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7. BUILDING AND CONSTRUCTION LAW

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I. Introduction

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.

II. Variations

A. Absence of written instructions

7.2 In *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd*[1] ("*Vim v Deluge*"), the Appellate Division of the High Court ("Appellate Division") clarified the approach to be taken in determining whether a claim for variation should be dismissed merely because the varied work had not been ordered in writing.

1 [2023] 2 SLR 468.

7.3 The issues in *Vim v Deluge* arose from a sub-subcontract for certain plumbing and sanitary works. One of these issues related to the claims for variation work carried out by the sub-subcontractor ("Vim"). Clause 16 of the sub-subcontract provided that variation works should be carried out "only" with written instructions from the project manager of the principal subcontractor ("Deluge"). In its payment claim, Vim included claims for variation works allegedly instructed by way of drawings issued by Deluge's project manager but which instructions were not documented subsequently as variation instructions as required by cl 16. Vim also relied on an oral promise made by Deluge on a number of occasions that Vim would be paid for the variation works. Deluge's representatives had previously signed on the variation claims and included written comments that these would be subject to the approval of Samsung, the main contractor. Notwithstanding these endorsements on the claims, Deluge maintained that the work ought to have been carried out only under written instructions pursuant to cl 16 of the subcontract. Deluge succeeded before the High Court. The first instance judge held that Vim's variation claims failed because there were no written instructions from Deluge's project manager as required under the subcontract.

7.4 In allowing Vim's appeal, the Appellate Division approved a statement of principle in a textbook that in order to claim for work as a variation under a contract, it is necessary to establish that:[2]

> (a) the work is "extra" work not included in the work for which the contract sum is payable;
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> (b) there is an express or implied promise to pay for the work;
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> (c) an agent who ordered the work was authorised to do so; and
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> (d) any condition precedent imposed by the contract has been fulfilled.

7.5 The decision reached by the Appellate Division turned essentially on the construction of cl 16. Quentin Loh SJ, in delivering the judgment on behalf of the Appellate Division, observed that cl 16 was "not drafted in a stringent manner requiring strict compliance failing which a variation claim will fail".[3] Significantly, cl 16 did not state that "if there

2 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [29], citing Stephen Furst & Sir Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 10th Ed, 2021) at para 4-043.

3 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [32].

are no written instructions for variations … Vim will forfeit the right to any payment or is otherwise barred from claiming payment for work that it considered a variation".[4] Loh SJ elaborated:[5]

> Unlike some standard form contracts, there are also no provisions in this Subcontract requiring Vim to give written confirmation of verbal instructions given by Deluge's project manager for variation works. If Vim is able to make out a case on the facts that Deluge's project manager did verbally ask or otherwise requested or required Vim to carry out 'variation' or 'additional' works, then such works are perfectly capable of constituting 'additional' works outside the Subcontract or requested under an implied promise to pay for such additional work …

7.6 The learned judge further noted that Deluge only ran a case on the threshold point that there was no written instruction from its project manager. It had not run a case that it had suffered damage because Vim had failed to comply with the terms of cl 16.[6]

B. Estoppel

7.7 At any rate, the general rule is that a contractor who has been requested to do work which is in fact a variation will be able to recover payment for it if the employer has expressly or impliedly requested the work knowing it to be such. In a suitable situation, the employer may be estopped by his conduct from denying liability to pay notwithstanding the non-compliance with the formalities stipulated in the contract.[7]

7.8 Loh SJ also referred to the "commercial reality" that contractors and subcontractors in large-scale building projects are engaged in complex and overlapping scopes of work set out in "back-to-back" contracts. In these situations, the submission that variation claims by Vim (as sub-subcontractor) would be subject to the claims being submitted by Deluge (as subcontractor) to Samsung (the main contractor), and required securing the latter's approval of such claims, was problematic on two levels:[8]

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4 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [33].

5 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [35].

6 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [35].

7 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [37], following *Comfort Management v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [89]–[90].

8 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [42].

> First because this is not provided for in the Subcontract and secondly, the main contract between Samsung and Deluge was not in evidence and Vim was not privy to any of Samsung's criteria for the approval of variation work claims. Even if Samsung had approved the variation work claims, nothing would have prevented Deluge from pretextually denying Vim for the same.

7.9 Furthermore, he held that Deluge could not insist that Vim should strictly comply with cl 16 when Deluge's own representatives had signed off on the variation work claims. While these "sign-offs" are not necessarily acknowledgments by Deluge that Vim would be paid for the works, they inform "the totality of circumstance" showing that Deluge had by election waived the requirement of the written notice.[9]

7.10 This is an instructive case. However, *Vim v Deluge* should not be read to suggest that contractual terms conditioning a contractor's entitlement to be paid for variations on written instructions – such as cl 16 in this case – can be readily circumvented. The case is not inconsistent with the proposition that such a term may be expected to be construed strictly. In the absence of a clearly-stated intention in the contract to exclude claims made on the basis of oral instructions, a contractor is not to be denied a claim for varied work if the totality of circumstances suggest that the contractor had acted on the basis that parties have agreed to depart from the original condition precedent.

III. Extension of time

A. Determination of entitlement

7.11 In *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd*[10] ("*Terrenus*"), the General Division of the High Court ("General Division") delivered an interesting judgment which demonstrates how the facts surrounding issues of delay and completion can be established. Although no complex points of law were debated, the analysis of Kwek Mean Luck J in this case contains salutary lessons for construction lawyers and their experts on the reception of expert evidence. The commentary which follows therefore examines the evidential basis for the decision of the court on the contractor's entitlement to extension of time ("EOT").

7.12 Terrenus employed Attika as the contractor for the construction of a 19,174 kilowatt peak ("kWp") ground mount solar generation facility

9 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [45].

10 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333.

and a 250 kWp linkway solar generation facility at a business park. An important aspect of the case concerned the delay to the works; in particular, the determination as to whether Attika was entitled to an EOT. The analysis of the critical path was developed around four intervals or "windows". Among the delay events which formed the subject of the contention between the parties were: (a) the time taken by the National Parks Board ("NParks") in granting approval for the removal of certain trees; (b) the delay in the delivery of the solar panels; (c) the delay by the main contractor's subcontractor; and (d) the time taken by the subcontractor to rectify certain defects.

7.13 "Window 1" related to a period where the critical path was affected by the time taken by NParks to approve tree removal works. Kwek J found that there was no express term providing that Attika bears the risks for securing NParks's approval and that, on the facts, the risk for this delay fell on Terrenus because it was the latter's consultant who made the necessary submissions to NParks.[11]

7.14 Terrenus was responsible for supplying the solar panels for the ground mount facility. Attika's responsibility was to install these panels after they had been delivered. In "Window 2", the inquiry was the criticality of the delay in the delivery of solar panels by Terrenus. Terrenus's expert assumed that the work was planned to be carried out on a linearly distributed basis, at a uniform rate of progress per day. This was used to advance the thesis that Attika required a minimum volume of 13% of the PEG mounting structures for each work front ("the 13% work front assumption"). The actual situation, however, was that the installation was planned around the delivery of the solar panels in three batches. Attika's expert also demonstrated that the delivery of the solar panels was more critical than any delay in the PEG mounting structures because the latter had always been ahead of the solar panel installation. The court preferred the delay analysis by Attika's expert on this basis instead of the analysis premised on the 13% work front assumption.[12]

7.15 "Window 3" was for a period where Terrenus's subcontractor was in critical delay. In the course of establishing this, the parties disputed which events were on the critical path. The issue was settled when Attika demonstrated that until Terrenus's subcontractor completed its part of the works, Attika could not proceed with the "energisation" of the solar farm. Once again, Terrenus's expert was criticised for assuming a distribution

11 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [142].

