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

[2023] SGHC(A) 2

Civil Appeal No 29 of 2021

Between

Vim Engineering Pte Ltd

… *Appellant*

And

Deluge Fire Protection
(S.E.A.) Pte Ltd

… *Respondent*

In the matter of Suit No 1298 of 2018

Between

Vim Engineering Pte Ltd

… *Plaintiff*

And

Deluge Fire Protection
(S.E.A.) Pte Ltd

… *Defendant*

JUDGMENT

[Building and Construction Law — Building and construction contracts]
[Building and Construction Law — Scope of works — Variations]

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Vim Engineering Pte Ltd
v
Deluge Fire Protection (S.E.A.) Pte Ltd

[2023] SGHC(A) 2

Appellate Division of the High Court — Civil Appeal No 29 of 2021
Woo Bih Li JAD, See Kee Oon J and Quentin Loh SJ
27 August, 10 September 2021

12 January 2023 Judgment reserved.

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

Introduction

1 This appeal arises out of a construction project in relation to the building located at 5 Shenton Way, Singapore 068868 ("the Building").

Facts

2 The developer of the project, UIC Investments (Properties) Pte Ltd, engaged Samsung C&T Corporation ("Samsung") as its main contractor to redevelop the Building into both a commercial and residential property comprising, among other things, a 23-storey office and a 54-storey residential block, (comprising Towers A and B). In around July 2015, Samsung engaged the respondent, Deluge Fire Protection (S.E.A.) Pte Ltd ("Deluge"), as a subcontractor in respect of the design, supply and installation, engineering, project management and testing and commissioning of plumbing, sanitary and

gas work for the project.[1] On 23 February 2016, Samsung complained of "severe schedule delay" in Deluge's work.[2] In an effort to ameliorate the delays, Deluge engaged the appellant, Vim Engineering Pte Ltd ("Vim"), sometime in March or April 2016, to carry out a limited scope of plumbing works, namely, the installation and testing of sanitary pipes on and above the 20th storey of the residential block.[3]

3 Subsequently, in July 2016, Deluge agreed to pay Vim $1.75m to complete a specified scope of plumbing and sanitary works (excluding payment for variations) in respect of the project. This agreement was set out in a subcontract ("the Subcontract"), which made reference to a purchase order ("the Purchase Order"), a set of tender clarifications ("Tender Clarifications")[4] and a quotation ("the Quotation"). In the event of any discrepancies in the terms and conditions the order of precedence, in descending order, would be the Subcontract, the Purchase Order, the Tender Clarifications, and finally the Quotation.

4 The temporary occupation permit ("TOP") was obtained on 20 October 2017. Owing to disagreements with Deluge, Vim left the project site on 5 February 2018 and did not complete any further work. On 19 October 2018, the defects liability period ("DLP"), which ran for 12 months from the date the TOP was obtained, expired.

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1 RA Vol III (Part A) at p 5, Affidavit of Evidence-in-Chief of Mr Cheo Hwee Kang ("Mr Cheo's AEIC") at para 5.

2 RA Vol V Part A at p 34.

3 RA Vol III Part A at p 5.

4 RA Vol III Part A at pp 50–53.

Arguments and decision below

5 The dispute below featured two heads of claim and two heads of counterclaim. Vim's claims were made pursuant to (a) sums promised under the Subcontract; or (b) in the alternative, a reasonable sum based on *quantum meruit*. The two heads of claim comprised:

(a) **Main works**, which referred to the original scope of works set out in the Subcontract that Deluge had engaged Vim to perform.

(b) **Variation works**, which referred to work outside the original scope of works set out in the Subcontract and these included additions or modifications that Vim had to carry out.

6 Deluge's counterclaims were predicated on the terms of the Subcontract, and the two heads of counterclaim were:

(a) **Rectification works**, which referred to works that Deluge had to complete or attend to during the remaining DLP after Vim had left the worksite (*ie*, between 5 February 2018 and 19 October 2018).

(b) **Back-charges**, which referred to additional costs incurred by Deluge due to Vim's breaches or failure to complete the original scope of works that it had been engaged to do, and these included: (i) Deluge's and Samsung's manpower costs; and (iii) penalties imposed on Deluge by Samsung for Vim's safety infractions.

Claim 1: main works

7 Vim's argument below was that cll 4 and 5 of the Subcontract read with the Quotation entitled it to payment for the original scope of works worth

$1,750,000. This was not seriously contested. Neither did Deluge dispute that the value of the main works that had been completed at the time Vim left the site (*ie*, 5 February 2018) was $1,742,537.74, which was $7,462.26 less than the contractually stipulated value of $1.75m. However, the parties disagreed on how much Deluge had in fact paid Vim:

(a) Deluge initially claimed that it had paid Vim $1,288,624.80 up to 30 August 2017 (and so $453,912.94 remained outstanding), and that no payment was made on the subsequent payment certificates because of back-charges owed by Vim. In closing submissions, however, Deluge claimed to have paid Vim $1,293,104.90 (and so $449,432.84 remained outstanding).[5] Following the Judge's request for clarification on this change of position, Deluge clarified that the lower sum was the correct figure.[6] Subsequently, however, Deluge in further submissions reverted to its position as pleaded in its defence – that it had paid Vim $1,288,624.80 (and so $453,912.94 remained outstanding).

