IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 62

Originating Summons No 1249 of 2010

Between

TT INTERNATIONAL
LIMITED

… *Plaintiff*

And

HO LEE CONSTRUCTION
PRIVATE LIMITED

… *Defendant*

JUDGMENT

[Building and Construction Law] — [Standard form contracts]

[Contract] — [Waiver]

[Res judicata] — [Issue estoppel]

[Abuse of process]

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TT International Limited
v
Ho Lee Construction Private Limited

[2017] SGHC 62

High Court — Originating Summons No 1249 of 2010
Quentin Loh J
25–26 March; 1, 11 April 2013; 29–30 July 2014; 16–18 March 2015; 13–14 April 2016

29 March 2017 Judgment reserved.

Quentin Loh J:

1 The plaintiff, TT International Limited ("the Plaintiff"), filed this Originating Summons ("OS") for the court to adjudicate upon the proof of debt ("the Proof of Debt") filed by the defendant, Ho Lee Construction Private Limited ("the Defendant"), in a scheme of arrangement ("the Scheme") that was finally, after some tortuous twists and turns in these courts, approved by the court.

2 The main issue in this judgment is whether, on a true construction of this building and construction contract, entered into on the Public Sector Standard Conditions of Contract for Construction Works ("PSSCOC"), the Defendant is entitled to recover for loss of profits on uncompleted work flowing from the Plaintiff's termination of the Defendant's employment.

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Secondary issues relating to, *inter alia*, issue estoppel, abuse of process, and waiver by estoppel are also raised by the parties.

The parties

3 The Plaintiff is a company incorporated in Singapore which is listed on the Singapore Stock Exchange.[1] Its main business is in trading and distributing consumer electronic products.[2] The Plaintiff also owns warehouses and provides warehousing services.[3]

4 The Defendant is a company incorporated in Singapore which carries on the business of building and construction.

Background to the dispute

5 In 2007, the Plaintiff obtained a Warehouse Retail Scheme licence from the Economic Development Board to develop and construct an eight-storey warehouse retail complex, known as the "Big Box", at Jurong East Street 11 ("the Project").[4]

6 Subsequently, the Plaintiff entered into two contracts with the Defendant in relation to the Project. First, a contract for piling and sewer diversion works.[5] Secondly, a contract for the main building works ("the Main Contract") for the sum of $226,000,000.[6] Both contracts incorporated the PSSCOC 2006. The Plaintiff appointed Jurong Consultants Pte Ltd ("Jurong

1 Tong Jia Pi Julia's ("Tong's") Affidavit at para 12.

2 Tong's Affidavit at para 12.

3 Tong's Affidavit at paras 12 and 13.

4 Tong's Affidavit at paras 13 to 14.

5 Tong's Affidavit at TJP-1 (at p 30).

6 Tong's Affidavit at TJP-2 (at p 108).

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Consultants") as the Superintending Officer ("the SO") in respect of works under the Main Contract.[7]

7 Sometime in March or April 2008, the Defendant began works under the Main Contract.[8]

8 In the second half of 2008, the Plaintiff began to experience financial difficulties due to the global financial crisis.[9] Thus, under the Plaintiff's directions, the SO issued three instructions to the Defendant to suspend works:

(a) On 12 September 2008, the SO instructed the Defendant to suspend most of the works for the Project.[10]

(b) On 2 October 2008, the SO instructed the Defendant to suspend all works except for certain works.[11]

(c) Finally, on 15 October 2008, the SO instructed the Defendant to suspend all works until further notice".[12]

Then, in early November 2008, the Plaintiff froze repayments of all debts due to its creditors except for debts due to its essential trade creditors.[13]

9 On 9 December 2008, the Plaintiff sent a Notice of Termination under cl 31.4 of the PSSCOC ("cl 31.4") to the Defendant, thus terminating the

7 Yeo Tai Kwee's ("Yeo's") 1st Affidavit at para 15.

8 Tong's Affidavit at para 20 (April); Yeo's 1st Affidavit at para 16 (March).

9 Tong's Affidavit at para 23.

10 Tong's Affidavit at para 23. Also see para 1 of the SO's letter to the Defendant dated 2 October 2008: Yeo's 1st Affidavit at YTK-3 (at p 171).

11 Yeo's 1st Affidavit at YTK-3 (at p 171).

12 Yeo's 1st Affidavit at YTK-3 (at p 173).

13 Tong's 1st Affidavit at para 26.

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Defendant's employment under the Main Contract.[14]

10 On 29 December 2008, the Defendant submitted a claim to the SO for the sum of $68,139,652.94.[15] On 15 January 2009, the SO suspended its services for the Project, on the basis that the Plaintiff had not repaid its debt to the SO, but offered to evaluate the Defendant's claim dated 29 December 2008 out of goodwill.[16] However, the Plaintiff did not immediately direct the SO to evaluate the claim.[17] The Plaintiff requested Northcroft Lim Consultants Pte Ltd ("Northcroft") to assist in evaluating the claim in or around August 2009.[18] On 14 August 2009, Northcroft requested the Defendant to submit its claim and thereafter provided an assessment of the claim on 7 September 2009.[19]

11 On 29 January 2009, the Plaintiff obtained approval from the High Court ("the HC") to convene a meeting of its creditors to vote on the Scheme.[20] Clause 4.1 of the Scheme provided for eligible creditors to lodge proofs of debts, in respect of their claims against the Plaintiff, with the scheme manager ("the Scheme Manager").[21] Clauses 4.5 to 4.6 of the Scheme set out the procedure for resolving disputed amounts of debts.[22] Under cl 4.5, the Scheme Manager would first issue a notice of rejection of proof of debt to the creditor

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14 Tong's Affidavit at TJP-3 (at p 182).

15 Tong's Affidavit at TJP-3 (at p 185).

16 Yeo's 1st Affidavit at YTK-3 (at p 178).

17 Tong's Affidavit at para 36.

18 Tong's Affidavit at para 37.

19 Yeo's 1st Affidavit at paras 29 and 31(a) and at YTK-3 (at pp 182 to 198).

20 Tong's Affidavit at para 39.

21 Tong's Affidavit at TJP-5 (at p 290).

22 Tong's Affidavit at TJP-5 (at p 291).

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to inform that it had rejected (part of) the latter's claim. Upon receiving such a notice, a creditor was entitled to request the Plaintiff, under cl 4.6, to start proceedings for the HC to adjudicate the claim.

12 On 6 October 2009, the Defendant submitted the Proof of Debt for the sum of $84,563,154.14.[23] This comprised a claim in the sum of $33,556,433.09 for loss of profits.[24]

13 On 15 December 2009, the Scheme Manager notified the Defendant that it had rejected the Defendant's claim in part (admitting $22,769,729.15), and that the disputed debt amount was $61,793,424.99 ("the Disputed Amount").[25] In response, on 22 December 2009, the Defendant requested the Plaintiff to commence proceedings in the HC for adjudication of the Disputed Amount.[26]

14 The Plaintiff subsequently engaged PricewaterhouseCoopers ("PWC") to perform an independent review and assessment of the proofs of debts filed by creditors. On 12 February 2010, PWC produced a report which stated that there was an absence of supporting documents in respect of, *inter alia*, the loss of profits claim in the Proof of Debt. PWC opined that, based on the available documents, the rejected amounts were reasonably rejected.[27]

15 On 15 March 2010, upon the Plaintiff's application, the HC sanctioned the Scheme (see *Re TT International Ltd* [2010] SGHC 177 ("*TT International*

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23 Tong's Affidavit at TJP-6 (at pp 503-504).

24 Tong's Affidavit at TJP-6 (at p 514).

25 Tong's Affidavit at TJP-7 (at p 856).

26 Tong's Affidavit at TJP-8 (at p 858).

27 Tong's Affidavit at TJP-9 (at p 880).

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(HC)"). The Defendant and several other scheme creditors appealed against the HC's decision. On 27 August 2010, the Court of Appeal ("the CA") allowed the appeals and set aside the HC's sanction of the Scheme (see *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213 ("*TT International (CA)*"). The CA also directed that a further meeting of the scheme creditors be called to approve the Scheme (see [1] of Annexure I to *TT International (CA)*).

