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Case Comment

DELINEATING THE PROCEDURAL REQUIREMENTS FOR INSTRUCTIONS FOR VARIATION WORK IN CONSTRUCTION CONTRACTS

Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd [2023] SGHC(A) 2

[2023] SAL Prac 10

In *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2, the Appellate Division of the High Court ("Appellate Division") allowed a sub-subcontractor's variation claims notwithstanding the absence of written instructions from the subcontractor as required by the contract, thus overturning the judge's decision on this issue. The authors in this article discuss the Appellate Division's analysis of conditions precedent to payment and waiver by election, and then consider the implications of the Appellate Division's decision on the interpretation of standard form contracts and "back-to-back" contracts.

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I. Introduction

1 Construction contracts commonly stipulate procedural requirements for the instructions for variations – for example,

that such instructions be in writing from an employer. Such procedural requirements are intended to promote certainty and obviate future disputes as to whether such instructions were in fact given.[1] Yet, practical issues may arise as to the scope and effect of such requirements. Significant guidance may be drawn from the judgment of the Appellate Division of the High Court ("Appellate Division") in *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd*[2] ("*Vim Engineering (AD)*").

2 Faced with a contract that stipulates procedural requirements for variation instructions, a contractor does well to ensure that such requirements are met before commencing variation work. Yet, when a contractor receives an instruction to carry out variation work (such as an oral instruction on site, or in a manner that otherwise departs from the contractual procedure), a potentially difficult dilemma presents itself. If the contractor refuses to carry out the variation work until the requirements are complied with, it risks being penalised for any resulting delay or for the costs the employer incurs if it chooses to carry out the work itself. On the other hand, if the contractor proceeds to carry out variation work without compliant instructions, it risks losing the entitlement to such work entirely.

3 Recognising the potential injustice which may arise on the facts of each case, the courts have developed ways to enable the contractor to make claims with respect to variation work even without strict compliance with the contractual procedure for instructions.

4 In *Vim Engineering (AD)*, the Appellate Division allowed the sub-subcontractor's claims for variation work even though it had not received written instructions from the subcontractor as required by the contract. In reaching its conclusion, the Appellate Division had occasion to consider some of these devices, in particular, whether the requirement for written instructions from the subcontractor was intended to be a condition precedent

1 See the decision of the Singapore High Court (General Division) in *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 at [37].
2 [2023] SGHC(A) 2.

to payment, as well as whether the subcontractor had waived the need for written instructions through its conduct.

5 This article considers the potential implications of this decision, especially on the standard form contracts commonly used in Singapore, as well as the interpretation of provisions expressly stated to be "back-to-back" to an upstream contract.

II. Background to the dispute

6 The dispute in *Vim Engineering (AD)* concerned a project for the redevelopment of a building. The main contractor, Samsung C&T Corporation ("Samsung"), engaged the respondent, Deluge Fire Protection (S.E.A.) Pte Ltd ("Deluge"), as a subcontractor. By way of a subcontract ("Subcontract"), Deluge engaged the appellant, Vim Engineering Pte Ltd ("Vim"), to carry out certain plumbing and sanitary works for the project.

7 Clause 16 of the Subcontract provided that variation work shall only be carried out with written instructions from Deluge's project manager:[3]

> **16 VARIATIONS**
>
> Any variation works such as addition[s] or omission[s] or modification[s], shall be on a *back-to-back basis* with the Main Contract. Such variation shall be carried out only with *written instruction[s] from [Deluge's] Project Manager* and the unit rates are in accordance with the agreed SOR for this Subcontract. …
>
> [emphasis added]

8 Vim subsequently commenced proceedings against Deluge to claim for, among others, certain variation work it had carried out. On the facts, Deluge's project manager did not issue written instructions to Vim as provided under cl 16 of the Subcontract. Hence, Vim relied on certain variation forms it had submitted to Deluge in relation to each variation claim. These forms typically contained a breakdown of the cost of the variation, as well as a

3 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [11].

description of or photographs illustrating the extra work done. Deluge's employees, including its project manager, had signed and/or included written comments on these forms. In particular, Deluge's employees had included written comments on a majority of the signed forms that Vim's claims would be subject to Samsung's approval.