(b) Vim initially claimed that Deluge had paid $1,283,764.89 (and so $458,772.85 remained outstanding) but later submitted in the alternative – yet without retracting its earlier position – that Deluge had paid a greater sum of $1,291,987.72 (and so $450,550.02 remained outstanding).

8 The Judge accepted Deluge's explanation that there had been clerical errors in the certification process which had "led to incorrect figures being certified for payment, and that the correct figure for what Deluge paid Vim for

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5 Defendant's Closing Submissions ("DCS") at paras 25–27.

6 Defendant's Further Submissions ("DFS") at paras 11–12.

the main works is $1,288,624.80": see [15] of the GD. Since the value of main works up to the point Vim left the site was $1,742,537.74 (see [7] above), Deluge owed Vim the balance of $1,742,537.74 - $1,288,624.80 = **$453,912.94** in respect of main works. Vim, rightly so, does not appeal against this aspect of the Judge's decision.

Claim 2: variation works

9 As regards Vim's claim for **variation works**, Vim claimed $697,130.58. Deluge contested liability for variation works and later submitted, in the alternative, that Deluge was liable only for $106,579.51 worth of variation works.[7] The Judge agreed with Deluge and held that Deluge was not liable to Vim for any variation works: see GD at [19].

10 It should be noted that each variation work claim comprised of two components: (a) an **invoice** which contained the breakdown of the cost of the variation; and (b) a **form** that included a signed acknowledgment by the project manager or site engineer.

11 In support of its claim for $697,130.58 of variation works, Vim invoked cl 16 of the Subcontract, which provided that:[8]

> **16 VARIATIONS**
>
> Any variation works such as addition[s] or omission[s] or modification[s], shall be on a back-to-back basis with the Main Contract. Such variation shall be carried out only with written instruction[s] from [Deluge's] Project Manager and the unit rates are in accordance with the agreed SOR for this Subcontract.

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7 DCS at para 149.

8 Appellant's Core Bundle ("ACB") Vol II Part A at p 123.

> [Vim] shall be entitled to ninety percent (90%) or shall or shall [sic] allow a discount of 10% (Profit & Attendance) for [Deluge], on any approved variation claim for additional work orders.
>
> Where rates are not contained therein or are not applicable then the amount shall be such sum as in all circumstances be reasonable and agreed by the parties. Notwithstanding any disputes in the [*sic*] as to the adjustments, [Vim] shall immediately carry out all variation orders, as instructed by [Deluge] pending valuation of the variation order.

12 To show that Deluge had given Vim written instructions, Vim adduced in evidence drawings that Deluge had furnished to it, which Vim claimed to constitute a type of written instruction. But even assuming that Deluge had not given Vim written instructions, Vim argued that "a gentleman's word is his bond",[9] and that Deluge had given oral instructions for such variation works to be carried out. In particular, it was claimed that Deluge's director Mr Tan Ann Kiong ("Mr AK Tan") had orally promised that Vim would be paid at meetings in October 2017, May 2018, and September 2018.[10] Furthermore, Deluge's representatives had signed the variation works forms. In these circumstances, the requirement of Deluge's written instructions under cl 16 had been waived or, alternatively, that Deluge was estopped from enforcing the writing requirement because Vim had relied, to its detriment, on representations made by Deluge that the latter would pay Vim in respect of the variation works. In this regard, Vim tendered in evidence its variation works forms which Deluge's representatives had signed.

13 Deluge mounted two complete defences to liability and one defence to quantum in respect of the variation works claim. First, Deluge contended that the claimed "variation works" were actually main works falling within the scope

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9 Plaintiff's Closing Submissions ("PCS"), para 6.

10 Statement of Claim ("SOC") at para 12.

of cll 2, 4, and 5 of the Subcontract or rectification works (see [16] below). This was contended to be consistent with Deluge's conduct because it had never accepted the works disclosed in Vim's variation works invoices to be variation works.[11] Secondly, in any event, Deluge never issued Vim any written instructions in respect of variation works as required under cl 16 of the Subcontract (see [11] above), and the language of cl 16 was plainly a condition precedent for a claim in variation works. Finally, even if Vim had a valid claim for variation works, the quantum should be confined to $106,579.51 owing to Vim's: (a) baseless 15% "admin charge"; (b) wrongful inclusion of works disclosed in 17 of 49 variation works invoices/forms that had already been completed; and (c) excessive rates and man-hours spent in its variation works invoices.[12]

14 The Judge disallowed Vim's claim for variation works in its entirety and Vim appeals against this aspect of the Judge's decision. In arriving at his decision, the Judge accepted Deluge's argument that no written instructions had been provided as required under cl 16 of the Subcontract. At trial, both of Vim's witnesses, Arun Meyyappan ("Mr Arun") and Muruganandham Mathi Selvan ("Mr Anand"), admitted that Vim did not receive written instructions for the alleged variation works:[13] see GD at [23]. Moreover, Vim's contention that drawings could constitute written instructions did not succeed because: (a) the drawings were received from Samsung and not Deluge (at [24] of the GD); (b) Vim did not plead that the drawings were written instructions (at [25] of the GD); and (c) of the six variation works invoices that did include drawings, none

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11 DCS, paras 71–77.