16 On 24 September 2010, the further meeting of the scheme creditors was held. The Plaintiff then applied to the CA for sanction of the scheme. On 13 October 2010, the CA sanctioned the scheme subject to some alterations (see [6]–[8] of Annexure II to *TT International (CA)*). On 26 October 2010, the CA directed that the Defendant's loss of profits claim should be ascribed an amount of S$9.27 million for the purposes of voting.[28]

17 On 12 November 2010, the Defendant requested the Plaintiff to start proceedings in the HC for adjudication of the Disputed Amount.[29] Accordingly, the Plaintiff filed this OS on 16 December 2016.

18 In this OS, the Defendant revised its claim such that the Disputed Amount fell to $53,855,381.00.[30] At a number of pre-trial conferences, after discovery, I made suggestions as to how some of the issues could be settled or streamlined. This included for example, categorising the subcontractor's claims into binding subcontracts already entered into, contingent subcontracts

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28 Tong's Affidavit at para 73; Plaintiff's Reply Submissions dated 13 March 2015 ("Plaintiff's Reply Submissions") at Appendices 1 and 2.

29 Tong's Affidavit at TJP-16 (at p 945).

30 Defendant's Opening Statement dated 27 April 2012 at para 26.

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with varying degrees of obligation to proceed to a binding subcontract and those where only indicative prices and terms had been explored, and settling them accordingly. Counsel for both parties should be commended for their very practical and commercial approach to resolving and narrowing the issues between their clients. They managed to settle a number of issues. Subsequently, following mediation on 16 May 2012, the parties reached agreement on several items of claim in relation to the Disputed Amount.[31] Consequently, the dispute was narrowed to three items of claim, *viz*, the Defendant's claims for:

(a) loss of profits ("the Loss of Profits Issue");

(b) damages payable to its subcontractors and suppliers ("the Damages Issue"); and

(c) for interest for four progress claims which were adjudicated upon under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Interest Issue").[32]

19 On 11 July 2012, the Plaintiff filed a summons, with the Defendant's consent, for the trial of two preliminary points of law which pertained to the Damages Issue and the Interest Issue respectively.[33] I heard the summons on 9 October 2012, and made further suggestions on how agreement could be reached on the Damages Issue. The parties later reached an agreement on the Damages Issue.[34]

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31 Settlement Agreement dated 16 May 2012.

32 Minute Sheet for PTC on 17 May 2012.

33 SUM 3456/2012.

34 Letter from the Plaintiff's Solicitors dated 20 February 2013

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20 A trial for the Loss of Profits issue began on 25 March 2013. There were two main sub-issues.[35] First, whether the Plaintiff was entitled to rely on cl 31.4 to limit or dispose of the Defendant's claim for loss of profits ("the cl 31.4 Issue"). Secondly, if cl 31.4 was inapplicable, the quantum of damages that the Defendant was entitled to for loss of profits ("the Quantum Issue"). The parties requested that I put the cl 31.4 issue to one side, and deal with the Quantum Issue first. The experts' evidence was reduced to a joint report on agreed items and items that were not agreed and the reasons therefor. During the course of the expert witness conferencing, it appeared to counsel that their experts had not considered a number of matters and that, on quite a number of items in dispute, their approaches or bases for their conclusions were erroneous.

21 The parties then agreed to binding adjudication before me on the Quantum Issue, and reserved their right to a decision in the normal manner on the cl 31.4 Issue (after determination of the Quantum Issue). I heard counsel on the respective contentions and submissions on the Quantum Issue. On 14 April 2016, I determined the Quantum Issue by finding that the loss of profits due to the Defendant, on the assumption that cl 31.4 did not apply, was $18,193,000 rounded to the nearest thousand.[36]

22 The Plaintiff has now requested for my decision on the cl 31.4 Issue.[37]

The parties' cases

23 The Plaintiff's case was that cl 31.4(2) exhaustively sets out the sums

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35 Agreed Terms of Binding Adjudication dated 28 June 2013 at p 1.

36 Binding Adjudication by Agreement of Parties dated 14 April 2016

37 Letter from the Plaintiff's Solicitors dated 15 April 2016.

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which a contractor ("the Contractor") may recover upon termination under cl 31.4(1), and that loss of profits on uncompleted works is not recoverable under cl 31.4(2).[38] The Plaintiff further submitted that it was entitled to rely on cl 31.4(2) to dispose of the Defendant's claim for loss of profits (as presented).[39]

24 The Defendant's case was that cl 31.4(2) does not bar the Contractor from recovering for loss of profits.[40] The Defendant further submitted that, if the Plaintiff's interpretation of cl 31.4(2) was correct, the Plaintiff was not entitled to rely on cl 31.4(2). In this regard, the Defendant argued the doctrines of issue estoppel, abuse of process, and waiver by estoppel applied such that the Plaintiff was not entitled to rely on cl 31.4(2); the Defendant also submitted that the Plaintiff had disabled cl 31.4(2)'s operation.[41]

Issues to be determined

25 The cl 31.4 Issue can therefore be analysed in two parts:

(a) Whether, on a true interpretation of cl 31.4(2), the Contractor may recover for loss of profits for uncompleted work upon termination under cl 31.4(1) ("the Interpretation Issue").

(b) Whether the Plaintiff is entitled to rely on cl 31.4(2) to dispose of the Defendant's claim for loss of profits ("the Entitlement Issue").

26 If the Defendant succeeds on the Interpretation Issue, the Entitlement Issue becomes academic. Thus, I turn first to the Interpretation Issue.

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38 Plaintiff's Submissions dated 27 October 2014 ("Plaintiff's Submissions") at para 27.

39 Plaintiff's Reply Submissions at paras 61 to 131.

40 Defendant's Submissions dated 9 January 2015 ("Defendant's Submissions") at para 45(c).

41 Defendant's Submissions at para 45(a) to 45(b).

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The Interpretation Issue

27 Clause 31.4 provides as follows:[42]

> 31.4 Termination Without Default
>
> (1) The Employer may at any time, give the Contractor a written Notice of Termination. This shall have the effect of immediately terminating the employment of the Contractor under the Contract and the Contractor shall immediately thereafter vacate the Site, remove all his Construction Equipment and labour force from the Site and surrender possession of the Site to the Employer.
>
> (2) In the event of a Notice of Termination under Clause 31.4(1) or where Clause 13.2 is applicable, the Superintending Officer shall subject to compliance by the Contractor with Clause 23 *certify payment to the Contractor*:
>
> (a) for *all work executed prior to the date of termination* at the Rates for the Works set out in the Contract including
>
> > (i) the amounts payable in respect of any other items shown and separately priced in the Contract including those for Construction Equipment, Temporary Works and the like, so far as the work comprised therein has been carried out or performed, and a proper proportion of any such items which have been partially carried out or performed;
> >
> > (ii) the cost of Plant, materials or goods reasonably ordered for the Works which have been delivered to the Contractor or of which the Contractor is legally liable to accept delivery, and where such Plant, materials or goods will become the property of the Employer upon such payments made by him; and
>
> (b) *any Loss and Expense suffered by the Contractor in connection with or as a consequence of the termination.*
>
> The Superintending Officer shall expeditiously certify the amounts payable to the Contractor under this Clause, and the Contractor shall provide all reasonable assistance to the Superintending Officer. In the event that the Contractor does not submit the necessary information required, the Superintending Officer shall make his certification on the information available. *The amount certified shall be paid by the Employer* less any sums previously paid or due to or recoverable by the Employer from the Contractor.

[42] Tong's Affidavit at "TJP-2" (at p 163).