9 One of the issues before the court was thus whether Vim's variation claims could be allowed, notwithstanding the non-compliance with cl 16.

10 In the first-instance judgment, the High Court dismissed Vim's variation claims as there were no written instructions from Deluge's project manager. The judge also held that there had been no waiver or estoppel in this regard.[4]

11 This was overturned on appeal. The Appellate Division allowed all of the variation claims Vim pursued on appeal, on the grounds that (a) the requirement for written instructions in cl 16 was not intended to be a condition precedent to payment,[5] and (b) in any event, Deluge had waived the need for written instructions through its conduct.[6] These two grounds are considered in turn below.

III. Distinction between mere administrative provision and condition precedent to payment

12 The first issue is whether the requirement for written instructions in cl 16 amounted to a condition precedent to Vim's entitlement to payment for its variation claims.

13 In the High Court judgment, the judge adopted a strict interpretation of the procedural requirements in cl 16. While the judgment made no reference to the words "condition

4 *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 at [19].
5 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [35].
6 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [45].

precedent", the judge appeared to treat the requirement for written instructions as such. For example, the judge reasoned that:[7]

> In not paying for alleged variation works carried out without such written instructions, Deluge was simply honouring what parties had contractually agreed to in clause 16 of the Subcontract.

14 In doing so, the judge relied on *Mansource Interior Pte Ltd v CSG Group Pte Ltd*[8] ("*Mansource*") as authority for the proposition that the "contractual conditions"[9] for variation claims must be complied with.[10]

15 *Mansource* concerned the contract between a subcontractor and a sub-subcontractor, which provided that "there shall be no claim whatsoever unless it is a variation work authorised and approved by [the main contractor] only".[11] The defendant sub-subcontractor claimed payment for variation work it had allegedly carried out based on the plaintiff subcontractor's oral instructions, and it was undisputed that the main contractor had not authorised or approved these works. The High Court in *Mansource* dismissed the defendant's variation claims on the basis that "the contractual conditions agreed between the plaintiff and defendant for a successful variation claim are not satisfied".[12]

16 On appeal, the Appellate Division in *Vim Engineering (AD)* clarified that *Mansource* does not in fact stand for the broad proposition that all "contractual conditions" for variation instructions must be complied with.[13] The Appellate Division also noted the following distinguishing factors in *Mansource* which

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7 *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 at [32].

8 [2017] 5 SLR 203.

9 This was the term used by the High Court in *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203 at [101], which was adopted by the judge in *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 at [20].

10 *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 at [20]–[21].

11 See *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203 at [7].

12 *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203 at [101].

13 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [36]. See also para 14 above.

rendered it of limited assistance to the dispute in *Vim Engineering (AD)*.

(a) First, cl 17 in the subcontract in *Mansource* contained wording which was "quite specific and quite different"[14] from cl 16.

(b) Second, the issue of waiver was not considered by the court in *Mansource* because the defendant had not made good its submissions on this.[15]

17 Having considered in some detail the wording of cl 16 itself and whether it was intended to be a condition precedent to payment,[16] the Appellate Division ultimately held that "cl 16 is not drafted in a stringent manner requiring strict compliance failing which a variation claim will fail".[17] In reaching this conclusion, the Appellate Division helpfully distinguished cl 16 from the following two types of clauses which were likely to be interpreted as conditions precedent.[18]

(a) The first is a clause which expressly states that a written authorisation of work done or written confirmation of an oral order is a condition precedent for any right to additional payment. For example, where a clause provides that there must be a written order signed by the architect and that no extras will be paid for unless so ordered, a proper written order is likely to be a condition precedent to payment for variation work.[19]

14 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [36].

