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7. BUILDING AND CONSTRUCTION LAW

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I. Overview

7.1 During the year under review, the COVID-19 pandemic continued to ravage the industry. Uncertainties persisted with the industry's myriad supply chains and labour resources, accentuated by the need to vary pandemic site movement control protocols to address changes in the dominant variants of the virus. Not surprisingly, the level of construction activity remained suppressed throughout much of 2021. In turn, this affected the volume of local construction cases and the number of adjudication applications during the year. Nevertheless, despite the low volume of cases, the judgments delivered during the year raised a number of interesting points. Regular readers of this segment of the review will appreciate, in particular, the careful exposition of the principles relating to variation instructions,[1] extension of time, certification and the recognition of completion of a project.[2]

II. Variations

7.2 Where a contract provides for a variation to be ordered by way of a written instruction, a claimant will face formidable issues to mount a variation claim made on the basis of an oral instruction. In *Vim*

1 *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63.
2 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9.

Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd,[3] the parties had entered into a sub-subcontract for certain plumbing and sanitary works. The sub-subcontractor ("Vim") left the site after temporary occupation permit was obtained but before the expiry of the defects liability period. 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 sums for alleged variation works. Vim did not dispute that the variations were not ordered in writing by Deluge's project manager but contended that Deluge was estopped from denying its claims on the basis that the project manager had orally instructed Vim to carry out the variation works.

7.3 The High Court held that Vim's variation claims failed because there were no written instructions from Deluge's project manager as required under the sub-subcontract. In the course of his decision, Andre Maniam JC (as he then was) cited with approval an earlier decision where the same court had rejected variation claims carried out pursuant to verbal instructions.[4] The learned Judicial Commissioner also rejected the submission that Deluge has waived the requirement for written instructions. He stated in his judgment that the fact that Vim acted on verbal instructions itself "cannot amount to waiver or estoppel".[5] Maniam JC explained the objectives of a contractual provision requiring variations to be instructed in writing:[6]

> The requirement of written instructions from a designated person serves various objectives. First, it provides for a written record, thus obviating disputes as to what was allegedly said (which happened in the present case). Second, it focuses the parties' attention, at the time, on whether in principle there may be an adjustment to the contract sum. If, without written instructions, Vim proceeded to do work that it considered to be a variation, it did so at its own risk. As a corollary, if there had been written instructions from Deluge's project manager, Deluge would be recognising that – in principle – Vim might get additional payment.

3 [2021] SGHC 63.

4 *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 at [20], citing *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203 at [94].

5 *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 at [31].

6 *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63 at [37].

III. Extension of time

A. Context

7.4 The saga of a protracted construction dispute continued during the year under review. In 2015, an earlier case on the same contract provided an opportunity for the Court of Appeal to elaborate on the construction of conflicting terms between different documents in a building contract and the exercise of the certification machinery under a building contract.[7]

7.5 The parties came before the courts again in 2021 in *GTMS Construction Pte Ltd v Ser Kim Koi*[8] ("*GTMS Construction*"). In the course of a detailed 430-page judgment, the High Court took the opportunity to examine the law on several areas, including extension of time, due diligence, temporary occupation permit ("TOP") and practical completion, acts of prevention and the duty of supervision. The High Court also had to address complex questions of interpretation involving the Singapore Institute of Architects' Standard Form of Contract[9] ("the SIA Conditions") and the implications arising therefrom. This is a judgment written, no doubt, with considerable care and effort and helpfully demonstrates the application of settled principles in this area of law.

7.6 The facts in *GTMS Construction* relate to a contract to build three bungalows. The contract incorporated the SIA Conditions. The contract sum was $13.13m and the works were to be completed within 20 months, effectively by 21 February 2013. On 15 May 2013, the architect certified completion as at 17 April 2013, granting full extension of time ("EOT") up to that date. This was notwithstanding that the buildings failed their inspection for the TOP two weeks earlier. It was not disputed that the TOP was not obtained until 16 September 2013. The contractor brought the action to 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 the architect's fee of $60,990. On its part, the employer counterclaimed the contractor for the sum of $12,752,651 and took out a third-party claim against the architect and other third parties for the sum of $10,853,718, alleging that the contractor and the third parties had conspired to injure him. As a corollary of that conspiracy, the employer claimed that the architect had, *inter alia*, granted EOTs improperly,

7 *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51, discussed in (2016) 17 SAL Ann Rev 155 at 155–156, paras 7.1–7.4 and 174–175, paras 7.51–7.55.
8 [2021] SGHC 9.
9 9th Ed, 2010.

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. Clause 23(1)(a) – Extension of time on account of force majeure

7.7 The dispute surrounding EOT related to the delay caused to the works when a power utility, SP PowerGrid Ltd, took a longer time than expected for the power supply connection and the utility's late notification of the need for an "over ground distribution box" ("OG box"). The contractor and the architect had submitted that this event amounted to a *force majeure* and was therefore an event in respect of which an EOT may be granted under cl 23(1)(a) of the SIA Conditions. The employer argued that cl 23(1)(a) was meaningless as the contract did not contain a definition of *force majeure*.

*(1) Meaning of "*force majeure*"*

7.8 Tan Siong Thye J dismissed the employer's argument. He considered that the meaning of the term "*force majeure*" is generally understood.[10] Referring to two textbook authorities[11] and the Court of Appeal's decision in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd*,[12] the learned judge considered that the term "*force majeure*" is generally understood in those terms:[13]

> Thus, a *force majeure* event generally refers to an event that impedes or obstructs the performance of the contract, which was out of the parties' control and occurred without the fault of either party. Whether a *force majeure* event arises is ultimately a matter of construction based on the facts of each case, with a view to giving effect to the parties' intentions. Furthermore, the element of unforeseeability is not strictly necessary.

7.9 The essence of the term is that of an event that "was radical and out of the parties' control". Given this "general and established meaning", the court should be slow to find the *force majeure* clause unenforceable on the basis that it was not defined in the contract.[14] The learned judge further observed that the delayed events in respect of which an EOT may

10 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [194].
11 Chow Kok Fong, *Construction Contracts Dictionary* (Sweet & Maxwell, 2nd Ed, 2014) at p 198; *Halsbury's Laws of Singapore* vol 2 (Lexis Nexis, 2003) at para 30.112; *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [194] and [195].
12 [2007] 4 SLR(R) 413 at [54] and [57].
13 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [197].
14 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [197].

be granted under cll 23(1)(a)–23(1)(q) share the "common thread … that when the delaying events are not attributable to the contractor, it can apply for an EOT". He considered that this is a fair and equitable approach to the issue of EOT.[15]