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> [Emphasis added]

The Parties' Arguments

28 The Plaintiff argued that cl 31.4(2) exclusively sets out the sums which the Contractor is entitled to recover upon termination under cl 31.4(1).[43] The Contractor may recover for work done before the termination (cl 31.4(2)(a)), and for "Loss and Expense" suffered in connection with or as a consequence of the termination (cl 31.4(2)(b)). Loss and Expense is defined in cl 1.1(q) of the PSSCOC ("cl 1.1(q)") as follows:[44]

> 1.1 Definitions
>
> In the Contract (as hereinafter defined) the following words and expressions shall have the meanings hereby assigned to them except where the context otherwise requires:
>
> …
>
> (q) "Loss and Expense" means: (i) the direct relevant costs of labour, Plant, materials, or goods actually incurred; and (ii) costs of an overhead nature actually and necessarily incurred on the Site but in either case only in so far they would not otherwise have been incurred and which were not and should not have been provided for by the Contractor; and (iii) *15% of any such costs, such 15% to be inclusive of and in lieu of any profits*, head office or other administrative overheads, financing charges (including foreign exchange losses) *and any other costs, loss or expense of whatsoever nature and howsoever arising*.
>
> [Emphasis added]

29 Thus, the Plaintiff submitted that, under cl 1.1(q)(iii), the Contractor is entitled to a 15% mark up under cl 1.1(q)(i)–(ii) for, *inter alia*, lost profits.[45] But the Contractor cannot recover any more for lost profits for uncompleted work.

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43 Plaintiff's Submissions at para 44.

44 Tong's Affidavit at "TJP-2" (at p 119).

45 Plaintiff's Submissions at para 48.

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30 In response, the Defendant made two submissions. First, the Defendant submitted that cl 31.4(2) does not provide for the Contractor's rights following termination under cl 31.4(1), but merely sets out the SO's duties upon such termination. In this regard, the Defendant argued as follows:

(a) First, termination under cl 31.4(1) is equivalent to "a total act of prevention" which amounts to a repudiation of the contract. Therefore, termination under cl 31.4(1) triggers the Contractor's right at common law to recover for loss of profits for uncompleted work.[46] Furthermore, in this case, the Plaintiff had concurrently repudiated the Main Contract, thus giving rise to the Contractor's right to recover for loss of profits.[47]

(b) Secondly, cl 31.4(2) does not contain the clear words necessary to oust the Contractor's common law right to recover for loss of profits for uncompleted work. This is because cl 31.4(2) only refers to the SO's duties; it does not expressly address the Contractor's entitlement, unlike other clauses in the PSSCOC.[48]

(c) Thirdly, it could not have been the intention of cl 31.4(2) to limit the Contractor's common law right to recover for loss of profits, because the SO's certificates bear only temporary finality, are not conclusive of the matters stated therein, and the sums stated in cl 31.4(2) would not adequately compensate the Contractor.[49]

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46 Defendant's Submissions at paras 128 to 130.

47 Defendant's Submissions at paras 140 to 141.

48 Defendant's Submissions at paras 106, 110 and 136 to 150.

49 Defendant's Submissions at paras 108 to 109 and 131 to 134.

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31 Secondly, the Defendant submitted that, if cl 31.4(2) sets out the sums which the Contractor may recover upon termination under cl 31.4(1), cl 31.4(2) nonetheless entitles the Contractor to recover for loss of profits for uncompleted work. In this regard, the Defendant argued as follows:

> (a) First, termination under cl 31.4(1) is an act of prevention (see [30(a)] above). Upon such termination, the works are "disrupted…or otherwise materially affected". Thus, cl 22 of the PSSCOC ("cl 22") is triggered.[50] Clause 22.1 provides as follows:
>
> > 22.1 Reasons for Loss and Expense
> >
> > The Contractor shall be entitled to recover as Loss and Expense sustained or incurred by him and for which he would not be reimbursed by any other provision of the Contract, *all loss, expense, costs or damages of whatsoever nature and howsoever arising* as a result of the regular progress and/or completion of the Works or any phase or part of the Works having been *disrupted, prolonged or otherwise materially affected by*:
> >
> > …
> >
> > (i) *any act of prevention or breach of contract by the Employer not mentioned in this Clause.*
> >
> > …
> >
> > [Emphasis added]
>
> (b) Secondly, cl 22.1 supplements the definition of Loss and Expense in cl 1.1(q). Under cl 22.1, the Contractor is entitled to recover for loss of profits for uncompleted work, as cl 22.1 provides for the Contractor to recover "all loss, expense, costs or damages…". This phrase should be interpreted in the light of the common law definition of loss and expense, which encompasses loss of profits, and thus entitles the Contractor to recover for loss of profits.[51]

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50 Defendant's Submissions at para 113.

51 Defendant's Submissions at paras 116 to 123.

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32 In reply, the Plaintiff responded to the Defendant's first submission (see [30] above) by arguing that termination under cl 31.4 does not amount to an act of prevention or repudiation of the contract.[52] Moreover, in this case, there was no concurrent act of repudiation giving rise to the Defendant's right to recover for loss of profits; alternatively, the Defendant had not accepted any such breach.[53] The Plaintiff also rebutted the Defendant's argument that cl 31.4(2) could not have been intended to limit the Contractor's right to recover for loss of profits, by arguing that cl 31.4(2) provided for fair compensation for the Contractor.[54]

33 The Plaintiff responded to the Defendant's second submission (see [31] above) by arguing that cl 22.1 does not apply upon termination under cl 31.4.[55] The Plaintiff also submitted that cl 22.1 does not extend the express definition of Loss and Expense set out in cl 1.1(q), which governs cl 31.4(2)(b).[56]

My Decision

34 The parties' arguments are joined over two sub-issues:

(a) Whether cl 31.4(2) exhaustively sets out the sums which the Contractor is entitled to recover after (proper) termination under cl 31.4(1) ("the Threshold Issue").

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52 Plaintiff's Reply Submissions at paras 7 to 17.

53 Plaintiff's Reply Submissions at paras 39 to 53.

54 Plaintiff's Reply Submissions at paras 55 to 59.

55 *Ibid* at paras 36 to 38.

56 *Ibid* at paras 27 to 31.

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(b) Whether "Loss and Expense" under cl 31.4(2)(b) includes loss of profits ("the Scope Issue").

The Threshold Issue

35 Clause 31 of the PSSCOC empowers an employer ("the Employer") to terminate the Contractor's employment. It contains four sub-clauses. Clause 31.1 to 31.3 address the situation of termination upon the Contractor's default. By contrast, cl 31.4 allows the Employer to terminate the Contractor's employment without the latter's default. Clause 31.4 comprises two limbs:

(a) Under cl 31.4(1), an employer ("the Employer") has the right to terminate the Contractor's employment by giving the Contractor a written Notice of Termination. The Contractor is then under an obligation to immediately vacate the construction site, remove all equipment and labour from the site and surrender possession of the site to the Employer.

(b) Under cl 31.4(2), the SO is under an obligation to certify the amounts payable to the Contractor in respect of the heads of claim in cl 31.4(2)(a) and (b). Moreover, cl 31.4(2) expressly states that the certified amounts "*shall be paid by the Employer* less any sums previously paid or due to or recoverable by the Employer from the Contractor" [emphasis added]. Thus, cl 31.4(2) imposes a duty on the Employer to pay the certified sums to the Contractor (subject to deductions for sums owing to the Employer).

36 Clause 31.4 is a "termination for convenience" clause (also known as a convenience clause). Such clauses grant the Employer the power to terminate the contract even if the Contractor is not in breach or default of the contract:

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see Nicholas Dennys QC, Mark Raeside QC and Robert Clay, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 12th Ed, 2010) ("*Hudson's*") at para 8-033. Such a clause is by no means unique. Similar clauses can be found in cl 32(1) of the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) (9th Ed, September 2010) ("the SIA Conditions") and cl 30.1 of the Real Estate Developers' Association of Singapore Design and Build Conditions of Contract (3rd Ed, October 2010) ("the REDAS D&B Conditions"). I discuss cl 32(1) of the SIA Conditions and cl 30.1 of the REDAS D&B Conditions at [64] below.