12 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [164].

of work by reading into the master programme "logic links which did not exist".[13]

7.16 "Window 4" related to a period when Terrenus's subcontractor was required to carry out rectification works before handing over. On the facts, the court found that the rectification works related to Terrenus's works and not Attika's works. The court was not persuaded by the evidence of Terrenus's expert that Attika's other site works were critical because the expert "unjustifiably" assumed a linear progression of work and determined delay on that basis.[14] On the basis of this analysis, Kwek J held that Attika was entitled to 140 days of EOT out of 146 days of delay.

B. Use of expert evidence

7.17 This decision poses several insights which merit reflection. Readers in the industry will appreciate that delay experts are not infrequently blindsided into assuming certain parameters by instructing parties when further examination on the opposite party's case could have suggested that the information provided by the expert's instructing party may be incomplete. This is quite understandable because the short periods of time within which an analysis has to be carried out means that most experts must rely on the parties for most of the initial inputs. Tragically, if a party fails to provide sufficient information, an expert would be compelled to build his analysis on assumed parameters. The higher the incidence of assumed parameters, the higher the degree of care has to be taken in applying the results of an analysis. This was demonstrated vividly in this case where the court expressed the unsurprising preference for an analysis using such data over one which appeared to rest critically on the expert's assumptions.

7.18 A second aspect of this case which should be of interest to the construction industry at large is the way the expert evidence on delay is gathered. Our inquiry with counsel having conduct of this case confirmed that this evidence was received through witness conferencing. It is also clear that the case was efficiently managed. Both experts were able to agree to mount their analysis over the four windows. It is also one of the few instances where the Society of Construction Law Delay and Disruption Protocol was explicitly mentioned in the judgment.

13 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [172].

14 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [190].

IV. Claims for general damages

A. Causation: Intertwined events

7.19 In a detailed and carefully considered decision, the Appellate Division of the High Court in *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd*[15] ("*Crescendas*") re-visited the principles relating to the recovery of general damages, specifically issues relating to causation, remoteness and quantification of loss.

7.20 The parties in *Crescendas* entered into a management contract for the construction of a seven-storey business park. The completion of the project was delayed and the resulting disputes had spawned earlier reported decisions in 2019 of the High Court and Court of Appeal dealing with liability[16] (hereinafter the "Liability Judgments"). The Liability Judgments found that while contract completion was due by 22 January 2010, the project was only completed on 22 December 2010, resulting in a delay of 334 days. Because of its acts of prevention, the employer was held responsible for 173 days of the delay. Due to the absence of an extension of time clause, time for completion was set at large. The contractor was thus only liable to complete within a reasonable period of time, which was determined to be 14 July 2010. As completion only took place on 22 December 2010, the contractor exceeded the reasonable time for completion by 161 days. In the present case before the Appellate Division, the issue concerned the assessment of the employer's claim for damages in respect of the 161 days of delay.

7.21 A crucial element in any claim for general damages is the demonstration of a causal link between the breach by the defaulting party and the loss suffered by the innocent party. In *Crescendas*, it was contended by the contractor that as the periods of delay attributable to the employer "were spread out and intertwined" with the periods of delay caused by the contractor, the requisite causal link had not been demonstrated.

7.22 The Appellate Division upheld the General Division's rejection of this contention.[17] Woo Bi Lih JAD, in delivering the judgment of the court, highlighted several authorities where the courts have shown how

15 [2023] 1 SLR 536.

16 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 (HC), *Jurong Primewide Pte Ltd v Crescendas Bionics Pte Ltd* [2019] SGCA 63 (CA).

17 The first instance decision on the assessment of loss was reported in *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2021] SGHC 189.

this situation could be dealt with.[18] The thrust of the authorities is that if a breach of contract is one of two causes, "both co-operating and of equal efficiency" in causing loss to the aggrieved party, the contract breaker is liable for as long as his breach was an effective cause of the loss.[19] It is not necessary to identify which was more effective. In the instant case, the Appellate Division observed that the length of the delay attributable to the employer and the contractor respectively were almost evenly balanced and ruled that the delay attributed to each party "was each an independent and effective cause of the loss" suffered by the employer.[20]

B. Remoteness of damage: Loss of rental revenue

7.23 The employer in *Crescendas* also claimed for loss of rental revenue arising from the 161 days of culpable delay attributed to the contractor. In determining this claim, Woo JAD referred to the two limbs of the remoteness rule in *Hadley v Baxendale*[21] and provided a useful statement of the operation of each of the two limbs:[22]

> (a) Damage falling under the first limb … may be termed 'ordinary' damage. Ordinary damage is awarded for consequences which may be seen as arising naturally (i.e., according to the usual course of things) from the breach of contract itself or flowing from what may reasonably be supposed to be in the contemplation of both parties at the time they made the contract, having regard to the knowledge of the relevant surrounding circumstances that the contract breaker would generally be taken to have had.
>
> (b) Damage falling under the second limb … may be termed 'extraordinary' damage. Such damage is not by its very nature within the reasonable contemplation of contracting parties. Neither does it flow naturally from the breach of contract. Rather, it arises due to special circumstances which are outside the usual course of things. For there to be liability for extraordinary damage, the contract breaker must have had actual knowledge of these special circumstances.

18 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [55]–[58], citing *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, *Great Eastern Hotel Company Ltd v John Laing Construction Ltd* [2005] EWHC 181 (TCC), *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234, *iVenture Card Ltd v Big Bus Singapore City Sightseeing Pte Ltd* [2022] 1 SLR 302.

19 *Heskell v Continental Express Ltd* [1950] 1 All ER 1033 at 1048, *Great Eastern Hotel Company Ltd v John Laing Construction Ltd* [2005] EWHC 181 at [314], *Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd* [2020] 3 SLR 1234 at [25].

20 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [60].

21 (1854) 9 Exch 341.

22 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [86].

7.24 He further stated that the overarching criterion of the loss being "reasonable contemplation" applied to both limbs:[23]

> For the First Limb of *Hadley v Baxendale*, the horizon of contemplation is confined to loss which arises naturally (i.e., in the usual course of things) and which is therefore presumed to have been in the contemplation of parties. For the Second Limb of *Hadley v Baxendale*, by reason of the actual knowledge possessed by the contract breaker of the special circumstances giving rise to the extraordinary damage, the horizon of contemplation is extended to loss that does not arise in the usual course of things.

