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7. BUILDING AND CONSTRUCTION LAW

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I. Contract formation

7.1 During the year under review, two cases in the High Court feature the familiar refrain of subcontract works which have been placed with some haste in order to achieve demanding completion timelines. While the cases do not deal with any novel principle of law, the facts illustrate the nature of the factual inquiry to determine this issue and, in particular, the weight to be attached to the fact that works have commenced notwithstanding that not all the terms have been concluded by the parties.

A. Agreement as to price

7.2 While not necessarily determinative, price is generally considered a basic term which is expected to be concluded as part of the contract formation process.[1] In *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd*[2] ("*DSL Integrated*"), DSL Integrated Solution Pte Ltd ("DSL") was employed as a subcontractor for the design, supply and installation of electrical works. DSL, in turn, invited Triumph

1 See *Ramo Industries Pte Ltd v DLE Solutions Pte Ltd* [2020] SGHC 4 at [68], considered in (2020) 21 SAL Ann Rev 172 at 172–174, paras 7.1–7.5.
2 [2022] SGHC 221.

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Electrical System Engineering Pte Ltd ("TES") to quote for a part of these electrical works as a sub-subcontractor. On 17 September 2020, TES submitted to DSL a quotation for the relevant electrical works. On 22 September 2020, DSL responded to TES by an e-mail ("Confirmation E-mail") setting out a revised quotation ("Revised Quotation") at "8% from CNQC's contract sum" and stating: "This quotation approved in principle and pending official main contractor's contract."

7.3 Before the High Court, TES argued that there was no contract; the price was indeterminate since the statement "8% from CNQC's contract sum" could be read to mean "8% of the CNQC's contract sum" or "8% less than the CNQC contract sum". Kwek Mean Luck J ruled that the statement meant that DSL was entitled to retain 8% of the contract price and TES was to be entitled to 92% of the contract price. The price was therefore not indeterminate.[3] In any case, the court observed that TES in preparing its progress claims had clearly allowed for this 8% difference in a manner consistent with this construction.[4]

B. Commencement of work

7.4 As with the agreement as to price, the fact that a party commenced with the works in the absence of a concluded agreement does not always mean that a contract is in place. In *Siong Ann Engineering Pte Ltd v Pure Group (Singapore) Pte Ltd*[5] ("*Siong Ann*"), the case concerns a dispute between a contractor ("SAE") and a construction management company ("PGS") for the design, supply and installation of a temporary ramp to transport materials from the entrance of a theatre to the stage area. On 16 January 2018, SAE submitted a quote for the works in the sum of $100,000. Following discussions concerning the design and specifications, on 1 February 2018, SAE submitted a revised quote of $130,180. A further quotation was submitted by SAE on 5 February 2018 incorporating further details but retaining the terms on the scope of work, price and other terms of the 1 February 2018 quotation. On 9 February 2018, SAE was instructed to proceed with part of the works except for the works that were not approved. Sometime after the work was started, the contractor was instructed to stop further work because of concerns with the calculations of the load capacity of the ramp.

3 *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd* [2022] SGHC 221 at [17].
4 *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd* [2022] SGHC 221 at [18].
5 [2022] SGHC 73.

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7.5 The High Court concluded that there was an agreement between the parties on the terms of the 5 February 2018 quotation. In arriving at this finding, Choo Han Teck J considered it significant that after the rounds of revisions to the quotations, the contractor was permitted to commence works. Choo J noted in particular the existence of an e-mail expressly instructing the contractor to have the steel materials ready for fabrication and to have the ramp installed by 23 February 2018. He considered that this amounted to a clear instruction to commence work to meet a tight deadline.[6] In his judgment, the learned judge also highlighted that there were no objections from PGS despite the fact that it was informed on two occasions that SAE had started the ramp works, suggesting that the parties had come to an agreement for these works.[7]

7.6 Similarly, one of the considerations that supported the view that a contract was in place between the parties in *DSL Integrated*[8] was that TES started work in September 2020. The court accepted that while this on its own was not determinative, it raised questions as to the credibility of the argument that no contract was in place when work started.[9] In so deciding, the court distinguished the facts in *DSL Integrated* from those in the early decision of *L & M Equipment Pte Ltd v Hyundai Engineering & Construction Co Ltd*[10] ("*L & M Equipment*"), where it was held that there was no contract between a subcontractor and a sub-subcontractor notwithstanding that the latter had already commenced work at the former's request. It was noted that in *L & M Equipment*, the sub-subcontractor negotiated directly with the main contractor without the involvement of the subcontractor, there was no written sub-subcontract agreement and, specifically, no terms were agreed for the valuation of work for interim payments.[11]

C. Other matters relevant to contract formation

7.7 It is useful to summarise the other matters which the High Court considered in *DSL Integrated* in concluding that there was a binding agreement between the parties in that case. It is considered that these factors serve as useful examples of practical matters which may, in an

6 *Siong Ann Engineering Pte Ltd v Pure Group (Singapore) Pte Ltd* [2022] SGHC 73 at [16].
7 *Siong Ann Engineering Pte Ltd v Pure Group (Singapore) Pte Ltd* [2022] SGHC 73 at [19].
8 See para 7.2 above.
9 *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd* [2022] SGHC 221 at [42].
10 [1999] SGHC 182.
11 *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd* [2022] SGHC 221 at [50].

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appropriate situation, assist in the analysis on this point. *First*, the court noted that the relevant project information on work scope and the contract documents had been duly sent by DSL to TES,[12] following which parties engaged in further discussions on the terms of the Revised Quotation.[13] *Secondly*, the court also considered relevant records showing that TES did not at any point disagree with the terms of the Revised Quotation.[14] *Thirdly*, TES had acknowledged to the main contractor its position as DSL's subcontractor in its correspondence with the main contractor and in the entries relating to various project documents, including those pertaining to risk assessment, safe work procedure, method statements and project organisation.[15]

7.8 In *Siong Ann*,[16] Choo J noted that PGS was updated by SAE on the progress of the ramp works and provided with progress photographs. It also appeared relevant that there was a clear oral assurance by PGS that the necessary formalities relating to the contract would be regularised. On this point, the learned judge referred to the incident on 19 February 2018 when SAE requested for a purchase order and PGS had simply replied that "it can be done tomorrow".[17]

II. "Back-to-back" contracts

7.9 Another issue in *DSL Integrated* was whether the sub-subcontract was a back-to-back subcontract. DSL had in its Revised Quotation indicated that the subcontract would be a "back-to-back contract". It has been settled earlier that "back-to-back contract" is not a term of art.[18] It is essentially a pragmatic term of incorporation of the terms of the head contract into a subcontract. The court noted that, on the authorities, a relevant point was whether TES was aware of the terms of the main contract. In *Hi-Amp Engineering Pte Ltd v Technicdelta Electrical*

12 *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd* [2022] SGHC 221 at [30].
13 *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd* [2022] SGHC 221 at [34]–[35].
14 *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd* [2022] SGHC 221 at [38].
15 *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd* [2022] SGHC 221 at [44]–[47].
16 See para 7.4 above.
17 *Siong Ann Engineering Pte Ltd v Pure Group (Singapore) Pte Ltd* [2022] SGHC 73 at [11] and [21].
18 *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd* [2022] SGHC 221 at [21], following *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR(R) 918 at [35].

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Engineering Pte Ltd,[19] it was held that that there was no back-to-back contract because the subcontractor was not furnished with the main contract at the point when the subcontract was signed.