37 In my judgment, cl 31.4(2) exhaustively provides for the sums which the Contractor is entitled to recover upon a proper termination under cl 31.4(1).

38 First, as explained at [35(b)] above, cl 31.4(2) imposes a duty on the Employer to pay the certified sums to the Contractor. This duty correlates to the Contractor's right to receive the said sums. Thus, the Defendant's submission that cl 31.4(2) merely provides for the SO's duties, and not the Contractor's entitlements, cannot be sustained. Clause 31.4(2) confers on the Contractor a right to payment in respect of the heads of claim in cl 31.4(2)(a) and (b) (subject to deductions for sums owed by the Contractor to the Employer).

39 Secondly, I do not accept the Defendant's submission that, upon termination under cl 31.4(1), the Contractor obtains without more a right at common law to recover for loss of profits which cl 31.4(2) fails to oust. No such right arises. The Defendant submitted that the right arises on the basis that termination under cl 31.4(1) is akin to a "total act of prevention" in

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repudiation of the contract. This submission is without basis. In terminating the Contractor's employment under cl 31.4(1), the Employer is exercising a contractual right. The mere exercise of a contractual right cannot constitute a breach of contract, let alone a repudiation of the contract. Thus, the Contractor does not acquire a right at common law to recover for loss of profits upon termination under cl 31.4(1). Moreover, in my judgment, even if such a right arises at common law, cl 31.4(1) is in sufficiently clear words to oust this right.

40 At this point, I make clear that I leave open the possibility that, in some cases, the Employer may commit a breach of contract in purporting to terminate the Contractor's employment under cl 31.4(1). In the United States of America ("US"), where termination for convenience clauses are common in government contracts, the power to terminate is limited by a duty of good faith: see, for example, *Krygoski Construction Company, Inc v United States* 94 F 3d 1537. Similarly, the Federal Court of Australia has recognised, albeit *obiter*,that a termination for convenience clause would be subject to a duty of good faith: *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited* [2003] FCA 50 at [753] (*per* Finn J). Such a duty may constrain the Employer from terminating the Contractor's employment on certain grounds. Thus, it has been suggested that the Employer may not invoke a termination for convenience clause to take advantage of lower prices offered by another contractor: *Hudson's* at para 8-034 and Chow Kok Fong, *The Singapore Public Sector Construction Contract: Commentary on the Public Sector Standard Conditions of Contract (7th Edition)* (LexisNexis, 2015) ("*Chow*") at para 31.83. If this is right, the Employer will breach the contract if the latter terminates the Contractor's employment on such grounds. The Contractor may thus acquire a right to recover for loss of profits upon the

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wrongful termination. However, I note that the issue of whether the right to terminate is fettered is controversial. The English High Court has held that a termination for convenience clause was not subject to a duty of good faith: *TSG Building Services Plc v South Anglia Housing Limited* [2013] EWHC 1151 (TCC). Clause 15.5 of the 1999 *Fédération Internationale des Ingénieurs-Conseils* ("FIDIC") Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer: the Construction Contract ("the 1999 Red Book"), which usually operates in an international setting, removes this uncertainty by expressly providing that "[t]he Employer shall not terminate the Contract under this Sub-Clause in order to execute the Works himself or to arrange for the Works to be executed by another contractor". As this question does not arise here, the possible implied duty of good faith on an employer when exercising its right under cl 31.4 must be left for another occasion when the issue can be fully argued.

41 In sum, cl 31.4(2) provides for the sums which the Contractor is entitled to recover after (proper) termination under cl 31.4(1). Upon such termination, the Contractor does not acquire additional remedial rights at common law. The Defendant does not contend, nor is there any basis to contend, on these facts, that any other clause in the PSSCOC provides for the Contractor's rights after termination under cl 31.4(1). It follows that cl 31.4(2) exhaustively sets out the sums which the Contractor is entitled to recover after (proper) termination under cl 31.4(1).

42 I now turn to the Defendant's contention (see [30(a)] above) that, on these facts, the Plaintiff had concurrently repudiated the Main Contract. The Defendant submits that the Plaintiff had concurrently repudiated the Main Contract based on its instructions to the Defendant through the SO to suspend works and the Plaintiff's freezing of debt repayments to its creditors (see [8]

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above). The Defendant then relies on the principle that, if a contract is terminated pursuant to a contractual termination clause, the innocent party may recover loss of bargain damages if there is a concurrent repudiation of the contract.[57] Thus the Defendant submits that it may recover for loss of profits (as a component of loss of bargain damages) in this case.

43 This submission is flawed. If the Plaintiff had repudiated the Main Contract, by suspending the works or by freezing payments to the Defendant, this would have occurred before the termination of the Defendant's employment and not concurrently with it. Thus, even if the Plaintiff had repudiated the Main Contract, the present case would not fall within the ambit of the principle which the Defendant contends for.

44 In any case, there is a more fundamental reason why that principle does not apply. It is limited to cases where one party has a right to terminate a contract on two grounds, *viz*, under an express contractual provision and under the common law for repudiatory breach; and where both grounds are triggered by the same event. This is illustrated by *Lombard North Central Plc v Butterworth* [1987] QB 257 ("*Lombard*"), which the Defendant cites as authority for the principle. In *Lombard*, the defendant had leased equipment from the plaintiff and failed to make prompt payment of rentals. This gave rise to the plaintiff's right to terminate the contract under a clause in the contract. Moreover, the court found that prompt payment was a condition such that the breach was a repudiation of the contract which gave rise to the plaintiff's right to recover loss of bargain damages upon terminating the contract.

45 However, in this case, the Defendant is alleging that the Plaintiff, which held the contractual right of termination, had committed the repudiatory

[57] Defendant's Submissions at paras 142 to 143.

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breach, thus giving rise to the Defendant's right to terminate the Main Contract at common law. On this account there are two parties with the right to terminate, not one. Moreover, the alleged rights to terminate derive from different events. Plainly, the Defendant is trying to fit a square peg into a round hole in attempting to apply the principle in *Lombard* to the factual matrix which it has put forward. Therefore, I cannot accept the Defendant's submission that it may recover for loss of profits due to a concurrent repudiation of the Main Contract.

46 Finally, I note that it is not the Defendant's case that it is entitled to recover for loss of profits because it had accepted the alleged repudiation and terminated the Main Contract. Nor is there evidence before me to this effect. This is important because, even if the Plaintiff had repudiated the contract, the Defendant would only be entitled to recover for the loss caused by the breach if it had accepted the repudiation and terminated the Main Contract. Thus, if the breach was in failing to make prompt debt repayments (see [42] above), the Defendant could only recover for the unpaid sums and loss caused by the Plaintiff's failure to pay those sums promptly, and not for loss of profits on the uncompleted work. In sum, even if the Plaintiff had repudiated the contract, and I find that it clearly had not, the Defendant did not acquire a right to recover for loss of profits.

The Scope Issue

47 I now turn to the Scope Issue.

48 As noted above, cl 31.4(2) provides for the Contractor to recover for "Loss and Expense suffered…in connection with or as a consequence of the

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termination". Clause 1.1(q) expressly defines Loss and Expense (see [28] above) and it is specifically delineated by the words set out therein:

> (i) the direct relevant costs of labour, Plant [which is defined under cl 1.1(v) of the PSSCOC to mean machinery, apparatus and the like intended to form or forming part of the Permanent Works], materials or goods *actually incurred*;
>
> (ii) costs of an overhead nature *actually and necessarily incurred* on Site but in either case only in so far they would not otherwise have been incurred and which were not and should not have been provided for by the Contractor; and
>
> (iii) 15% of any such costs, such 15% to be inclusive of and in lieu of any profits, head office or other administrative overheads, financing charges (including foreign exchange losses) and any other costs, loss or expense of whatsoever nature and howsoever arising.