7.25 The contractor had argued that the loss of rental revenue is the "most remote" form of loss. It submitted that the claim here falls within the second limb of the rule because this loss arose from circumstances outside of the contractor's control, such as the employer's pricing strategy, its negotiations with prospective tenants, each prospective tenant's decision-making calculus, and the global financial crisis back in late 2008.[24] The contractor relied on the Australian decision of *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd*[25] where Cole J had held that in a large commercial development, as a result of the uncertainties relating to the timing of any sale or lease, the quantum of any sale price or rental and other factors, it cannot be said that delay in achieving practical completion must result in the loss of rental receipts and that this category of loss cannot therefore fall within the first limb in *Hadley v Baxendale*.[26]

7.26 In *Crescendas*, the Appellate Division expressly differed from this view. Woo JAD noted that both parties were aware that the building was a multi-tenanted development at the time of contracting and that it was within the reasonable contemplation of parties that it would take multiple years to fill up.[27] Woo JAD also considered that it would be within the reasonable contemplation of parties that: (a) a substantial delay in completion would cause potential tenants to walk away from the development; and that (b) tenancies would run for several years since costs would be incurred in the fitting-out and relocation.[28] For these reasons, Woo JAD considered it unnecessary to distinguish between pre-completion and post-completion loss and concluded that the entire claim for loss of net rental revenue fell within the first limb of *Hadley v Baxendale* and was not too remote.[29]

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23 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [87].
24 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [96].
25 (1992) 33 NSWLR 504.
26 *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504 at 520.
27 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [106].
28 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [107].
29 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [109].

7.27 Woo JAD also pointed out that even where the loss arose from circumstances outside the contractor's control, that did not preclude the recoverability of such loss under the first limb of *Hadley v Baxendale*. The conventional principle is that the contract breaker will be held liable for the full extent of the loss so long as the *type or kind* of loss was reasonably contemplated at the time of the contract, even if its *precise detail or extent* were not. The circumstances relied upon by the contractor affected the precise quantum of the loss and did detract from the point that the category of loss was within the contractor's reasonable contemplation.[30]

C. Quantification of damages

7.28 The debate on quantification of rental loss in *Crescendas* was between loss calculated on a single-year model ("Single-Year Model") and that under the multi-year model ("Multi-Year Model"). The Multi-Year Model calculated the net rental revenue loss suffered by the employer over multiple years, beginning from 23 January 2010, the contractual completion date, until the date on which stabilised occupancy was attained. By contrast, the Single-Year Model assessed the net rental revenue loss suffered by the employer during the period of the delay from 23 January 2010 to 22 December 2010. Both models calculated loss under the "Delay Scenario" and "No-Delay Scenario" and used the same values for occupancy level, gross monthly rental and net rental revenue.

7.29 The trial judge had decided that the Multi-Year Model was inappropriate because of overarching considerations of fairness and equity. He criticised the model for: (a) its speculative nature; (b) its dependence on variables such as stabilised occupancy which was outside the contractor's control; and (c) the possibility that the model could yield illogical and inequitable outcomes. The trial judge further considered that this model infringed on the principles of remoteness of damage.[31] Interestingly, the learned judge arrived at this finding notwithstanding that the court's own expert had expressed his preference for the Multi-Year Model.[32]

7.30 The Appellate Division held that the trial judge erred in rejecting the Multi-Year Model for the reasons given in his judgment. Woo JAD emphasised that the issue was proof as to the fact of damage so that even if the Multi-Year Model computations involved speculative

30 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [108].

31 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [116]–[118], citing *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2021] SGHC 189 (First Instance Decision) at [116]–[118], [236]–[237] and [246]–[247].

32 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [126].

variables outside the contractor's model, that was a point going towards the quantification of damage rather than the existence of damage.[33] Since the delay had resulted in post-completion net rental loss over multiple years, Woo JAD considered that this "point[ed] strongly in favour of using the Multi-Year Model".[34] This was reinforced by the fact that none of the experts endorsed the Single-Year Model.

7.31 In his judgment, he did not find the Multi-Year Model too speculative. He emphasised that the law does not demand that the claimant prove with complete certainty the exact amount of damage suffered. A claimant must satisfy the court as to the fact of damage and its amount to justify an award of substantial damages.[35] If the fact of damage is shown but *no evidence* is given as to its amount, such that it is *virtually impossible* to assess damages, this will generally result in only an award of nominal damages.[36]

7.32 Outside such situations, the court should allow recovery of damages claimed where the claimant has attempted its level best to prove its loss and the evidence is cogent. The law does not demand that the claimant prove the exact amount of damage suffered with complete certainty; it only requires the claimant to attempt its level best as far as circumstances permit to put forward cogent evidence of its loss. Where precise evidence is available, the court will naturally expect to have such evidence. Where precision and certainty as to quantum is impossible, this will not be held against a claimant so long as it has "put forward cogent evidence in an attempt to do its level best to prove the loss":[37]

> Where it is clear that substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the loss is no reason for awarding no damages or merely nominal damages …

7.33 In any case, a discount on the final award could be applied to account for uncertainty in determining the multi-year net rental revenue loss.[38]

7.34 The Appellate Division also dismissed the trial judge's concern that the quantum of contractual loss was influenced by variables beyond the contract-breaker's control. He remarked that it is quite often the case that the extent of a claimant's loss is beyond the control of a contract-

33 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [136].
34 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [149].
35 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [160].
36 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [161].
37 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [162].
38 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [175].

breaker. However, the claimant had to prove the quantum of loss and that he had taken reasonable steps to mitigate his loss, where applicable. The concept of remoteness also applied.[39]

7.35 Finally, the Appellate Division noted that the learned judge below relied on two hypothetical situations to anticipate the possibility of illogical and inequitable outcomes with the Multi-Year Model. These anxieties were considered misplaced, since in the light of established principles, the hypothetical scenarios could not possibly be used to justify compensation[40] or award of damages.[41]

7.36 To account for the uncertainties in the quantification, the Appellate Division applied an 8% discount rate on a compounded basis – instead of a simple 8% discount rate – to the difference between the Delay and No-Delay Scenarios for a particular year.[42] The Appellate Division also agreed with the trial judge that the resulting quantum of damages assessed should be apportioned based on the fact that the contractor was liable for 161 out of 355 days.[43]

V. Liquidated damages

A. Absence of EOT clause

7.37 One of the issues in *Crescendas* relates to the effect of the employer's acts of prevention on the operation of the liquidated damages clause in the contract. The first instance court had affirmed the principle that because the contract did not contain an extension of time clause, the liquidated damages clause was rendered inoperative. Nonetheless, the contractor is under an obligation to complete the project within a reasonable time and failure to complete the project within a reasonable time will render the defendant liable for general damages.[44] The Appellate Division affirmed this settled principle. Further, since the employer cannot rely on the liquidated damages clause and is only entitled to