(2) Establishing force majeure

7.10 In the case before him he found that the relevant delay was occasioned by the need to determine a location for the OG Box and the delay occasioned by the time taken by the utility to install the OG Box and complete the power connection. He found that not only was the OG Box requirement entirely unexpected, but the delay thereby caused by the OG Box requirement also occurred without the fault of either party and was out of their control. Similarly, the time taken by the utility to carry out the power connection works was also out of the control of both parties and occurred without either party's fault.[16] The fact that the contractor had provided for the power supply connection in the master programme did not take the delay outside the scope of cl 23(1)(a)[17] and, in any case, the element of foreseeability is not critical to the concept of *force majeure*. The learned judge proceeded to hold that in accordance with the "spirit and intent" of cl 23(1), this delay event "could easily justify" the grant of the EOT to the contractor.[18]

C. Due diligence and "float"

7.11 In *GTMS Construction*, the employer further contended that the contractor failed to exercise due diligence in the execution of the works. This contention was made with reference to the time allowed in the master programme for the construction of electrical meter compartments. On the same basis, the employer also pointed to the delay in the contractor's other ongoing works which obstructed the cable-laying works. However, the court found that these items of works could only be installed after the utility had completed its connection works. There was no factual basis therefore for the employer's allegations.[19]

7.12 In any case, Tan J considered that the fact that an activity was shown to be behind the date indicated in the master programme could not mean that the contractor was in delay. This was because the master programme allowed for a "float". He accepted a textbook's definition of

15 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [199].
16 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [200]–[204].
17 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [208].
18 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [210].
19 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [226]–[228].

"float" as "the period of time in which the execution of an activity which is not on a critical path may be prolonged without affecting subsequent activities or the completion time for the project as a whole".[20] The learned judge stated in his judgment:[21]

> Therefore, the Master Programme has to be analysed in conjunction with the concept of a float. The purpose of the Master Programme is to provide a general guide to monitor the progress of the work and is not intended to impose strict contractual deadlines for each activity …

7.13 He accepted that in assessing whether a contractor is acting with due diligence, the master programme was of evidential value, but it was not conclusive. The issue, instead, was to establish whether the plaintiff was proceeding at a rate consistent with the completion date. The learned judge explained:[22]

> Thus, the critical question is whether the rate at which the plaintiff was proceeding was in accordance with his obligation to act with due diligence. In this regard, *Construction Contracts Dictionary* at p 153 observes that 'any obligation for due diligence has to be interpreted with reference to the completion date stated in the contract'.

7.14 Based on the delay analysis carried out by the employer's expert but adjusted for the expert's erroneous assumption as to the date of the application for power connection,[23] the judge concluded that, if not for the delay by the utility, the project would be completed ahead of the original completion date.[24] He concluded that the contractor could not therefore be held liable for the delay arising from the utility's work.[25]

D. Approach for certifying extension of time

7.15 The High Court in *GTMS Construction* also considered the approach which a certifier is expected to take in assessing a contractor's entitlement to extension of time. Tan J emphasised that the court "will

20 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [229], citing Chow Kok Fong, *Construction Contracts Dictionary* (Sweet & Maxwell, 2nd Ed, 2014) at p 197.

21 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [230]. At [231], the learned judge approved the comment that cl 4(2) of the Singapore Institute of Architects' Standard Form of Contract (9th Ed, 2010) "deliberately downplays the significance of the programme confining its relevance to operate only as a broad sequence of activities": Chow Kok Fong, *The Singapore SIA Form of Building Contract: A Commentary on the 9th Edition of the Singapore Institute of Architects Standard Form of Building Contract* (Sweet & Maxwell, 2013) at para 6.10.

22 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [235].

23 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [239] and [240].

24 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [249].

25 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [251].

not lightly disturb" an architect's assessment, "as long as it is made fairly and rationally".[26] He suggested that a fair and reasonable assessment must require a certifier to:[27]

> (a) carry out a logical analysis in a methodical way of the impact that the relevant matters the plaintiff put forward had on the delay to the Project;
>
> (b) make a calculated assessment of time which it thought was reasonable for the various items individually and overall, rather than an impressionistic assessment;
>
> (c) apply the provisions of the Contract correctly; and
>
> (d) in allowing time based on the grounds listed in the provisions of the Contract, ensure that the allowance made bears a logical and reasonable relation to the delay caused.

7.16 In the case before him, Tan J considered that the architect had made a fair and rational assessment of the extensions of time. He noted, for this purpose, that the architect had sought and reviewed a critical path analysis of the claimed delay, sought the views of the mechanical and electrical ("M&E") engineer and requested the relevant information from the contractor.[28]

E. Mitigation efforts

7.17 The court also addressed whether the contractor, upon knowing the utility's delay, took reasonable mitigation efforts to reduce the delay. It was common ground that it fell on the M&E engineer to arrange for the incoming power supply. Nevertheless, the court noted that the contractor followed up with the utility to persuade the utility to carry out its power connection works expediently. The court concluded on the facts that there was no failure on the contractor to exercise due diligence or take reasonable mitigation steps.[29]

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26 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [257], citing with approval *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 3 SLR(R) 518 at [29], *per* Warren Khoo J, and *Liew Ter Kwang v Hurry General Contractor Pte Ltd* [2004] 3 SLR(R) 59 at [17], *per* Judith Prakash J.

27 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [258].

28 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [259].

29 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [272].

F. Conspiracy allegation

7.18 The court also dismissed the employer's allegation that the contractor and the architect had conspired to grant the EOTs 2 and 3.[30] The M&E engineer had initially refused to recommend any EOT but later changed her mind. Nevertheless, Tan J in his judgment pointed out that it is the architect who has to make the final judgment call on whether or not to grant an EOT. As long as the architect exercises its judgment fairly and rationally, it is completely entitled to disagree with the M&E engineer and arrive at a different conclusion.[31] The learned judge also considered it relevant that neither the employer nor his assistants raised these allegations when the EOTs were considered:[32]

> If these allegations were indeed true, one would have expected the defendant and his Assistants to have protested or expressed some dissatisfaction over the granting of EOT 2 and EOT 3. However, there were no signs or any indications of unhappiness over the granting of EOT 2 and EOT 3 until the plaintiff commenced this Suit …

IV. Certification of completion

7.19 The employer alleged that the completion certificate was issued prematurely and without basis. The learned judge examined this allegation in relation to Item 72 of the preliminaries of the contract ("the Preliminaries") which stipulated that a completion certificate would not be issued until certain conditions were satisfied.