7.10 However, the true test appears to be whether the terms to be incorporated are matters which fall within the general appreciation and knowledge of parties to the particular subcontract. In the course of his judgment in *DSL Integrated*, Kwek J also referred to *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd*[20] ("*GIB Automation*") where Sundaresh Menon JC described the analytical approach in these terms:[21]

> The weight to be attached to the fact that a party has not seen the main contract must be considered in the light of the factual matrix as a whole. It may not be decisive if the circumstances are such that the terms said to be affected by the back-to-back provision are matters that would fall within the general appreciation and knowledge of the parties to the subcontract. On the other hand, if the terms are highly technical and particular, it may be more important. Further, consideration should be given to the sub-contractor's ability to ask for a copy of the main contract. It may also be overcome with sufficiently explicit language making it clear that the head contract was being incorporated and that the sub-contractor was deemed to have acquainted itself with its terms.

7.11 In this case, the main contract was not even signed on 22 September 2020, the date of the Revised Quotation, and it was only on 23 December 2020 that DSL sent TES a copy of the main contract. Since both the parties in this case were unaware of the terms of the main contract, the court concluded that "it cannot be said that all the terms of the Main Contract were imported into the parties' agreement as of 24 September 2020".[22] Applying the analytical approach laid down in *GIB Automation*, Kwek J held that the only terms of the main contract within the general appreciation and knowledge of the parties in this case were the contract price, the work scope and the term that TES would be paid 92% of the contract price.[23]

19 [2003] SGHC 316.

20 [2007] 2 SLR(R) 918.

21 *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR(R) 918 at [48].

22 *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd* [2022] SGHC 221 at [22].

23 *DSL Integrated Solution Pte Ltd v Triumph Electrical System Engineering Pte Ltd* [2022] SGHC 221 at [24].

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III. Variations

A. Generally

7.12 A number of the judgments delivered during the year addressed the subject of variations in a construction contract. The cases illustrate the operation of many of the settled principles of the subject by reference to the approaches in undertaking the factual inquiry required in these cases.

B. Variations arising from inconsistencies in the contract

7.13 In *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd*[24] ("*ICOP Construction*"), the facts concern a subcontract for carrying out micro-tunnelling works for a Public Utilities Board ("PUB") project. The subcontract was placed by way of a letter of award and a supplemental letter ("the LOA"). The fact that the various documents constituting the subcontract contained several inconsistencies should be familiar to most readers in the industry.[25]

7.14 The first of the variation claims related to the supply of hydraulic joints for a pipeline referred to as DN1200mm pipeline. The method statement expressly mentioned the use of "chipboard" joints. However, given the length of the pipe segments, it was common ground that hydraulic joints would normally be used. The main contractor ("TSCE") thus argued that the subcontractor ("ICOP") should have included the provision of hydraulic joints in its rates. Lee Seiu Kin J noted that ICOP's final quotation for this work predated the execution of the subcontract and pre-contractual discussions. In the circumstances, it was unlikely that ICOP would have considered the need for hydraulic joints in its final quotation. ICOP was therefore entitled to be paid for the hydraulic joints as a variation.[26]

C. Prices in the bill of quantities

7.15 Another variation claim also concerned hydraulic joints, in this case for a larger diameter pipeline, the DN1600mm pipeline. In this case, the bill of quantities expressly provided that TSCE was to pay for JC132 and JC238 hydraulic joints but these were to be used in connection with

24 [2022] SGHC 257.
25 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [20].
26 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [22].

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3.5m pipe sections. During the course of the works, TSCE instructed ICOP to use 3.0m pipe segments, and this resulted in an increase in the number of hydraulic joints required. TSCE's main argument against paying for the increase was that ICOP's obligation was to supply the required number of joints for the total length of pipeline, irrespective of the length of individual pipe sections. The court rejected TSCE's argument. In the course of his judgment, Lee J explained the weight given to the bill of quantities ("BQ") in this claim situation:[27]

> The BQ set out a specific rate per metre for ICOP's supply of hydraulic joints based on a pipe length of 3.5m. One logically expects this rate to increase if the length of each pipe section was shortened, and thus, more hydraulic joints are required. It is wholly unrealistic for TSCE to suggest that ICOP would have provided the exact same per metre quotation for hydraulic joints irrespective of the number of joints which ICOP would actually need to use in the installation of the pipeline.

7.16 While the BQ is not consistent, the learned judge ruled that "the priced item (on which ICOP relies) should be preferred over any fringe description of the characteristics of [the pipeline]".[28] In this case, given that the priced item in the BQ provided for provision of hydraulic joints per metre for 3.5m pipe lengths, it was irrelevant whether the subcontractor should have known that the pipes would eventually be constructed in 3.0m pipe lengths.[29]

D. *Variation claim for working space*

7.17 Another of the variation claims related to the cost of providing "working space" in the tunnelling shafts. As a result of the misalignment of tunnel axis as provided by TSCE and a protruding pipe cap, ICOP was prevented from extracting its micro-tunnel boring machine in one piece. ICOP's submission was that TSCE should have allowed sufficient working space for this operation in planning the alignment of the tunnels. Lee J rejected this claim, primarily because the case as founded in tort had not been pleaded.[30] However, the learned judge considered that even if this was not an obstacle, the claim would still fail because there was nothing in the subcontract (in particular the specifications) to suggest that TSCE had to provide anything other than a shaft with

27 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [30].
28 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [31].
29 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [31].
30 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [44] and [46]–[47].

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a minimum internal diameter of 7.5m "wall to wall".[31] It would appear from the learned judge's reasoning that the provision for working space falls within the subcontractor's scope of works in the absence of express provisions to the contrary in the subcontract.

E. Variation to the terms of a contract and a variation to the works

7.18 It seems surprising that it is possible for parties to conflate a variation to the works (which forms the subject of a contract) with a variation to the terms of the contract itself. In *Backho (S) Pte Ltd v KSE Marine Works Pte Ltd*[32] ("*Backho*"), a subcontractor ("KSE") carrying out certain reclamation and marine works invited an equipment specialist ("Backho") to quote for the deployment of a "Super Long Arm Excavator" together with operators and ancillary equipment. Backho furnished a series of quotations; the first quotation on 30 August 2019 ("the First Quotation") and two quotations on 4 February 2020. Backho applied and successfully obtained an adjudication determination in its favour when KSE failed to pay on a payment claim. In applying to set aside the adjudication determination, KSE argued, *inter alia*, that the determination was inconsistent with "contractual legal principles" on the ground that the subsequent quotations could not vary the terms of the contract formed by the First Quotation given that the latter did not contain a term allowing for the variation of the works.

7.19 In the High Court, Tan Siong Thye J distinguished between the two contexts in which the term "variation" is used:[33]

> The present dispute does *not* concern whether there was a variation order issued by any party. If there was a clause that enabled variations of the scope of works to be ordered, the issue then is whether the parties were vested with the power under the terms of a construction contract to be able to order a subsequent variation of the works unilaterally. In contrast, the material issue here is whether the parties had agreed to amend or vary the construction contract. This concerns the parties' objective intentions … [emphasis in original]

7.20 Accordingly, the court held that KSE had misunderstood the applicable legal context and rejected its submission that the adjudicator had disregarded the applicable law.

31 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [43].
32 [2022] 4 SLR 1332.
33 *Backho (S) Pte Ltd v KSE Marine Works Pte Ltd* [2022] 4 SLR 1332 at [66].

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IV. Delay claims

A. Generally

7.21 Two decisions delivered during the year under review are particularly instructive on the subject of delay analysis and extensions of time ("EOTs"). The first of these is *ICOP Construction*, mentioned earlier in this chapter,[34] and the second decision is a return to the "bitterly fought and long running dispute" in a judgment by the Appellate Division of the High Court ("High Court (Appellate Division)") in *Ser Kim Koi v GTMS Construction Pte Ltd*[35] ("*Ser Kim Koi*").

