

**IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

[2023] SGHC(A) 20

Civil Appeal No 125 of 2021

Between

Diamond Glass Enterprise Pte
Ltd

... Appellant

And

Zhong Kai Construction Co
Pte Ltd

... Respondent

Civil Appeal No 129 of 2021

Between

Zhong Kai Construction Co
Pte Ltd

... Appellant

And

Diamond Glass Enterprise Pte
Ltd

... Respondent

In the matter of Suit No 1282 of 2019

Between

Zhong Kai Construction Co
Pte Ltd

... Plaintiff

And

Diamond Glass Enterprise Pte
Ltd

... Defendant

And Between

Diamond Glass Enterprise Pte
Ltd

... Plaintiff in counterclaim

And

Zhong Kai Construction Co
Pte Ltd

... Defendant in counterclaim

SUPPLEMENTARY JUDGMENT

[Building and Construction Law — Damages — Liquidated damages]
[Building and Construction Law — Scope of works — Variations]
[Building and Construction Law — Costs]

TABLE OF CONTENTS

INTRODUCTION.....	3
ISSUES RAISED FOLLOWING THE RELEASE OF THE APPEAL JUDGMENT	6
BACKGROUND.....	6
<i>TSMP's 29 December 2022 Letter</i>	<i>6</i>
<i>Zenith Law's 11 January 2023 Letter</i>	<i>9</i>
<i>Court's directions on 1 March 2023</i>	<i>9</i>
<i>Zenith Law's 14 March 2023 Letter.....</i>	<i>10</i>
<i>TSMP's 15 March 2023 Letter.....</i>	<i>11</i>
ISSUE 1: SUMS WHICH ZK WOULD HAVE HAD TO PAY DG IF DG HAD COMPLETED THE WORKS UNDER THE SUBCONTRACT	13
<i>Proper measure of damages.....</i>	<i>14</i>
<i>DG's lack of pleadings.....</i>	<i>16</i>
ISSUE 2: CALCULATION ERRORS AT [279] AND [280] OF THE JUDGMENT	24
COSTS.....	26
COSTS OF THE APPEALS	26
ANCILLARY COSTS ORDERS	27
<i>Background</i>	<i>27</i>
(1) Consolidation of HC/S 917/2019 and HC/S 1282/2019	27
(2) The Adjudication Application (AA 339)	28
(3) The winding up application (HC/CWU 95/2020).....	28
(4) DG's application to stay any execution proceedings (HC/SUM 5722/2021).....	29
(5) Trial Judge's costs orders.....	30

<i>Ancillary costs issues</i>	31
<i>Our decision</i>	31
CONCLUSION	36

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Diamond Glass Enterprise Pte Ltd
v
Zhong Kai Construction Co Pte Ltd and another appeal

[2023] SGHC(A) 20

Appellate Division of the High Court — Civil Appeal Nos 125 and 129 of 2021

Woo Bih Li JAD, Hoo Sheau Peng J and Quentin Loh SJ
6 January 2023

31 May 2023

Judgment reserved.

Quentin Loh SJ (delivering the supplementary judgment of the court):

Introduction

1 This is a supplementary judgment for the cross-appeals in AD/CA 125/2021 (“CA 125”) and AD/CA 129/2021 (“CA 129”). They arise out of the decision of the High Court judge (the “Trial Judge”) in HC/S 1282/2019 (“S 1282”), published as *Zhong Kai Construction Co Pte Ltd v Diamond Glass Enterprise Pte Ltd* [2021] SGHC 277 (the “Trial Judgment”). The appeals were first heard on 21 July 2022 and judgment was delivered on 23 December 2022 (see *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd and another appeal* [2022] SGHC(A) 44 (the “Appeal Judgment”).

2 The background facts have been comprehensively set out in the Trial Judgment at [1]–[3] and [6]–[27]. We will therefore only highlight the pertinent facts.

3 Zhong Kai Construction Co Pte Ltd (“ZK”) engaged Diamond Glass Enterprise Pte Ltd (“DG”) as a subcontractor for the supply of materials, equipment and tools to carry out and complete the aluminium cladding of an external facade, blast/ballistic doors and windows, aluminium doors, and window works by a Letter of Award dated 7 November 2016 (the “Subcontract”). These works were for a project for the construction of equipment buildings and facilities at the Singapore Changi Airport.

4 In S 1282, ZK claimed against DG for liquidated damages arising from DG’s delays. ZK also claimed the sum of \$340,233.10 against DG for replacement works arising from DG’s abandonment of the worksite around 6 June 2018 and for rectification works done. ZK further sought to overturn the adjudicated amount that was awarded to DG in Adjudication Determination No 339 of 2019 (“AA 339”) under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) issued on 15 November 2019 (the “AD”). DG counterclaimed for, *inter alia*, payments due under four variation orders (“VOs”) being DV0006 (“VO 6”), DV0008 (“VO 8”), DV00018 (“VO 18”) and DV00019 (“VO 19”).

5 The Trial Judge allowed ZK’s claims for liquidated damages and the costs of replacement and rectification works in part. The itemised claims were set out in the Trial Judgment at [220] and the Appeal Judgment at [93]. As for DG’s counterclaims, the Judge allowed DG’s counterclaim for payment due under VO 18 in the amount of \$5,070 and disallowed DG’s counterclaims for payments in respect of VO 6, VO 8 and VO 19 (see Trial Judgment at [232] and [241] and Appeal Judgment at [6]).

6 We allowed DG’s appeal in CA 125 in part and ZK’s appeal in CA 129 in part and made, *inter alia*, the following orders (see Appeal Judgment at [7]):

- (a) DG’s appeal against the award of \$5,906.40 to ZK in respect of ZK’s claim for replacement and rectification works, was allowed, (see item 1(e), Appeal Judgment at [93]), and this award was accordingly set aside;
- (b) ZK’s appeal against the dismissal of its claim for \$27,735.47 in respect of its claim for replacement and rectification works (see item 4(a), Appeal Judgment at [93]), was allowed and ZK was awarded this sum;
- (c) DG’s appeal against the dismissal of its counterclaim for payments in respect of variation order VO 6 (*ie*, the sum of \$32,602.50) was allowed, and DG was awarded this sum;
- (d) DG’s appeal against the dismissal of its counterclaim for payments in respect of variation order VO 8 (*ie*, the sum of \$13,185) was allowed, and DG was awarded this sum; and
- (e) DG’s appeal against the dismissal of its counterclaim for the retention sum for the Subcontract (the “Retention Sum”) in the amount of \$27,902.75 was allowed, and DG was awarded this sum.