A. Item 72(a) –Readiness of occupation and use

7.20 Item 72(a) of the Preliminaries stated that the completion certificate shall not be issued until all parts of the works are "in the Architect's opinion ready for occupation and for use". The plaintiff distinguished between the project being "physically ready for occupation" and the employer being able to "legally occupy the Project" after the TOP was obtained. In his judgment, Tan J stated that he "generally" agreed with the judgment of the Court of Appeal in the 2015 case between the parties that "the reasons for the failure of the TOP inspections can be attributed to matters that fall within the scope of the [contractor's]

30 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [287].
31 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [289].
32 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [294].

works".[33] However, the learned judge considered that that judgment does not mean that a completion certificate can never be issued if the TOP had not been obtained. The issue turned in his view on the reasons for the failure of the TOP inspections:[34]

> Were any of these reasons due to construction-related issues that were within the scope of the plaintiff's Works? If the failure of the TOP inspections was due to defects that were wholly beyond the plaintiff's control and not within its contractual responsibility, it would be difficult for the third party [the architect] not to issue the CC since the plaintiff can be considered to have completed its contractual obligations. In these circumstances, it would be justifiable for the third party to issue the CC notwithstanding that the TOP has not been obtained …

7.21 He noted that some of the reasons why the first TOP inspection on 30 April 2013 failed were due to the contractor's works: for example, the unequal steps and risers. In respect of these non-compliances, the learned judge stated that it mattered not whether they were "minor" and "could easily be rectified" since the fact remained that the project could not have been "ready for occupation". The fact that the architect acted in good faith based on its experience did not override the clear and express language of Item 72(a) of the Preliminaries. It follows that the architect should not have issued the completion certificate on 15 May 2013 certifying that the project was completed on 17 April 2013.[35]

7.22 The learned judge next proceeded to examine the issues arising from the second TOP inspection on 18 June 2013. The issue relating to steps and risers was no longer an issue. On this occasion, the inspection failed on three other items – (a) the steps at the reinforced concrete flat roof for all the units; (b) the last step at the landscape area in Unit 12A; and (c) the height of the barrier at the pavilion in Unit 12A.

7.23 Item (a) arose from a variation which the contractor executed in accordance with the design. In the design, the architect had taken a different view on the regulatory requirement from the Building and Construction Authority. The item was not a construction error by the contractor.[36] Item (b) was a defect but it was not a construction error; it arose from the settlement of the landscaped soil. The judge considered that this was a "natural phenomenon" and could not be attributed

33 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [322], referring to the judgment of the Court of Appeal in *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 at [44]–[45].

34 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [324].

35 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [326] and [327].

36 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [330].

to either the contractor or architect.[37] Item (c) again arose from the architect's interpretation of the regulatory requirement. It was therefore not a construction error.[38] The learned judge thus considered that while the failure of the first TOP inspection was due to the contractor, that in the second TOP inspection was not due to defects within the contractor's responsibility. Since the rectification works relating to the first TOP were completed on 28 May 2013, it was held that Item 72(a) of the Preliminaries was satisfied by that date.[39]

B. Item 72(b) – Completion of testing and commissioning

7.24 Item 72(b) of the Preliminaries imposed, as a condition for the completion certificate, the requirement that all services must be "tested, commissioned and operating satisfactorily as specified in the Contract … including the handing over of all test certificates, operating instructions and warranties".

7.25 The architect argued that the employer was estopped from relying on Item 72(b) in respect of the testing and commissioning of gas services because it was represented to all the parties for safety reasons that the testing and commissioning for the gas services would be done after the project was completed, and all parties consented to this. The learned judge accepted this submission, noting that there was no objection by the employer and his assistants when this representation was made during the site meeting on 21 January 2013.[40] Following TOP, testing and commissioning was duly conducted by the utility company as well as the contractor.[41]

7.26 With respect to the electrical services, the court found that the testing and commissioning had been carried out both before and after power turn-on.[42] The air conditioning and mechanical ventilation works had also been conducted and completed.[43] On the requirement as to the completion of the documentation, the court considered that, on a proper construction of the various documents forming the contract as a

37 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [331].
38 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [333].
39 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [334].
40 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [340]–[341], following *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [57], [58] and [61].
41 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [343].
42 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [346], [348]–[349] and [351].
43 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [352].

whole, this requirement was *de minimis*.[44] In arriving at this conclusion, the learned judge noted that the item was included in the contract by the employer's M&E engineer and that this was not a case where "the parties specially took pains to include this clause in the Contract".[45] It was also consistent with a "purposive interpretation" of cl 31(13) of the SIA Conditions.[46] Finally, given that the testing and commissioning had been carried out for all the services by 17 April 2013 (with the exception of the gas services, which it was agreed would be deferred until after completion), it was held that Item 72(b) was satisfied by that date.[47]

C. Item 72(c) – Completion of testing and commissioning

7.27 Item 72(c) of the Preliminaries provides that before the completion certificate can be issued, all works should be performed including "such rectification as may be required to bring the work to the completion and standards acceptable to the Architect". In his analysis, Tan J noted that the presence of minor defects does not prohibit the issuance of the completion certificate.[48] A selection of the defects dealt with in the judgment on the basis of this principle may be briefly noted.

> (a) On the dented and punctured gas pipe, the learned judge found that the employer failed to show that the pipe had not been replaced. Furthermore, the sums involved, $1,149.90 and $3,822.00 respectively, were described as "relatively trivial sums" and "do not justify the considerable and inordinate time and resources that were devoted to try this issue".[49]

(b) The allegation as to the "cracks, scratches and other forms of damage to the marble flooring" were found to be due to the employer's

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44 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [369] and [379], citing *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [130] and Gerald McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2007) at [131].

45 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [379].

46 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [380].

47 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [381].

48 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [385]–[387], referring to *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd* [2009] 1 SLR(R) 385 at [134], *per* Judith Prakash J; Chow Kok Fong, *The Singapore SIA Form of Building Contract: A Commentary on the 9th Edition of the Singapore Institute of Architects Standard Form of Building Contract* (Sweet & Maxwell, 2013) at para 24.14; and Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 5th Ed, 2018) at para 23.414.

49 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [416].

failure to handle, lay and protect the marble[50] while the other defects of the marble were "natural flaws" of that particular marble.[51]

> (c) Similarly, the alleged defects relating to the ironwood used for the timber decking and the tonality variance of the timber floor finish were again found to be "natural characteristics" of the respective materials.[52]
>
> (d) The issues with the aluminium claddings and cappings were considered to be "aesthetic in nature" and would not affect "the performance of the metal cappings".[53]
>
> (e) The swimming pool leakages allegedly resulted in "abnormal water consumption". However, investigations by a specialist found that the water level only dropped "marginally" due to seepage from the screed at the coping edge and evaporation.[54]

7.28 Other allegations of defects addressed and dismissed by the learned judge related to the grouting at the swimming pool,[55] the trellis beams,[56] the intumescent paint,[57] finishing of the external boundary wall,[58] the loamy soil[59] and the sliding glass doors.[60] Tan J concluded that a reasonable architect would have determined in the circumstances that Item 72(c) of the Preliminaries had been fulfilled and thereby issued the completion certificate on 28 May 2013.[61]

V. Liquidated damages and general damages

A. Acts of prevention

7.29 In *GTMS Construction*, the employer had counterclaimed for liquidated damages for the period between the extended completion date and the date when the completion should have been certified. The court dismissed this claim because it was the architect, acting as the employer's

50 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [417].
51 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [423].
52 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [438] and [445].
53 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [453].
54 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [486].
55 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [531].
56 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [538].
57 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [542].
58 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [554].
59 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [561].
60 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [568].
61 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [574].

agent, who instructed the contractor not to commence rectification of the steps and risers until after the first TOP inspection.[62] The learned judge found that the instruction prevented the contractor from completing the rectification works sooner. Although the EOT clause would have allowed the architect to extend time for this purpose, no EOT was in fact granted.[63] He proceeded to hold that this constituted an act of prevention which rendered the liquidated damages clause inoperable against the contractor.