B. Selecting the baseline programme

7.22 The first port of call in any delay analysis is the identification of the baseline programme. In *ICOP Construction*, the learned judge defined a baseline programme in these terms:[36]

> An applicable baseline programme is a construction programme which sets out the start and end dates of works, the planned duration of those works, and the sequence in which they are to be carried out. It serves as the schedule against which progress is tracked and also, conversely, the schedule against which delays are assessed.

7.23 It is not unusual for each party to canvass its case for its preferred baseline programme. It is interesting therefore to consider the process by which the court in this case decided on its selection of the applicable programme.

7.24 Three competing programmes were presented before the court. The court declined to accept the latest of the three programmes because it was not a programme which was accepted by TSCE.[37] The court also excluded the earliest of the three programmes because it was superseded by the late notice for the commencement of the work issued by TSCE.[38] By "a process of elimination", Lee J decided that the most relevant event was

34 See para 7.13 above.

35 [2022] SGHC(A) 34.

36 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [58].

37 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [62].

38 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [63].

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the second of the three programmes. This was submitted on 8 January 2018.[39]

C. Identifying the critical path events

7.25 ICOP contended before the court that the critical delay was caused by TSCE's late handover of the site. On its part, TSCE alleged that the works were critically delayed because of ICOP's delayed mobilisation operations. However, the court found that neither of these events were critical to the completion of the works. Instead, the critical delay was found to be caused by the delay in obtaining the necessary approvals from the Singapore Power Grid and PUB. These were necessary to enable ICOP to carry out work in the vicinity of the subterranean electricity cables and pipelines.[40] The result was that TSCE was the cause of the critical delay.[41] On this basis, Lee J determined the period of critical delay to be 69 days after allowing for a six-day work week and noting there were no other matters which affected the works during this period.[42]

7.26 ICOP's claim for prolongation costs or damages consisted of "the standby costs it incurred". Lee J was content to rely on the standby costs as jointly agreed by the experts in determining the amount to be awarded.[43]

D. Issues with framing "global" claims

7.27 In its counterclaim for liquidated damages, TSCE alleged that it suffered delay amounting to 266 days but did not particularise this with reference to the delayed events. Lee J recognised that TSCE was mounting what was considered a "global" or a "composite" delay claim. He cited with approval the English decision of *Walter Lilly & Co Ltd v Mackay*[44] where Akenhead J expressed the view that there is nothing wrong with mounting a claim on this basis[45] but cautioned that this is a "risky

39 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [64].
40 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [76] and [81]–[82].
41 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [83].
42 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [85].
43 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [86].
44 [2012] EWHC 1773.
45 *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773 at [486(c)].

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enterprise" and that "added evidential difficulties" may be encountered with this approach.[46]

7.28 In contrast, in its claim for 158 days of compensable delays, ICOP chose to ascribe specific days to the various delayed events – the worksite readiness and handover issue, the authority approvals issue, the headwall issue and the noise restriction issue.[47] Lee J considered this to be more "straightforward" in that it "facilitates simpler, itemised treatment of each head of delay subject to consideration of opposing causal arguments as well as evidence by the delay experts on whether a work item was on the critical path".[48]

V. Extension of time

A. Revisiting **Ser Kim Koi**

7.29 In *Ser Kim Koi*,[49] the judgment of the High Court (Appellate Division) examined the construction of several of the provisions of the Singapore Institute of Architects' Standard Form of Contract[50] ("SIA Conditions") relating to *force majeure* as a ground for EOT and the operation of the EOT certification mechanism itself. Arising from the wide-ranging discourse running some 253 pages, the judgment of the High Court (Appellate Division) is instructive for its detail in examining these and other principles pertaining to contract administration. The facts of the case have been set out in last year's Annual Review,[51] but it will be useful for the purpose of this chapter to recall the key aspects of the facts.

7.30 The case concerned a contract to build three bungalows at a contract sum of $13.13m. The contract, which incorporated the SIA Conditions, provided for the works to be completed within 20 months on 21 February 2013. On 15 May 2013, the architect certified completion as at 17 April 2013, granting full EOT up to that date. This was notwithstanding that the buildings failed their Temporary Occupation Permit ("TOP") inspection two weeks later. It was not disputed that the TOP was not obtained until 16 September 2013. The contractor brought the action to

46 *Walter Lilly & Co Ltd v Mackay* [2012] EWHC 1773 at [486(d)].
47 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [111] and [112].
48 *ICOP Construction (SG) Pte Ltd v Tiong Seng Civil Engineering Pte Ltd* [2022] SGHC 257 at [115].
49 See para 7.21 above.
50 9th Ed, September 2010.
51 (2021) 22 SAL Ann Rev 152 at 155–169.

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claim a sum of $1,103,915 as certified by the architect in respect of its final payment claim. The employer refused to pay the certified sum and also the architect's fees of $60,990. The employer further counterclaimed against the contractor for a sum of $12,752,651 and took out a third-party claim against the architect and other third parties for a sum of $10,853,718, alleging that the contractor and the third parties had conspired to injure him. In particular, the employer claimed that the architect had, *inter alia*, granted EOT improperly, certified deficient works as satisfactory, allowed defects to remain unrectified, and certified the project as completed when it was clearly not safe for occupation.

B. Approach to certifying extension of time

7.31 At the start of the court's analysis, the High Court (Appellate Division) considered that cl 23(1) of the SIA Conditions required three conjunctive requirements to be satisfied in order to grant an EOT, provided the condition precedent in cl 23(2) was met. First, it must be shown that there is a delay event (or events) which falls within cl 23(1). Second, such delay event or events must have in fact caused the delay. Third, the contractor must have acted with due diligence and taken all reasonable steps to avoid or reduce the delay in completion.[52]

7.32 The first instance judge had held that pursuant to cl 23(3) of the SIA Conditions, the architect has to determine a contractor's application for an EOT and to notify the contractor of its decision. However, he rejected the employer's submission that the architect acted improperly and indeed prematurely in granting the EOT request because cl 23(3) only permits an architect to determine an EOT request *after* the delaying factor has ceased to operate. This was on the basis of his observation that cl 23(3) does not state that an architect may not grant the EOT earlier if the architect is able to evaluate the EOT application before the cessation of the delay event.[53]

7.33 In affirming the High Court decision, Quentin Loh JAD, delivering the judgment of the High Court (Appellate Division), noted that the terms of cl 23(3) distinguish between an architect determining the EOT and notifying the contractor of the same. This is intended to afford the architect some "flexibility" and accords with common sense while "a delaying factor may have ceased to operate but there may be other 'knock-on' effects to other works … lying on the critical path".[54] Loh JAD considered that this flexibility is reinforced by the history of the

52 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [34].
53 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [40].
54 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [61(b)].

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SIA Conditions, in particular the conscious amendment to allow EOT to be determined retrospectively given that time extension serves no purpose other than the calculation of the quantum of liquidated damages which may be imposed by the employer.[55]

C. **Force majeure** ***as a ground for extension of time***

7.34 In *Ser Kim Koi*, the works were delayed because a power utility company had delayed completing power supply connection and in notifying the architect of the need for an overground distribution box ("OG Box"). The contractor and the architect considered that this constituted a *force majeure* and that the contractor was entitled to an EOT under cl 23(1)(a) of the SIA Conditions. The employer's contention was that cl 23(1)(a) was "meaningless" as the SIA Conditions do not define the term "*force majeure*". The High Court had rejected this, holding that a *force majeure* event is "an event that impedes or obstructs the performance of a contract, which was out of the parties' control and occurred without the fault of either party".[56]

7.35 The High Court (Appellate Division) agreed with the High Court that the contractor was entitled to an EOT but departed from the High Court's holding that the delays in connection with the power utility constituted a *force majeure*. Loh JAD made two points in his judgment delivered on behalf of the High Court (Appellate Division). First, he pointed out that not *any event* that is beyond the parties' control necessarily constitutes a *force majeure* event. Thus, a change in economic or market circumstances, affecting the profitability of a contract or the ease with which the parties' obligations can be performed, is not regarded as a *force majeure* event.[57] Loh JAD considered that the essence of a *force majeure* event is a radical external event that prevents the performance of the relevant obligation and is due to circumstances beyond the parties' control. It is not sufficient that the event merely prevents the performance of a contractual obligation:[58]

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55 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [62], referred to Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell, 5th Ed, 2018) at paras 21.287 and 21.288.