7 In this Supplementary Judgment, we address:

- (a) two issues that were raised by DG’s solicitors, TSMP Law Corporation (“TSMP”) by way of letter after the Appeal Judgment had been issued; and
- (b) the costs of the appeals.

Issues raised following the release of the Appeal Judgment

8 Following the release of the Appeal Judgment, the parties sent in various letters in relation to the Appeal Judgment. We set out the background and content of the various letters here.

Background

TSMP’s 29 December 2022 Letter

9 On 29 December 2022, DG’s counsel, TSMP, sent a letter to court querying two aspects of the Appeal Judgment (“TSMP’s 29 December 2022 Letter”):

(a) First, DG highlights that in CA 125, DG had submitted that the Trial Judge erred in awarding ZK the relevant amounts of its claims for replacement works without accounting for and/or deducting the sums that ZK would have to pay DG, if DG had completed the works under the Subcontract. While the Appeal Judgment addressed the deduction of the Retention Sum of \$27,902.75, this court did not address the remaining sums which ZK would have had to pay DG under the Subcontract, which amounted to \$62,514.30 (the “Remaining Sums Issue”).

(b) Secondly, DG highlights an apparent calculation error in the Appeal Judgment (at [279]–[280]) and requested the court’s correction of the calculation error (the “Calculation Error Issue”).

10 In relation to the Remaining Sums Issue, DG states that it had quantified the remaining sums which ZK would have had to pay DG if the Subcontract was fully performed, amounting to the sum of \$90,417.05 in their Appellant’s

Case (“AC”) in CA 125, Respondent’s Case in CA 129 and Combined Skeletal Arguments for CA 125 and CA 129. This comprises the following items that ZK would have had to pay DG under the Subcontract:

- (a) Remaining works for Aluminium Cladding without insulation:
 $\$129,143.00 - \$116,228.70 = \$12,914.30$.
- (b) Remaining works for Aluminium Glass Door (blast/ballistic resistant): $\$16,000 - \$11,200 = \$4,800$.
- (c) Remaining works for the installation of cabin glass: $\$51,200 - \$6,400 = \$44,800$.
- (d) Retention Sum of $\$27,902.75$.

11 DG further highlights that these remaining sums accorded with claims which, as *per* the AD, DG was not fully entitled to. If ZK is not required to account for and/or deduct the sums that it would have to pay DG for the remaining 14 cabin glass panels under the Subcontract, ZK will reap a windfall. DG says this is because ZK will effectively have received the full benefit of the Subcontract without having to incur the full Subcontract price for the cost of supplying and installing the remaining 14 cabin glass panels under the Subcontract.

12 DG points out that this court had addressed the deduction of the Retention Sum (Appeal Judgment at [255]–[261]). However, the Appeal Judgment did not address the remaining works at [10(a)]–[10(c)] above, which amount to $\$62,514.30$. DG thus requests clarification from this court on whether the remaining works in the sum of $\$62,514.30$ are to be accounted for and/or

deducted from the costs of the replacement and rectification works awarded to ZK.

13 Separately, DG highlights an apparent calculation error in the Appeal Judgment (at [279]–[280]). The Appeal Judgment (at [279]) states:

DG was entitled to only \$146,647.33 (\$197,522.83 less \$50,875.5) out of the claimed amount of \$264,789.08 (Judgment at [250]).

14 The figure of \$50,875.50 was derived from the total sum for VO 6, VO 8 and VO 18, which the Trial Judge had set aside. However, the accurate total sum for VO 6, VO 8 and VO 18 is \$50,857.50, and not \$50,875.50. As such, DG suggests that paragraphs [279]–[280] of the Appeal Judgment should be corrected as follows (proposed corrections made in underline):

279. ... DG was entitled to only \$146,665.33 (\$197,522.83 less \$50,857.50) out of the claimed amount of \$264,789.08 (Judgment at [250]).

280. As we have allowed DG's claims for VO 6 and VO 8, DG is now entitled to \$192,452.83 (the sum of \$146,665.33, \$32,602.50 and \$13,185.00) out of the claimed amount of \$264,789.08. ...

15 DG also further highlights that the Judge had allowed VO 18 (which was not challenged by ZK) and therefore, DG is properly entitled to \$197,552.83 (and not \$192,452.83) out of the claimed amount of \$264,789.08, which amounts to 74.6% of the claims made in AA 339. Accordingly, DG submits that [280] of the Appeal Judgment should be corrected accordingly (proposed corrections made in underlined):

280. As we have allowed DG's claims for VO 6 and VO 8, DG is now entitled to \$197,552.83 (the sum of \$146,665.33, \$32,602.50 and \$13,185.00 and \$5,070.00) out of the claimed amount of \$264,789.08. This amounts to approximately 74.6% of the claims it made in the adjudication and DG had succeeded in the majority of claims it made. ...

Zenith Law's 11 January 2023 Letter

16 On 11 January 2023, ZK's counsel, Zenith Law Corporation ("Zenith Law") sent a letter to court responding to TSMP's 29 December 2022 Letter ("Zenith Law's 11 January 2023 Letter"). ZK's position is that:

(a) In relation to the Remaining Sums Issue, ZK disagrees with DG's argument that the remaining works in the sum of \$62,514.30 should have been deducted from the costs of replacement and rectification works awarded to ZK. ZK points out that it was not part of the scope of DG's appeal that any replacement and rectification costs, if eventually awarded to ZK following the outcome of the appeal, were to be reduced by the value of the remaining works not completed or abandoned. Furthermore, DG's own pleaded case was confined to the balance sum based on the main works and variation works carried out by DG. In fact, DG did not even plead in the alternative (in its defence and/or counterclaim) that, should DG be found to have wrongfully terminated the subcontract and was in repudiatory breach of the subcontract, and be liable for any replacement and rectification costs, such costs awarded to ZK are to take into account the value of the remaining works under the subcontract not completed and abandoned by DG.

(b) On the Calculation Error Issue, ZK had no objections to DG's proposed corrections of the figures.

Court's directions on 1 March 2023

17 On 1 March 2023, the court directed that TSMP was to respond in writing to the following queries:

- (a) whether the Remaining Sums Issue was pleaded below, and if so, that TSMP identify the parts of the pleadings they rely on; and
- (b) whether the Remaining Sums Issue was dealt with in DG's closing submissions at trial, and if so, that TSMP identify those parts of the closing submissions they rely on.

