hudson (12th Ed)*") and *Keating on Construction Contracts* (S Furst & D Keating eds) (Sweet & Maxwell, 8th Ed, 2006) ("*Keating (8th Ed)*"). The Judge also referred to differences of opinions in the updated editions of the textbooks, *Keating (10th Ed)* and *Hudson's Building and Engineering Contracts* (R Clay & N Dennys eds) (Sweet & Maxwell, 13th Ed, 2015) ("*Hudson (13th Ed)*"), though he considered that following a shift in position in *Hudson (13th Ed)*, the difference between them was now merely a matter of "emphasis rather than substance" (GD at [115] and [124]).

68 Despite the controversy, what remains apparent is that there is no clear authority for the implication of a term of due diligence and expedition in the construction context. In implying the Due Diligence Implied Term, the Judge relied only on *Hudson (13th Ed)* and Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 4th Ed, 2012), with no reference to any construction case authority where such an implied term has been found (GD at [145]–[147]). The lack of such authority was also noted by Coulson J in *Leander* at [31], where he commented that the authors of *Hudson (12th Ed)* did not cite any authority for their proposition that terms of due diligence may in some cases be implied by law in construction contracts as a matter of business efficacy. The authors only "test[ed] their submission by

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reference to a hypothetical example". In fact, we observe that the Judge also expressly noted that the two cases which he considered, *Leander* and *Greater London Council v Cleveland Bridge & Engineering Company Ltd* (1984) 34 BLR 57, did not support the proposition (GD at [126]–[135]).

69 Several explanations have been proffered for the courts' reluctance to imply a term of due diligence in the construction context. We shall highlight two which are particularly pertinent in the present case.

(1) The ability of parties to make such terms an express term of the contract

70 First, it has been suggested that the courts have not implied such a term in construction contracts because "the courts are extremely reluctant to interfere unnecessarily with the bargain made between the parties. Surely if the employer wishes to be sure that the contractor proceeds regularly and diligently, then he should make the obligation an express contractual term?" (see Ruth van Dreumel & Andrew Outram, "Progress cannot be implied" (2012) 23 3 Cons Law 17 at 18).

71 In our view, this concern equally applies in the Singapore context. It is common ground among parties that due diligence clauses are commonly found in standard form construction contracts in Singapore. Given that parties to construction contracts have recourse to standard form contracts which they can either use or refer to, the fact that they ultimately agreed on a contract without due diligence clauses may well mean that they elected not to include such clauses. If so, it follows that there would then be no gap in the contract, and thus no room for a term to be implied. The first step in the test set out in *Sembcorp* (as set out at [66] above) would thus not be satisfied.

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72 On the facts of the present case, the presence of the LOA further strongly suggests that there was no gap in the contract in the first place. As noted at [9] above, the LOI itself envisaged that the LOA would subsequently be executed. About two months after the LOI was signed, Newcon sent the LOA to CAA. The LOA expressly addressed the issue of due diligence (and also the issue of time being of the essence). Clause 7.11 of the LOA provided:

> Due Diligence By Supplier
>
> You are to take notice that time is of the essence and therefore you shall proceed with your works diligently and with due expedition at all times until completion.

73 The foregoing strongly suggests that, at the very least, Newcon had contemplated an express contractual clause to provide for work to proceed with due diligence and to treat time to be of the essence but decided, for whatever reason, not to include it in the *LOI*. There is simply no evidence that CAA too had contemplated such a clause. On the contrary, we would have thought that given the non-execution of the LOA, the facts bear out the converse.

74 To our knowledge, past cases have not addressed the point of whether the court would consider the existence of a "true" gap in a contract where only one party has contemplated the clause. This situation was not one of the three scenarios specifically considered in *Sembcorp* at [94]:

> … There are at least three ways in which a gap could arise:
>
> (a) the parties did not contemplate the issue at all and so left a gap;
>
> (b) the parties contemplated the issue but chose not to provide a term for it because they mistakenly thought that the express terms of the contract had adequately addressed it; and

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> (c) the parties contemplated the issue but chose not to provide any term for it because they could not agree on a solution.

75 In each of the three scenarios, either *both* or *neither* of the parties contemplated such a clause. Nevertheless, applying the reasoning in *Sembcorp*, our view is that in a situation where *only one party* has expressly contemplated the issue, there will still not be a "true" gap which can be remedied by the implication of a term, if the other party did not contemplate the issue. This court in *Sembcorp* explained (at [93]) that the process of implication of terms into a contract "is best understood as an exercise in giving effect to the parties' *presumed* intentions" [emphasis in original]. Only scenario (a) qualifies as a "true" gap. Scenario (c) is not considered a "true" gap because "parties had actually considered the gap but were unable to agree and therefore left the gap as it was. To imply a term would go against their *actual* intentions" [emphasis in original] (at [95]).