39 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [181].
40 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [187].
41 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [189].
42 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [192].
43 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [195].
44 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2021] SGHC 189 at [34], following *Fongsoon Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd* [2011] SGHC 82 at [24]–[25] and *Kwang In Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1997] 1 SLR(R) 907 at [18], and citing with approval Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell, 5th Ed, 2018) at para 9.084.

general damages, it follows that the contractor cannot similarly rely on the clause to restrict the quantum which the employer is entitled to claim in general damages.[45]

B. Construction of terms governing liquidated damages

7.38 In *Terrenus*, arising from the finding that Attika was entitled to 140 days EOT, the court held that Attika's liability for liquidated damages was reduced to six days of delay. Attika argued before the court that the liquidated damages amount of $5,100 per day set out in the contract constitutes a penalty because the rate of liquidated damages bears no relation to any genuine pre-estimate of loss that Terrenus may suffer. Kwek Mean Luck J in his judgment stated that "the question to be considered is not whether there are possible circumstances where a lesser loss would be suffered, but whether Attika can show that the sum is so extravagant, having regard to the range of damages which Terrenus as the innocent party was likely to suffer". The learned judge affirmed two established principles:[46]

> (a) A clause is not a penalty "simply because it results in overpayment in particular circumstances and the parties are allowed a generous margin to determine the agreed damages to be payable upon breach".[47]
>
> (b) The assessment of the genuineness of a liquidated damages clause is a question of construction that must be decided at the time the contract was entered into, and not as at the time of reach.[48]

7.39 The court considered that on these principles, the onus was always on Attika to show that the amount of liquidated damages is so extravagant, having regard to the greatest loss which Terrenus could have reasonably been anticipated to suffer at the time of contracting, such that it could not constitute a genuine pre-estimate of damages. In this case, it was held that the liquidated damages clause is not a penalty because "Attika did not provide any evidence that this is so".[49]

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45 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2023] 1 SLR 536 at [34].
46 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [203].
47 *CIFG Special Assets Capital 1 Ltd v Polimet Pte Ltd* [2017] SGHC 22 at [125].
48 *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 631 at [281].
49 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [206].

C. Further liability for general damages

7.40 In connection with Attika's liability for liquidated damages, it was also contended by Terrenus that Attika is further liable for general damages due to delay pursuant to a term of the contract. Clause 17.1.4 of the contract provides:

> If [Terrenus] suffers other losses and damages which cannot be covered by such liquidated damages, such losses and damages incurred by [Terrenus] shall be deemed as its losses and damages resulting from [Attika's] default and shall be reimbursed by [Attika] to [Terrenus].

7.41 In addressing this issue, Kwek J referred to the established principle that "an innocent party cannot claim unliquidated damages in addition to the liquidated damages which were designed to deal with the loss that has occurred".[50] In this case, the liquidated damages clause referred specifically to a situation where Attika failed to achieve timely completion, that is, damages arising from delay. As a consequence, all damages arising from delay would therefore fall within the ambit of the liquidated damages provision in cl 17.1.2.[51] The wording of the clause was significant – it refers to "other losses and damages" and not "additional" losses and damages from delay.[52] The court accordingly rejected Terrenus's claim for general damages arising from delay under the clause.

D. Back-charges

7.42 The term "back charge" is encountered frequently in the construction industry. It is a sum imposed by a main contractor against a subcontractor for costs incurred by the main contractor in supplying materials to the subcontractor or for carrying out work which was originally intended to be carried out by the subcontractor. The back charge operates as a set-off against amounts which would be otherwise payable to the subcontractor.

7.43 The approach to establish a case for imposing back-charges was examined in some detail during the year under review. In *Pro-Active Engineering Pte Ltd v Prime Structures Engineering Pte Ltd*,[53] Prime

50 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [213], citing *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd* [2012] 3 SLR 1088 at [55].

51 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [214].

52 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [215].

53 [2023] SGHC 205.

Structures Engineering Pte Ltd ("Prime") was a subcontractor employed by a main contractor to carry out certain engineering work. Prime, in turn, employed Pro-Active Engineering Pte Ltd ("PAE") under a sub-subcontract to supply, fabricate and install certain steelworks. PAE failed to meet the agreed timelines for each stage of the works and the overall timeline for completion of the sub-subcontract works. Subsequently, because of PAE's repeated failures to meet the deadline, Prime omitted certain works from the sub-subcontract described as the "roof crown works". The materials for the omitted works had been paid for by way of a letter of credit issued by Prime at PAE's request. Prime back charged PAE for the costs incurred following the engagement of a third party to complete the works.

7.44 Before the High Court, PAE argued that there was no evidence of any back charging by the main contractor to Prime for works carried out by the third party. The High Court dismissed this objection, holding that it was sufficient for the work which had been taken off PAE's sub-subcontract. In the course of reaching this conclusion, Lai Siu Chiu SJ approved the following statement of principle on the subject:[54]

> In my view, the onus is on the party claiming a back charge to prove that:
>
> 1. The back charge is for an expense actually, necessarily and reasonably incurred by the party claiming the back charge.
>
> 2. By the terms of the subcontract, or by some other agreement between the parties, the charge is one, or is in relation to some task, for which the subcontractor undertook responsibility.
>
> 3. The general contractor incurred the expense because the subcontractor defaulted on the responsibility to which the charge relates.
>
> 4. Prior to incurring the charge, the general contractor gave notice to the subcontractor of its default and a reasonable opportunity to cure it.

7.45 The learned judge considered that, in this case, Prime fulfilled all four requirements in this case[55] and, consequently, all back charges incurred by Prime that arose from the removal of the installation component of the roof crown works must necessarily be for PAE's account.[56]

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54 *Pro-Active Engineering Pte Ltd v Prime Structures Engineering Pte Ltd* [2023] SGHC 205 at [102], referring to Burrows J in *Impact Painting Ltd v Man-Shield (Alta) Construction Inc* [2018] AWLD 582.

55 *Pro-Active Engineering Pte Ltd v Prime Structures Engineering Pte Ltd* [2023] SGHC 205 at [103].

56 *Pro-Active Engineering Pte Ltd v Prime Structures Engineering Pte Ltd* [2023] SGHC 205 at [104].

VI. Construction defects

A. Burden of proof

7.46 In *Terrenus*, one of the areas of dispute concerns the defective installation of the supporting rods ("PEG Rods") on which the solar panels were mounted. It was alleged that Attika failed to embed the PEG Rods to a "minimum" depth of 500mm below ground as specified in one of the contract drawings. Terrenus' position was that so long as it was proven that there had been a departure from the contractual specifications, a defect would be made out. It relied on the evidence of its expert who did not assess the actual number of non-compliant PEG Rods but arrived at this view on the basis of "observations on site" and an extrapolation based on an analysis of six out of 71 solar panel arrays. Terrenus claimed that the measure of loss should be based on complete reinstallation unless Attika could show that the cost of cure is disproportionate.