7.30 It is unclear if Tan J intended to pronounce a general principle that a failure or refusal to grant EOT constitutes an act of prevention rendering liquidated damages inoperable, despite the existence of an effective EOT contract mechanism. This appears unlikely given that the SIA Conditions (and many other modern forms of construction contracts) provides power under the dispute resolution process to substitute (and thus correct or adjust) any decision of the architect. This would extend to reviewing a certifier's decision on any EOT application, including a refusal or failure to grant an EOT.

7.31 Earlier, Tan J had noted that the concept of an act of prevention is well settled[64] and approved the definition of the term as an event that "operates to prevent, impede or otherwise make it more difficult for a contractor to complete the works by the date stipulated in the contract".[65]

B. Assessment of damages where time is set at large

7.32 It was emphasised during the year under review that a claim for general damages and that for liquidated are underpinned by different considerations. As with *GTMS Construction*, *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd*[66] ("*Crescendas Bionics*") is a continuation of a long chronology of disputes in respect of the same project, and the case heard during the year was the second round of litigation before the court. In *Crescendas Bionics*, the works were placed under a management contract and were completed late, incurring a delay of 334 days. The

62 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [661].
63 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [664].
64 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [662], referring to *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd* [2009] 1 SLR(R) 385 at [385]; *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2011] 4 SLR 455; and *Chua Tian Chu v Chin Bay Ching* [2011] SGHC 126 at [58]–[64].
65 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [662], referring to Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 5th Ed, 2018) at paras 9.155–9.157; and *Kwang In Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1997] 1 SLR(R) 907 at [18], *per* Warren Khoo J.
66 [2021] SGHC 189.

contract had a tiered liquidated damages provision. The applicable rates of liquidated damages were $30,000 per day for the first 30 days that the works remained incomplete after the contract period; $70,000 per day for the next 30 days that the works remained incomplete after the contract period; and $50,000 per day for each day that the works remained incomplete beyond the 60th day after the contract period. Crucially, the contract was silent as to EOT. Arising from an earlier round of litigation in 2019, the courts found that the employer committed several acts of prevention which caused the project to be delayed by 173 days[67] while the contractor was responsible for 161 days of delay.[68] Since the contract did not provide an EOT clause, the result of the employer's acts of prevention was that the contractor was no longer bound by the original contractual completion date, and the time for the completion of the project was set at large.

7.33 In the 2021 round of litigation in *Crescendas Bionics*, the issue before the court was the assessment of the general damages claimed by the employer on account of the 161 days of delay for which the contractor was responsible. The contractor's case was that parties were "fixated" on the liquidated damages rates during negotiations and argued that any general damages payable for delay should not therefore exceed the liquidated damages that the employer would have obtained had the liquidated damages clause been operative. The High Court in the 2021 case rejected this submission. Tan Siong Thye J agreed with the employer that general damages and liquidated damages are underpinned by different considerations. General damages are intended to compensate the innocent party for the *actual* losses suffered as a result of a breach of contract. In contrast, liquidated damages are intended to be a genuine pre-estimate of the *likely* losses that would be suffered in the event of a breach.[69] The learned judge also dismissed as "unmeritorious" the objection that in allowing the employer to recover general damages in excess of the amount which would have been recovered under the liquidated damages clause, the employer would be benefitting from its own breach of contract. He considered that this was an unsustainable submission since the employer who had caused an act of prevention would only be able to claim damages for delay if the contractor exceeded the reasonable time for completion.[70]

67 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2019] SGHC 4 at [352].

68 *Jurong Primewide Pte Ltd v Crescendas Bionics Pte Ltd* [2019] SGCA 63 at [14]–[20].

69 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2021] SGHC 189 at [58], following *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd* [2021] 1 SLR 661 at [151]–[152] and [185(b)].

70 *Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd* [2021] SGHC 189 at [59], citing with approval the view expressed in Edwin Lee Peng Khoon, *Building Contract Law in Singapore* (LexisNexis, 3rd Ed, 2016) at p 155.

7.34 In deciding as it did in the 2021 round of *Crescendas Bionics*, the Singapore High Court has taken a different position from that laid down by the UK Technology and Construction Court a few months earlier. In *Eco World – Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd*[71] ("*Eco World*"), the contract related to the design and installation of façade works for a building. It was contended in that case that the liquidated damages provisions were not enforceable since the employer had exercised a right to take early partial possession and there was no contractual term in the contract to provide for the liquidated damages to be adjusted for this purpose. O'Farrell J considered that there was no general principle that a clause stipulating only one rate of liquidated damages without allowing for a reduction in the rate to account for sectional completion or partial possession was not necessarily invalid.[72] In this case, the terms of the liquidated damages provision were "reasonably clear and certain" and not unconscionable or extravagant.[73] She held therefore that the liquidated damages clause remained valid and enforceable.

7.35 However, even if the liquidated damages provision had been found to be unenforceable, the learned judge considered that, on its true construction, the liquidated damages in that contract was intended to operate as a cap on the contractor's liability for delay.[74] It should be pointed out that the *obiter* views expressed by O'Farrell J on this point were to a large extent influenced by the decision of the UK Supreme Court in *Cavendish Square Holding BV v Talal El Makdessi*[75] ("*Cavendish Square*") and the line of authorities following that decision. It is necessary, therefore, to recall that in *Denka Advantech Pte Ltd v Seraya Energy Pte Ltd*[76] the Singapore Court of Appeal had declined to follow the new approach taken by the leading judgments of Lords Neuberger and Sumption in *Cavendish Square*. Nevertheless, O'Farrell J's view that the rate of liquidated damages may be read to reflect parties' intent to operate as a cap on general damages had been earlier contemplated by Andrew Baker J in *K Line PTE Ltd v Priminds Shipping (HK) Co Ltd*.[77]

7.36 The better view is that in Singapore, *Crescendas Bionics* is likely to prevail over the *obiter* views expressed in *Eco World*. The latter is more

71 [2021] EWHC 2207.
72 *Eco World – Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd* [2021] EWHC 2207 at [74].
73 *Eco World – Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd* [2021] EWHC 2207 at [75] and [78].
74 *Eco World – Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd* [2021] EWHC 2207 at [116].
75 [2015] UKSC 67.
76 [2021] 1 SLR 661.
77 [2020] EWHC 2373 (Comm) at [55(ii)] and [59(iii)].

consistent with jurisprudential developments on this subject arising from the *Cavendish Square* line of authorities.