56 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [197]; see also discussion in (2021) 21 SAL Ann Rev 172 at 174–175, paras 7.7–7.9.

57 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [76], referring to *The Concadoro* [1916] 2 AC 199 and *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497.

58 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [77], citing with approval *Chitty on Contracts* vol 1 (Hugh Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2019) at para 15-164.

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> The CA [that is, Court of Appeal] observed in *Sato Kogyo* at [57] that '*force majeure* clauses would – in the ordinary course of events – be triggered only where there was a *radical* external event that supervened and that was not due to the fault of either of the contracting parties' …. The use of the words 'radical' and 'external' by the CA suggests that the phrase '*force majeure*' would cover only those events or circumstances which were generally not, at the time the contract was entered into, contemplated or expected to or which might reasonably have been foreseen to occur during the performance of the contract. [emphasis in original]

7.36 On this construction, the relevant EOTs were not validly granted pursuant to cl 23(1)(a).[59] In an interesting *dicta*, the High Court (Appellate Division) observed that the COVID-19 pandemic, the lockdown that followed in 2020 and 2021, the resultant shortage of labour and materials, the prohibition of travel between countries and the ensuing disruption of supplies and manufacture of goods and material, would fall within the definition of *force majeure*.[60]

D. Other grounds for extension of time

7.37 However, the High Court (Appellate Division) held that the contractor was entitled to EOT on the basis of the other grounds under cl 23(1), notably cll 23(1)(f) and/or 23(1)(o).[61] As to cl 23(1)(f), Loh JAD considered that the power utility company was a "statutory undertaker" because it had the power to oversee and operate the power grid.[62] In respect of cl 23(1)(o), the High Court (Appellate Division) ruled that while the work for the OG Box was constructed by the power utility company, it was a variation since it is mandatory that the contractor complies with any order made by a statutory undertaker.[63] In this case, both the contractor, in its application for EOT, and the architect, in granting EOT, did not cite the basis of the EOT in terms of the particular paragraphs under cl 23(1). Therefore, the EOTs were, in principle, correctly granted by the architect whether pursuant to cll 23(1)(f) and/or 23(1)(o).[64]

59 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [91].
60 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [81].
61 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [96].
62 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [102].
63 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [102] and [103].
64 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [104].

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VI. Certification of completion

A. Issues in **Ser Kim Koi**

7.38 Most construction contracts specify the criteria on which the works may be adjudged to have been completed. In this situation, the certifier cannot certify completion if the works do not comply with the specified criteria. This was one of the areas where the High Court (Appellate Division) in *Ser Kim Koi* departed from the findings of the High Court below.

7.39 It will be recalled that in that case, the architect had certified that the works were completed as at 17 April 2013 notwithstanding that the buildings failed their first TOP inspection on 30 April 2013 and that TOP was eventually obtained only on 16 September 2013. The contract contained two provisions which were relevant to this point. Firstly, item 72(a) of the preliminaries of the bills of quantities ("Preliminaries") stated that the completion certificate would not be issued until all parts of the works were "in the Architect's opinion ready for occupation and for use". Secondly, cl 24(4) of the SIA Conditions provides that the architect may issue the completion certificate "when the works appear to be complete and to comply with the Contract in all respects".

7.40 The High Court had found that the completion certificate was improperly and prematurely issued, as the works could not have been deemed to be completed as of 17 April 2013. Instead, the first instance judge found that the works could have been deemed completed at the earliest on 28 May 2013.

7.41 The High Court (Appellate Division) noted that the High Court had reasoned that the completion certificate could be issued pursuant to item 72(a) of the Preliminaries notwithstanding that the TOP had not been obtained so long as the reasons for the failure to pass the TOP inspection were not due to "construction-related issues" (that were within the contractor's scope of works). The first instance judge had found that:

(a) The project failed the first TOP inspection because of the unequal steps and risers and these were construction-related issues.[65]

(b) However, the project failed the second TOP inspection because the landscape area of one of the bungalows was higher

65 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [328].

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than permitted. This was not a construction-related error but due to the settlement of the landscaped soil.[66]

7.42 On this reasoning, the first instance judge found that the completion certificate could not have been properly issued before 30 April 2013.[67] However, the unequal steps and risers were resolved by 28 May 2013; consequently, there was no impediment to the issuance of the completion certificate on that date. There is nothing to prevent the certification of completion if the works were only prevented from obtaining the TOP by reason of "non-construction-related issues" (which fall outside the scope of the construction contract).

B. Temporary occupation permit and completion certificate

7.43 The High Court (Appellate Division) disagreed with the High Court. First, the High Court (Appellate Division) distinguished between the statutory issuance of a TOP and the contractual issuance of a completion certificate:[68]

> The *statutory* issuance of a TOP is intended as a preliminary step towards the issuance of the Certificate of Statutory Completion (the 'CSC'). Practically, and as its name suggests, this is an important step as it entitles a person to occupy the building during the pendency of the CSC (see s 12(2)(*b*) of the BC Act). … In contrast, the issuance of the CC may, according to the terms of the construction contract, be employed as a contractual mechanism to trigger other obligations. [emphasis in original]

7.44 The High Court (Appellate Division) noted that in the subject contract, item 72(a) of the Preliminaries unambiguously stated that the works had to be ready "for occupation and for use".[69] In providing for the issuance of the completion certificate "when the works appear to be complete and to *comply with the Contract* in all respects" [emphasis added], cl 24(4) of the SIA Conditions must be read in conjunction with item 72(a) of the Preliminaries.[70]

66 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [329].
67 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [334].
68 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [131], citing the example in *Liang Huat Aluminium Industries Pte Ltd v Hi Tek Construction Pte Ltd* [2001] SGHC 334 where the High Court considered that a completion certificate of a building contract is usually issued for reasons such as (a) to stop damages or liquidated damages for delay from running; or (b) to enable the maintenance period to commence.
69 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [133].
70 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [133].

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7.45 The employer could not have entered into occupation and used the bungalows on 17 April 2013 because TOP had not been issued. This meant that the works could not be occupied and used as a dwelling-house *before* obtaining the TOP. The terms of item 72(a) did not leave any room for doubt as to what it meant. The High Court (Appellate Division) therefore disagreed with the first instance judge that the contractor would have discharged its duty to complete the works if the delays in obtaining TOP were due to non-construction factors which were not within the scope of the construction contract.[71]

7.46 Who caused, and was therefore liable for, the delay in obtaining the TOP was a separate question altogether. That was a question of liability as between the contractor and/or the architect to the employer (as the employer did not contribute to the delay in obtaining the TOP on the facts).[72]

VII. Architect's skill as contract administrator

7.47 Construction contracts incorporating the SIA Conditions look to the architect as the certifier. In substantial projects, the architect may be assisted by a quantity surveyor in carrying out the functions. One of the issues considered by the High Court (Appellate Division) in its judgment in *Ser Kim Koi* concerns the extent to which an architect must be familiar with the requirements of the contract.