7.47 It was not surprising that the High Court found that Attika was in breach of the requirement in the specification given that Attika did not seriously contest this point. However, it was held, as a matter of first principles, that the burden is on Terrenus as the claimant to prove its case:

> (a) on the extent of non-compliance;
>
> (b) that the non-compliance resulted in the alleged risks such that Terrenus is entitled to substantial damages; and
>
> (c) that the measure of costs it claims as damages is reasonable.[57]

7.48 In the light of established principles on the burden of proof, these submissions by Terrenus were held to be wholly misconceived. The burden was on Terrenus to prove its case.[58] In this case, the court found that although Attika was in breach for some failure to comply with the contractual requirement of a minimum embedment depth of 500mm for PEG Rods, Terrenus failed to prove its case on the extent of non-compliance and failed to show that the breach resulted in any loss that justifies substantial damages. Accordingly, the court awarded Terrenus only nominal damages in respect of such breach, fixed at $1,500.[59]

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57 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [32].

58 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [33].

59 *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 at [71].

B. Notice to rectify

7.49 Another issue in *Vim v Deluge* concerns Deluge's counterclaim against Vim for defective work amounting to $987,230.04. Clause 19.1 of the sub-subcontract provided that if Vim is notified by Deluge to correct defective or non-conforming works and Vim is unable or unwilling to proceed with the corrective action, Deluge may upon written notice perform or procure the performance of the "redesign, repair, rework or replacement" of the non-conforming work at Vim's cost. Clause 19.2 provided that the performance or procurement of such work by Deluge shall not relieve Vim of any of its responsibilities under the Subcontract.

7.50 Loh SJ noted that this requirement is "fairly standard procedure adopted in construction contracts". The general rule is that while a failure to comply with such a provision may preclude an employer from relying on the defects clause, in the absence of any term to the contrary, the employer's right to damages in respect of the repairs is not extinguished.[60] He considered the rationale to be as follows:[61]

> The requirement of notification is necessary to balance the consequence that any other party who carries out such remedial work, is likely to do so at a greater cost. This is because the contractor is in the best position to carry out such remedial work, if justified, at the lowest cost. There is an element of the upstream party having to take reasonable steps to mitigate its damage. Where no notice is given and such remedial work is carried out, it is open to the subcontractor to argue that it should not be liable for the greater cost of remedial work but only to the lower cost it would have incurred in carrying out such remedial works if due notice had been given.
>
> Thus, where the employer does not provide the contractor with a contractual opportunity to rectify defects during the defect liability period, the employer can still recover the cost of repairing the defects, but the sum that the employer can recover may be limited to how much it would have cost the contractor to rectify the defects.

7.51 In this case, Loh SJ considered that there was "some evidence" to show that the requirement of written notice had been satisfied as regards the most substantial back-charges. He noted that Deluge sent 14 e-mails notifying Vim that it had to redress defects and delays in its works and, in those e-mails, warned that Vim would be held responsible if these were not carried out.[62] The Appellate Division found that there was sufficient

60 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [80].

61 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [81] and [82].

62 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [91].

notice, given in writing, under cl 19 in relation to four back-charges but held that the remainder of the back-charges were not supported by any form of notification.[63] In the result, following an examination of the evidence, the Appellate Division reduced the trial judge's award of back-charges from $858,604.36 to $41,788.80.

VII. Security of payment

A. Timelines for adjudication application

7.52 During the year under review, the High Court affirmed once again the crucial requirement for parties in adjudication to comply with the strict timelines laid down in the Building and Construction Industry Security of Payment Act 2004[64] ("SOPA").

7.53 A decision which will be followed with interest in the industry addresses the determination of the last date for filing an adjudication application under s 13(3)(*a*) of the SOPA. In *HP Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd*,[65] the adjudication rose from a subcontract. It is not in dispute that: (a) the payment claim was served on 30 May 2023; (b) according to s 11 of the SOPA, the payment response was due on 20 June 2023; and (c) the seven-day dispute settlement period commenced from 21 June 2023 and expired on 27 June 2023. The primary question before the court concerned the determination of the period within which a claimant is entitled to apply for adjudication for the purpose of s 13(3)(*a*).

7.54 Section 13(3)(*a*) provides that an adjudication application "must be made within seven days after the entitlement of the claimant to make an adjudication application first arises under section 12".[66] Section 12(2) in turn provides that the right to make an adjudication application arises if "by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response". The adjudicator had held that the entitlement to make the adjudication application first arose on 28 June 2023, and the seven-day period to lodge the adjudication application was to commence on 29 June 2023 and would therefore end on 6 July 2023.

63 *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A) Pte Ltd* [2023] 2 SLR 468 at [98].
64 2020 Rev Ed.
65 [2023] SGHC 298.
66 Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) s 13(3)(*a*).

7.55 The High Court agreed with the adjudicator and dismissed the application to set aside the adjudication determination. In his decision, Philip Jeyaretnam J rejected the submission that s 50(a) of the Interpretation Act 1965[67] should not apply and that there "is nothing absurd about the proper interpretation permitting the adjudication applicant a period of eight days after the expiry of the dispute settlement period, which equates to seven days after the day on which entitlement arose".[68] He considered that the issue should be approached in two steps. The first of these is to determine the date when the entitlement arises. Jeyaretnam J notes that since the SOPA operates in days, the context must lead "the ordinary reader to the conclusion that the entitlement arises on the day" and that "[to] have a day to do something after that would mean a complete day". The second step was to consider what is meant by the phrase "must be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12". He held that "as a matter of ordinary language, the seven-day period after the entitlement arises will commence on the day after".[69]

7.56 The timeline for filing an adjudication application was also raised in *Asia Grand Pte Ltd v AI Associates Pte Ltd*.[70] In that case, the payment claim was served on 16 November 2022 and the adjudication application was lodged on 13 December 2022. The dispute turned on whether the payment claim should have been served on 16 November 2022 or 30 November 2022. The latter date was "the deemed date" of service under s 10(3)(*b*) of the SOPA. If the operative date was 30 November 2022, it follows that the entitlement to lodge the adjudication application could only arise from 22 December 2022.

7.57 The adjudicator determined that the payment claim was validly served on 16 November 2022 and consequently, that the adjudication application was properly lodged. The High Court set aside the adjudication determination. The High Court noted that the expression "date prescribed" in s 10(2)(*a*)(ii) of the SOPA referred to the last day of the relevant calendar month. Thus, if a payment claim is served before the last day of the relevant month, then by virtue of s 10(3)(*b*) of the SOPA, the payment claim would be deemed to have been served on the last day of that month. In this case, the payment claim was deemed to have been served on 30 November 2022 and therefore the adjudication application was filed prematurely.

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67 2020 Rev Ed.

68 *HP Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2023] SGHC 298 at [12].

69 *HP Construction & Engineering Pte Ltd v Mega Team Engineering Pte Ltd* [2023] SGHC 298 at [14].

70 [2023] SGHC 175.