VI. Standard of architect's supervision

7.37 In *GTMS Construction*,[78] the problem with the steps and risers had led to failure of the first TOP inspection and the issue arose as to whether this reflects a lapse in the architect's supervision of the works. In determining this issue, Tan J first referred to *Sim & Associates v Tan Alfred*[79] and reproduced the following principles stated by the Court of Appeal in that case:[80]

> The standard of supervision required of an architect ultimately depends on the facts of each case, in particular on the terms of his contract with the employer and the main building contract. In the absence of any provision in the contract requiring a higher degree of supervision, an architect is merely required to give the building works reasonable supervision …
>
> …
>
> … The architect must give such reasonable supervision to the works as enables him to give an honest certificate that the work has been properly carried out. He is not required personally to measure or check every detail, but should check substantial and important matters… But prolonged and detailed inspection and measurement at interim stage is impractical and not to be expected.

7.38 He also referred to several other authorities affirming these principles, including *Wei Siang Design Construction Pte Ltd v Euro Assets Holding (S) Pte Ltd*[81] and the classic case of the House of Lords in *East Ham Corp v Bernard Sunley & Sons*[82] ("*Bernard Sunley*"). In *Bernard Sunley*, Viscount Dilhorne stated that where the contract does not require an architect to be always upon the site, it is sufficient for an architect "to send his representative there to inspect the sufficiency of the work done".[83] Turning to the case before him, Tan J stated:[84]

> … [A]lthough the third party's representatives were not physically present when the rectification works were carried out, this does not mean that the third party was not supervising the Works. The authorities cited above make clear that the duty of supervision does not require the architect to be present on site at all times. As Ms Chiyachan explained, the third party would ask the

78 See para 7.5 above.
79 [1994] 1 SLR(R) 146.
80 *Sim & Associates v Tan Alfred* [1994] 1 SLR(R) 146 at [40] and [43].
81 [2019] 4 SLR 628.
82 [1966] AC 406. The judgment noted that this decision was also cited with approval by the Court of Appeal in *Sim & Associates v Tan Alfred* [1994] 1 SLR(R) 146 at [56].
83 *East Ham Corp v Bernard Sunley & Sons* [1966] AC 406 at 427F.
84 *GTMS Construction Pte Ltd v Ser Kim Koi* [2021] SGHC 9 at [691].

> plaintiff for updates, request for photos or request to go to the site to verify the plaintiff's progress. The evidence shows that the third party inspected the steps and risers after the rectification works were carried out by the plaintiff, and provided photographs of the rectified steps and risers to the BCA through a letter dated 6 September 2013.

7.39 The learned judge was satisfied that the architect's supervision was adequate.

VII. Stakeholding moneys

7.40 During the year under review, the High Court considered, for the first time, the nature of stakeholding moneys held by the Singapore Academy of Law ("SAL") arising from the sale and purchase of residential units. In *Lau Soon v UOL Development (Dakota) Pte Ltd*,[85] purchasers had paid 5% of the purchase price of a condominium unit to the SAL to be held as stakeholder ("Stakeholding Sum"). In resisting an application by the developer for the release of the Stakeholding Sum, the purchasers argued that the application was time barred and that the developer had failed to discharge its obligations under the sale and purchase agreement ("SPA") when it failed to rectify certain defects in the unit. The High Court upheld the decision of the District Court and ordered the SAL to release the Stakeholding Sum to the developer.

7.41 In his judgment, Lee Seiu Kin J distinguished between two contracts in the stakeholding scheme. The first of these is the SPA between the vendor and the purchaser which determines when and to whom the stakeholding moneys will be paid ("the bilateral contract"). The second contract is the contract between the vendor, the purchaser and the stakeholder ("the tripartite contract").[86] The tripartite contract is limited only to providing for the stakeholder to retain and pay the stakeholding moneys pending a triggering event.

7.42 In this case, the dispute related to whether there was a basis for the developer's application to compel the SAL to release the Stakeholding Sum some six years from the date when the sum became due. Rule 7 of the Singapore Academy of Law (Stakeholding) Rules[87] (made under the Singapore Academy of Law Act 1988)[88] provides the mechanism for

85 [2021] SGHC 195.
86 *Lau Soon v UOL Development (Dakota) Pte Ltd* [2021] SGHC 195 at [28], citing *Gribbon v Lutton* [2002] 1 QB 902 at [11].
87 1998 Rev Ed.
88 2020 Rev Ed.

managing and resolving disputes relating to the stakeholder moneys. On the nature of this mechanism, Lee J said:[89]

> The mechanisms for managing and resolving such disputes are specifically and exactly provided for by r 7 of the Stakeholding Rules. This being the case, there was no need for the terms of the tripartite contract to be separately formulated. This would be redundant. Rule 7 is squarely applicable and to resolve the instant dispute, it can be interpreted and applied as a term governing the three parties' contractual relationship.

7.43 Once the purchaser has filed a Notice of Deduction and the developer a Notice of Dispute in response, r 7 is engaged. In this situation, the SAL will retain the stakeholding moneys until it receives a notice to pay as agreed by the parties or a court order for the release of the stakeholding moneys. Significantly, r 7 does not contemplate a limit to the period of extension of the stakeholding period and provides for payment out only upon the occurrence of one of these two triggering events. The purchasers' contention that the action is time barred was misplaced because the developer's claim does not rest on a breach by the purchasers of any of the terms of the SPA.[90] It followed that even though the subject claim was founded on a contract (that is, the tripartite contract), it was not subject to any limitation period and the developer was entitled to the stakeholding moneys held by the SAL.

7.44 On the issue of the defects, this cause of action arose under the bilateral contract between the developer and purchaser. The court could have examined and adjudicated this dispute in determining the release of the stakeholding moneys. However, this claim was time barred and therefore failed.[91]

VIII. Security of payment

7.45 There were 338 adjudication applications lodged during the year under review. This approximates that of the preceding year and remained firmly at around 30% below the level prior to the emergence of the COVID-19 pandemic. Despite the more subdued activity within the construction industry, a number of important decisions were delivered by the courts. Of particular interest are the cases which involved an examination of the operation of several new provisions introduced by the Building and Construction Industry Security of Payment (Amendment) Act 2018 ("Amendment Act 2018").

89 *Lau Soon v UOL Development (Dakota) Pte Ltd* [2021] SGHC 195 at [33].
90 *Lau Soon v UOL Development (Dakota) Pte Ltd* [2021] SGHC 195 at [36].
91 *Lau Soon v UOL Development (Dakota) Pte Ltd* [2021] SGHC 195 at [43].