15 See *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203 at [105] and *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [36].

16 See *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [29]–[36].

17 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [32].

18 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [32].

19 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [32], citing Stephen Furst QC & The Hon. Sir Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 10th Ed, 2021) at para 4-072.

Similar peremptory language was used in the subcontract in *Mansource*:[20]

> This Sub-Contract shall be on a back-to-back basis to the contract between [the plaintiff] and [the main contractor] and there shall be *no claim whatsoever unless* it is a variation work *authorised and approved* by [the main contractor] *only*. [emphasis added by the Appellate Division in *Vim Engineering (AD)*]

In contrast, while cl 16 states that "[s]uch variation shall be carried out only with written instruction[s] from [Deluge's] Project Manager", it does not expressly state that Vim would be barred from claiming for such work unless there are such written instructions, or that such written instructions are a condition precedent to payment.

(b) The second is a clause which specifies a time within which the contractor is to inform the architect or owner in writing that it considers the instruction, direction or request to do certain work as a variation with time and cost consequences.

A. Observations on the Appellate Division's analysis

18 In the authors' view, the Appellate Division's approach in first considering the nature of the procedural requirements in cl 16, and whether they were intended to be a condition precedent to payment, is appropriate.

19 As mentioned above, the courts have developed ways to allow contractors to claim for variation work despite non-compliance with the contractual procedure. For reference, these have been summarised in *Hudson's Building and Engineering Contracts*[21] ("*Hudson's*"), and include:

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20 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [36].

21 *Hudson's Building and Engineering Contracts* (Nicholas Dennys QC & Robert Clay gen eds) (Sweet & Maxwell, 14th Ed, 2020) at para 5-044, which was cited by the Appellate Division in *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [34].

(a) interpreting such requirements as merely administrative and not a condition precedent;

(b) finding that there has been a waiver of the required formalities;

(c) finding that there has been an "implied contract" to pay the contractor for the additional work;

(d) treating a particular variation as outside the scope of the contract;

(e) allowing the contractor to recover on the basis of "unjust enrichment" reasoning (for example, by allowing a claim on a *quantum meruit* basis); and

(f) giving a wide interpretation to an arbitrator's power of review.

As can be seen from the above, determining whether the procedural requirements are merely administrative, rather than a condition precedent to payment, is the logical first step.

20 In terms of distinguishing mere administrative requirements from conditions precedent to payment, the Appellate Division's requirement for "stringent"[22] wording before a clause is interpreted as a condition precedent, rather than a mechanistic application of contractual provisions, is more likely to give effect to the commercial bargain struck between parties.

21 Furthermore, there are good reasons for why the two abovementioned categories of clauses,[23] as opposed to a clause like cl 16, should generally be treated as conditions precedent to payment:

(a) For the first category of clauses, the plain language of the clause generally makes clear that the parties intended the procedural requirements to be strictly complied with. For example, the clause may expressly use the words "condition precedent", or it

22 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [33].

23 See para 17 above.

might spell out the consequences of non-compliance (*ie*, that no claim by the contractor would be allowed under the contract unless the procedural requirements were satisfied).

(b) The second category of clauses relates to clauses which place the burden on the contractor to provide written notice to the employer or the consultant that it considers a particular instruction to be a variation. The contractor's compliance with this notice mechanism is especially important in contracts which do not stipulate a template format in which variation orders are to be issued, and the employer or consultant may simply issue an instruction to the contractor to do certain work, without any express recognition of whether this work fell within the contractor's original scope of work. In these circumstances, the employer may not be aware that the work ordered would amount to a variation. This is especially since the contractor is likely to possess better knowledge on whether any additional expense would be incurred. The notice mechanism is thus crucial for the employer to make an informed decision on whether it intends to issue an instruction for a variation, and is likely to be applied strictly by the courts. As summarised in *Hudson's*:[24]