18 In relation to the Calculation Error Issue, the court also highlighted that the proposed corrections by the parties did not deal with the mistaken deduction of VO 18 instead of VO 19. Accordingly, the court requested that the parties indicate if they were agreeable to the following corrections to be made to [279] and [280] of the Appeal Judgment:

279. ... DG was entitled to only \$146,647.33 (\$197,522.83 less \$50,875.5) out of the claimed amount of \$264,789.08 (Judgment at [250]). However, we note that the Judge had made a calculation error by deducting the sum for VO 18 instead of VO 19. The Judge should therefore have allowed DG \$136,743.38 (\$197,522.83 less \$60,779.45) instead of \$146,647.33.

...

280. As we have allowed DG's claims for VO 6 and VO 8, DG is now entitled to \$182,530.88, (the sum of \$136,743.38, \$32,602.50 and \$13,185.00) out of the claimed amount of \$264,789.08. This amounts to approximately 68.9% of the claims it made in the adjudication and DG had succeeded in the majority of claims it made. ...

Zenith Law's 14 March 2023 Letter.

19 On 14 March 2023, Zenith Law responded to the court's proposal (at [18] above) on the correction of the calculation error, stating that it was amenable to the court's proposal.

TSMP's 15 March 2023 Letter

20 On 15 March 2023, TSMP responded to the court's queries as *per* the directions of 1 March 2023 ("TSMP's 15 March 2023 Letter").

21 On the Remaining Sums Issue, TSMP highlights the following:

(a) that this issue was not specifically pleaded by DG or dealt with in DG's closing submissions "in the specific manner set out in the [AC] filed in CA 125"; and

(b) that the material facts on which the Remaining Sums Issue was premised had however been pleaded in DG's Defence and Counterclaim (Amendment No. 2) ("DCC") and raised in DG's closing submissions at trial dated 13 October 2021 and that as a consequence, ZK was aware that the remaining sums that ZK would have had to pay DG under the Subcontract amounted to \$62,514.30.

We note that TSMP chose to very carefully limit their answer to the first question by confining it to the manner in which it was set out in the AC (compare [9(a)], [17(a)] and [21(a)] above). This was an unhelpful qualification to the court's direction to identify in their pleadings or closing submissions those parts they rely on for the Remaining Sums Issue (see [21(a)] above). Secondly, TSMP went on to state that the material facts on which the Remaining Sums Issue was premised have been pleaded, *but they failed to identify where these pleadings could be found*, thereby ignoring the very assistance the court was clearly requesting in support of their contention. As will be seen in our analysis below, this contention was not made out. This is something to be regretted from officers of the court.

22 DG further stated that if the court was of the view that the Remaining Sums Issue was not sufficiently pleaded, the court was not precluded from considering this issue and giving effect to it for two reasons.

23 First, the Remaining Sums Issue was an intrinsic consequence of ZK's claims. In S 1282, ZK claimed as damages the full costs incurred to carry out replacement and/or rectification works for DG's incomplete and/or defective works, to be assessed. In assessing the quantum of damages to be awarded to ZK, DG is entitled to rely on the general principle that damages are meant to place ZK in the same position as if the contract had been performed. DG thus submits that this was a legal issue which need not be specifically pleaded.

24 In this regard, the Remaining Sums Issue is an application of the general principle on the compensatory nature of damages: to place the plaintiff in the same position they would have been in, in monetary terms, had the contract been performed. Furthermore, the material facts relating to the full Subcontract price of \$561,019.90, the sums received, and the remaining works for the (i) aluminium cladding without insulation; (ii) aluminium glass door; and (iii) installation of cabin glass under the Subcontract had been pleaded.

25 Furthermore, one of ZK's claims was for the balance 70% for 13 panels of cabin glass panels (*ie*, Item 5(a) of ZK's claim for replacement works). It was stated in DG's closing submissions that ZK was not entitled to this claim as the Subcontract provided that "the costs of 16 pieces of original class were for the total sum of \$51,000 ... and ZK is not entitled to such a claim since this sum relates to a much more expensive glass that was different from the glass specified in the Subcontract". As such, ZK's claim must still be assessed on the premise that ZK would have had to pay DG the full price under the Subcontract for the installation of original cabin glass. ZK cannot claim the full costs

incurred for installing the new cabin glass while also withholding the price of installing the original cabin glass under the Subcontract.

26 Secondly, it would be unjust and inequitable if the Remaining Sums Issue was disregarded. No prejudice would be caused to ZK if this court permits DG to raise this issue; and a failure to consider this issue would result in ZK gaining a windfall at DG's expense.

27 In relation to the Calculation Error Issue, DG disagrees with the proposed corrections by the court. In this regard, DG submits that there was no mistaken deduction of VO 18 instead of VO 19.

Issue 1: Sums which ZK would have had to pay DG if DG had completed the works under the Subcontract

28 We first consider the Remaining Sums Issue. In summary, DG's contention is that the Trial Judge below erred in awarding ZK the full sums for the "replacement works". The court should thus take into account the value of the *outstanding works* under the Subcontract which ZK has not paid DG, otherwise ZK would reap a windfall because:

- (a) ZK will not have to incur the full contract price for the works that DG was supposed to do;
- (b) but yet recover from DG the full cost of completion, *ie*, the cost of completing the remaining works after DG had abandoned the worksite *and* the additional costs for engaging another subcontractor to complete the work; and
- (c) would end up with a finished subcontract product without having to pay the full price.

Proper measure of damages

29 In its combined skeletal arguments in CA 125 and CA 129, DG cites *McGregor on Damages* (Sweet & Maxwell, 21st Ed, 2022) at [31-005] for the principle that: in the circumstances of a breach to build at all or in part by the builder, the normal measure of damages is the cost to the owner of completing the buildings in a reasonable manner, less the contract price. This principle was laid down in the case of *Mertens v Home Freeholds Co* [1921] 2 KB 526 (“*Mertens*”). In *Mertens*, the defendant had contracted to build a house for the claimant but failed to complete it; and when the claimant completed the work himself two or three years later, the costs had risen. It was determined that the proper measure of damages was the cost to the claimant of completion in a reasonable manner at the earliest moment he was allowed to proceed with building, less the amount he would have had to pay the defendant had the defendant completed the house agreed under the terms of the contract.

30 Whilst this principle is, in theory, correct, it seldom arises in practice as the facts are typically less straightforward. This is for two reasons.