76 In our view, the scenario at hand bears considerable similarity to scenario (c). Where one party contemplates an issue but does not raise it to the counterparty for discussion, that party must be taken to have intended not to provide a term for it. Implying a term, in this instance, would then go against the actual intention of that party. Given that the implication of terms is an exercise in giving effect to *both* parties' presumed intentions, we cannot see how parties can be presumed to have intended to fill a gap, when the actual intention of one party was either *not* to fill the gap or where such a gap was not even contemplated. It must follow, therefore, that in such a scenario, there is no "true" gap.

77 To look at this scenario another way, it is also counterintuitive to think that a main contractor who intends to have a term of due diligence in the contract

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can be in a better position by remaining silent (and having the term implied in fact), than by raising it for discussion with the other party and risk the counterparty refusing to agree to the term. The policy of the law cannot be to encourage parties to keep silent about key terms which they want to be included in the contract. Therefore, in a scenario where only one party contemplates a term but chooses to stay silent about the term before the contract is signed, the court is unlikely to find that a "true" gap exists in relation to the term.

(2) The presence of a main contractual obligation to complete by a certain date

78 We turn to another feature of construction contracts. After a comprehensive review of the relevant case law, the court in *Leander* (at [42]) made the following pertinent observation:

> In all of those cases, in one way or another, the courts declined to imply a term that would have imposed upon the contractor or sub-contractor interim obligations as to rate of progress and detailed performance. In those cases, the court repeatedly gave priority to the principle that, provided that the main contractual obligation was an obligation to complete by a certain date, it was unnecessary and unhelpful to impose other interim progress obligations upon the contractor.

79 In short, it would usually be unnecessary to imply a term of due diligence in construction contracts that already provide for a certain completion date of the main contractual obligation. The second step in the test set out in *Sembcorp* (as set out at [66] above) would thus usually not be satisfied.

80 In the present case, we have already found that the delivery schedules issued by Newcon have contractual force. Thus, although the LOI itself did not contain certain dates for CAA to make the deliveries, it provided for a

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mechanism for Newcon to (within reasonable boundaries) *specify* those dates. *A fortiori*, there was no necessity to imply a term of due diligence.

81 Finally, it seems to us that the Judge justified the necessity for both the Due Diligence Implied Term and Time Implied Term in order to give Newcon a right to terminate. He reasoned at [155] of the GD that absent such terms, Newcon would have to wait "patiently" for CAA to miss each delivery date and even then to sue only for damages without having the right to terminate. Recognising the difficulties in implying such terms into the Sub-Contract, the Judge sought to limit Newcon's right to terminate "if CAA were guilty of persistent breach of its obligation of due diligence and expedition which evinces either an inability to perform its contractual obligations or an intention no longer to be bound by the contract" (GD at [154]). If CAA were guilty of such a breach, it would be tantamount to depriving Newcon of substantially the full benefit of the Sub-Contract which in itself would have justified the termination under common law without the necessity to resort to implying terms in fact. The Judge said as much when he concluded at [154] that "[i]t gives Newcon that right *only* if the breach, taken together with other breaches, goes to the root of the parties' bargain" [emphasis added]. In our view, terms cannot be implied in fact *in order* to give a party a specific remedy which the parties did not expressly provide for. In such a situation, the party is left to justify the termination under common law which in essence was what the Judge in fact decided.

82 Thus, we are of the view that the Due Diligence Implied Term and the Time Implied Term ought not to be implied into the Sub-Contract. As to whether it will ever be permissible to imply such terms into construction contracts, we prefer to leave the issue open to be decided on the specific facts of each case. It suffices for now that we have identified in [70]–[81] above the

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difficulties which will typically arise to imply such terms in the context of construction contracts.

Whether the Judge erred in his award of damages to Newcon

Liquidated damages

83 CAA argues that the Judge erred in allowing Newcon's claim for the liquidated damages of $407,000 paid by Newcon to JTC for the late completion of the Project because Newcon has not discharged its burden of proving that Newcon's late completion of the Project was caused by CAA's breaches.

84 We agree with CAA's submission. It is important to bear in mind that Newcon's claim is essentially to be indemnified against the liquidated damages which it paid to JTC. To be able to make this claim, Newcon has to prove that the liquidated damages were payable *solely* due to CAA's breaches. However, there is no evidence directly linking JTC's imposition of the liquidated damages to CAA's breaches. Newcon simply relies on an interim final payment certificate No 9 dated 13 April 2015, issued by Jurong Consultants Pte Ltd (which was the Supervising Officer under Newcon's contract with JTC)[23] to Newcon, to prove that it had to pay the liquidated damages to JTC. This document indicates that Newcon was penalised for 22 days of delay, after taking into account an extension of time of 59 days granted by JTC.[24] All that this proves is that Newcon paid JTC a sum in liquidated damages. It does not, however, indicate the cause of such delay or that CAA was the sole cause of the delay for which the liquidated damages were paid to JTC. Finally, it would not

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23 ROA Vol III Part H p 5.