B. Adjudication of claims after termination

7.58 Readers of this series will be familiar with the debate surrounding the entitlement of a claimant to apply for adjudication following the termination of the construction contract. In the 2021 volume[71] of this series of reviews, we had stated that, arising from the decisions of the Court of Appeal in *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd*[72] ("*Far East*"); *Shimizu Corp v Stargood Construction Pte Ltd*[73] ("*Shimizu*") and *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd*[74] ("*Orion-One*"), the present position is that unless the right to make a payment claim or to be paid is expressly reserved in the underlying contract, a claimant is not entitled to serve a payment claim and is hence not entitled to lodge an adjudication application arising from that claim. The effect of *Far East* and *Shimizu* has allowed a respondent therefore to forestall any attempt by a claimant to apply for statutory adjudication by immediately terminating the subsisting contract once the works are substantially completed or approaching completion. While this strategy is not without risk to a respondent, it does serve to force issues relating to termination and final account claims for resolution outside the scope of the statutory regime.

7.59 During the year under review, a small window of respite against the harsh situation is afforded by the High Court in *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd*[75] ("*Builders Hub*"). In that case, the adjudication arose from a main contract which incorporated the terms of the Real Estate Developers' Association of Singapore Design and Build Conditions of Contract ("REDAS Conditions"). The contractor served a payment claim on 18 August 2022. On 26 August 2022, the employer alleged that the claimant had repudiated the contract. It accepted the alleged repudiation and terminated the contractor's employment under cl 30.2.2 of the REDAS Conditions. On 15 September 2022, the employer served its payment response. The adjudicator found that he had no jurisdiction because the contractor's employment had been terminated and that, as a consequence, the adjudicator considered that the contractor has no contractual right to be paid progress payments following termination.

7.60 The High Court set aside the adjudication determination. In her judgment, Teh Hwee Hwee JC considered that under the termination

71 Chow Kok Fong, Christopher Chuah & Mohan Pillay, "Building and Construction Law" (2021) 22 SAL Ann Rev 153.
72 [2019] 2 SLR 189.
73 [2020] SGCA 37.
74 [2020] SGCA 121.
75 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120.

provisions in the REDAS Conditions, a contractor's entitlement to be paid based on a payment claim validly served before termination remains unaffected. In arriving at this decision, the court considered that *Far East* (or "*Yau Lee*" as referred to in the judgment) was distinguishable because the payment claim that was challenged was served after the contract had come to an end.[76] The court noted that in the case of *Shimizu* and *Orion-One*, the terms of the respective contract could not serve as a valid basis for the service of payment claims following contractual termination.[77] Crucially, the learned judge held that none of these decisions:[78]

> … support a finding that an entitlement arising from a validly served pre-termination payment claim will be 'lost', negated or suspended upon the termination of the contract or the contractor's employment, if the contract does not expressly provide for the contractor to be paid post-termination.

C. Reasons in adjudication determination

7.61 Section 17(2) of the SOPA sets out the matters which an adjudicator must determine in an adjudication and expressly requires the adjudicator to "include, in the determination, the reasons therefor". Similarly, under s 19(8), a review adjudicator or panel of review adjudicators is required to include in the review determination, the reasons for the determination.

7.62 During the year under review, this issue was raised before the Court of Appeal in *CVV v CWB*[79] ("*CVV*") in connection with a setting-aside application in respect of an arbitrator's award. Although the case does not relate specifically to statutory adjudication, the decision is of interest because it addresses some of the policy considerations on this issue which may be relevant to both arbitration and adjudication.

7.63 In *CVV*, it was argued that an aspect of fairness in proceedings is the need for the tribunal to give reasons for its decision. The argument relied on the 2013 decision of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd*[80] where it was suggested that an arbitral tribunal is generally bound to give reasons for its decision and that a failure to give reasons may be a breach of Art 31(2) of the UNCITRAL Model Law on International Commercial Arbitration[81] (the "Model Law") that would

76 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 at [39] and [40].
77 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 at [41] and [42].
78 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 at [43].
79 [2024] 1 SLR 32.
80 [2013] 4 SLR 972.
81 GA Res 40/72, UN GOAR, 40th Sess, Supp No 17, Annex 1, UN Doc A/40/17 (1985).

render an award liable to being set aside.[82] However, the Court of Appeal in *CVV* clarified that:

> (a) While Art 31(2) of the Model Law indeed places the arbitral tribunal under a general duty to give reasons, it is not settled in the case law whether a tribunal's failure to give *adequate* reasons is itself a reason to set aside an award. A failure to give adequate reasons has not been expressly recognised in *TMM Division* as a breach of the rules of natural justice and, indeed, the award in that case had not been set aside for a failure to give reasons.[83]
>
> (b) The standards applicable to judges to give reasons do not apply to an arbitration. In court cases, there is a need for open justice and to set out the court's reasons in detail, because a review by the appellate court would involve a re-examination of the merits. This ensures that the appellate court has the proper material to understand, and do justice to, the decisions taken at first instance. By contrast, arbitration proceedings are confidential in nature and not subject to a review of the merits at the setting-aside or enforcement stage. It follows that the scope of a tribunal's duty to give reasons would differ from that of a judge, and it is therefore inappropriate to apply standards applicable to judges in the context of arbitration proceedings.[84]

7.64 In the course of its judgment, the Court of Appeal did allow that, in an appropriate situation, an award may be set aside if the failure on the part of a tribunal to furnish adequate reasons gives rise to the inference that the tribunal had "ignored, forgotten or overlooked" a party's submissions so that it constitutes a breach of the fair hearing rule. In such a situation, the case has to be evaluated from the "perspective of whether, on the totality of the evidence, it is indeed the case that the Tribunal had failed to apply its mind in breach of the fair hearing rule". Steven Chong JA in his judgment cautioned that such an application would only succeed if "the tribunal's omission to give reasons must logically be so grave or so

82 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [97] and [99].

83 *CVV v CWB* [2024] 1 SLR 32 at [32].

84 *CVV v CWB* [2024] 1 SLR 32 at [33]. In another passage, the Court of Appeal approved the observations of the High Court of Australia in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 3 where the majority rejected the notion that an arbitrator is required to give reasons to a "judicial standard" and instead preferred the view that what is required of the tribunal "will depend upon the nature of the dispute and the particular circumstances of the case" (at [53]).

glaring as to point to the inescapable inference that the tribunal did not even attempt to comprehend the essential issues in the arbitration".[85]

7.65 It is appropriate to comment briefly on the significance of this decision in the context of an adjudicator's duty to furnish reasons in an adjudication determination under the SOPA:

> (a) Firstly, in *CVV*, the Court of Appeal observed that a failure to give adequate reasons has not been expressly named as a ground for setting aside under s 24 of the International Arbitration Act 1994[86] or Art 34 of the Model Law. The same could not be said of statutory adjudication. Section 27(6)(*e*) of the SOPA states that an adjudication determination may be set aside on the ground that the adjudicator failed to comply with the provisions of the Act so that an adjudication determination which failed to furnish *any* reasons might be set aside on this ground.
>
> (b) Secondly, it may be posited that the standards which apply to adjudicators are unlikely to be higher than that of arbitrators. However, the Court of Appeal, in explaining the difference between the standards applicable to judges and those which apply to arbitrators, was cognisant that in the case of judges, a matter may be the subject of an appeal and a review by the appellate court would involve a re-examination of the merits. With the 2018 amendments, either of the parties in adjudication may apply for adjudication review. This suggests that there is a similar consideration here and, arguably, an adjudicator should state adequate reasons for his/her determination.