> […] contractual provisions requiring notice of claims within a stipulated period are generally treated very differently. *The courts will frequently interpret them as conditions precedent to any claim and apply them relatively strictly so as to defeat contractors who fail to comply with such requirements.* This attitude is fully justified, it is submitted, *since Employers and their Architects may legitimately require an opportunity to reconsider and possibly withdraw an instruction, or to mitigate its effect by giving a still further or different instruction if the first is found to provoke a claim to additional payment*. This is particularly so since the Contractor, with their

24 *Hudson's Building and Engineering Contracts* (Nicholas Dennys QC & Robert Clay gen eds) (Sweet & Maxwell, 14th Ed, 2020) at para 5-040, which the Appellate Division partially cited in *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [32].

> unique knowledge of their own internal pricing and construction arrangements, will inevitably know much more about any additional expense than an Employer or the Employer's advisers at the time the instruction is given. Notice requirements will be doubly important for the Employer if the contract, as is usual in England and the Commonwealth, does not impose a written 'change order' or 'variation order' requirement of form (which on its face would indicate the Architect's awareness of a price modification), but merely an instruction in writing to do the work in question, which might well carry no such implication in the mind of the person giving it. [emphasis added]

B. Implications for the interpretation of contractual procedures for variation instructions in standard form contracts

22 In the light of the Appellate Division's analysis on conditions precedent to payment, it is helpful to review the implications of the Appellate Division's decision on the standard form contracts commonly used in Singapore.

23 Clause 12(1)(a) of the SIA Building Contract 2016 Without Quantities[25] empowers the Architect to "at any time to give Directions or Instructions, as the case may be, requiring a Variation to be made in the original scope of work". Clause 1(2)(a) in turn provides that:

> … The Contractor shall comply with all written Directions or Instructions given by the Architect. *No claim by the Contractor under this Contract shall be made based upon an Direction or Instruction of the Architect unless the Direction or Instruction shall have been given in writing.* [emphasis added]

24 Clause 1(2)(a), which provides that the contractor shall not make a claim *unless* it is based on a *written* Direction or Instruction by the Architect, would appear to contain the type of stringent language which the Appellate Division held was lacking in cl 16. While cl 1(2)(a) does not expressly use the words "condition precedent", the plain wording of the clause makes clear that the absence of a written Direction or Instruction by

25 1st Ed.

the Architect would bar the Contractor from making a claim under the contract. As such, it appears likely that the courts will construe the requirement for written Directions or Instructions by the Architect as a condition precedent to payment of variation claims by the contractor.

25 Another example is cl 19.2 of the Public Sector Standard Conditions of Contract for Construction Works 2020[26] ("PSSCOC"), which provides that:

> 19.2 Power to Order Variations
>
> The Superintending Officer may at any time issue an instruction in writing requiring a variation. If or to the extent that an instruction does not state that it requires a variation but the Contractor considers that it does require a variation, the Contractor shall within 14 days from the date of receipt of the instruction notify in writing the Superintending Officer who may, if he thinks fit, within 14 days from the date of receipt of the Contractor's notification, confirm, modify, rescind or contradict in writing the instruction and the Contractor shall then comply forthwith.

26 The second sentence of cl 19.2 places the burden on the Contractor to provide written notice to the Superintending Officer if the Contractor considers that an instruction requires a variation. This contractual mechanism falls squarely within the second type of clauses the Appellate Division cited as an example of common conditions precedent to payment.[27] From the Appellate Division's analysis, and for the reasons explained above,[28] it seems likely that the courts will require strict compliance with this notice mechanism before the contractor may be entitled to payment for variation work.

27 As mentioned above, there are good practical reasons for this, especially since the PSSCOC does not stipulate a specific "variation order" form, but simply requires an instruction from the Superintending Officer to do certain work. The notice mechanism in cl 19.2 is thus crucial in ensuring that (a) the

26 8th Ed.
27 See para 17(b) above.
28 See para 21(b) above.

employer is aware that it is ordering a variation and (b) if it does not intend to do so, it has the opportunity to "modify, rescind or contradict" the instruction.