31 First, incomplete works are often interwoven with works that are apparently “complete” but *defective*. These have to be distinguished and separately quantified. Therefore, where as is usual in such cases, there are three components to such claims: (a) completed works that are not defective and contract compliant; (b) defective or non-contract compliant “completed” works which have to be removed and replaced; and (c) work not yet completed, all of which have to be separately particularized, quantified and proved.

32 This was indeed the case here. The Adjudicator was alive to the fact that defective works were also in issue, as the Adjudicator acknowledged that he had

received ZK’s “*Table of Defective Works Photographs ... with Reference to Items Enumerated in the Payment Claim*” and had been informed by ZK that there were defective works which ZK and/or the main contractors were still rectifying (see AD at [32] and [82]). Taking, for instance, the supposed item “[r]emaining works for Aluminium Cladding without insulation”, the payment for this item (itemised as the “design, fabrication and installation of aluminium cladding works (without insulation)”) before the Adjudicator was \$129,143.00, as correctly highlighted by DG in TSMP’s 29 December 2022 Letter. The Adjudicator noted that ZK had only certified 80% of this payment claim for various reasons, including “*total qty different, alignment not adjusted, defect not done, indemnities and warranties not provided*” [emphasis added in bold]. The Adjudicator agreed with ZK that there was evidence of alignment and other defects. However, the Adjudicator ultimately determined that it would have been reasonable to award 90% of the claimed sum, amounting to \$116,228.70. This was because ZK had not produced evidence of the costs of rectification of the defects nor explained why they certified only 80% of the payment claim, which appeared to be an arbitrary estimate.

33 Furthermore, the defective works were also in issue at trial. In S 1282, ZK not only claimed for incomplete work but also defective work, work that did not go through a “final handing over process”, and the failure of DG to provide warranties and indemnities (see Trial Judgment at [20] and [246]; AD at [79]). DG submitted at trial that ZK was not entitled to the claim for the replacement and rectification of defective works and that there were no major defects, but only minor touch-up works that would have been done during the Defects Liability Period. It was thus clear that the defective works remained an issue at trial.

34 Secondly, it is not often the case that there are no *other* damages in addition to the increased costs of completing the outstanding works. For example, a new subcontractor may refuse to warrant the work done by the earlier subcontractor in breach, in which case the court would need to quantify, in monetary terms, the loss of that warranty for works done. There may also be delays to other parts of the work, increased costs for disrupting the orderly carrying out of related work and possibly damages for delay.

DG’s lack of pleadings

35 DG’s more fundamental problem, which is fatal to and undermines the whole basis of their complaint, is that this issue was *not specifically pleaded*. DG has conceded this in TSMP’s 15 March 2023 Letter (see [21(a)] above). Due to this lack of pleadings, the Trial Judge did not address this issue.

36 However, DG relies on parts of their DCC, as cited in TSMP’s 15 March 2023 Letter, that they had pleaded the “material facts” on which this issue is premised. Specifically, DG points to several paragraphs of the DCC and states that they had pleaded the claim for the sum of \$297,819.49, being the “balance sum of money due under the contract for the full scope of work and the variation works less payments made”.

37 However, DG did not plead that, *in the alternative*, the costs awarded to ZK should take into account the remaining works not completed and abandoned by DG. Compounding this, the items that DG now seeks payment for were also not particularized. This makes it difficult for any court to properly consider the issue, which is, as highlighted at [29]–[33] above, a complex one. This is an issue which cries for particulars, such as the quantification of various other elements interwoven with incomplete works, including defective work, costs

due to the delays to ZK’s works, the absence of warranties/indemnities and delays due to failure to prepare the works for handing over.

38 At paragraphs 14 and 22 of ZK’s Statement of Claim (Amendment 1) (“SOC”), ZK seeks to claim “additional costs and expenses” amounting to \$358,870.25 incurred for sourcing and engaging replacement or substitute contractors. As highlighted at [32] above, this was to deal with incomplete *as well as* defective work. In DG’s DCC, DG denies paragraph 14 of the SOC and further alleges that the claim is “unsubstantiated and false”. DG claims that there is no repudiatory breach on their part, but repudiatory breach on ZK’s part by their failure to make payments to DG for the work done under the Subcontract. DG also goes on to claim that the particulars of paragraph 14 of the SOC are “bare and lacking”, making it difficult for DG to plead thereto. DG also denied paragraph 22 of the SOC. However, DG did not ask for any Further & Better Particulars on this lack of particulars. Again, as noted above, there was also no alternative claim for reducing the sum to be awarded and no particulars furnished as to how much that reduction should be.

39 DG’s written submissions at trial similarly did not address the issue that they now raise. Instead, DG’s written submissions at trial were consistent with its DCC, that DG was entitled to the remainder of the contract value of \$297,819.49, which it frames as its “expectation loss”. There was no claim made in the alternative that any costs awarded to ZK should take into account the works not completed and abandoned by ZK. In ZK’s written reply submissions, ZK denies this amount. The issue that DG now seeks to raise was also not put to any of the witnesses at trial.

40 In Zenith Law’s 11 January 2023 Letter, ZK states that this issue is a non-starter as:

(a) In DG’s pleaded case, on the basis that it was ZK who repudiated the subcontract, DG counterclaimed the sum of \$297,819.49 which was confined to the balance sum based on their subcontract works and variation works by DG. Notably, there was no alternative plea that should DG be found to have wrongfully terminated their subcontract and abandoned the subcontract works, any replacement or rectification amounts awarded to ZK should be reduced by the value of the remaining works under the Subcontract.

(b) On appeal, DG appealed for the remainder of the contract value of \$561,019.90. Again, it was not part of their appeal that any replacement and rectification costs eventually awarded to ZK should be reduced by the value of the remaining works not completed or abandoned by DG.

41 The lack of pleadings, particulars and investigations at trial on the “remaining works” means that the court is unable to link the three figures presented in TSMP’s 29 December 2022 Letter to the evidence, or to properly ascertain how they were derived. Moreover, there were no relevant findings of fact that this court could rely upon. It is notable that TSMP has defined this as an “accounting issue” to be resolved. However, an examination of the pleadings and submissions made below reveals that this cannot be reduced to a mere “accounting issue” given the lack of relevant information or findings of fact before the court. To illustrate this, we discuss the three figures that DG has raised (at [10(a)]–[10(c)] above) in turn.

42 First, DG claims that \$12,914.30 for the “[r]emaining works for aluminum cladding without insulation” should be offset against the awards to

ZK. However, it is not clear, first of all, which item of outstanding work this claim relates to.