A. Suspension of progress payments following termination

7.46 One of the new amendments is s 4(2)(*c*) of the Building and Construction Industry Security of Payment Act 2004[92] ("the SOP Act"). This provides that the SOP Act shall not apply to any terminated contract if the terminated contract contains a term which permits a respondent to suspend progress payments to the claimant until a specified date or event and so long as the specified date or event has not occurred. The effect of s 4(2)(*c*) is that in this situation, the claimant is no longer entitled to make a payment claim so long as the term relating to the suspension of progress payments continues to operate. An example of such a term is cl 31.2(3) of the Public Sector Standard Conditions of Contract[93] which provides that in the event of termination of a contract for default, no sum shall be certified as due to the contractor; nor shall the employer be liable to pay to the contractor any sum until the expiry of the defects liability period and until the superintending officer shall have ascertained the total costs to the employer of completing the works and the rectification of any defects and the damages for delay.

7.47 In *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd*,[94] the facts concerned a subcontract for the supply of labour for the carrying out of reinforcement concrete works. Clause 9 of the subcontract provided that in the event of termination of the subcontract, payments due to the subcontractor would be suspended until completion of the main contract. The main contractor terminated the subcontract. Notwithstanding cl 9, the subcontractor submitted a payment claim which was the subject of an adjudication application and the adjudicator determined for the subcontractor. In resisting the main contractor's reliance on cl 9 of the subcontract, the subcontractor argued that cl 9 of the subcontract was essentially a "pay when paid" clause and was therefore unenforceable by reason of s 9 of the SOP Act. The main contractor replied that s 4(2)(*c*) of the SOP Act should be interpreted on its own and take primacy over s 9.

7.48 The High Court held that the adjudicator was correct in accepting the subcontractor's submission. In his judgment, S Mohan JC (as he then was) considered this must be the case "particularly where that construction would promote the purpose of the legislation and thereby, give effect to the intention of Parliament".[95] As such, s 4(2)(*c*) of

92 2020 Rev Ed.
93 8th Ed, 2020.
94 [2021] 4 SLR 862.
95 *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] 4 SLR 862 at [43].

the SOP Act should be construed in light of provisions such as s 9. He noted that it is settled that s 9 "limits the parties' freedom to contract" by rendering "pay when paid provisions" completely unenforceable.[96] The main contractor's contention was described as "circular" in that it assumed that cl 9 was valid and enforceable[97] but cl 9 of the subcontract must be subject to s 9 of the SOP Act. The learned Judicial Commissioner stated in his judgment:[98]

> In light of the context of the Act as a whole, s 4(2)(*c*) of the Act does not, in my judgment, take primacy over s 9 of the Act. The conclusion I have reached is consistent with and gives effect to the *raison d'être* of the statutory framework, which was to ensure that subcontractors are not left at the mercy of main contractors: (a) withholding payments for reasons unrelated to the subcontractors' performance; and (b) making such payments contingent on performance of some other contract. In contrast, if the plaintiff's interpretation was accepted, s 9 of the Act could easily be circumvented by dint of contract drafting, thereby rendering it otiose in many cases. I did not consider this to be a consequence intended by the Legislature; nor would it promote the purpose of the Act or s 9 in particular. Therefore, when s 4(2)(*c*) of the Act is construed to determine if the Act applies to a particular terminated construction contract, any termination and suspension of payment provisions in that contract are to be given effect only if they do not fall foul of s 9 of the Act. [emphasis in original omitted]

B. Limitation on the scope of claims under the Building and Construction Industry Security of Payment Act

7.49 Another important amendment introduced by the Amendment Act 2018 effectively reduces the scope of claims which may be brought under the SOP Act. Introduced as s 17(2A) – but now re-numbered as s 17(3) in the 2020 version of the SOP Act[99] – the amended provision prohibits claims relating to damage, loss or expense, whether such claims are made in payment claims or in payment responses, save for certain stipulated exceptions. For ease of reference, s 17(2A) is reproduced as follows:

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96 *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] 4 SLR 862 at [46], citing the holding of *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [30].

97 *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] 4 SLR 862 at [46], citing the Court of Appeal's statement on the operation of s 9 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) in *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 at [30].

98 *Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd* [2021] 4 SLR 862 at [47].

99 For the purpose of this note, the reference "s 17(2A)" is retained.

> In determining an adjudication application, an adjudicator must disregard any part of a payment claim or a payment response related to damage, loss or expense that is not supported by —
>
> > (*a*) any document showing agreement between the claimant and the respondent on the quantum of that part of the payment claim or the payment response; or
> >
> > (*b*) any certificate or other document that is required to be issued under the contract.

7.50 In *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd*,[100] the subject contract was a design and build contract which incorporated the REDAS Design and Build Conditions of Main Contract[101] with amendments ("REDAS Conditions"). The adjudication arose from a payment claim served by the contractor on 2 December 2019. The claimed amount included a sum representing the first half of the retention sum following the handing over of the project. In its payment response, the employer sought to set off a sum of liquidated damages against the claimed amount. The adjudicator allowed the employer's set-off in determining the adjudicated amount. The Court of Appeal upheld the High Court decision in dismissing the claimant's application to set aside the adjudication determination. Section 17(2A) did not apply to the claim in this case since the payment claim was served before 15 December 2019, the date when the 2018 Amendments came into force. However, in arriving at its decision, the Court of Appeal, as did the High Court before it, considered it necessary to review s 17(2A) in order to determine the scope of matters which may be properly referred and adjudicated under the pre-amended SOP Act.

7.51 In the High Court, the learned judge had expressed the view that the true target of s 17(2A)(*b*) is claims for prolongation costs or "loss and expense".[102] The Court of Appeal did not comment on this view but held that s 17(2A) was intended to exclude both claims for prolongation costs as well as liquidated damages which were properly referrable to adjudication prior to the 2018 Amendments.[103] It was held therefore that the adjudicator acted within his jurisdiction in adjudicating the employer's entitlement to liquidated damages, and that his jurisdiction arose from ss 15(3) and 17(3) of the pre-amendment SOP Act.[104]

100 [2021] 2 SLR 91.
101 3rd Ed, July 2013.
102 *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2020] SGHC 191 at [21].
103 *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2021] 2 SLR 91 at [35], [45], [50] and [51].
104 *Range Construction Pte Ltd v Goldbell Engineering Pte Ltd* [2021] 2 SLR 91 at [42].

7.52 Most of the standard forms provide some certification machinery to state, for this purpose, that a contractor or supplier is in culpable delay but some standard forms (such as the SIA Building Contract 2016) do not provide for the quantum of liquidated damages to be the subject of certification. It may be that the delay certificate issued under the SIA Building Contract 2016 may be sufficient for the purpose of s 17(2A)(*b*) to "support" the claim for liquidated damages.