12 DCS, paras 130–148.

13 ROA Vol III Part FF at pp 49 – 50, 214.

of these invoices or forms included written instructions from Deluge's project manager (at [27] of the GD). Finally, the Judge rejected Vim's claim of estoppel or waiver because:

(a) acting on verbal instructions by itself did not mean that the contractual requirement of written instructions under cl 16 of the Subcontract had been complied with (at [31] of the GD);

(b) the signatures of Deluge's project manager Mr Veeraiah Nagasundarapandian ("Mr Sundar") and his subordinate Mr Manickam Tamilarasan ("Mr Tamil") on the forms were, as the pair had testified, only acknowledgements that the works had been carried out and not representations that Vim would be paid (at [35] of the GD);[14]

(c) neither Mr Sundar nor Mr Tamil had the authority to waive the requirement of written instructions under cl 16 of the Subcontract (at [36] of the GD); and

(d) the claim of an alleged oral promise by Mr AK Tan that Deluge would pay Vim was: (i) not particularised by Vim with consistency (at [40] of the GD); (ii) inconsistent with the fact that Deluge was at the relevant periods attempting to secure Vim's payment of back-charges (at [41] of the GD); (iii) not supported by any documentation in writing (at [44] of the GD); and (iv) undermined by Vim's failure to call as a witness one Velumani who was one of its two representatives at the meetings where the promises were allegedly made (at [47] of the GD).

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[14] Affidavit of Evidence-in-Chief of Manickam Tamilarasan ("Mr Tamil's AEIC") at para 65; Affidavit of Evidence-in-Chief of Veeraiah Nagasundarapandian ("Mr Sundar's AEIC") at para 49; Transcript, 7 July 2020, p 38 lines 27–31; p 39 lines 1–3; 8 July 2020, p 65 lines 18–20, p 67 lines 9 and 11, p 76 lines 24–25.

15 In terms of the quantum that Vim asserted, the Judge also accepted that Vim's quantification of its variation works claims was not justified:

> (a) Although cl 16 of the Subcontract provided that "[Vim] shall be entitled to ninety percent (90%) … or shall allow a discount of 10% (Profit & Attendance) for [Deluge], or any approved variation claim for additional work order", Vim did not give Deluge the stipulated 10% discount,[15] and instead imposed a 15% admin charge (at [60] of the GD).[16]
>
> (b) While Vim relied on an email dated 31 May 2017 by Deluge's quantity surveyor Ms Susan Ngu ("Ms Ngu") enclosing an agreed schedule of rates,[17] the email was expressly qualified as being "for … reference only" (at [61] of the GD).

Counterclaim 1: rectification works

16 It was common ground that the value of the main works when Vim had left the site was $1,742,537.74, which was $7,462.26 less than the contractually agreed sum of $1.75m. Deluge claimed that it subsequently incurred costs of $7,200 in completing the outstanding main works and a further $105,300 in attending to works during the DLP after Vim had left the site. These costs, totalling $112,500, exceeded the outstanding Subcontract sum of $7,462.26 by $105,037.74. Thus, Deluge asserted a counterclaim of $105,037.74 for rectification works.

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15 ROA Vol III Part FF at pp 60 – 61.

16 ROA Vol III Part FF at p 61.

17 PCS at para 18.

17 On the other hand, Vim contended that it was not liable for any rectification works because Deluge, having ordered Vim to leave the worksite, was responsible for its own losses. In addition, Vim argued that Deluge did not provide any notice that it would be carrying out works during the DLP.

18 The Judge allowed Deluge's counterclaim of $105,037.74, Specifically, the Judge accepted that Deluge incurred $7,200 in completing the outstanding work. Additionally, the Judge accepted that Deluge's calculation of $105,300 in costs – comprising one supervisor and two workers for the remaining duration of the DLP – was reasonable (at [65] of the GD). Given that the remaining balance of uncompleted main works valued at $7,462.26 was not disputed, the Judge allowed Deluge's counterclaim and set-off in the sum of 7,200 – $7,462.26 + $105,300 = $105,037.74.

Counterclaim 2: back-charges

19 In relation to Deluge's counterclaim for **back-charges**, Deluge sought $870,507.09 and Vim contested liability.[18] The Judge largely allowed Deluge's counterclaim but noted that Deluge had overcharged in respect of a 15% administrative fee for each of the 16 invoices and therefore reduced Deluge's entitlement to $858,604.36.