7.66 While *CVV* is not determinative of the situation with statutory adjudication, it is highly arguable that, on the reasoning, an adjudicator is required to furnish sufficient reasons of a determination.

D. Setting aside on ground of fraud

7.67 Another iteration of the dispute between the parties in *Builders Hub* came before the High Court for the second time in *JP Nelson Equipment Pte Ltd v Builders Hub Pte Ltd*[87] ("*Builders Hub No 2*"). In this case, the employer made out its case that the contractor had fraudulently submitted certain documents to deceive the employer. Notwithstanding this finding, Lee Seiu Kin J noted that the facts surrounding the fraud

85 *CVV v CWB* [2024] 1 SLR 32 at [36].
86 2020 Rev Ed.
87 [2023] SGHC 186.

were not relied upon by the first instance adjudicator and the review adjudicators in arriving at the adjudication determination and the subsequent adjudication review.

7.68 Readers may recall that, in the 2021 volume,[88] we commented on the two-step test laid down by the Court of Appeal in *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd*[89] ("*Façade Solution*") for reviewing an application to set aside an adjudication application on the ground of fraud. The *Façade Solution* test requires the innocent party to show *firstly* that the adjudication determination was based on facts which the party seeking the claim knew or ought reasonably to have known were untrue[90] and, *secondly*, that the established facts were material to the issuance of the adjudication determination.[91]

7.69 In *Builders Hub No 2*, it was held that the facts in that case did not satisfy the *Façade Solution* test. However, the learned judge recognised that the contractor was still holding onto "the fruits of its fraud" and this was something that the court had the power to interfere with. Lee J considered that the Court of Appeal in *Façade Solution* did not intend the test to be "the only situation under which a court may intervene".[92] He accepted the proposition[93] that no court would allow or assist a person to retain any advantage obtained by fraud since fraud unravels everything. Although he found that the fraud had resulted in an overpayment in the sum of $5,540.73,[94] he considered that it would be an inadequate expression of the court's disapprobation towards fraud to merely order the repayment of this sum.[95] He ordered that the adjudication review amount be reduced by an amount corresponding with the sum of $155,160 received in earlier payments but which were tainted by fraud.

7.70 The result of *Builders Hub No 2* is that where fraud has been proved, a court register its disapprobation of the fraudulent conduct by proceeding beyond the scope of the matters which formed the basis of an

88 Chow Kok Fong, Christopher Chuah & Mohan Pillay, "Building and Construction Law" (2021) 22 SAL Ann Rev 153.
89 [2020] 2 SLR 1125.
90 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [30]–[33].
91 *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [34]–[38].
92 *JP Nelson Equipment Pte Ltd v Builders Hub Pte Ltd* [2023] SGHC 186 at [80].
93 As laid down by Denning LJ in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712 (and affirmed by the Singapore Court of Appeal in *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 at [22]), cited in *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 at [80].
94 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 at [83] and [84].
95 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 at [84].

adjudication determination, to compel a party to disgorge the fruits of the fraud.

E. Application for stay enforcement

7.71 It is settled law under what is referred to as the *W Y Steel*[96] test that the court may order a stay of enforcement of an adjudication determination where: (a) there is clear and objective evidence of the successful claimant's actual present insolvency; or (b) the court is satisfied on a balance of probabilities that, if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute were resolved in the respondent's favour.[97]

7.72 In *Wan Sern Metal Industries Pye Ltd v Hua Tian Engineering Pte Ltd*,[98] the issue arose from an adjudication determination made in favour of a sub-subcontractor ("HTEP") against a subcontractor ("WSMI"). WSMI applied to stay the enforcement of an adjudication determination on both limbs of the *W Y Steel* test. The High Court rejected the application on a consideration of the facts against the two limbs of the test.

7.73 As to the first limb, the court found that there was no clear and objective evidence of the claimant's present insolvency. For the purpose of establishing whether HTEP was "presently insolvent", the court accepted that the sole and determinative test for insolvency should be the "cash flow test".[99] This test "assesses whether the company's current assets exceed its current liabilities such that it is able to meet all debts as and when they fall due".[100] HTEP provided documentary evidence showing that its assets exceeded its total liabilities.[101] This was supported by other evidence including statements from its bankers testifying to its timely payments of employees' Central Provident Fund contributions and that it had made timely payments to its suppliers and that it was liquid.[102] The court was satisfied that HTEP was "presently solvent".

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96 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380.

97 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [70]; *CEQ v CER* [2020] SGHC 192 at [9].

98 [2023] SGHC 46.

99 *Wan Sern Metal Industries Pye Ltd v Hua Tian Engineering Pte Ltd* [2023] SGHC 46 at [11], referring to the test as laid down in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [56].

100 *Wan Sern Metal Industries Pye Ltd v Hua Tian Engineering Pte Ltd* [2023] SGHC 46 at [10], referring to *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [65].

101 *Wan Sern Metal Industries Pye Ltd v Hua Tian Engineering Pte Ltd* [2023] SGHC 46 at [12].

102 *Wan Sern Metal Industries Pye Ltd v Hua Tian Engineering Pte Ltd* [2023] SGHC 46 at [15].

7.74 In relation to the second limb, the court was not satisfied on the evidence that, on a balance of probabilities, the money paid to the successful claimant would not ultimately be recovered if the dispute was resolved in the respondent's favour and the stay were not granted. The court held that HTEP's allegedly low paid-up capital and relatively low bank balance did not, in themselves, indicate that there was a risk of non-recovery.[103] There was also no evidence of problems with HTEP's cash flow or trade receivables or evidence that HTEP's trade receivables may not be recovered.[104] The court also agreed that there was no evidence suggesting the possibility of dissipation of assets or potential liquidation of the company.[105] On the evidence, the court concluded that there was nothing to suggest that WSMI would be unable to recover the moneys paid to HTEP in the event that the dispute was resolved in WSMI's favour.