7.48 Loh JAD considered that a knowledge of contract administration matters forms "one of the core standards of care and skill" expected of an architect:[73]

> There can be little doubt that one of the core standards of care and skill of an architect is that he should know the salient and more important provisions of the contract he is supervising and administering and carrying out certification functions. There may well be complex or unexpected questions of law or law applied to facts of a construction contract which an architect cannot be faulted for not appreciating. It is one thing to fail to appreciate that there is a complex latent legal issue within some provisions; it is quite another not to even know what is in the contract.

7.49 In the same passage, Loh JAD accepted that while a quantity surveyor may have carried out the initial evaluation of a claim for interim payment, "it is incumbent on the architect to exercise his own judgment, after due checking of the quantity surveyor's evaluation and calling for

71 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [138].
72 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [138].
73 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [335].

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substantiation if the architect has any doubts on any items before issuing the interim certificate of payment".[74]

VIII. Liquidated damages and general damages

A. Acts of prevention

7.50 In *Ser Kim Koi*, the High Court (Appellate Division) disagreed with the High Court's finding that the employer was prevented from recovering liquidated damages on account of an act of prevention.[75] The High Court had held that the architect's instruction (issued in his capacity as the employer's agent) to the contractor not to commence certain rectification works (involving the steps and risers) until after the first TOP inspection amounted to an act of prevention which rendered the liquidated damages clause inoperable as against the contractor.[76]

7.51 It appears unlikely that the High Court intended to pronounce a general principle that instructions of this nature constitute acts of prevention rendering the liquidated damages clause inoperable given the existence of an effective time extension certification machinery. In this case, the High Court (Appellate Division) overturned the High Court's finding on the narrow ground that the contractor did not plead the act of prevention in its pleadings.[77] The High Court (Appellate Division) observed that, in this case, the operation of the prevention principle was very fact sensitive, and that while the contractor pleaded an act of prevention, this was only with respect to the construction of the pavilion. The obvious inference is that there was no other act of prevention being relied upon. More significantly, the contractor did not argue that the architect's instructions in relation to the steps and risers was an act of prevention even in its written submissions in the High Court.[78]

B. Recovery of liquidated damages in the absence of a delay certificate

7.52 The High Court (Appellate Division) also considered whether an employer is entitled to impose liquidated damages under the SIA Conditions in a situation where the architect has not issued a delay certificate. The court accepted as settled law that liquidated damages,

74 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [335].
75 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [307].
76 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [306].
77 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [307].
78 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [307].

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as a contractually provided remedy, can only be awarded strictly in accordance with the provisions of the contract. Under the SIA Conditions, cl 24(2) provides that it is only upon receipt of the delay certificate that the employer's entitlement to deduct liquidated damages arises. Thus, on a plain reading of cl 24(2), there is no question of any liquidated damages arising in the absence of a delay certificate.[79]

7.53 However, it is also clear that under the SIA Conditions it is open for the court or an arbitrator to find that a delay certificate *ought to or should* have been issued as of a particular date when an architect failed to do so.[80] This appears from the "extremely widely worded and detailed"[81] scope of the arbitration clause in cl 37. Loh JAD noted, in particular, the following provisions:[82]

> (a) Under cl 37(1)(a), parties have a right to refer any dispute relating to any certificate of the architect to arbitration.
>
> (b) Clause 37(2) gives the arbitrator in an appropriate case express powers to rectify the contract.
>
> (c) Clause 37(3) provides that the arbitrator shall not, in making his final award, be "bound by any certificate, refusal of certificate" of the architect under any of the terms of the contract.
>
> (d) In cases where no ruling or decision has been made or certificate given by the architect, the aggrieved party can, pursuant to cl 37(3)(h), apply to an arbitrator to deal with the matter whether in interlocutory proceedings or by way of an interim award or in any other way before final award or judgment.

7.54 Thus, as a matter of construction of the SIA Conditions, an arbitrator (or the court) at the final resolution of all the disputes between the parties is entitled to take the view and decide, after considering the evidence and hearing the parties, that a delay certificate should have been issued as of a particular date. That will form the basis, together with a finding as to when completion took place, upon which an award for liquidated damages may be made.[83] The learned judge explained that this construction does not conflict with cl 24(2):[84]

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79 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [310] and [311], citing *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 1 SLR(R) 591 at [11], *per* L P Thean J; see also *New Civilbuild Pte Ltd v Guobena Sdn Bhd* [2000] 1 SLR(R) 368 at [66].

80 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [316].

81 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [318].

82 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [318] and [321].

83 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [322].

84 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [322].

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> Clause 24(2) does not contradict this construction because cl 24(2) deals with a different stage of the construction contract where without a Delay Certificate, the employer has *no right* and is *not entitled to start* deducting liquidated damages from payments due to the contractor. However, cl 24(2) does not mean that the employer cannot seek relief from an arbitrator or court on the basis that a Delay Certificate should have been issued. In *Tropicon* and *New Civilbuild*, that was not the issue which the court was asked to address. [emphasis in original]

7.55 The High Court (Appellate Division) further suggested that to hold otherwise would mean that an architect can render a liquidated damages clause inoperable and of no effect simply by failing to issue a delay certificate. Loh JAD considered that this construction of cl 37, in particular cl 37(3)(h), is supported by a number of "specialist texts".[85]

IX. Construction defects

A. Basis for assessing quantum

7.56 The long-running dispute between the parties in *Thio Keng Thay v Sandy Island Pte Ltd*[86] ("*Thio Keng Thay*") came back to the High Court for its quantum hearing. The case was first heard in the High Court in 2019[87] ("the First Judgment"). The decision was the subject of an appeal two years ago[88] and the subject of the authors' commentary in the 2020 Annual Review.[89] While the latest 2022 High Court decision turned largely on the facts relating to the existence and reasonableness of rectification works, there were some helpful observations by the High Court on points of principle relating to, *inter alia*, mitigation of damages, ascertaining reasonable costs of rectification and circumstances where a purchaser may justifiably refuse access under a defects liability period clause.

7.57 It will be recalled that *Thio Keng Thay* involved a claim by a purchaser against a developer for damages arising from defects in a

85 *Ser Kim Koi v GTMS Construction Pte Ltd* [2022] SGHC(A) 34 at [324] and [325], citing with approval Chow Kok Fong, *The Singapore SIA Form of Building Contract: A Commentary on the 9th Edition of the SIA Standard Form of Building Contract* (Sweet & Maxwell, 2013) at para 37.23; Ian N Duncan Wallace, *Construction Contracts: Principles and Policies in Tort and Contract* (Sweet & Maxwell, 1986) at para 17-11; *Hudson's Building and Engineering Contracts* (Robert Clay & Nicholas Dennys eds) (Sweet & Maxwell, 14th Ed, 2021) at paras 4-022–4-029.

86 [2022] SGHC 69.

87 *Thio Keng Thay v Sandy Island Pte Ltd* [2019] SGHC 175.

88 *Sandy Island Pte Ltd v Thio Keng Thay* [2020] 2 SLR 1089.

89 (2020) 21 SAL Ann Rev 172 at 202–203.

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waterfront villa in Sentosa, sold under the terms of the standard sale and purchase agreement ("SPA"). Clause 17 is the usual defects liability clause which requires the developer to make good any defect that became apparent within a 12-month defects liability period. Shortly after taking possession, the purchaser complained of numerous defects in the property.