It is noteworthy that both cl 1.1(q)(i) and (ii) above use words in the past tense, *viz*, "actually incurred" and "actually and necessarily incurred". Additionally, under cl 1.1(q), Loss and Expense does not include loss of profits, but includes 15% of the costs under cl 1.1(q)(i) and (ii) "inclusive of and in lieu of any profits". Thus, if the definition of Loss and Expense is governed by cl 1.1(q) alone, the Contractor is not entitled to directly recover for loss of profits under cl 31.4(2). Instead, the Contractor may recover a sum in lieu of, *inter alia*, loss of profits.

49 The Defendant does not appear to dispute this reasoning. Rather, the Defendant argues that cl 22 expands cl 1.1(q)'s definition of Loss and Expense to include loss of profits such that the Contractor may recover for loss of

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profits under cl 31.4(2)(b). However, this argument is, with respect, without merit.

50 First, I do not accept the Defendant's submission that cl 22 supplements the definition of Loss and Expense in cl 1.1(q). Clause 22.1 reads:

> 22.1 Reasons for Loss and Expense
>
> The Contractor shall be entitled to recover as Loss and Expense sustained or incurred by him *and for which he would not be reimbursed by any other provision of the Contract*, all loss, expense, costs or damages of whatsoever nature and howsoever arising ***as a result of*** *the regular progress and/or completion of the Works or* ***any phase or part of the Works having been disrupted, prolonged or otherwise materially affected by***:
>
> …
>
> [Emphasis in italics and bold italics added]

51 In my view, the following propositions regarding cl 22.1 are clear:

(a) First and foremost, cl 22.1 stipulates that the loss and expense must arise as a result of the regular progress and/or completion of the Works or any phase or part of the Works having been disrupted, prolonged or otherwise materially affected by the events set out in cl 22.1. On its plain and ordinary meaning, cl 22.1 does not and cannot be referring to a termination of the whole of the Works as expressly provided for under cl 31.4.

(b) Secondly, none of the events in cl 22.1(a) to (i) are applicable to the facts here. At first blush, it may be thought that the Defendant can try to rely on:

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(i) cl 22.1(d): "the suspension by the Superintending Officer of any work for a cause which entitles the Contractor to recover Loss and Expense"; or

(ii) cl 22.1(i): "any act of prevention or breach of contract by the Employer not mentioned in this Clause".

However, on a closer reading, the suspension of *any* work in cl 22.1(d) again cannot refer to a termination of the whole of the works (which is achieved by termination of the Contractor's employment). Similarly, cl 22.1(i) only applies to an "act of prevention or breach of contract" which cannot arise in the event of a proper termination under an express contractual provision which confers such a right.

(c) Thirdly, the Loss and Expense covered by cl 22.1 is the loss and expense suffered by the Contractor for which he cannot recover under any other provision of the PSSCOC. As noted above, cl 31.4 clearly gives the Contractor the entitlement to recover the sums provided for therein. Clause 22.1 therefore does not "expand" upon the remedies available to the Contractor upon a termination under cl 31.4.

(d) Fourthly, it is worth noting that the operative words "sustained" and "incurred" are in the past tense. Thus, cl 22.1 clearly refers to Loss and Expense that has already been sustained or incurred by the Contractor. It cannot apply to future Loss and Expense that has not been already "sustained" or "incurred".

52 Furthermore, cl 22.2 provides as follows:

22.2 Sufficiency of Loss and Expense

The Contractor shall not be entitled to recover any loss, expense, costs or damage whatsoever resulting from any

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> disruption, prolongation or other material effect to the regular progress or completion of the Works or any phase or part of the Works except in accordance with the express provisions of the Contract.
>
> [Emphasis added]

53 Nothing in the wording of cl 22.2 indicates that cl 22 was intended to supplement the definition of Loss and Expense in cl 1.1(q). Rather, the two sub-clauses have the following functions. Clause 22.1 has the positive function of identifying cases in which the Contractor may recover for Loss and Expense. Clause 22.2 has the negative function of restricting that right of recovery to the cases identified in cl 22.1 and other provisions in the PSSCOC. Both sub-clauses play a complementary role in providing for the Contractor's right to recover for Loss and Expense, which is the purpose of cl 22. Clause 22 does not expand the definition of Loss and Expense in cl 1.1(q).

54 I note that academic commentary also supports the view that cl 22 does not define Loss and Expense, but simply deals with the Contractor's entitlement to recover for Loss and Expense. Clause 22 is discussed in Philip Chan Chuen Fye, *Public Sector Standard Conditions of Contract for Construction Works 2005: A Commentary* (LexisNexis, 2006) ("*Chan*") at p 149 as follows:

> **Intention of the Clause**
>
> This clause has two sub-clauses. It is a contractual provision which *entitles the Contractor to recover Loss and Expense.* …However, *this clause does not define the term "Loss and Expense". The definition is found in Clause 1.1(q)* …
>
> [Emphasis in original in bold; emphasis added in italics]

55 I therefore reject the Defendant's submission that cl 22 supplements the definition of Loss and Expense in cl 1.1(q).

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56 I hold that cl 1.1(q) defines the phrase "Loss and Expense" in cl 31.4(2) and upon termination under cl 31.4(1), the Contractor may not recover for loss of profits under cl 31.4(2)(b), but may only recover 15% of the costs under cl 1.1(q)(i) and (ii) in lieu of, *inter alia*, lost profits.

57 I must point out that my conclusion at [56] above appears to be somewhat at odds with the commentary on cl 31.4(2)(b) in *Chow*, at para 31.79:

> Clause [31.4(2)(b)] provides for the Contractor to be compensated for loss and expense suffered as a consequence of the termination. The expression "loss and expense" is consistent with damages under common law. It may include costs sustained by the Contractor before the termination, a reasonable profit on work which has been performed and other additional costs. *It is considered that the expression is also sufficiently expansive to include loss of contribution to the Contractor's overheads and profit on any uncompleted parts of the works* and any other item of expenditure incurred by the Contractor as a consequence of the termination.
>
> [Emphasis added]

The last sentence in this extract is followed by a footnote, which states: "[t]hese principles are well described in a number of US cases; see for example *Pinckney v United States* 88 Fed Cl 490, 506 (2009)". Insofar as this paragraph can be read as stating that Loss and Expense means loss and expense according to common law and that a claim for future profits can be made under cl 31.4(2)(b), I make four points in relation to this text.

58 First, I think that this commentary must be read with care. *Chow* does not state that Loss and Expense means damages under common law. Neither has the learned author stated that Loss and Expense under cl 31.4 is to be "governed" by common law damages. Instead, he has chosen his words with care and said that it is *consistent with* damages at common law. On my reading

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of this paragraph, *Chow* does not state that the phrase "Loss and Expense" in cl 31.4(2)(b) should be interpreted by reference to common law principles instead of the definition in cl 1.1(q). In my view, since cl 1.1(q) expressly defines Loss and Expense, it is neither necessary nor legitimate to apply the common law definition in interpreting cl 31.4(2)(b). The words in cl 1.1(q) are sufficiently clear to provide guidance as to what can and cannot be included in a claim for Loss and Expense under this sub-clause. In this regard, I note that no reference is made to the common law definition of loss and expense in the discussion of cl 31.4(2)(b) in *Chan* at p 208.

59 Secondly, it is also important to note that *Chow*, in the paragraph quoted at [57] above, correctly points out that the loss and expense being claimed must already have been "suffered", and that costs or expenditure must have been "incurred". I note that, in the commentary on cl 22.1 in *Chow* at para 22.4, the learned author contrasts the words "sustained or incurred", which are used in cl 22.1, with the expression "incurs or is likely to incur", which is found in cl 4.23 of the JCT Standard Form of Building Contract (2011 Ed) ("the JCT Standard Form"). *Chow* states that this latter provision, which is the counterpart provision to cl 22.1 in the JCT Standard Form, was considered to contemplate "past, present or prospective incurring of loss and expense": see Stephen Furst QC and Sir Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 9th Ed, 2012) at para 20-282. This militates against understanding the learned author as advocating that future loss of profit *per se* can be claimed.