C. Setting aside on the ground of fraud

7.53 The Amendment Act 2018 has introduced s 27(6)(*h*) of the SOP Act, which is essentially a codification of the principle that an application may be made to set aside an adjudication determination on the ground of fraud. A year earlier, in *Facade Solution Pte Ltd v Mero Asia Pacific Ltd*[105] ("*Facade Solution*"), the Court of Appeal had laid down a two-step test for reviewing an application for setting aside on this ground.[106] Briefly, the *Facade 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;[107] and *secondly*, that the established facts were material to the issuance of the adjudication determination.[108]

7.54 During the year under review, the High Court in *Dongah Geological Engineering Co Ltd v Jungwoo E & C Pte Ltd*[109] ("*Dongah Geological*") provided a further demonstration of the application of the two-step test in reviewing an application to set aside an adjudication determination on the ground of fraud. In *Dongah Geological*, the subject contract was a sub-subcontract related to the carrying out of ground improvement works and deep soil mixing operations. JEC, the sub-subcontractor, applied for adjudication under the SOP Act and was awarded a sum of $2.43m which included a sum of $2.15m for additional light grouting work. DGE, the subcontractor, applied to set aside the adjudication determination on the ground of fraud pursuant to s 27(6)(*h*) of the SOP Act. DGE's case was that the adjudicator had referred to two quotations from two companies to reflect the market rate for the additional light grouting work but its inquiries showed that JEC knew that the two quotations were not a genuine representation of the market rate.

105 [2020] 2 SLR 1125.
106 *Dongah Geological Engineering Co Ltd v Jungwoo E & C Pte Ltd* [2021] SGHC 239 at [35].
107 *Facade Solution Pte Ltd v Mero Asia Pacific Ltd* [2020] 2 SLR 1125 at [30]–[33].
108 *Facade Solution Pte Ltd v Mero Asia Pacific Ltd* [2020] 2 SLR 1125 at [34]–[38].
109 [2021] SGHC 239.

7.55 In applying the two-step test laid down in *Facade Solution*, the High Court in *Dongah Geological* found that the defendant did represent to the adjudicator that the rates stated in the two quotations – $21.50/m^3$ and $23.50/m^3$ – were the market rate for the deep soil mixing light grouting works.[110] However, in reviewing the record of the adjudication determination, Tan Siong Thye J was not satisfied that the adjudicator relied on this representation. The adjudicator had accepted JEC's applicable rate of $18.90/m^3$ for light grouting works on the basis that the light grouting works and the trench grouting works were largely similar and DGE had agreed to the rate of $18.90/m^3$ for trench grouting works.[111] The phrasing in the adjudication determination showed "unequivocally" that the adjudicator was relying on this analysis. The adjudicator's observation with regard to the two quotations was merely confirmatory in nature.

7.56 In any case, Tan J found that DGE had not proven that the two quotations were inauthentic and false. The court considered that the evidence relied on by DGE was speculative[112] and further could have been adduced in the payment response for the adjudicator's consideration. The adjudication determination recorded that DGE did not object to the applicable rate of the additional light grouting works; nor did it provide an alternative rate for assessing this item.[113] The learned judge concluded that the nature of DGE's objection was merely that it proffered a better way to calculate the applicable rate for the additional light grouting works.[114]

7.57 The application to set aside the adjudication determination was therefore dismissed.

110 *Dongah Geological Engineering Co Ltd v Jungwoo E & C Pte Ltd* [2021] SGHC 239 at [39].

111 *Dongah Geological Engineering Co Ltd v Jungwoo E & C Pte Ltd* [2021] SGHC 239 at [41], referring to the adjudication determination in Adjudication Application No SOP/AA 108 of 2021 at [163].

112 *Dongah Geological Engineering Co Ltd v Jungwoo E & C Pte Ltd* [2021] SGHC 239 at [51] and [59].

113 *Dongah Geological Engineering Co Ltd v Jungwoo E & C Pte Ltd* [2021] SGHC 239 at [63]. The court considered that *Facade Solution Pte Ltd v Mero Asia Pacific Ltd* [2020] 2 SLR 1125 does not preclude the court from making appropriate inferences from the plaintiff's conduct.

114 *Dongah Geological Engineering Co Ltd v Jungwoo E & C Pte Ltd* [2021] SGHC 239 at [70]

D. Enforcement of adjudication determination during winding-up

7.58 A claimant may, in seeking payment of the adjudicated amount determined by an adjudicator, issue a statutory demand on the judgment debt. If the respondent fails to pay the demanded sum within three weeks, the claimant may proceed to apply for the respondent to be wound up on the ground that the respondent is unable to pay its debt for the purpose of s 125(2) of the Insolvency, Restructuring and Dissolution Act 2018.[115] The respondent may resist this application by showing that it has reasonable cross-claims; for example, claims for liquidated damages for delay or costs of defect rectification. It used to be that the courts required the respondent in this situation to show that there was a triable issue as to the cross-claim before allowing a stay.

7.59 In particular, the courts have insisted, *inter alia*, that the respondent must show "that there was a genuine cross-claim" and that the cross-claim was greater than the debt on which the winding-up application was tendered.[116] It will be clear that the thrust of the argument against a winding-up petition is not to contest the existence of the debt itself. Such an argument, if made, would fail because it is settled that s 21(1) of the SOP Act confers temporary finality on the adjudication determination.[117] Nevertheless, the courts have been careful in guarding against "premature presentation of winding-up petitions" on the policy consideration that "the commercial viability of a company should not be put into jeopardy … where it has a serious cross-claim based on substantial grounds".[118]

7.60 Recent developments in insolvency law have substantially redrawn the approach to be taken in reviewing cross-claims where the primary dispute is subject to an arbitration agreement. In *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)*[119] ("*AnAn*"), the Court of Appeal decided that in lieu of what was previously referred to as a "triable issue" standard, a lower *prima facie* standard of review should be applied in these cases. The Court of Appeal considered that the higher

115 2020 Rev Ed.

116 *Strategic Construction Pte Ltd v JH Projects Pte Ltd* [2018] 4 SLR 1192 at [25].

117 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [71], affirmed in *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [32].

118 *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [82]; see also *Denmark Skibstekniske Konsulenter A/S I Likvidation v Ultrapolis 3000 Investments Ltd* [2011] 4 SLR 997, both cited in *Strategic Construction Pte Ltd v JH Projects Pte Ltd* [2018] 4 SLR 1192 at [18] and [19].

119 [2020] 1 SLR 1158.

triable issue standard encourages the abuse of using the winding-up jurisdiction of the court as a forum to adjudicate a disputed claim that is subject to arbitration.[120] The court should not take the place of an arbitral tribunal in inquiring into the merits of the debtor's defences, an inquiry which would be demanded of the court in the application of the triable issue standard.[121]

7.61 The *prima facie* standard for reviewing a cross-claim was explored in the context of adjudication by the Court of Appeal. In *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd*[122] ("*Diamond Glass*"), an adjudicator determined that a façade works subcontractor was entitled to be paid the adjudicated amount of $197,522.83. The subcontractor obtained a court order to enforce the adjudication determination as a judgment and served a statutory demand for the adjudicated amount plus interest. The main contractor refused to pay the adjudicated amount. It had separately commenced an action against the subcontractor in the High Court claiming $501,800 in liquidated damages for delay and a sum of $358,870 as additional costs for completing the subcontractor's works. When the main contractor refused to accede to the statutory demand, the subcontractor applied to wind up the main contractor. The trial judge granted the main contractor a stay on the ground that the main contractor had a *bona fide* and a "serious cross-claim" against the subcontractor that might exceed the judgment debt.