(a) Before the Adjudicator, DG claimed \$129,143 for the design, fabrication and installation of aluminum cladding works (without insulation). For this item of work, the Adjudicator awarded 90% of this to reflect the work done by DG, amounting to \$116,228.70. However, it should be remembered that at the adjudication stage, the Adjudicator is entitled, if there is insufficient detail or evidence, to make estimations to achieve rough and ready, but speedy albeit temporary, justice. The determinations made by the AD are subject to being re-opened and re-evaluated before the tribunal or court dealing with the final resolution of all disputes between the parties. As we have noted above, (especially at [31] and [32]), this was not just a case of works that remained *outstanding*. To properly arrive at the figures that DG proposes, this required findings of fact to quantify the properly completed and contract compliant work, the defective work which had to be dismantled and removed, the outstanding costs and any other related damages. The foregoing factors must be taken into account before one can arrive at the sum representing the true balance of incomplete or outstanding work.

(b) More fundamentally, it is unclear as to which item of work this \$12,914.30 relates to in S 1282. This is because DG's claim for the "[r]emaining works for aluminum cladding without insulation" could be referring to, not one, but two different items before the Judge below, *viz*, item 10(a) (cabin capping and annex aluminum cladding) and item 11(a) (rectification works on cladding) (see Trial Judgment at [220] and Appeal Judgment at [93]). These were ZK's claims for additional costs and expenses incurred in sourcing, engaging and repaying replacement

or substitute subcontractors to carry out and complete the balance of the Subcontract works not properly carried out, completed or abandoned by DG, *ie*, these were claims for removal and/or rectification of defective non-contract compliant work as well as, perhaps, Subcontract works that had not been done. Taken together with sub-paragraph (a) and what we have said above, this cannot be just a matter of accounting. The responsibility for this lies squarely on DG for not pleading their case with adequate particulars nor conducting its cross-examination appropriately to separate and ascertain these components.

(c) Given the lack of pleadings, this court has no indication of the outstanding sum of works to be completed by DG after it had abandoned the works. Neither is there any information on how much it cost ZK to complete the outstanding works which DG had abandoned. Furthermore, as highlighted at [34] above, ZK may have incurred *other* damages in addition to the increased costs of completing the outstanding works – but none of these figures are before us.

(d) In any case, ZK’s claims for items 10(a) and 11(a) were dismissed by the Trial Judge, as the invoices produced for items 10(a) and 11(a) did not clearly relate to works to be done by DG (Trial Judgment at [210] and [214]). As items 10(a) and 11(a) were dismissed, it cannot be said that ZK had recovered the cost of the remaining works from DG for these items. These items were also not in issue on appeal (see Appellant's Case (“AC”) in CA 129 at para 86).

Thus, notwithstanding the lack of pleadings, there is simply no evidence before us upon which we can find that the sums award to ZK should be reduced by \$12,914.30 based on the principle set out in *Mertens*.

43 Secondly, DG claims that \$4,800 for the “[r]emaining works for Aluminium [*sic*] Glass Door (blast/ballistic resistant)” should be offset against the awards to ZK. DG has claimed this sum on the basis that its payment claim for this item was \$16,000 and the Adjudicator had only awarded \$11,200 to reflect 70% of the work done by DG (see AD at [126]). Therefore, a credit of \$4,800 should be offset against the awards to ZK, representing the remaining 30% of the incomplete work. Again, it is not clear which item this relates to.

(a) Before the Adjudicator, DG claimed \$16,000 for the supply and installation of a 2400mm x 1500mm aluminum glass door (blast/ballistic resistant). ZK had only certified 50% of the item, as the “door had been rejected by client; final handing over not done, defect not done, product/workmanship indemnity and warranties not provided” (AD at [121]–[123]). The Adjudicator determined that there were indeed some defect rectification works that had not been done, but awarded 70% of the claim, amounting to \$11,200 (AD at [125]–[126]).

(b) It is unclear which claim this relates to in S 1282. The closest item would be item 4(b) (“[l]abour cost to repair metal blast glass door”). This court also does not have any evidence or figures of the outstanding sum of works to be completed by DG; how much it would have cost ZK to complete the outstanding works which ZK had abandoned; and any additional damages that ZK may have incurred in addition to the increased costs of completing the outstanding works. Without these figures, this court is unable to apply the principle set out in *Mertens*.

(c) In any case, this claim was dismissed by the Trial Judge. In the invoice produced by ZK for this item, there were several optional items that did not come with any corresponding invoice and there was no

evidence that the door was defective after DG installed it to justify the repairs of the Metal Blast Glass Door (Trial Judgment at [171] and [220]). Given that the claim was not allowed in favour of ZK, it cannot be said that ZK had recovered the cost of the remaining works from DG for this item. This was also not an issue on appeal (see AC in CA 129 at para 85).

There is therefore no issue of ZK claiming more than what it could have been entitled to claim.

44 Lastly, DG claims that \$44,800 for “[r]emaining works for the installation of cabin glass” should be offset against the awards to ZK. Under the Subcontract, DG was to install 16 units of full height cabin glass (2040 x 2700) at the unit rate of \$3,200 each.

(a) Before the Adjudicator, DG claimed 80% of the contractual quantity for the installation of cabin glass, or \$40,960. This was because they had installed the entire framing system for all 16 pieces of glass but installed only three pieces of glass. DG did not install the remaining 13 pieces of glass as they had already terminated the contract by then (AD at [100]). ZK only certified 12% of the contractual quantity, or \$6,144, as of the three pieces of glass put up, one was broken. The other reasons included “defects not done, product/workmanship warranties not provide[d]” (see AD at [101]). The Adjudicator thus determined that DG had failed to show that they were entitled to the value of the works claimed, particularly for the framing system for the 13 units without cabin glass, and that the one broken panel of glass should be attributed to DG. As such, the Adjudicator found that DG was entitled to claim for

the two pieces of installed glass ($\$3,200 \times 2$) = \$6,400 (AD at [107]–[108]).

(b) This presumably relates to item 5(a) (see Appeal Judgment at [166]) which was an invoice for “70% balance for 13pcs panel” for \$111,930.27. The 13 pieces of glass panels likely include the one cracked panel that the Adjudicator had excluded. Nevertheless, the numbers do not match up, as item 5(a) is valued at \$111,930.27 but DG now claims that the value of the remaining works for the installation of cabin glass under the Subcontract is \$51,200.