7.58 In the First Judgment, the High Court found the purchaser in breach of cl 17 which obliged the purchaser to give an opportunity to the developer to rectify the defects. The High Court had explicitly stated that the question of whether the breach of cl 17 "could have cost the [developer] nothing at all to rectify the said defects" would be addressed in the second tranche of the proceedings.[90]

B. Mitigation of damages

7.59 In the 2022 High Court hearing, the developer submitted that a breach of the defects liability clause did not entitle the purchaser to recover more than it could have cost the contractor to rectify the defects given that the cost of employing a third party to carry out the repair work was likely to be higher than the cost of the contractor carrying out the work itself. This was achieved through the lens of mitigation of damages by setting off the amount by which the contractor had been disadvantaged against the owner's damages claim.[91]

7.60 The High Court accepted the submission[92] that if the purchaser had permitted the developer to enter the property to undertake the rectification, the defects would have been repaired by the developer or its contractors. They would, between themselves, have borne all costs in accordance with the terms of the construction contract. Therefore, the damages that the purchaser was entitled to in this situation would be the amount that the developer would have incurred had the rectification been undertaken in accordance with the defects liability clause of the SPA.[93]

C. Reasonable costs of rectification

7.61 However, the High Court rejected the developer's submission that, as the defects would have been repaired by the contractor pursuant

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90 *Thio Keng Thay v Sandy Island Pte Ltd* [2019] SGHC 175 at [117].
91 *Thio Keng Thay v Sandy Island Pte Ltd* [2022] SGHC 69 at [8].
92 *Thio Keng Thay v Sandy Island Pte Ltd* [2022] SGHC 69 at [9].
93 *Thio Keng Thay v Sandy Island Pte Ltd* [2022] SGHC 69 at [9], citing with approval the English decision in *Pearce and High Ltd v Baxter* (1999) 66 Con LR 110.

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to the terms of the contract, the rectification works would cost the developer nothing at all. The High Court found that the developer failed to discharge the burden of proving this assertion. The developer did not exhibit the construction contract to show that the contractor was liable to rectify any defects within the defects liability period or "produce any evidence of the sum it would have incurred (whether zero or otherwise) to repair the defects".[94] On this basis, the court held that the developer had not proved that the purchaser failed to mitigate damages.

7.62 The purchaser claimed for the costs of rectification costs on the basis of the contract it had awarded for the rectification work. The court found the pricing of the contract to be "an accurate reflection of the reasonable costs" for the rectification works. In his judgment, Lee Seiu Kin J stated a number of reasons for this finding, not least the fact that the works were awarded following a competitive tender exercise:[95]

> I find that the manner in which that tender was called and awarded was reasonable under the circumstances. Although the Defendant's expert gave reasons why this or that item was too high, I was not satisfied with the basis for those figures. With respect, while an expert's opinion might be useful in making estimates, this cannot compare with the real-world pricing manifested in the JTA Contract. So long as the tender was called in a competitive manner and properly conducted, which I find it was, that has to be the best measure of the reasonable cost of carrying out the works.

7.63 The developer had submitted that some of the purchaser's rectification works went beyond mere rectification and involved improvement. While the High Court agreed that, as a matter of principle, the purchaser would only be entitled to rectification of the defects and not to any additional costs for improvement, there may be situations where the most reasonable or cheapest method of rectification results in an improvement to the items. In such a case, the plaintiff should be entitled to the full sum for that item.[96]

X. Suspension of works

A. General principle

7.64 In *LBE Engineering Pte Ltd v Double S Construction Pte Ltd*,[97] the High Court affirmed the long-established principle that, in the absence

94 *Thio Keng Thay v Sandy Island Pte Ltd* [2022] SGHC 69 at [11].
95 *Thio Keng Thay v Sandy Island Pte Ltd* [2022] SGHC 69 at [13].
96 *Thio Keng Thay v Sandy Island Pte Ltd* [2022] SGHC 69 at [14]–[16].
97 [2022] SGHC 92.

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of any express term to the contrary in the contract, a party has no right to suspend work for non-payment of construction work. In that case, a main contractor employed a subcontractor to upgrade certain community facilities and construct a linkway. Clause 5 of the subcontract provided for the subcontractor to make progress claims and the main contractor to certify the sums payable and pay the certified sums. Issues between the parties arose from the fourth and fifth progress payments. In the course of submitting its fifth payment, the subcontractor was informed by the main contractor to ignore the fourth payment. The main contractor did not certify the fifth progress payment because the fifth progress claim was submitted a day late. The subcontractor alleged that because the main contractor failed to certify the claimed amount, it was unable to proceed with the work. The subcontractor notified the main contractor that as the claimed amount was not certified, it was unable to continue work. After notifying the main contractor of its intention to stop work, the subcontractor duly proceeded to suspend its works.

7.65 Lee Seiu Kin J held that the position as laid down by the authorities on this point is that a contractor has no general right at common law to suspend work unless this is expressly agreed upon. This is so even if payment has been wrongly withheld.[98] Lee J emphasised that "the existence of such a right could create chaos within the building industry if contractors were to muscle their way through disputes with threats or actual acts of suspension instead of having their disputes adjudicated".[99] Thus, while there may be instances where a persistent course of payment delays, or a protracted delay in payment of a substantial sum, could amount to repudiation of the contract, not every instance of non-payment by a contracting party would amount to repudiation.[100]

98 *LBE Engineering Pte Ltd v Double S Construction Pte Ltd* [2022] SGHC 92 at [14]–[18], citing *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 and *Diamond Class Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510.

99 *LBE Engineering Pte Ltd v Double S Construction Pte Ltd* [2022] SGHC 92 at [14], citing *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 at [57].

100 *LBE Engineering Pte Ltd v Double S Construction Pte Ltd* [2022] SGHC 92 at [15], citing *Diamond Class Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [96].

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XI. Security of payment

A. Court's supervisory jurisdiction in setting aside cases

7.66 During the year under review, there were several matters relating to the operation of the Building and Construction Industry Security of Payment Act 2004[101] ("SOP Act"). The first of these concerns the scope of the court's supervisory jurisdiction in hearing an application to set aside an adjudication determination which was discussed by the High Court on two occasions.

7.67 In *Backho*,[102] it was alleged that the application in that case was a "deliberate abuse of the court's process and a deliberate disguised appeal on the merits" of the adjudicator's findings. In *Emergent Engineering Pte Ltd v China Construction Realty Co Ltd*[103] ("*Emergent Engineering*"), the subject was raised by the High Court in the course of explaining the nature and scope of the court's inquiry in determining these applications. The same judge, Tan Siong Thye J, presided in both cases.

7.68 The court in both judgments affirmed the basic principles as laid down in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd*[104] where the Court of Appeal stated succinctly the position as follows:[105]

> [I]n hearing an application to set aside an AD and/or a s 27 judgment, the court does not review the merits of the adjudicator's decision, and any setting aside must be premised on issues relating to the jurisdiction of the adjudicator, a breach of natural justice or non-compliance with the SOPA. Applications to set aside ADs and/or s 27 judgments are thus akin to judicial review proceedings, and are not appeals on the merits of the adjudicator's decision.

7.69 From the passage cited, it is "axiomatic" that the court does not, in deciding on these applications, review the merits of the adjudication determination.[106] However, in *Backho*, the learned judge observed that it is also clear from this passage that the court is entitled to examine issues relating to the adjudicator's jurisdiction.[107] Thus, to the extent that the adjudicator had made findings pertaining to his jurisdiction, the court is entitled, in exercising its supervisory function, to review such findings.[108]

101 2020 Rev Ed.
102 See para 7.18 above.
103 [2022] SGHC 276.
104 [2015] 1 SLR 797.
105 *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [48].
106 *Emergent Engineering Pte Ltd v China Construction Realty Co Ltd* [2022] SGHC 276.
107 *Backho (S) Pte Ltd v KSE Marine Works Pte Ltd* [2022] 4 SLR 1332 at [52].
108 *Backho (S) Pte Ltd v KSE Marine Works Pte Ltd* [2022] 4 SLR 1332 at [54].