7.62 The Court of Appeal in *Diamond Glass* considered that the ratio of its earlier decision in *AnAn* in adopting the *prima facie* standard should be extended to building and construction cases even where the cross-claim is not the subject of an arbitration agreement.[123] However, in relation to stays or dismissals of winding-up petitions which are founded on adjudication determinations, the court considered that the issue turns on three considerations.

7.63 The first of these is that adjudication determination enjoys only "temporary finality" which ceases when an arbitral tribunal or court finally determines all the parties' disputes, rights and obligations. When that happens, any judgment previously obtained under s 27 of

120 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [63].

121 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [77].

122 [2021] 2 SLR 510.

123 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [44]. The judgment of the court referred to the party from whom payment is sought as the adjudication determination judgment debtor and the party seeking payment as the adjudication determination judgment creditor.

the SOP Act ceases to have effect.[124] The adjudication debtor (that is, the respondent who is liable to pay the adjudicated amount) is allowed to resist or stay winding-up proceedings by "raising a genuine or *bona fide* cross-claim".[125]

7.64 A second consideration is the tension between the policy of temporary finality and the draconian consequences of a winding-up order. It is relevant that a creditor's winding-up petition often "implies insolvency and is likely to damage the company's creditworthiness or financial standing with its other creditors or customers" and that a winding-up petition "might trigger cross-default clauses in the company's own financing instruments or in other companies within the same group as the company".[126]

7.65 The third consideration is that even if the winding-up application is stayed or dismissed, other avenues are available to obtain satisfaction of the judgment debt.[127] Quentin Loh JAD, in delivering the judgment of the court, noted that despite the court's strong backing of the "pay now, dispute later" approach in adjudication, the courts have carved out a number of exceptions to the general rule.[128] Thus, an adjudication debtor may apply to set aside an adjudication determination pursuant to s 27(6) of the SOP Act. It can rely on the terms of the contract providing for reference of the dispute to arbitration or to challenge the adjudication determination.

7.66 After weighing these considerations, the Court of Appeal considered that the *prima facie* standard of review represents "a practical and workable solution to the apparent opposing considerations of the winding-up jurisdiction of the court and the temporary finality of

124 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [49] and [50].

125 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [69]. The learned judge earlier accepted at [52] that one of the risks in applying the *prima facie* standard is that the adjudication determination judgment debtor may evade its payment obligations too easily.

126 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [73], citing *BNP Paribas v Jurong Shipyard Ltd* [2009] 2 SLR(R) 949 at [17]–[19].

127 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [76]–[77].

128 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [79].

adjudication determinations".[129] In an important passage of the judgment, Loh JAD stated:[130]

> On one hand, reviewing the cross-claim in accordance with a lower *prima facie* standard acknowledges the reality that the adjudication determination will, in all likelihood, be 'opened up' when the contract between the parties is coming or has come to an end or has been terminated. On the other hand, the requirement that the cross-claim or dispute (as the case may be) cannot constitute an abuse of the court's process provides a useful check on parties trying to game the system. We have no doubt that courts will be able to sift out disputes or cross-claims that are raised merely to delay winding up those companies which, despite raising such disputes or cross-claims, are hopelessly insolvent. Thus, save for the fact that an ADJ debtor cannot dispute the adjudication determination as a ground for staying or setting aside a winding-up petition founded on that adjudication determination, there is no need to modify the general approach … in building and construction cases like the present.

7.67 On the facts of the case, it was concluded that the main contractor had met the *prima facie* standard to resist the winding-up application. In arriving at this finding, the court considered the premises on which cross-claims were calculated,[131] the factual and contractual basis for the claim in liquidated damages and the costs of defect rectification.[132] The Court of Appeal was satisfied that the cross-claim was *bona fide* but cautioned that it was not intended to suggest that the cross-claim was likely to succeed.[133] The court further noted that in a normal setting aside application, the applicant is required under s 27(1) of the SOP Act to pay the unpaid portion of the adjudicated amount as security. The court considered that it was just in this case to require the main contractor to pay the sum of the judgment debt into court as a condition for the grant of the stay. This would settle any issues as to whether the main contractor was insolvent on the basis that it was unable to pay its debts.[134]

129 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [83]

130 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [83].

131 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [92].

132 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [98]–[100].

133 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [104].

134 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [110]–[112].

E. Stay of enforcement of adjudication determination

7.68 Some eight years earlier, in *W Y Steel Construction v Osko Pte Ltd*,[135] the Court of Appeal had decided that a stay of enforcement of an adjudication determination may be granted if there is clear objective evidence of the successful claimant's actual present insolvency; or the court is satisfied that if the stay is not granted, moneys paid to the claimant would not ultimately be recovered when the dispute has been finally resolved in the respondent's favour.

7.69 In *Dongah Geological*,[136] the High Court applied these principles to DGE's application for a stay of enforcement of the adjudication determination on the ground that any moneys paid by DGE to JEC may not be recovered if the ongoing arbitration was resolved in DGE's favour. The High Court allowed the stay. In arriving at this decision, Tan J considered that JEC had declined to furnish (a) its bank account statements for the last six months showing its cash balance; (b) relevant transactions showing that it has ongoing work and receivables; (c) project documents for any ongoing projects; and (d) annual returns and financial statements for the financial years, including that ending 2019 and 2020.[137] He also noted that JEC did not have fresh construction projects and evidence that it was selling its remaining equipment.[138] The learned judge was further persuaded that the stay should be granted in view of the evidence that JEC's sole foreign director had left Singapore and would cause DGE grave difficulties in recovering moneys that could be owed to it if the ongoing arbitration was concluded in its favour.[139] However, the stay would not apply to the entire adjudicated amount. There was an undisputed amount of $1.21m acknowledged by DGE to be owing to JEC. The final order of the court was for the release of this undisputed sum.[140]

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135 [2013] 3 SLR 380.

136 See para 7.54 above.

137 *Dongah Geological Engineering Co Ltd v Jungwoo E & C Pte Ltd* [2021] SGHC 239 at [83].

138 *Dongah Geological Engineering Co Ltd v Jungwoo E & C Pte Ltd* [2021] SGHC 239 at [86]–[88].

139 *Dongah Geological Engineering Co Ltd v Jungwoo E & C Pte Ltd* [2021] SGHC 239 at [91].

140 *Dongah Geological Engineering Co Ltd v Jungwoo E & C Pte Ltd* [2021] SGHC 239 at [102] and [103].