60 Thirdly, in my view, the words which are italicised in the extract from *Chow* at para 31.79, at [57] above, indicate the learned author's tentative view or, more likely, a view held by some in the industry. It should be noted that the phrase "it is considered that…" is used. The phrase "loss and expense" in

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building and construction law has considerable lineage and has been the subject of important court decisions like *Walter Lilly and Company Ltd v Giles Patrick Cyril Mackay and DMW Developments Ltd* [2012] EWHC 1773 (TCC) (on what amounts to loss and expense under the JCT Standard Form). What *Chow* states at para 31.79 should, in all fairness, be read with what *Chow* states at para 1.29, *viz*, that "[i]n the context of the PSSCOC…Clause 1.1(q) confines the term ["Loss and Expense"] to three categories of claim items", namely, the three items which are set out at [48] above.

61 Fourthly, the case which is cited in the footnote to para 31.79 does not support the view that, upon a termination for convenience, the Contractor may recover for loss of profit on uncompleted works (under US law). In *Pinckney v United States* 88 Fed Cl 490 *("Pinckney*"), the following is stated at 506:

> … Damages for a termination for convenience "are limited to costs incurred prior to termination, a reasonable profit *on work performed*, and certain additional costs associated with termination." *Id.* However, *if plaintiff can demonstrate that the decision to terminate the contract was made in bad faith,* traditional breach of contract damages may be awarded.
>
> [Emphasis added]

62 According to this passage, as a matter of US law, the Contractor may generally not recover for loss of profits on uncompleted work after the Employer exercises a termination for convenience clause. The Contractor may only recover for loss of profits if the clause is exercised in bad faith (see [40] above). Thus, *Pinckney* is not authority for the specific proposition that the Contractor may generally recover for loss of profits on uncompleted work.

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Conclusion on the Interpretation Issue

63 I conclude that, on a true interpretation of cl 31.4(2), the Contractor may not recover for loss of profits for uncompleted work upon termination under cl 31.4(1).

64 The position under cl 31.4 thus appears to diverge from that under cl 32(1) of the SIA Conditions and cl 30.1 of the REDAS D&B Conditions. Both of these provisions expressly provide that the Contractor may recover for "loss of profits (if any) on any uncompleted parts of the Works". At this point, I make the following four observations.

65 First, the express wording of cl 31.4 read with cl 1.1(q) has led me to conclude that cl 31.4 does not provide for the Contractor to recover for loss of profits for uncompleted work. There is no room for me to reach the opposite conclusion given the clear meaning of the relevant provisions in the PSSCOC.

66 Secondly, cl 31.4 is not anomalous as a termination for convenience clause. Such clauses typically disallow the Contractor from recovering for loss of profits for uncompleted work, as noted in *Hudson's* at para 8-033:

> … The practical effect and purpose of [termination for convenience] clauses is that they usually permit recovery by the Contractor of contract or reasonable value, plus a reasonable profit on the work done prior to the termination, as well as settlement of Sub-contractor accounts and any removal or other expenses, *but disallow any claim for loss of profit on the remaining work*. …
>
> [Emphasis added]

One commentator even identifies this limited entitlement to recover as one of three "main features" of termination for convenience clauses: Ruth Loveranes, "Termination for Convenience Clauses" (2012) 14 UNDALR 103 at p 105.

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Here, the history of these clauses is instructive. The story is vividly told in *Ronald A Torncello and Soledad Enterprises, Inc v United States* 681 F 2d 756 at 764 to 766 and *GL Christian and Associates v United States* 312 F 2d 418 at 426. Termination for convenience clauses date back to the time of the American Civil War, and evolved to enable the US federal government to terminate military procurement contracts without being liable for profits on unperformed work. The clauses were then used in American wartime contracts during World War I and II, and later spread into non-military contracts. It was vital to the clauses, when they first developed, that they prohibited recovery of anticipatory profits, to allow the government the flexibility to end wartime contracts. In this light, it is clear that cl 31.4, in disallowing recovery for loss of profits on uncompleted work, is not exceptional at all. It is a classic termination for convenience clause.

67 Thirdly, the history of termination for convenience clauses might suggest why the position under the PSSCOC differs from that under the SIA Conditions and the REDAS D&B Conditions. The PSSCOC is the standard form contract used for public sector construction work in Singapore. The need for flexibility in construction contracts involving the public sector, which drove the development of termination for convenience clauses to begin with, may explain why cl 31.4, unlike its counterparts in the SIA Conditions and the REDAS D&B Conditions, disallows recovery for loss of profits. I further note that the position under cl 31.4 appears to be similar to that under cl 15.5 of the 1999 Red Book, which gives the Employer the contractual right to terminate the contract at any time for its convenience (see [40] above). In Jeremy Glover and Simon Hughes, *Understanding the New FIDIC Red Book* (Sweet & Maxwell, 2006), the learned authors opine at para 15-029 that the most likely cause for the operation of this clause "will be an inability to fund and thereby

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finish the project". It is of interest that these authors note that, upon termination under cl 15.5, the Contractor is entitled to payment in accordance with the *force majeure* provisions of cl 19.6, but that cl 19.6 "does not refer to loss of profits". The learned authors further note at para 1-033 that "cost", a term used in cl 19.6, is defined in cl 1.1.4.3 as "all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, *but does not include profit*" [emphasis added].

68 Finally, the Defendant submits that it is unfair that the Contractor is not compensated for purchased equipment.[58] I do not think the inadequacy or otherwise for compensation under cl 31.4(2) is an aid to the construction of a contractual provision. It should not be forgotten that these standard form contracts are all about the allocation of the risks in a building and construction project. Over time, the finer points on the risk allocation effected by the standard form are worked out by arbitration or the courts; and, periodically, the professional bodies responsible for these standard forms amend them if such amendments are deemed necessary by the industry. There is therefore little room for the Defendant's submission that cl 31.4(2) should be construed in a way they contend as it otherwise provides for inadequate compensation.

69 I now turn to the Entitlement Issue.

The Entitlement Issue

70 The Defendant submits that, even if cl 31.4(2) means that the Contractor may not recover for loss of profits, the Plaintiff may not rely on cl

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[58] Defendant's Submissions at paras 132 to 133.

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31.4(2). This submission is founded on three grounds. I deal with each ground in turn.

Issue Estoppel and Abuse of Process

71 The Defendant submitted that the Plaintiff was barred by the principles of issue estoppel and abuse of process from relying on cl 31.4. This was because the CA had decided that the Defendant was entitled to recover for loss of profits in *TT International (CA)*, and the Plaintiff had failed to argue, before the CA, that cl 31.4 precluded the Defendant from recovering for loss of profits.[59]

Issue Estoppel

72 The elements of issue estoppel are well-established. In *Wing Joo Loong Ginseng Hong (Singapore) Co Pte Ltd v Qinghai Xinyuan Foreign Trade Co Ltd and Another and Another Appeal* [2009] 2 SLR 814 ("*Wing Joo Loong*"), the CA summarised the requirements laid down in *Lee Tat Development Pte Ltd v Management Corporation of Strata Title Plan No 301* [2005] 3 SLR(R) 157 as follows, at [165]:

> (a) there must be a final and conclusive judgment on the merits of the issue which is said to be the subject of an estoppel;
>
> (b) that judgment must be by a court of competent jurisdiction;
>
> (c) the parties in the two actions that are being compared must be identical; and
>
> (d) there must be identity of subject matter in those two actions.

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[59] Defendant's Submissions at para 45(b) and paras 69 to 91.

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The requirements which are in issue in this case are requirements (a) and (d).[60]

73 I turn first to requirement (a). In *Goh Nellie v Goh Lian Teck* [2007] 1 SLR 453 ("*Goh Nellie*"), Sundaresh Menon JC (as he then was) clarified the concept of finality. Menon JC held, at [28], that finality involves "a declaration or determination of a party's liability and/or his rights or obligations leaving nothing else to be judicially determined". Whether a judgment is final depends on the judge's intention, which may be gleaned from the relevant document filed, the order made and the notes of evidence taken or arguments made.