24 ROA Vol IV p 111.

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suffice for Newcon to simply prove that CAA's breaches had caused *some* delay to the Project.

85 In essence, Newcon is inviting the court to infer that the 22 days of delay must have been caused by CAA's breaches of cl 2 of the LOI. In the court below, the Judge considered and rejected CAA's arguments that the delay could have been caused by other sub-contractors, and accordingly found that CAA's breaches caused the delay (GD at [210]–[214]). In this regard, we should add that CAA has no burden to prove that the delay was caused by some other sub-contractors, and therefore the mere fact that CAA was not able to establish that the delay was caused by other sub-contractors did not *per se* prove that CAA was solely responsible for Newcon's payment of the liquidated damages to JTC. That burden rests with Newcon.

86 Further, it appears to us that the Judge failed to take into account the undisputed evidence that Eastern Pretech, the sub-contractor hired by Newcon to replace CAA, was itself late. Under Eastern Pretech's contract with Newcon, Eastern Pretech was expected to finish its delivery of the HCS by September 2013,[25] but in fact it only completed the full delivery in January 2014.[26] Hence, it would appear that Eastern Pretech was also in breach of its contract with Newcon, and presumably caused some delay. We are therefore not persuaded that Newcon has proven that CAA had caused Newcon to suffer the entire or any of the loss of $407,000 in liquidated damages paid to JTC. It seems to us that Newcon's approach was just to shift the entire burden of the liquidated damages to CAA, *ie*, an all or nothing approach. As Newcon has failed to

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25 ROA Vol III Part B p 282, cl 4(l).

26 ACB Vol II p 9.

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discharge its burden of proof, it follows that this head of Newcon's claim must fail in its entirety.

Costs of hiring the crawler crane

87 CAA argues that Newcon should not be awarded the cost of hiring the crawler crane, because the crawler crane was not in fact idling. CAA points to the fact that the time sheets of the crane operator contained overtime claims, indicating that other works were ongoing. It also asserts that "the purpose of the crawler crane was to unload any heavy material, not just CAA's slabs",[27] supporting its theory that the crawler crane was not idling.

88 However, these new assertions were not put to Newcon's witnesses at the trial.[28] This should have been done to afford them an opportunity to explain. Newcon's director had also stated in his affidavit of evidence-in-chief that the crawler crane "was used for the hoisting of the [HCS]" and was on standby because CAA had failed to deliver the HCS according to schedule.[29] As CAA did not challenge this evidence in cross-examination, it is too late in the day for CAA to submit otherwise. We therefore find that the Judge was right in awarding CAA the cost of hiring the crawler crane.

Costs of renting the system formwork

89 On appeal, CAA also argues that the Judge erred in awarding Newcon the costs of renting the system formwork. In particular, CAA contests Newcon's computation of its claim for the daily rental rate of the system formwork,

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27 AC at [134].

28 RC at [123].

29 ROA Vol III Part B at p 29.

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arguing that the rate should be based on the required area at various times, rather than the site's entire area.[30]

90 We are likewise unable to accept this argument since it has only been raised for the first time on appeal.[31] At the trial, CAA's only objection to this head of claim was that Newcon (and not CAA) was responsible for the delay.[32] No dispute was raised regarding the method of computation, and Newcon's witnesses were not cross-examined on this point. It may very well have been, as Newcon now submits, that the system formwork had to be rented as a whole, and not on a piecemeal basis.[33] The point is that Newcon is prejudiced because its witnesses were not afforded the opportunity to explain as this point was not challenged by CAA at the trial. Accordingly, we reject CAA's belated argument in this regard.

Conclusion

91 For the reasons given above, we allow CAA's appeal in part. We set aside the order below only to the extent that CAA pays $407,000 to Newcon for Newcon's losses in liquidated damages paid to JTC.

92 As for costs, as CAA was only partially successful, parties shall make written submissions on costs (limited to ten pages each) within two weeks of the date hereof.

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30 AC at [139]–[140].

31 RC at [127].

32 ROA Vol III Part E, p 125 lines 20–31.

33 RC at [128].

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Judith Prakash Judge of Appeal	Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

Edwin Lee Peng Khoon and Jennifer Fong Lee Cheng (Eldan Law LLP) (instructed), Irving Choh Thian Chee, Christine Chuah Hui Fen and Kor Wan Wen Melissa (Optimus Chambers LLC) for the appellant;
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