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7.70 In *Emergent Engineering*, the learned judge referring to the same passage stated that there are limited instances in which the court can intervene. These instances are prescribed statutorily under s 27(5) read with s 27(6) of the SOP Act.[109] It would include instances where the inquiry is to determine whether there was a breach of natural justice or whether the adjudication determination was induced or affected by fraud or corruption.[110]

B. One payment, one contract rule

7.71 In *Backho*, the High Court was invited to address an issue which has been settled for some years. This concerns the principle that "each adjudication application is to relate to one payment claim and each payment claim is to relate to one contract".[111] However, within a single contract, there can be "two scopes of work".[112]

7.72 Tan Siong Thye J held on this point as follows:

(a) The nature of the works is not relevant in assessing whether the contracts are separate.[113]

(b) The fact that separate invoices were issued in respect of each of the quotations is not determinative if the arrangement is simply for administrative convenience.[114]

7.73 Instead, the determinative factor is whether the parties possessed the objective intention to enter into two separate contracts at that time arising out of the two separate quotations.[115] The proper inquiry is whether there was an overarching agreement for a single contract between the parties.[116] On the facts, the court found that, taking both quotations together, there was an overarching agreement between the parties to supply all the relevant equipment needed. Hence, the later quotation to

109 *Emergent Engineering Pte Ltd v China Construction Realty Co Ltd* [2022] SGHC 276 at [15].

110 *Emergent Engineering Pte Ltd v China Construction Realty Co Ltd* [2022] SGHC 276 at [16].

111 *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359 at [28] and [34], approved by the Court of Appeal in *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [57] and [65]–[68].

112 *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359 at [76].

113 *Backho (S) Pte Ltd v KSE Marine Works Pte Ltd* [2022] 4 SLR 1332 at [73].

114 *Backho (S) Pte Ltd v KSE Marine Works Pte Ltd* [2022] 4 SLR 1332 at [96].

115 *Backho (S) Pte Ltd v KSE Marine Works Pte Ltd* [2022] 4 SLR 1332 at [60].

116 *Backho (S) Pte Ltd v KSE Marine Works Pte Ltd* [2022] 4 SLR 1332 at [80] and [81], applying the principle laid down in *Rong Shun Engineering & Construction Pte Ltd v C P Ong Construction Pte Ltd* [2017] 4 SLR 359.

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supply additional equipment and labour could be seen as "different terms of the same contract".[117]

C. *Stay of an adjudication determination*

7.74 Given the current economic challenges in the construction industry, it is not surprising to encounter once again applications to the court for stays of adjudication determinations on the ground that the successful claimant in the adjudication is financially stringent or insolvent. The principles on this issue were laid down by the Court of Appeal a decade ago in *W Y Steel Construction Pte Ltd v Osko Pte Ltd*.[118] The Court of Appeal in that case held that a stay of an adjudication determination may be ordinarily justified where:[119]

> (a) there is clear and objective evidence of the successful claimant's actual present insolvency (first limb); or
>
> (b) the court is satisfied on a balance of probabilities that if the stay was not granted, the money paid to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body (second limb).

7.75 In *LJH Construction & Engineering Co Pte Ltd v Elmeader Pte Ltd*[120] ("*Elmeader*"), an employer sought a stay in the enforcement of an adjudication determination because she had cross-claims against the contractor. Under the first limb, the employer tried to argue that the main contractor's past financial troubles were relevant in proving that the claimant was currently insolvent. However, the court held that relevant financial status of the claimant is to be assessed at the time of the stay application.[121] Past financial troubles are not relevant if they ceased to exist at the time of stay of application. The court elaborated that "past financial impecuniosity *may* give rise to an *inference* of present insolvency, but, without more, that could only be a very weak inference, if any at all" [emphasis in original].[122] The employer in *Elmeader* also failed in its case under the second limb. The court rejected the employer's submission that the main contractor's lack of current business activities satisfied the second limb, holding that the lack of current business activities is only

117 *Backho (S) Pte Ltd v KSE Marine Works Pte Ltd* [2022] 4 SLR 1332 at [82] and [88].
118 [2013] 3 SLR 380.
119 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [70].
120 [2022] SGDC 80.
121 *LJH Construction & Engineering Co Pte Ltd v Elmeader Pte Ltd* [2022] SGDC 80 at [19].
122 *LJH Construction & Engineering Co Pte Ltd v Elmeader Pte Ltd* [2022] SGDC 80 at [19].

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"one possible basis to infer monies paid would be unrecoverable and is not conclusive" [emphasis in original omitted].[123]

D. Service by e-mail

7.76 There is no controversy that, by reason of s 37(1)(*d*) of the SOP Act, a payment claim may be served by e-mail. In *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie*[124] ("*LJH Construction*"), the High Court considered the basis on which s 37(1)(*d*) is expected to operate.

7.77 In *LJH Construction*, a contractor served a payment claim on the employer by e-mail. The employer contended that a payment claim could only be validly served in this way if the fact that the payment claim had been served was brought to the attention of the addressee. The employer's case was that there was no evidence that she had operated the e-mail account, pointing out, *inter alia*, that the contractor had never previously served any payment claims to her by e-mail and that she had never given her e-mail address to the contractor.

7.78 The court referred first to s 37(3) of the SOP Act. This provides that where a document is served by e-mail, it must be sent to either "the last email address given by the addressee" as provided under s 37(3)(*a*) or to "the last email address of the addressee concerned known to the person serving the document" as provided under s 37(3)(*b*). In this case, s 37(3)(*a*) was inapplicable since the employer never gave her e-mail address to the contractor for the service of documents. This left the matter to be determined on the basis of s 37(3)(*b*). In his judgment, Ang Cheng Hock J considered that where a sender wishes to serve a payment claim on a recipient via the last e-mail address of the addressee known to the sender under s 37(3)(*b*), the sender must have some basis, which is objectively ascertainable, to believe that the last known e-mail address is one which the addressee currently uses, or at least checks regularly. It is insufficient that the sender has some subjective belief, without any proper basis, that the last known e-mail address would be one that the addressee would check regularly.[125] There must be some reasonable basis to expect

123 *LJH Construction & Engineering Co Pte Ltd v Elmeader Pte Ltd* [2022] SGDC 80 at [50].

124 [2022] SGHC 230.

125 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [47].

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that documents served via that e-mail address would be likely to be brought to the addressee's attention in a reasonably prompt manner.[126]

7.79 On the evidence in this case, the learned judge decided that the contractor could not have had an objectively ascertainable basis to believe that the employer used or checked the e-mail account to which the payment claim was sent. Ang J considered it significant that the contractor had never served any payment claims to the employer by e-mail. Although the employer did use that e-mail account on two occasions in 2016, there was no evidence that she used it regularly after 2016 and, in particular, 2021, the year when the payment claim was served.[127]

7.80 On the totality of the evidence, the court thus found that the contractor did not have an objectively ascertainable basis to believe that the employer used or regularly checked the e-mail in 2021. The service of the payment claim was therefore defective; it followed that the adjudicator had no jurisdiction to determine the adjudication application. The adjudication determination was therefore set aside.[128]

E. Fraudulent representation

7.81 An alternative ground relied on by the employer in *LJH Construction* was that at least a part of the adjudicated amount determined by the adjudicator in favour of the contractor was tainted by the contractor's fraudulent representation. Section 27(6)(*h*) of the SOP Act provides that a party to an adjudication may commence proceedings to set aside an adjudication determination where the making of the adjudication determination was induced or affected by fraud or corruption.

7.82 The High Court considered that the applicable approach was the two-step test as formulated in *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd*[129] ("*Façade Solution*") The first step is to inquire whether the adjudication determination was based on facts which the party putting forward the claim knew, or ought reasonably to have known, were untrue.

126 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [48].

127 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [56] and [57].

128 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [61] and [63].