(c) Furthermore, although DG claimed the sum of \$40,960 before the Adjudicator for this item, DG now relies on the Subcontract price of \$51,200. Deducting the Adjudicator’s determination of \$6,400 from the Subcontract price of \$51,200 would result in the \$44,800 which DG now claims should be offset from the amount awarded to ZK.

Given that the figures do not corroborate, it is difficult to assess the validity of any credit to be given to DG in relation to the sums awarded to ZK. Again, this is the result of the issue not being properly pleaded, without proper particulars or investigation through the trial process.

45 If this point had been properly pleaded by DG, the court would have some figures and findings to consider the figures that DG seeks to be offset against ZK’s award. However, without more, we are not able to work out what the value of the incomplete works were when the starting point is unclear – should it be \$51,200 or \$111,930.27? Given that there were no pleadings or particulars on this point, we are in no position to determine how much credit should be applied to decrease ZK’s award for damages.

46 As such, we are of the view that the Remaining Sums Issue was *not* an issue before the Trial Judge or before us. There is thus no merit in this complaint and nothing that warrants the court’s clarification.

Issue 2: Calculation errors at [279] and [280] of the Judgment

47 Both parties have agreed that a correction to the Judgment is required.

48 The calculation errors arise from claims for payments under the four VOs. We reproduce a table which details the findings made on the VO claims:

<u>Adjudicator:</u>		<u>VO Claim:</u>		<u>Trial J:</u>		<u>Appellate Division:</u>
Allowed	✓	VO 6:	\$32,602.50	Disallowed	✗	Allowed ✓
Allowed	✓	VO 8	\$13,185.00	Disallowed	✗	Allowed ✓
Allowed	✓	VO 18	\$5,070.00	Allowed	✓	ZK not appealing
Disallowed	✗	VO 19	\$14,991.95	Disallowed	✗	DG not appealing

49 The Adjudicator had allowed the claims for VO 6, VO 8 and VO 18 (which totalled \$50,857.50), while disallowing the claim for VO 19 (see AD at [74], [114], [120] and [142]). The final AD amount for DG’s payment claim amounted to \$197,522.83 (see AD at [152]).

50 The Trial Judge disagreed with the Adjudicator in relation to VO 6 and VO 8 and disallowed those claims (Trial Judgment at [235] and [238]). Following this, the Trial Judge should have deducted \$45,787.50 (VO 6 and VO 8) from the AD amount of \$197,522.83. However, the Trial Judge erroneously *also* deducted VO 18, which he had allowed on appeal. This is apparent from [250] of the Trial Judgment, where the Trial Judge deducts from the final AD amount of \$197,522.83 the sum of “\$50,875.50”. This sum of “\$50,875.50” is itself a typographical error (compare the sum of \$50,857.50 at [49] above),

which then led to the erroneous conclusion that DG was entitled to \$146,647.33. This error was then carried forward to the Appeal Judgment (at [280]).

51 In TSMP's 29 December 2022 Letter, DG highlights the typographical error in the calculation of DG's entitlement, *but not* the mistaken deduction of VO 18. However, DG's contradictory position is evident from TSMP's 29 December 2022 Letter. DG first points out the figure of \$50,857.50 (consisting of VO 6, VO 8 and VO 18) that were *set aside* by the Trial Judge. A few paragraphs later, DG references VO 18, pointing out that it was *allowed*. DG however does not highlight that VO 18 was erroneously deducted by the Trial Judge. We also note that neither party appears to have raised this error on appeal.

52 DG also further suggests that \$5,070 should be further added to DG's entitlement, as the Trial J had allowed VO 18. However, the Adjudicator had allowed VO 6, 8 and 18, so the payment claim for VO 18 was already included within the AD amount of \$197,522.83. That is the same position that prevails after our decision. VO 18 is therefore already included in the AD sum and to do as DG suggests would amount to double counting.

53 As such, we are of the view that the Trial Judge should have allowed DG \$151,735.33 (\$197,522.83 less \$45,787.50). The following amendments will thus be made to the Appeal Judgment (at [279]–[280]) (amendments underlined):

279. ... DG was entitled to only \$146,647.33 (\$197,522.83 less \$50,875.5) out of the claimed amount of \$264,789.08 (Judgment at [250]). However, we note that the Judge had mistakenly deducted the sum for VO 18 when this VO claim had been allowed (Judgment at [241]). The Judge should therefore have allowed DG \$151,735.33 (\$197,522.83 less \$45,787.50) instead of \$146,647.33.

...

280. As we have allowed DG's claims for VO 6 and VO 8, DG is now entitled to \$197,522.83, (the sum of \$151,735.33, \$32,602.50 and \$13,185.00) out of the claimed amount of \$264,789.08. This amounts to approximately 74.6% of the claims it made in the adjudication and DG had succeeded in the majority of claims it made. ...

Costs

Costs of the appeals

54 At [283] of the Appeal Judgment, we determined that the costs of both appeals should be awarded to DG, to be agreed or failing agreement, to be fixed by the court. The parties were not able to agree on the quantum of costs to be awarded to DG and have tendered written submissions on costs.

55 DG submits that it should be awarded costs in the sum of \$100,000 for CA 125 and \$75,000 for CA 129, excluding disbursements. DG further claims reasonable disbursements of \$18,057.20. ZK submits that DG should be awarded costs in the sum of \$50,000 for CA 125 and \$35,000 for CA 129.

56 ZK has produced a table in their costs submissions which tabulates the items appealed and the successful quantum. This shows that DG appealed against 10 items and was successful in five, with a 70.2% percentage of success based on the quantum appealed. ZK has appealed against 10 items and was successful in two, with a 59.3% percentage of success based on the quantum appealed. However, we do not think it would be appropriate to decide on the quantum of costs strictly based on the number of claims or issues on which the respective parties had succeeded on.

57 Appendix G of the Supreme Court Practice Directions 2013 provides a range of \$30,000 to \$150,000 for appeals before the Appellate Division against a judgment obtained following a trial. We note that ZK, in its combined skeletal

submissions for the appeals, had claimed \$60,000 in costs for CA 125 and \$80,000 in costs for CA 129. The appeals were also essentially against the entirety of the Trial Judge’s decision.

58 In the circumstances, we award DG \$70,000 in costs for CA 125 and \$50,000 in costs for CA 129, and reasonable disbursements of \$18,000 for both appeals.

Ancillary costs orders

Background

59 ZK has also requested that several ancillary costs orders be made (see [73] below). We first set out the key background facts that are of relevance to the ancillary costs issues.