20 Deluge's argument below was that cl 19 read with cl 21 of the Subcontract entitled it to back-charges in respect of costs imposed on Deluge as a result of defective work. Clauses 19 and 21 of the Subcontract provide:

> 19.1 If, under the provisions of this Subcontract, [Vim] is notified by [Deluge] to correct defective or non-conforming Subcontract works, or to perform Subcontract works in

[18] D&CC at para 53(a).

> accordance with (and so as to comply with) the Subcontract's Programme, and [Vim] states or, by its actions, indicates that it is unable or unwilling to proceed with the Subcontract works or corrective action or otherwise fails to do so in a reasonable time, [Deluge] may, upon written notice, perform or procure the performance of the redesign, repair, rework or replacement of nonconforming or non-performed Subcontract works by any reasonable means available at [Vim's] cost including any cost for supervision and/or overhead.
>
> 19.2 [Deluge] will notify [Vim] of any work performed or procured by it pursuant to [Clause 19.1]. The performance or procurement of such work by [Deluge] shall not relieve [Vim] of any of its responsibilities under the Subcontract including, but not limited to, express or implied warranties, specified standards for quality, contractual liabilities and indemnifications and [Deluge's] Programme.
>
> 19.3 If at any time [Deluge] performs or procures the performance of work pursuant to [Clause 19.1], [Deluge] shall have the right to retain, deduct, withhold or set-off the cost thereof from any payment to be made by [Deluge] to [Vim] or otherwise claim such amount from [Vim] without the need for a notice or an order of a court or tribunal sanctioning the intent of any such notice.
>
> …
>
> **21 DELAY AND LIQUIDATED DAMAGES**
>
> [Vim] shall perform all its obligations stated in this Subcontract and shall be liable for any delay in the completion of the services which are due to [Vim's] negligence or fault.
>
> If the completion of services is likely to cause a delay, [Deluge] is entitled to take all necessary actions to mitigate the delay in the delivery or completion of services at [Vim's] cost. …
>
> In the event of any delay due to [Vim's] own fault, [Vim] is required to reimburse [Deluge] all losses, damages and expenses incurred because of the delay cause solely by [Vim].

21 Of the total sum of $987,230.04 claimed in respect of back-charges, Deluge argued that Vim had initially accepted the back-charges invoices valued at $116,722.93 ("initial back-charges"). Moreover, Deluge claimed a further $870,507.09 in its back-charge invoices BC/S13030/UIC/VIM-016A ("BC 16A"), BC/S13030/UIC/VIM-017 ("BC 17"), BC/S13030/UIC/VIM-018 ("BC

18") and BC/S13030/UIC/VIM-019 ("BC 19") (collectively, "further back-charges"). The back-charges refer to costs incurred by Deluge due to Vim's alleged breaches or damage caused to the original scope of works such as costs incurred in: (a) engaging third parties such as Systems Engineering & Resources Pte Ltd ("SER") to complete Vim's works or to rectify defects which were part of the original scope of works;[19] (b) hiring additional manpower to complete the original scope of works; (c) reimbursing Samsung for additional manpower; (d) completing Vim's original scope of works; and (e) paying Samsung fines for Vim's safety breaches.

22 Vim denied that it was liable for either the initial back-charges or further back-charges, as follows:

(a) First, Vim denied liability for the reason that, in a similar vein to Deluge's invocation of the writing requirement under cl 16 of the Subcontract, Deluge did not likewise give the requisite written notice pursuant to cl 19.1 of the Subcontract in respect of back-charges.

(b) Secondly, Vim argued that it had not caused any delays or defects in the original scope of works and suggested that Deluge had damaged the completed work. Vim also suggested that Deluge had caused its own delay by delaying the supply of materials and payment to Vim[20] or that Mr Tamil did not conduct regular checks on Vim's works.[21] In any event, Vim argued that the delays and defects were minor.[22]

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19 DCS at paras 204, 212, 222, 227.

20 ROA Vol III Part FF at p 114.

21 ROA Vol III Part GG at p 99 – 100.

22 ROA Vol III Part GG at p 177; ROA Vol III Part HH at pp 140 and 164.

(c) Thirdly, Vim argued that some contemporaneous documentation – such as (i) Samsung's site memoranda, (ii) SER's documentation, and (iii) records of attendance of Vim's workers at daily toolbox meetings – amounted to hearsay evidence and the contents of which have not been proved by Deluge.[23]

23 The Judge accepted the evidence of Mr Tamil that Vim would have needed some 80 or more workers on site per day to carry out its works successfully, and that the daily toolbox meeting attendance showed that Vim only had an average of 27 workers there per day (at [76] of the GD).[24] The Judge also accepted that Vim had placed orders for materials on short notice and so the delays, which culminated in two site meetings with Samsung, were its own doing (at [78]–[79] of the GD). Moreover, the Judge rejected Vim's defences:

(a) First, the Judge rejected the argument that Deluge's failure to give written notice under cl 19.1 of the Subcontract was fatal to its claim for back-charges. The Judge noted that cll 16 and 19 were drafted differently, but nevertheless accepted that if Deluge acted without written notice, Deluge could not levy a back-charge within cl 19 of the Subcontract (at [93] of the GD). However, there remained two problems with Vim's defence because: (i) Deluge had given written notice that action would be taken if Vim did not redress defects and delays in its works (at [96] of the GD);[25] and (ii) cl 21 of the Subcontract, which

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23 PCS at para 91.