129 [2020] 2 SLR 1125. See *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [66]–[69].

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[130] The second step is to determine whether the facts in question were material to the issuance of the adjudication determination.[131]

7.83 In *LJH Construction*, the employer had engaged a third-party contractor, Yong Chow Construction Pte Ltd ("Yong Chow"), to complete the works which were left uncompleted by the contractor and had paid Yong Chow directly for these works. Before the adjudicator, the contractor falsely represented that it was entitled to be paid for parts of these works even though the employer had paid Yong Chow for these works. On the evidence, the High Court found that the contractor "could not have genuinely believed" that it was under any actual or potential liability to pay these sums to Yong Chow. The contractor had no basis to make the claim for these works. The first step of the two-step test in *Façade Solution* was therefore satisfied.[132]

7.84 The court found that the second step of the *Façade Solution* test was also satisfied. The adjudicator had awarded the sum in respect of the variations solely on the basis of the representations made by the contractor that it was liable to Yong Chow for the cost of these works.[133] In addition, the adjudicator also relied on forged documents in respect of variation works carried out by another of the contractor's subcontractors.[134] The result was that the learned judge held that fraud had been established and the adjudication determination was tainted by fraud and liable to be set aside under s 27(8)(*a*) of the SOP Act.[135]

7.85 Arising from its finding that the case for fraud had been made out, the court had to consider whether part of the adjudication determination could be severed. Ang J held that the relevant test for this purpose was the test laid down in *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd*[136] ("*Rong Shun*"). The overarching principle in *Rong Shun* is that a part of an adjudication determination is severable if it is *both* textually severable and substantially severable from the remainder of the determination.[137] However, where an adjudication determination

130 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [29]–[33].
131 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [35].
132 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [83]–[84].
133 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [86].
134 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [87]–[88].
135 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [127].
136 [2017] 4 SLR 359.
137 *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 at [155(a)].

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has been obtained by fraud, the court must additionally take into account the policy consideration of upholding public confidence in the administration of justice, and the starting point is that an adjudication determination "corrupted by fraudulent conduct would be tainted in its entirety".[138] Such a determination would only be severed in exceptional and extremely limited circumstances where the fraud is *de minimis* both in nature and quantum.[139]

7.86 On the facts in *LJH Construction*, the learned judge considered that the fraud did not relate to a discrete component of the main contractor's claim and the quantum of the claim affected by fraud could not be considered *de minimis* as it accounted for 48.6% of the adjudicated amount.[140] On these considerations, the learned judge declined to exercise his discretion to sever the adjudication determination; the adjudication determination was therefore set aside in its entirety.[141]

F. Breach of natural justice

7.87 Given that the courts in exercising their supervisory jurisdiction will not inquire into the merits of an adjudicator's decision, it is not surprising that most of the reported cases on setting aside revolve around allegations of an adjudicator's breach of natural justice. The application is typically grounded on two provisions in the SOP Act:

(a) s 16(5)(*c*), which provides that an adjudicator must comply with the principles of natural justice; and/or

(b) s 27(6)(*g*), which provides that a party may apply to set aside an adjudication determination on the ground that a breach of the rules of natural justice has occurred in connection with the making of the adjudication determination.

7.88 In *LJH Construction*, the High Court affirmed the two facets of the principles of natural justice, namely, the right of parties to a fair hearing ("the fair hearing rule") and the requirement that the adjudicator must be independent and impartial in deciding the dispute ("the no

138 *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359 at [170].
139 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [170].
140 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [174], distinguishing *Hansen Yuncken Pty Ltd v Ian James Ericson Trading as Flea's Concreting* [2011] QSC 327.
141 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [175].

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bias rule").[142] The standard of proof to be met is that on a balance of probabilities. The party alleging breach has to show that (a) there has been a material breach of natural justice; and (b) this has caused the party to suffer prejudice.[143]

7.89 The employer's contention in *LJH Construction* was that the fair hearing rule was breached when the adjudicator did not afford the employer an opportunity to address him on new materials introduced by the contractor.[144] Ang J found that the adjudicator failed to ask the employer and her solicitors whether they wished to respond to the new materials and had simply proceeded to issue his determination two days after receiving these new materials.[145] The learned judge considered that this was a situation where it would have been "entirely appropriate" for the adjudicator to request for an EOT to issue his determination in order to receive further arguments from the employer or to convene an adjudication conference.[146] He therefore found that the fair hearing rule had been breached.

7.90 On the no bias rule, Ang J noted that the employer did not specify whether the allegation related to actual or apparent bias. There was, in any case, no evidence to substantiate actual bias.[147] The test for apparent bias is set out in *Re Shankar Alan s/o Anant Kulkarni*:[148] namely, whether there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of all the relevant facts that the decision-maker was biased.[149] In his judgment, Ang J accepted that the courts are cognisant of the tight timelines given to an adjudicator to make a determination and the need for a quick method of adjudication to facilitate cash flow. As a consequence,

142 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [180], citing the position as laid down in *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] 2 SLR 532 at [34].

143 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [181], citing *Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311 at [34]–[35].

144 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [184(a)] and [184(b)]. The employer's complaints related to (a) an e-mail relating to the service of the payment claim; and (b) further submissions filed by the contractor.

145 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [190]–[192].

146 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [193] and [199].

147 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [202].

148 [2007] 1 SLR(R) 85 at [91].

149 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [203].

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"deficiencies in the reasoning or methodology of the adjudicator may be tolerable, given the concept of temporary finality whereby parties may seek a fuller ventilation of their arguments at another more thorough and deliberate forum".[150] In the present case, the learned judge found that the adjudicator's reasoning in finding that the payment claim was validly served did not warrant a finding of apparent bias on his part.[151] The failure of an adjudicator to invite a party to respond to certain matters would not normally constitute apparent bias.[152]

7.91 The learned judge found therefore that there was a breach of natural justice only with respect to the fair hearing rule. This would be sufficient on its own to set the adjudication determination aside under s 27(8)(*a*) of the SOP Act.

7.92 The issue of natural justice was also raised in *Emergent Engineering Pte Ltd v China Construction Realty Co Ltd*.[153] In that case, the main contractor terminated a subcontract on two legal grounds – under common law and pursuant to a termination clause in the subcontract. Two months following the termination, the subcontractor lodged an adjudication application for a payment claim. The subcontractor was successful before the adjudicator.

7.93 In its setting-aside application, the main contractor argued that, based on the record in the adjudication determination, the adjudicator committed a breach of the fair hearing rule because the adjudicator only considered the main contractor's case based on repudiation under common law but failed to consider its right to terminate under the termination clause.

7.94 The High Court dismissed this submission. The learned judge found that the adjudicator invited the parties to address him specifically on the termination clause in the subcontract. The adjudication determination itself contained numerous references to the termination provision.[154] The learned judge observed that the true substance of the main contractor's complaint lay in its disagreement with the adjudicator's

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150 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [206], referring to *JRP & Associates Pte Ltd v Kindly Construction & Services Pte Ltd* [2015] 3 SLR 575 at [70].

151 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [207].

152 *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230 at [208].

153 See para 7.67 above.

154 *Emergent Engineering Pte Ltd v China Construction Realty Co Ltd* [2022] SGHC 276 at [25] and [26].

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decision.[155] However, whether the adjudicator was correct in his analysis was beside the point. An error in law committed by the adjudicator is not a ground for finding a breach of natural justice as it is not the prerogative of the court to review the merits of an adjudicator's decision when hearing an application to set aside a determination.[156]

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155 *Emergent Engineering Pte Ltd v China Construction Realty Co Ltd* [2022] SGHC 276 at [40].

156 *Emergent Engineering Pte Ltd v China Construction Realty Co Ltd* [2022] SGHC 276 at [41].

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