IV. Waiver by election

28 The second issue is whether Deluge had waived the requirement for written instructions. It is particularly interesting to note the Appellate Division's and the judge's different treatment of Deluge's written comments on the variation forms submitted by Vim. As mentioned above, Deluge had consistently signed these forms and on many of these forms included written comments that Vim's variation claims would be subject to Samsung's approval.

29 In the first-instance judgment, the judge accepted Deluge's argument that Deluge's signature on the forms was simply acknowledgment that the work had been carried out, but not that those work were variation work or that Vim would be paid for such work.[29] Crucially, the judge treated Deluge's written comments that Vim's claims would be subject to Samsung's approval as militating against Vim's argument of waiver, as any waiver of the need for written instructions would appear to be conditional upon Samsung's approval of Vim's variation claims, and there was no evidence that Samsung had approved or paid Deluge for any of Vim's variation claims.[30]

30 On the contrary, the Appellate Division held that Deluge's written comments were particularly significant[31] in establishing that Deluge had waived the requirement for written instructions. In reaching this conclusion, the Appellate Division considered whether the elements for waiver by election had been satisfied, namely, that a party unequivocally chooses not to exercise one

29 *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 at [34].
30 See *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 at [35].
31 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [44].

of two inconsistent rights, and he is aware of the circumstances giving rise to the existence of that right.[32]

(a) **Had Deluge unequivocally chosen not to enforce the requirement for written instructions in cl 16?** The Appellate Division considered Deluge's written comments that Vim's claims would be subject to Samsung's approval "a clear acknowledgment"[33] that Deluge was not disallowing the claims on the basis of not having given written instruction under cl 16 to carry out such work. The Appellate Division was of the view that "it was irreconcilable for Deluge's representatives to sign the variation work claims *and include* written *comments that these would be subject to Samsung's approval,* and then for them to subsequently insist that the work ought to have been carried out only under written instructions from Deluge pursuant to cl 16 of the Subcontract"[34] [emphasis in original].

(b) **Was Deluge aware of the circumstances giving rise to its right?** The Appellate Division observed that, while Deluge had included comments in the earlier few variation forms directing Vim to "clarify" or "discuss with [the] contract department", its comments in the subsequent variation forms were "ostensibly made with greater confidence as they stated that the claims would be subject to Samsung's approval".[35] On this basis, the court inferred that Deluge must be taken to have known of, and thus voluntarily relinquished, the requirement for written instructions in cl 16.[36]

32 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [43], citing the Court of Appeal's decision in *Audi Construction v Kian Hiap Construction* [2018] 1 SLR 317 at [54].

33 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [44].

34 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [45].

35 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [44].

36 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [44].

31 The Appellate Division thus concluded that Deluge had waived the requirement for written instructions in cl 16, and was thus not entitled to rely on the lack of written instructions to reject Vim's variation claims.

A. Implications on waiver in the context of "back-to-back" contracts

32 It is noteworthy that the Appellate Division allowed Vim's variation claims notwithstanding the fact that cl 16 provided that any variations work "shall be on a back-to-back basis with the Main Contract", and there was no evidence that Samsung had approved or paid Deluge for any of Vim's variation claims.[37]

33 In this regard, the Appellate Division made certain observations on what are commonly termed "back-to-back" contracts, and in particular endorsed the view that a "back-to-back" provision is not a term of art and may hold different meanings depending on the factual matrix:[38]