24 Defendant's Supplementary Bundle of Documents ("DSBD"); Transcript, 2 July 2020, p 4 lines 2–7.

25 DCS at paras 205, 206, 214, 228–229; Defendant's Reply Submissions ("DRS") at para 26; Mr Tamil's AEIC at para 90; Mr Sundar's AEIC at para 37.

contains no requirement of notice, permitted Deluge to claim against Vim for breach of contract arising from such defects and delays.

(b) Secondly, the Judge rejected Vim's suggestion that it had not caused the delays or defects because Deluge's witnesses gave evidence that was consistent with the contemporaneous site memoranda issued by Samsung (at [84] of the GD).[26] The allegations that Deluge had caused its own delays by delaying its supply of materials were also rejected because Vim had placed orders for materials on short notice and so the delays were its own doing (at [78] and [85] of the GD). Vim had its own project supervisor, Mr Manikandan, and could not therefore blame Deluge's Mr Tamil for not supervising workers. Even if such defects or delays were minor, Deluge's contractual right to levy back-charges did not depend on the delays and defects being major or minor (at [86] of the GD).

(c) Thirdly, the documentation that Vim objected to was supported by the testimony of its witnesses, such as Mr Tamil and Mr Sundar. Further, they were in the nature of business records for which s 32(1)(*b*)(iv) of the Evidence Act (Cap 97, 1997 Rev Ed) makes an exception to the hearsay rule. The hearsay rule was not contravened in so far as Deluge's reliance on documents issued by Samsung and SER was not for the truth of the contents but the fact that the documents were issued (at [89] of the GD). In any event, the admission of the toolbox records into evidence was not objected to at trial (at [90] of the GD).

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[26] Mr Tamil's AEIC at paras 82–101; Mr Sundar's AEIC at paras 29–43; Mr Cheo's AEIC at paras 49–54.

24 As to the quantum of back-charges put forward by Deluge, the Judge found that Deluge had substantiated its claims save for the 15% admin charge that Deluge added to the back-charge invoices (at [100] of the GD). Deluge did not explain why the 15% admin charge should be allowed for "supervision and/or overhead" as nothing extra was claimed by Deluge for completing Vim's works. Thus, the Judge allowed Deluge's claim for back-charges in the sum of $116,722.93 (initial back-charges) + $870,507.09 (further back-charges) - 128,625.66 (15% admin fee) = **$858,604.36.**

Summary

25 Setting-off the claims against the counterclaims, the Judge held that Vim was liable for a net sum of $105,037.74 + $858,604.36 – $453,912.94 = **$509,729.16**. The Judge later explained in his GD, that he had adjusted that figure given in his earlier oral judgment because in preparing his GD, he discovered that in determining Deluge's claims for 15% "admin" charges based on its back-charge invoices No. 5, 8 to 15, he found that invoices No. 8 and 10 had themselves included certain amounts as "admin fee"; he therefore reduced Deluge's claim to $509,377.26 (at [114] of the GD). There is no dispute before us on this downward adjustment.

The parties' cases

Appellant's case

26 Following the decision below, Vim discharged its counsel below and engaged, on a *pro bono* basis, Mr Avinash Pradhan ("Mr Pradhan"). In the present appeal, Vim does not appeal against the Judge's decision on the issue of main works, but appeals against the Judge's decision with regard to its claim of

variation works and Deluge's counterclaims on rectification works and back charges:

(a) First, 34 of Vims 49 variation works invoices should have been allowed because: (i) there was a significant overlap between Vim's and Deluge's scope of work; [27] (ii) Deluge's work *vis* Samsung was already defective and in a state of delay prior to Vim's engagement;[28] (iii) cl 16 of the Subcontract Agreement should not be construed so strictly;[29] (iv) the documentary bases for Vim's variation claims were well-founded and established that these were true variation works;[30] (v) Deluge had acknowledged the foregoing, and Mr Sundar and Mr Tamil had the authority and in fact did waive the requirement set out in cl 16 of the Subcontract Agreement;[31] and (vi) Vim was, in any event, entitled to claim in restitution in respect of the 34 invoices.[32]

(b) Secondly, as to Deluge's claim for rectification costs, these should be disallowed because: (i) Vim abandoned its DLP work on Deluge's instructions and the Judge erred in holding that Vim was obliged to maintain a permanent presence on site;[33] (ii) no notification had been given to Vim to conduct the works during the DLP;[34] and (iii) the quantum that Deluge claimed was not supported by documentary

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27 Appellant's Case ("AC"), paras 9-13.
28 AC at paras 14-15.
29 AC at paras 21-28.
30 AC at paras 29-32 and 39-53.
31 AC at, paras 33-39
32 AC at para 55.
33 AC at, para 66.
34 AC at para 57.