74 In this case, it is plain that the CA did not finally determine that the Defendant was entitled to recover for loss of profits under the Main Contract. That issue was simply not before the HC or the CA in the 2010 proceedings for the sanction of the Scheme ("the 2010 proceedings"). The following passages from *TT International (HC)*, at [96]–[99], attest to this point:

> 96 Bearing in mind the general principles that the purpose of a scheme of arrangement under s 210 of the Companies Act is to obviate the need for messy and complicated proceedings with a view to obtaining the unanimous approval of the creditors to a variation of their rights, and that a minority of creditors should not be allowed to frustrate a beneficial scheme to the detriment of the majority, *I was minded to defer final determination of Ho Lee Construction's claims against the Company until after the Scheme had obtained this court's approval.*
>
> …
>
> 97 As I considered that the Scheme Manager had acted reasonably and with bona fides in rejecting part of Ho Lee Construction's claim, the computation of the weight of Ho Lee Construction's vote against the Scheme should not be impugned. Thus, *for the purposes of ascertaining whether the requisite majority had been obtained at the Meeting*, the

60 Plaintiff's Reply Submissions at para 87.

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> Scheme Manager's partial rejection of Ho Lee Construction's claim could not be faulted.
>
> …
>
> 99 It was Ho Lee Construction's evidence that the determination of its claims for losses suffered, expenses incurred and lost profits would require the assistance and technical expertise of qualified professionals such as a Quantity Surveyor or Architect who are familiar with disputes in the construction industry. The Company's position was that *there were other grounds on which to challenge Ho Lee Construction's claim apart from its main failure to provide sufficient documentation to substantiate its proof of debt*. I was in no position to assess the strength of the parties' contentions and a proper determination thereof required a full judicial or arbitral process. To my mind, this requirement militated against deferring the court's approval of the Scheme to after a final non-appealable judicial determination of Ho Lee Construction's claim against the Company. Such a judicial process may well prove to be protracted and would unduly delay the restructuring process of the Company via the Scheme to the detriment of the general body of Scheme Creditors. The more practical step forward was, in my judgment, to accept the Scheme Manager's rejection of Ho Lee Construction's claim for the purpose of ascertaining the requisite majority, *leaving it open to Ho Lee Construction to resort to the adjudication process to determine its final entitlement under the Scheme*.
>
> [Emphasis added]

The narrow issue before the HC was whether the Scheme Manager had acted properly in rejecting the Defendant's claims for, *inter alia*, loss of profits, for the purposes of a vote on the proposed Scheme. The HC clearly contemplated that the Defendant's final entitlement under the Scheme would only be decided in subsequent court or arbitral proceedings.

75 Similarly, the CA did not determine that the Defendant was entitled to recover for loss of profits. This is evident from [108] of *TT International (CA)*:

> We should emphasise that up to now, we have only been discussing the position regarding the chairman's admission or rejection of claims *for the purpose of voting in a s 210 creditors' meeting*. It must be made clear that even though the court

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> may order (on appeal by a creditor) that his claim be admitted or rejected for the purpose of voting, this is in the nature of a "rough and ready" determination keeping in mind that a vote on the proposed scheme should not be delayed unnecessarily. *Such an order does not bar the creditor from going back to the court subsequently to seek determinative final adjudication of the same claim on its merits.*
>
> [Emphasis added]

76 At [113] of *TT International (CA)*, the CA stated that it "agreed with Ho Lee that its claim for loss of profits should have been admitted for a reasonable amount…". The CA further ordered that the Defendant's claim for loss of profits be valued by reference to certain objective criteria. The Defendant has relied on this passage to submit that the CA had finally determined that it was entitled to recover for loss of profits.[61] In my view, however, the CA merely decided that the Defendant's claim should be admitted for the narrow purpose of voting on the proposed Scheme. This is clear from [108] beyond peradventure. In Annexure II to *TT International (CA)*, the CA's brief Grounds of Decision of 13 October 2010, the CA noted at [4] that its direction on how the loss of profits claim should be valued was made "to reduce the degree of uncertainty with respect to the quantum of Ho Lee's claim for loss of profits to be admitted *for the limited purpose of voting as at an unsecured creditor at the Further Meeting*… [for the Scheme to be put to a re-vote]" [emphasis added].

77 Thus, in my view, there was no final determination of the Defendant's entitlement to recover for loss of profits prior to these proceedings.

78 Moreover, there is no identity of subject matter between the present action and the 2010 proceedings. In *Goh Nellie*, Menon JC explained that the requirement of identity of subject matter comprises three strands. First, the

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61 Defendant's Submissions at para 77.

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prior decision "must traverse the same ground as the subsequent proceeding and the facts and circumstances giving rise to the earlier decision must not have changed or should be incapable of change" (see *Goh Nellie* at [34]). Secondly, "the previous determination in question must have been fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination" (see *Goh Nellie* at [35]). Thirdly, the issue which is said to be subject to an estoppel "should be shown in fact to have been raised and argued" (see *Goh Nellie* at [38]). In *Wing Joo Loong* at [167], the CA affirmed Menon JC's account of the identity of subject matter requirement.

79 The 2010 proceedings were concerned with the Defendant's rights for the limited purposes of voting on the proposed Scheme, and not with the latter's final entitlement to recover for loss of profits (see [74]–[76] above). Therefore, the CA decision does not traverse the same ground as the present proceedings. Moreover, the Defendant's final entitlement to recover for loss and profits was not in fact raised and argued in the 2010 proceedings. Thus, there is no identity of subject matter between the present action and the CA proceedings.

80 In sum, requirements (a) and (d) (set out at [72] above) are not fulfilled. Therefore, the Plaintiffs are not issue estopped from relying on cl 31.4 to argue that the Defendant is not entitled to recover for loss of profits.

Abuse of Process

81 The defence of abuse of process bars litigants from raising issues which should have been raised in earlier proceedings. In *Henderson v*

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Henderson [1843-60] All ER Rep 378 at 381–382, Wigram VC famously encapsulated this doctrine as follows:

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special-case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but *to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*
>
> [Emphasis added]

82 In *Goh Nellie* at [53], Menon JC, as he then was, clarified the principles which should guide a court in determining whether there is an abuse of process as follows:

> … In determining whether the ambient circumstances of the case give rise to an abuse of process, the court should not adopt an inflexible or unyielding attitude but *should remain guided by the balance to be found in the tension between the demands of ensuring that a litigant who has a genuine claim is allowed to press his case in court and recognising that there is a point beyond which repeated litigation would be unduly oppressive to the defendant.* In the context of cases such as the present, the inquiry is directed not at the theoretical possibility that the issue raised in the later proceedings could conceivably have been taken in the earlier but rather at *whether, having regard to the substance and reality of the earlier action, it reasonably ought to have been.* …
>
> [Emphasis added]

83 The issue here is whether the Plaintiff ought reasonably to have argued that the Defendant could not recover for loss of profits under cl 31.4 during

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the 2010 proceedings. In my view, it was not reasonably incumbent on the Plaintiff to make that argument during the 2010 proceedings for two reasons.

84 First, put narrowly, the issue before the HC and the CA was whether the Scheme Manager had properly rejected the Defendant's claims, including the loss of profits claim, in the Proof of Debt. The HC found that the Scheme Manager had acted properly because PWC had upheld the Scheme Manager's rejection of the Defendant's claims, on the grounds that the claims had not been properly substantiated (see *TT International (HC)* at [95], and [14] above). The CA disagreed, holding that the Scheme Manager had not acted on the correct principles as the latter had not made enquiries into the unsubstantiated claims in the Proof of Debt before rejecting it (see *TT International (CA)* at [106] and [113]). On this key issue, *viz,* whether the Scheme Manager had acted properly in rejecting the Defendant's claims in the Proof of Debt, without seeking further explanation and evidence from the Defendant, the Plaintiff's argument on cl 31.4 is irrelevant. Thus, it was not reasonably incumbent on the Plaintiff to raise it during the HC and CA proceedings.