7.75 In making its application for a stay, WSMI also raised a novel argument that the enforcement of payment could force WSMI itself into insolvency. This would defeat the purpose of the SOPA regime which the Court of Appeal in *W Y Steel* had described as "pay now, argue later". WSMI submitted that if payment rendered WSMI insolvent, it could not possibly "argue later". The court held that this submission has no legal basis in that it "completely misinterpreted *W Y Steel*" and attempted to use the decision for a proposition which the case did not put forth.[106] More plainly, *W Y Steel* did not establish that there should be a stay of enforcement where the paying party is on the verge of insolvency. Indeed, as highlighted by HTEP, if WSMI did have genuine financial difficulties, the situation could equally argue for a need to ensure that HTEP is paid the adjudicated amount without further delay.[107]

VIII. Performance bonds

A. Compliance with condition precedent

7.76 It is settled law that a guarantor of a performance bond or guarantee – usually a financial institution – is obliged to pay the

103 *Wan Sern Metal Industries Pye Ltd v Hua Tian Engineering Pte Ltd* [2023] SGHC 46 at [20].
104 *Wan Sern Metal Industries Pye Ltd v Hua Tian Engineering Pte Ltd* [2023] SGHC 46 at [21].
105 *Wan Sern Metal Industries Pye Ltd v Hua Tian Engineering Pte Ltd* [2023] SGHC 46 at [24].
106 *Wan Sern Metal Industries Pye Ltd v Hua Tian Engineering Pte Ltd* [2023] SGHC 46 at [28].
107 *Wan Sern Metal Industries Pye Ltd v Hua Tian Engineering Pte Ltd* [2023] SGHC 46 at [30].

beneficiary upon written demand of the beneficiary. The courts have upheld such demands on the ground that the performance bond is a contract between the beneficiary and the financial institution, and as between them, the underlying contract is not relevant.[108] However, the terms of a performance bond or guarantee may provide for the right to call on the assured sum on the fulfilment of certain pre-conditions. During the year under review, the High Court affirmed that where such requirements are present on the terms of the bond and applicable, strict compliance was necessary before a call could be made.

7.77 In *Chian Teck Realty Pte Ltd v SDK Consortium*,[109] a contractor ("SDK") appointed a subcontractor ("Chian Teck") to carry out reinforced concrete and precast installation work. SDK called on a bond issued by Lonpac Insurance Bhd ("Lonpac"). Chian Teck sought an injunction to stop the call. The parties disagreed on the basis of SDK's call.

7.78 Under the bond, SDK was entitled to call for payment of the guaranteed sum pursuant to two provisions. Firstly, under cl 1, SDK was entitled to make a call where there was a default on the part of Chian Teck "without any proof of actual default" and Chian Teck could only obtain an injunction to restrain payment if it could prove that the call was fraudulent. Secondly, under cl 3, Lonpac could give 90 days written notice of its intention not to extend the bond. Upon such notice, SDK was allowed to either: (a) make a call on the bond; or (b) direct Lonpac to extend the bond's validity for a further period not exceeding six months. There was no requirement to prove any default on the part of Chian Teck as the purpose of this clause was to preserve the security, either by way of obtaining a final extension or converting it to cash. The dispute between the parties was whether the call was made under cl 1 or cl 3.

7.79 In his judgment, Lee Seiu Kin J stated that a demand in respect of both a conditional and unconditional bond can be made subject to: (a) the fulfilment of various conditions precedent; and/or (b) compliance with the stipulated form. The doctrine of strict compliance applied equally to conditions precedent and stipulated forms. In the absence of strict compliance with these requirements, a call on the bond could be restrained.[110]

108 See *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125 at [26].

109 [2024] 3 SLR 1031.

110 *Chian Teck Realty Pte Ltd v SDK Consortium* [2024] 3 SLR 1031 at [21], citing *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125 at [31], *Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd* [2019] 4 SLR 1324 at [23].

7.80 From the events leading up to the call, Lee J decided the call was made pursuant to cl 3.[111] He observed that SDK's concern was Lonpac's notice of its intention not to extend the bond. In reaching this conclusion, Lee J highlighted the absence of any evidence that the call was made because of default on the part Chian Teck and the indirect admission by one of SDK's witnesses that the impending expiry of the bond was the reason for SDK's demand.[112] Although SDK had stated that the demand was made pursuant to cl 4, the learned judge considered that cl 4 was not a ground for making a demand – it simply set out how the demand was to be made.[113]

7.81 Following the finding that the call was made under cl 3, the learned judge proceeded to determine whether Lonpac's notice complied with the terms of that clause. He noted that Lonpac had dispatched a first notice to SDK's previous office address. This notice thus failed to fulfil the requirement for the written notice under cl 3.[114] A subsequent notice sent to SDK's current office address only provided 13 days' notice and this also did not comply with the 90-day notice period required under the clause.[115] As a consequence, the court held that the call was invalid and granted the injunction restraining Lonpac and SDK from making and receiving payment of the guaranteed sum.

B. Fraud exception

7.82 It was also argued by Chian Teck that SDK's call on the performance bond was made fraudulently in that SDK attempted to pass off the call as compliant with cl 3 when in fact it was not so. In his judgment, Lee J stated that the fraud exception is generally regarded as a difficult exception to invoke and affirmed the settled principles on this point:[116]

> (a) Firstly, a party invoking this exception must establish a strong *prima facie* case that the beneficiary called on the bond with the knowledge that its demand was invalid, without belief in the validity of its demand or with indifference to whether the demand was valid or not.[117]

111 *Chian Teck Realty Pte Ltd v SDK Consortium* [2024] 3 SLR 1031 at [24].
112 *Chian Teck Realty Pte Ltd v SDK Consortium* [2024] 3 SLR 1031 at [29].
113 *Chian Teck Realty Pte Ltd v SDK Consortium* [2024] 3 SLR 1031 at [25].
114 *Chian Teck Realty Pte Ltd v SDK Consortium* [2024] 3 SLR 1031 at [32]–[33].
115 *Chian Teck Realty Pte Ltd v SDK Consortium* [2024] 3 SLR 1031 at [33].
116 *Chian Teck Realty Pte Ltd v SDK Consortium* [2024] 3 SLR 1031 at [37].
117 *Chian Teck Realty Pte Ltd v SDK Consortium* [2024] 3 SLR 1031 at [37], citing *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2019] 2 SLR 295 at [74], *Arab Banking Corp v Boustead Singapore Ltd* [2016] 3 SLR 557 at [61]–[63].

(b) Secondly, the standard proof for fraud required the plaintiff to show that the only realistic inference to be drawn on the available evidence was that the beneficiary had no honest belief that it was entitled to receive payment or was recklessly indifferent as to whether it had a right to such payment.[118]

7.83 The court found that, on the facts of the case, the "high standards of proof" were not met. SDK's actions in this case were not *mala fide*, but reasonable in the circumstances of the case.[119] Distinguishing *Arab Banking Corp v Boustead Singapore Ltd*[120] ("*Arab Banking*") from the case before him, Lee J pointed out that in *Arab Banking* the calls were made, notwithstanding that the notices seeking to extend the term of the performance bonds were obviously and manifestly non-compliant with the requirements for making a valid call. By contrast, in SDK's case, it was totally reasonable for SDK to have acted as it did as that would have been the prudent thing to do.[121]

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118 *Chian Teck Realty Pte Ltd v SDK Consortium* [2024] 3 SLR 1031 at [37], citing *Arab Banking Corp v Boustead Singapore Ltd* [2016] 3 SLR 557 at [82].

119 *Chian Teck Realty Pte Ltd v SDK Consortium* [2024] 3 SLR 1031 at [38].

120 [2016] 3 SLR 557.

121 *Chian Teck Realty Pte Ltd v SDK Consortium* [2024] 3 SLR 1031 at [38].