evidence of man-hours spent attending to Vim's uncompleted main works and DLP works.[35]

(c) Thirdly, as to Deluge's claim for back-charges, these should be disallowed because: (i) Vim's work was neither defective nor in delay;[36] (ii) Deluge did not comply with cl 19 of the Subcontract to give notice to conduct the DLP works and such non-compliance destroys its claim;[37] (iii) the Judge stepped beyond the boundaries of Deluge's pleaded case in allowing Deluge's counterclaim for back-charges on a basis other than cl 19;[38] and (iv) there was no evidential foundation for the Judge's acceptance of the back-charges.[39]

Respondent's case

27 Deluge naturally disagrees and responds as follows:

(a) First, the Judge was correct to disallow the claims for variation works because: (i) there was no evidence that the Judge failed to give due consideration to the issue and Vim 's understanding of the scope of work relies on the Quotation which should be accorded the least amount of weight among the various documents;[40] (ii) the fact that Samsung had issued a site memorandum raising the issue of delay prior to Vim's engagement is irrelevant because the delays and defects in plumbing and sanitary works were the result of Vim's work;[41] (iii) cl 16 of the

35 AC at para 66.
36 AC at paras 60-65.
37 AC at paras 67-69.
38 AC at para 68.
39 AC at paras 70-96.
40 Respondent's Case ("RC") at paras 8-11
41 RC at paras 12-15.

Subcontract Agreement must be construed strictly because it saves parties from having to dispute whether particular works are truly "variations";[42] (iv) the works disclosed in Vim's purported variation works invoices were not in any event "variations";[43] (v) Deluge never at any material time acknowledged that the works in Vim's variation works invoices were actually "variations", and neither Mr Sundar nor Mr Tamil had any authority to waive the writing requirement under cl 16;[44] and (vi) Vim is not entitled to a claim in restitution.[45]

(b) Secondly, the Judge was correct to allow Deluge's claim for rectification works because (i) Vim left the project worksite of its own volition;[46] (ii) under the Subcontract, it is irrelevant whether Deluge gave Vim notice to carry out DLP works;[47] and (iii) Deluge's claim of $105,300 for work done in Vim's stead was reasonable and proportionate.[48]

(c) Thirdly, the Judge was correct to allow Deluge's claim for back-charges because: (i) Deluge imposed back-charges on Vim in view of the numerous delays and/or defects in Vim's work;[49] (ii) Vim's interpretation of cl 19 of the Subcontract should not be accepted and Deluge, in any event, complied with all the relevant notice requirements under cl 19;[50] and (iii) the Judge was correct in allowing Deluge's claim

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42 RC at, paras 19-23.
43 RC at paras 24-27.
44 RC at, paras 28-37.
45 RC at para 38.
46 RC at paras 47-49.
47 RC at para 50.
48 RC at paras 51-52.
49 RC at paras 56-58
50 RC at paras 59-63.

for back-charges because its pleaded claim was not confined to cl 19 of the Subcontract.[51]

Issues to be determined

28 The issues to be determined are as follows:

(a) First, was the Judge correct in rejecting Vim's claim for variation works in its entirety? More specifically:

(i) Did cl 16 of the Subcontract require Deluge's written notice?

(ii) Did Deluge waive the requirement of written notice in cl 16 of the Subcontract? In this regard, did Mr Sundar and Mr Tamil have the requisite authority to do so?

(iii) Did the documentation for Vim's variation works claim support its claim that such works were outside the original scope of main works and that the quantum sought was substantiated?

(b) Secondly, was the Judge correct in awarding Deluge $105,037.74 for rectification works?

(c) Thirdly, was the Judge correct in awarding Deluge $858,604.36 for back-charges? Specifically:

(i) Was Vim's work defective and delayed?

(ii) Was Deluge required to give written notice under cl 19 of the Subcontract and did Deluge breach this requirement? In

[51] RC at paras 64-66.

the alternative, was Deluge allowed to rely on cl 21 of the Subcontract?

(iii) Whether Deluge was able to establish Vim's liability in respect of the individual back-charges?

Issue 1: Whether the Judge was correct in rejecting Vim's claim for variation works

Written notice requirement for variation works under cl 16 of the Subcontract

29 In general, to claim for work as a variation under a contract, it is necessary to establish that (a) the work is an "extra"; (b) there is an express or implied promise to pay for the work; (c) the work was instructed by a person with authority to vary the contract; and (d) any condition precedent to payment has been fulfilled. As set out in Stephen Furst and Sir Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 10th Ed, 2021) ("*Keating*") at para 4-043:

> … A contractor frequently carries out, or is asked to carry out, work for which it considers it is entitled to payment in excess of the original contract sum. To recover such payment it must be shown that:
>
> (1) it is extra work not included in the work for which the contract sum is payable;
>
> (2) there is an express or implied promise to pay for the work;
>
> (3) any agent who ordered the work was authorised to do so; and
>
> (4) any condition precedent to payment imposed by the contract has been fulfilled.