(1) Consolidation of HC/S 917/2019 and HC/S 1282/2019

60 On 14 September 2019, ZK commenced HC/S 917/2019 (“S 917”), claiming the sum of \$317,559.90 for goods sold and delivered and services rendered to DG (see Trial Judgment at [18]). On 19 December 2019, ZK, without discontinuing S 917, commenced S 1282 against DG for reliefs which overlapped with those claimed in S 917.

61 On 11 March 2020, on ZK’s application in HC/SUM 889/2020, S 917 and S 1282 were consolidated, with S 1282 as the lead suit (see Trial Judgment at [23]). ZK’s claim in S 917 against DG for “goods sold and delivered and services rendered to DG” (see [60] above) was not pursued by ZK as a separate cause of action from the claim in S 1282.

(2) The Adjudication Application (AA 339)

62 On 1 October 2019, DG commenced AA 339. In the AD issued on 15 November 2019, the Adjudicator awarded the sum of \$197,522.83 (the “Adjudicated Amount”) plus interest to DG (AD at [3]). The Adjudicator noted that DG had succeeded on most items in AA 339. As such, he ordered that the fees for the adjudication, being the adjudication application fee of \$642 (inclusive of 7% GST) and the adjudicator fee of \$12,945.93 (inclusive of 7% GST) (collectively, the “Adjudication Fees”), were to be borne 20% by DG and 80% by ZK (AD at [161]).

63 Pursuant to paragraph 3(b) of the AD, the due date for ZK to pay the Adjudicated Amount to DG was 35 days from the date of submission of a tax invoice from DG to ZK for the Adjudicated Amount. DG served the said tax invoice on ZK via email on 21 November 2019 at 6.53pm, and as such, the due date for payment of the Adjudicated Amount was 27 December 2019. However, ZK did not make payment of the Adjudicated Amount by the stipulated deadline.

(3) The winding up application (HC/CWU 95/2020)

64 On 7 February 2020, DG served a statutory demand (the “Statutory Demand”) dated the same day on ZK, requiring ZK to make payment of the sum of \$211,044, being: the Adjudicated Amount plus interest for late payments; costs of DC/OSS 5/2020 (“OSS 5”), which was DG’s application to enforce the AD as a judgment debt; and 80% of the Adjudication Fees (as ordered by the Adjudicator), within three weeks of the date of service of the Statutory Demand. On 18 February 2020, ZK filed HC/OS 223/2020 (“OS 223”) to set aside the Statutory Demand and sought, in the alternative, an order or declaration that DG

was precluded from issuing a statutory demand in so far as S 1282 was not discontinued.

65 As ZK did not meet the Statutory Demand by the stipulated deadline, DG commenced HC/CWU 95/2020 (“CWU 95”) to wind up ZK on the basis that ZK had not satisfied the Statutory Demand and was deemed under s 254(2)(a) read with s 254(1)(e) of the Companies Act (Cap 50, 2006 Rev Ed) to be unable to pay its debts. On 24 June 2020, a High Court Judge dismissed OS 223 but allowed ZK’s application to stay CWU 95 until the determination of the consolidated suit and any appeal thereof.

66 On 1 February 2021, the Court of Appeal decided in *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [114] to grant a stay of CWU 95, with the added condition that ZK pay the sum of \$211,044 into court as security for the Statutory Demand amount (see [64] above). This was done by ZK on 16 February 2021.

(4) DG’s application to stay any execution proceedings (HC/SUM 5722/2021)

67 S 1282 was determined by the Trial Judge on 2 December 2021. The Trial Judge allowed the majority of ZK’s claims and one of DG’s counterclaims (see [5] above).

68 On 6 January 2022, DG filed HC/SUM 5722/2021 (“SUM 5722”) to stay any possible execution proceedings that ZK may commence on the basis of S 1282, pending DG’s appeal of the Trial Judge’s decision, and to stay the release of the \$211,044 that ZK had paid into court as security for the Statutory Demand amount (at [66] above). DG claimed that this was because ZK was suffering from serious cash flow difficulties and that “should the damages

and/or costs be paid to ZK, there [was] no reasonable probability of DG getting the same back if the appeal succeeds”. DG also clarified that this was *not* due to DG’s inability to satisfy the Trial Judge’s orders, as DG was in strong financial health. In support of this, DG provided evidence that it had deposited \$554,000 (the value of ZK’s successful claims in S 1282) in a fixed deposit bank account to pay the judgment sums if it should be required to after the disposal of the appeal. DG also stated that “[t]hese monies can also be paid into [c]ourt”.

69 In response, ZK denied that it was facing any cash flow difficulties and instead claimed that it was DG who suffered from cash flow difficulties. However, in the interest of saving time and costs, ZK was prepared to consent to SUM 5722 if DG made payment into court the sum of \$541,000 (comprising \$554,000 which is the value of ZK’s successful claims in S 1282, and deducting \$13,000 being the outstanding costs that ZK owed to DG for various filings).

70 DG agreed to ZK’s proposal. On 19 January 2022, pursuant to a consent order (HC/ORC 270/2022), DG made payment into court the sum of \$541,000, being the security for the judgment sums pending the disposal of CA 125.

(5) Trial Judge’s costs orders

71 On 10 February 2023 and 22 February 2023, the Trial Judge made the following costs orders:

- (a) for S 1282, party-and-party costs awarded to ZK in the sum of \$247,000 and disbursements to ZK in the sum of \$18,633.90;
- (b) for AA 339, party-and-party costs awarded to DG in the sum of \$27,149.13 plus disbursements of \$668.77;

- (c) for S 917, costs awarded for wasted work to DG in the sum of \$10,000 inclusive of disbursements.

72 As such, after setting off the costs awarded to DG (at [71(b)] and [71(c)]) against the costs awarded to ZK (at [71(a)]), the Trial Judge awarded ZK the net sum of \$227,816, inclusive of disbursements.

Ancillary costs issues

73 By way of letter on 16 March 2023 (“Zenith Law’s 16 March 2023 Letter”), ZK now seeks:

- (a) an order of payment out of court to ZK in the sum of \$211,044, being ZK’s security paid into court for a stay of CWU 95 pending the outcome of the cross appeals;
- (b) that the total net damages, disbursements and costs awarded to ZK for the consolidated suit, trial of the action and the two appeals be paid to ZK out of DG’s former payment into court in the sum of \$541,000, with the remaining balance be paid to DG; and
- (c) that the solicitor’s undertaking provided by Zenith Law as security for costs of \$20,000 in respect of CA 129 be discharged.