> Such an approach comports with an additional commercial reality that intermediate contractors and sub-contractors in large-scale building projects are engaged in complex and overlapping scopes of work set out in 'back-to-back' contracts. In the present case, cl 16 stipulates that variation work claims shall be on a 'back-to-back' basis. As noted by the High Court in *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR(R) 918 ('*GIB Automation*') at [35] and [45]–[50], *a 'back-to-back' provision, while not uncommon in many sub-contracts in the construction industry, is not a term of art and must be construed in the light of the factual matrix known to the parties at the time they contracted and the contract as a whole*. More importantly, the effect of such a provision is to enable an intermediate contractor 'who has undertaken certain obligations under a head contract … [to] pass on those obligations to a sub-contractor' and thereby avoid exposure under either contract (*GIB Automation* at [45]). But as the High Court noted in *GIB Automation* at [50]:

37 See *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 at [35] and *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [42].

38 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [40].

> 50 *Just what is incorporated will depend in each case upon such things (among others) as what was objectively known to the parties at the time they entered into the contract, what specific references were made to the main contract document, and whether the terms of the main contract relevant to the back-to-back provision were of such a nature that they should have been and were specifically brought home to the sub-contractor or whether they were sufficiently general that they would fall within the general appreciation and knowledge of the parties.* By way of example, it may be generally known to a sub-contractor that the main contractor would in due course make an application for payment to the employer in respect of works done by the sub-contractor. On the other hand, it may not be generally known to the sub-contractor that requests have to be in a very particular format.

[emphasis in original removed; emphasis added]

34 In the specific context of cl 16, the following features may explain why the Appellate Division allowed Vim's variation claims notwithstanding the lack of evidence on whether Samsung had in fact approved these claims.

(a) While cl 16 provided that any variation work shall be on a "back-to-back" basis with the main contract, it also provided that such variation "shall be carried out only with written instruction[s] from [Deluge's] Project Manager". From this, the Appellate Division concluded that Deluge had "reserve[d] to itself control over sanctioning of variations and Vim has to base its claims on the unit rates in accordance with the Schedule of Rates in the sub-subcontract with Deluge".[39]

(b) In addition, the Appellate Division noted that Vim was not privy to any of Samsung's criteria for the approval of variation work claims, and that it was not evident that Deluge ever conveyed to Vim whether Samsung

39 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [41].

had approved the variation work claims that Deluge had purportedly submitted on Vim's behalf.[40]

35 The Appellate Division's analysis in this regard may provide some guidance on the likely success of waiver arguments in the context of "back-to-back" contracts. For one, a distinction may be drawn between clauses which purport to be "back-to-back" to an upstream contract *and* require the approval of the upstream contractor (as in *Mansource*), and clauses which similarly purport to be "back-to-back" but retain some discretion for a party to the contract to approve the other party's variation claims (as in *Vim Engineering (AD)*). On the facts of *Mansource*, even if the defendant had fully argued its case on waiver, it may have faced a more difficult challenge than Vim in claiming for variation work on the back of the plaintiff's oral instructions, because a plain reading of the contractual provision suggested that, beyond the main contractor's approval and authorisation, the plaintiff was not intended to have any residual discretion on the success of the defendant's variation claims.

36 Second, the mere fact that a subcontract, or certain provisions in the subcontract, is stated to be "back to back" to an upstream contract does not necessarily mean that any claims under the subcontract are subject to the upstream contractor's approval, especially if it can be shown that the sub-subcontractor did not have sight of the upstream contract, or that the sub-subcontractor was not informed of whether the upstream contractor had in fact approved its claims.

V. Conclusion

37 The Appellate Division's decision in *Vim Engineering (AD)*, viewed together with *Mansource*, provides helpful guidance to the industry on when a contractor's variation claim may succeed even if the contractual procedures have not been complied with. Read together with *Mansource*, the decision in *Vim Engineering (AD)* delineates (a) when a procedural requirement may be interpreted

40 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) 2 at [42].

as a condition precedent, and (b) when such a requirement may be deemed as waived. By providing certainty to the contractual parties in a principled manner, this allows the parties to better understand their respective rights and obligations when drafting construction contracts as well as during the execution of variation work.