30 Variation works were expressly provided for in the Quotation, which states that "…any additions/alterations to the works specified in this quotation,

consider as variation" (see [11] above). It is not disputed that cl 16 contains an implied promise on Deluge's part to pay Vim for extra work, that is, variation work. But Deluge argues that it never requested Vim for such work to be carried out since cl 16 of the Subcontract stipulates that variation works "shall be carried out *only* with written instruction[s] from [Deluge's] Project Manager" [emphasis added].

31 On appeal, Vim argues that those same words "shall be carried out *only* with written instructions" must be regarded not as a condition precedent but rather as a procedural provision. In this regard, Vim relies on the Court of Appeal's guidance in *Comfort Management v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") at [89] that "it is not invariably the case that the absence of writing, or more generally, the failure to follow the prescribed procedure, will disentitle the party who has performed the variation works from claiming payment for those works". In response, Deluge contends that cl 16 should be construed strictly, as was the case in *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203 ("*Mansource*").

32 In our judgment, cl 16 is not drafted in a stringent manner requiring strict compliance failing which a variation claim will fail. For example, a clause may expressly state that a written authorisation of work done or written confirmation of an oral order is a condition precedent for any right to additional payment or it may specify a time within which the contractor is to inform the architect or owner in writing that it considers the instruction or direction or request to do certain work, as a variation with time and cost consequences: see Nicholas Dennys and Robert Clay, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell, 13th Ed, 2015) ("*Hudson's*") at paras 5-040 and 5-044. Similarly *Keating* at para 4-072 states:

> A frequent requirement is that there must be a written order signed by the architect and that *no extras will be paid for unless so ordered*. In such a contract a proper written order is a condition precedent to payment.
>
> [emphasis added]

In the risk allocation exercise inherent in any engineering and construction contract, this approach is justified on the ground that employers and architects "… may legitimately require an opportunity to reconsider and possibly withdraw an instruction or mitigate its effect by giving a still further or different instruction if the first is found to provoke a claim to additional payment or too costly a variation, see *Hudson's* at paras 3-074 and 5-040.

33 The kind of stringent language is missing from cl 16. Clause 16 does not state that if there are no written instructions for variations from Deluge's project manager, Vim will forfeit the right to any payment or is otherwise barred from claiming payment for work that it considered a variation. In *Hudson's*, the learned authors opine at para 5-047:

> A clause as to orders in writing may be so worded that such orders will in any event not be a condition precedent to the Contractor's right to payment. For example, where a clause provides that the Contractor shall execute such alterations as the Architect may direct in writing, *but does not expressly exclude any claim for work not so ordered.* In such a case there is clearly nothing to prevent the Employer being liable under general law on a separate contract express or implied.
>
> …
>
> Such a separate contract can be inferred from circumstances which show that the Employer requested or knew of a variation which was for their benefit, which the builder had been asked to carry out, and which the Employer must as a reasonable person have realised would involve extra expense.
>
> [emphasis added]

34 The standard authoritative texts on construction law, like *Hudson's* (at para 5-044), also recognise that in spite of cases which uphold provisions stipulating variation orders in writing as a condition precedent to the right of payment:

> …the anxiety of the courts to avoid injustice to contractors caused by strict wording requiring an order in writing has led them to rationalise reasons enabling Contractors to recover without such an order in a number of different ways. Thus, apart from wherever possible interpreting such requirements as merely administrative and not a condition precedent, they have achieved this result by "implied contract" or "unjust enrichment" reasoning; by giving a wide interpretation to the Arbitrator's power of review; by treating a particular variation agreed to by the Employer as outside the scope of the contract or *by finding that there was a waiver of the required formalities*.
>
> [emphasis added]

Similarly *Keating* at paras 4-074, 4-075, and 4-076 states:

> 4-075 The courts have held that there are certain exceptions to the rule that a contractor could not recover without a written order or other formality which is a condition precedent to payment …
>
> 4-076 **Implied promise to pay.** When there is a condition in the contract that extras shall not be paid for unless ordered in writing by the architect and the employer orders work which they know, or are told, will cause extra costs there may be an implied promise by the employer that the work should be paid for as an extra and especially so in cases where any other inference from the facts would be to attribute dishonesty to the employer.
>
> 4-077 Such a promise to pay may be implied *where there has been a waiver of the condition*. In order to constitute a waiver, there must be conduct which leads the other party reasonably to believe that the strict legal rights will not be insisted on. Thus, in principle, a written waiver by the employer would be effective, and even an oral waiver would be sufficient if it were a clear undertaking not to rely on the condition.
>
> [emphasis added]

35 Every contract has to be construed on its particular terms and where necessary within the context in which it was entered into (see [2] above). In the present case, we do not, with respect, agree with the Judge that cl 16 is meant to "avoid…this kind of dispute" (GD at [51]), by serving as an absolute bar to a right to claim for payment of the variation. As noted above, cl 16 does not contain any words to this effect. Unlike some standard form contracts, there are also no provisions in this Subcontract Vim to give written confirmation of verbal instructions given by Deluge's project manager for variation works. If Vim is able to make out a case on the facts that Deluge's project manager *did* verbally ask or otherwise requested or required Vim to carry out "variation" or "additional" works, then such works are perfectly capable of constituting "additional" works outside the Subcontract or requested under an implied promise to pay for such additional work. We note Deluge has run a defence against Vim's claims for variation only on the threshold point that there was no written instruction from its project manager. Deluge has not run a case that, for example, it had suffered damage because Vim had failed to comply with the strictures set out in cl 16.