Our decision

74 First, we consider the net amount (excluding costs) owing from DG to ZK. ZK submits that there is a balance of \$184,704.98 owing from DG to ZK, comprising of the liquidated damages for Phase 1 of the works; the costs of the replacement and rectification works; deducting the Adjudicated Amount in AA 339 and the Retention Sum. DG however argues that there is a balance of

\$77,637.67 owing from DG to ZK. The difference in the amounts put forth by the parties is because DG has argued that the following items should be further deducted from the amounts owing from DG to ZK:

- (a) \$1,500, the costs of OSS 5 which is payable by ZK to DG;
- (b) \$10,870.34, which is 80% of the Adjudication Fees of AA 339 that is payable by ZK to DG;
- (c) late payment interest at the rate of 5.33% per annum on the Adjudicated Amount of \$197,522.83 which is payable by ZK to DG;
- (d) a further deduction of \$62,514.30 if the Remaining Sums Issue is decided in DG's favour.

75 We note that ZK has provided evidence that the costs of OSS 5, have already been paid to DG's former solicitors. We have also decided that there is no sum payable to DG in respect of the Remaining Sums Issue.

76 We next consider the sum of \$10,870.34, which is 80% of the Adjudication Fees for AA 339. We note that the Adjudicator had ordered ZK to bear 80% of the Adjudication Fees (see [62] above; AD at [3(c)] and [161]). This is because DG had succeeded in the majority of the claims made in the AD. As we had allowed DG's claims for VO 6 and VO 8 (see Appeal Judgment at [7(d)] and [7(e)]), this reinforces that DG was the successful party in AA 339. In the circumstances, ZK should pay DG the sum of \$10,870.34, which is 80% of the Adjudication Fees for AA 339.

77 Lastly, we consider the late payment interest at the rate of 5.33% per annum on the Adjudicated Amount payable by ZK to DG. In S 1282 and CA 129, ZK sought for the Adjudicated Amount in the AD to be overturned in its

entirety (see Trial Judgment at [28(c)] and Appeal Judgment at [34(c)]). ZK failed. In the light of this, we are of the view that the late payment interest at the rate of 5.33% per annum on the Adjudicated Amount should run from the date that the Adjudicated Amount was due (27 December 2019, as *per* [63] above) to 31 May 2023, which is the date of this decision.

78 As such, the amount (excluding costs) owing from DG to ZK is as follows:

	Payable by DG to ZK	Payable by ZK to DG
Award by Adjudicator		
Adjudicated Amount	-	\$197,522.83 (including VO 6 and VO 8)
80% of the Adjudication Fees (<i>ie</i> , adjudication application fee and adjudicator fee)	-	\$10,870.34
Late payment interest of 5.33% per annum on the Adjudicated Amount (\$197,522.83) from 27	-	\$36,112.37 (\$28.84374/day x 1,252 days)

December 2019 to 31 May 2023		
Award by Appellate Division		
Liquidated damages for Phase 1	\$190,800	-
Replacement and rectification works	\$219,330.56 (\$197,501.49 (Total quantum allowed by Trial Judge) + \$27,735.47 (Item 4(a)) - \$5,906.40 (Item 1(e); see Appeal Judgment at [93])	-
Retention sum	-	\$27,902.75
Net amount awarded by Appellate Division	\$410,130.56	\$27,902.75
Statutory interest on net amount awarded by Appellate Division (5.33% per annum from 24 December 2022 to 31 May 2023)	\$9,522.56 (\$59.89029/day x 159 days)	\$647.86 (\$4.07456/day x 159 days)

Total		
	\$419,653.12	\$273,056.15
Aggregate amount to be paid by DG to ZK	\$146,596.97 (\$419,653.12 - \$273,056.15)	

79 To recapitulate, the Trial Judge has awarded party-and-party costs of \$227,816 to ZK for the consolidated suit, trial of the action and AA 339 (see [72] above). We have awarded costs of \$138,000 (inclusive of disbursements) to DG for CA 125 and CA 129 (see [58] above). After setting off the costs awarded by the Trial Judge with the costs of the appeals, the amount owing from DG to ZK for party-and-party costs is \$89,816.

80 Adding the amount (excluding costs) of \$146,596.97 (see [78] above) that is payable by DG to ZK, and the party-and-party costs of \$89,816 payable by DG to ZK (see [79] above), the total amount payable by DG to ZK is \$236,412.97.

81 ZK had previously made payment into court the security for the Statutory Demand amount of \$211,044, and DG had paid \$541,000 as security for the judgment sums pending the disposal of CA 125. In the circumstances:

- (a) the amount of \$236,412.97 payable by DG to ZK is to be paid out from DG's former payment into court of \$541,000, with the balance to be returned to DG; and

- (b) ZK’s security for the Statutory Demand amount of \$211,044 is to be returned to ZK.

82 Lastly, DG’s former solicitors, Luo Ling Ling LLC (“LLL”) has requested that Zenith Law pay costs of \$20,000 to LLL to satisfy Zenith Law’s solicitor’s undertaking for security for costs in respect of CA 129. As we have ordered that the costs of the appeal should be set off against the costs awarded by the Trial Judge, we order that the solicitor’s undertaking provided by Zenith Law be discharged.

Conclusion

83 In summary, we make the following supplementary orders:

- (a) that DG be awarded the costs of \$138,000 (inclusive of disbursements) for CA 125 and CA 129;
- (b) that the net amount payable by DG to ZK (after taking into account the balance payable by DG to ZK and the party-and-party costs of the consolidated suit and appeals) is \$236,412.97;
- (c) that the net amount of \$236,412.97 be paid out from DG’s payment into court of \$541,000, with the remaining sum to be returned to DG;
- (d) that the security sum for the Statutory Demand amount of \$211,044 be returned to ZK; and

(e) that the solicitor's undertaking provided by Zenith Law be discharged.

Woo Bih Li
Judge of the Appellate Division

Hoo Sheau Peng
Judge of the High Court

Quentin Loh
Senior Judge

Chan Kah Keen Melvin and Yong Wei Jie Timothy (TSMP Law Corporation) for the appellant in Civil Appeal No 125 of 2021 and the respondent in Civil Appeal No 129 of 2021;
Kris Chew Yee Fong and Isabel Su Hongling (Zenith Law Corporation) for the respondent in Civil Appeal No 125 of 2021 and the appellant in Civil Appeal No 129 of 2021.