85 Secondly, considered more broadly, the 2010 proceedings involved the determination of the Defendant's voting share for the purposes of voting on the proposed Scheme. Both the HC and the CA made clear that this did not impinge on the final determination of the Defendant's claim for loss of profits (see *TT International (HC)* at [99] and *TT International (CA)* at [108], referred to at [74]–[75] above). On the contrary, the HC expressly contemplated that there were other grounds of challenge to the loss of profits claim which would be addressed upon final determination of that claim (see *TT International (HC)* at [99], quoted at [74] above). If indeed, as is the effect of the Defendant's submissions, all creditors' claims had to be valued, for voting

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purposes, according to a final adjudication before arbitral tribunals or the courts (including any appeals therefrom), few votes in favour of schemes could be held within a practical timeframe. In that light, I do not consider it "unduly oppressive" that the Defendant is met with the Plaintiff's argument on cl 31.4 in these proceedings. On the contrary, the balance of justice lies in favour of allowing the Plaintiff to advance its argument on cl 31.4 in this action.

86 In sum, I find that it was not an abuse of process for the Plaintiff to raise its argument on cl 31.4 in these proceedings.

Waiver by Estoppel

87 The Defendant submitted that the Plaintiff had lost its right to rely on cl 31.4 due to waiver by estoppel; the Defendant had detrimentally relied on the Plaintiff's representation that it would not enforce its rights under cl 31.4:

> (a) First, the Plaintiff had represented, by its conduct, that it was not challenging the Defendant's right to recover for loss of profits.[62] In terms of conduct prior to litigation, the Plaintiff had failed to appoint the SO to certify the Defendant's claim and rejected the Proof of Debt on the sole ground of lack of substantiation. In terms of conduct during the CA proceedings, the Plaintiff had failed to raise and rely on cl 31.4. In terms of conduct during the present action, the Plaintiff had merely challenged the Defendant's claim on the sole basis of lack of substantiation and had engaged an expert to assess the Defendant's loss of profits claim.

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62 Defendant's Submissions at para 65.

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(b) Secondly, the Defendant had relied on the representation to its detriment.[63] If the Plaintiff had advanced its interpretation of cl 31.4 during the 2010 proceedings, the Defendant would have been entitled to a larger voting share in the Scheme, in view of the 15% margin element of Loss and Expense under cl 31.4(2)(b) read with cl 1.1(q). Again, the Defendant had incurred significant costs in the present action including those of engaging an expert to support its loss of profits claims.

88 In reply, the Plaintiff denied that it had represented that it would not enforce its cl 31.4 rights and submitted that, in any event, there had been no detrimental reliance.[64] The Plaintiff further submitted that it was also entitled to resile from its position by giving reasonable notice to the Defendant.[65]

89 In my view, the Plaintiff did not waive its right to rely on cl 31.4. The elements of waiver by estoppel are trite and were not in dispute (see *Aero-Gate Pte Ltd v Engen Marine Engineering Pte Ltd* [2013] 4 SLR 409 at [37]).[66] First, there must be a clear and unequivocal promise by the promisor that it will not enforce its strict legal rights. Secondly, the promisee must rely on the promise. Thirdly, the promisee must suffer detriment as a result of the reliance

90 In respect of the first requirement, the Plaintiff did not make a clear and unequivocal promise that it would not enforce its rights under cl 31.4. Failing to appoint the SO to certify the Defendant's claim and rejecting the Proof of Debt cannot be construed as such a promise. Moreover, as the CA

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63 *Ibid* at para 67.

64 Plaintiff's Reply Submissions at paras 121 to 126.

65 *Ibid* at paras 127 to 128.

66 *Ibid* at para 119.

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proceedings did not concern the final determination of the Defendant's claim (see [75]–[[77] and [85] above), the fact that the Plaintiff did not raise its arguments on cl 31.4 during those proceedings cannot be understood as a promise that it would not subsequently do so. Additionally, the Plaintiff's engaging of an expert to assess the Defendant's loss of profits claim in this action did not amount to a promise that it would not enforce its rights under cl 31.4. The Plaintiff required such an expert to advance its case on the Quantum Issue. Finally, the Plaintiff raised its argument on cl 31.4 on 22 March 2013,[67] three days before the trial for the Loss of Profits Issue. The mere fact that the argument was not raised in pre-trial proceedings cannot constitute an unequivocal promise that it would not be subsequently advanced.

91 Moreover, even if there was such a promise, the Defendant did not rely on it to its detriment. In respect of the costs which the Defendant has incurred, including those of engaging an expert for the loss of profits claim, the Defendant would have incurred these costs in any event, as it has taken the position that it is entitled to recover for loss of profits on the true construction of cl 31.4 and/or on the basis of common law damages. The Defendant also did not suffer any detriment in terms of its voting share at the meeting to approve the Scheme. The Scheme Manager ascribed a value of S$9.27 million to the Defendant's claim for loss of profits (see [16] above), which would have exceeded a 15% margin on the admitted claim of approximately $22.77 million (see [13] above).

92 Thus, the elements of waiver by estoppel are not fulfilled. Therefore, the Plaintiffs did not waive their right to rely on cl 31.4.

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67 Plaintiff's Submissions dated 22 March 2013 at paras 37 to 64.

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Disablement

93 The Defendant submitted that the Plaintiff could not rely on cl 31.4(2) as it had "disabled" cl 31.4(2) by impeding the SO from certifying the sums payable to the Contractor under cl 31.4(2).[68] This submission was based on the principle that a contracting party cannot rely on his or her own breach of contract to obtain a benefit.[69]

94 In reply, the Plaintiff made two submissions. First, the Plaintiff had not impeded the operation of cl 31.4(2). Although the SO under the Main Contract (Jurong Consultants) had not assessed the Defendant's claim, the Plaintiff had procured Northcroft to assess the claim pursuant to cl 31.4(2) (see [10] above).[70] Secondly, even if the Plaintiff had breached cl 31.4, the Plaintiff was not relying on the breach but on its substantive rights under cl 31.4. Thus, the principle invoked by the Defendant did not apply.

95 In my view, the Defendant's submission is unfounded. It is unnecessary for me to decide whether the Plaintiff had breached cl 31.4, for I agree with the Plaintiff that the principle underlying the Defendant's argument is inapplicable here. In *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR(R) 634, V K Rajah J (as he then was) summarised this principle, which is known as the "prevention principle", at [52] as follows:

> In order to invoke this principle it must be shown that the contractual right or benefit that a party is asserting or claiming is a *direct result of that party's prior breach of contract*. The relevant breach, the factual consequences flowing from the breach and the advantage the contract

68 Defendant's Submissions at paras 92 to 95.

69 Defendant's Submissions at paras 96 to 101.

70 Plaintiff's Reply Submissions at paras 73 to 79; Tong's Affidavit at paras 32 to 38.

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> breaker is seeking to raise must be identified. The principle seeks to *prevent the contract breaker from seeking an "advantage" arising from his default*…
>
> [Emphasis added]

96 Even if the Plaintiff had breached cl 31.4, the benefit which the Plaintiff is claiming – the right to exclude or dispose of the Defendant's claim for loss of profits – is not a "direct result" of that breach. Rather, the benefit flows from cl 31.4 itself which provides for the parties' rights and duties upon termination under cl 31.4. Therefore, the prevention principle does not apply on these facts. Accordingly, the Defendant's submission fails.

Conclusion on the Entitlement Issue

97 Thus, I conclude that the Plaintiff is entitled to rely on cl 31.4(2) to dispose of the Defendant's claim for loss of profits in this case.

Conclusion

98 For the reasons set out above, the Defendant is not entitled to recover for loss of profits on the uncompleted parts of the works. However, it is entitled to recover a 15% margin on the costs under the heads in cl 1.1(q)(i) and (ii) in lieu of, *inter alia*, loss of profits.

Quentin Loh
Judge

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