36 In *Mansource*, the plaintiff was the subcontractor to the main contractor for interior fitting out works to a section of the project and the defendant was a sub-subcontractor to the plaintiff for the wall finishes and joinery works under two sub-contracts. Each of these sub-contracts between the plaintiff and defendant expressly provided that the sub-contracts were back-to-back with the main contract between the plaintiff and the defendant. The court there held that as a consequence, the defendant was precluded from advancing a variation claim under either sub-contract unless the main contractor authorised and approved the variations. It is evident that the relevant clause, cl 17, (see

Mansource at [7]), is quite specific and quite different from cl 16 in the appeal before us:

> This Sub-Contract shall be on a back-to-back basis to the contract between [the plaintiff] and [the main contractor] and there shall be ***no claim whatsoever unless*** it is a variation work ***authorised and approved*** *by [the main contractor]* ***only***.
>
> [emphasis in bold italics added]

It is important to note that although the court in *Mansource* held, *inter alia*, that the defendant was unable to claim for variations, despite the plaintiff's representative, Ms Lee, confirming at trial that instructions on variations were generally given verbally and that works under a particular variation order were in fact carried out, the court stated at [101] and [104] that the defendant had not pleaded an alternative basis for its counterclaim for variations on the basis of *quantum meruit* in the law of unjust enrichment. The court in *Mansource* also stated there was no attempt by the defendant to make good its submissions on the basis of a waiver. This case is therefore of limited assistance to Deluge, as it accepts that despite the stringent drafting, there may still be a claim on alternative bases, except that they had not been pleaded.

Waiver

37 We now turn to address the issue of waiver. We first note that Deluge had accepted in its submissions, correctly in our view, that the contractual stipulation of written notice may be departed from to permit a claim for variation work where there is sufficient proof of waiver or estoppel.[52] The Court of Appeal in *Comfort Management* explained at [89]–[90]:

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[52] RC at para 22.

> 89 … We recognise that standard form construction contracts, which may be said to reflect industry practice, generally require variations in the contract to provide for a change in the scope of construction work contemplated to be effected in writing. However, it is not invariably the case that the absence of writing, or more generally, the failure to follow the prescribed procedure, will disentitle the party who has performed the variation works from claiming payment for those works. Thus it is said in Chow Kok Fong, *Law and Practice of Construction Contracts*, vol 1 (Sweet & Maxwell, 4th Ed, 2012) at para 5.25:
>
> > The effect of contractual provisions such as those cited here is that, except for situations which have been specifically exempted, a written variation order serves as a condition precedent for payment of the variation work. If a contractor ignores the requirement for a written variation order, as a general principle, he cannot be found to complain subsequently if he is not paid for the varied work, nor can he contend that he should be paid a reasonable sum for the work merely on the premise that the employer had the benefit of the variation work. However, in a suitable situation, the employer may be estopped by his conduct from denying liability to pay notwithstanding the non-compliance with the formalities stipulated in the contract.
>
> 90 This passage suggests that the absence of documents that demonstrate formal compliance with the contractually prescribed procedure for variation works is not necessarily fatal to a claim for variation works. That gives the impression that such absence does not inexorably translate into a patent error in the payment claim. All it means is that the contractor bears the risk of proving that the variation was ordered by the employer in the absence of a written variation order. This observation finds support in the position in English law on this issue, which is that a term of a contract which states that the contract can only be varied in writing will not prevent there being an oral variation; instead, the effect of such a term is at best to raise a rebuttable presumption that, in the absence of writing, there has been no variation: Sean Wilken QC & Karim Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) at p 26 fn 131, citing the English Court of Appeal's decision in *I-Way Ltd v World Online Telecom UK Ltd* [2002] EWCA Civ 413 (see [11]–[12] *per* Sedley LJ and [17] *per* Schiemann LJ); see also the English Court of Appeal's decision in *MWB Business Exchange Centres*

> *Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553 at [34] *per* Kitchin LJ.

38 The most recent iteration of Chow Kok Fong, *Law and Practice of Construction Contracts*, vol 1 (Sweet & Maxwell, 5th Ed, 2021) at para 5.029 similarly affirms that the law permits the application of principles of waiver or estoppel in meritorious cases despite non-compliance with requirements of written notice:

> **5.029** Under the SIA 2016 a variation may be ordered by way of a direction or instruction issued pursuant to clause 1(1)(b) or 1(1)(c) of the Conditions. The debate in practice with the SIA provisions on variations frequently revolves around whether a variation order should be characterised as an instruction or a direction because an instruction is considered in principle to entitle the contractor to additional payment or compensation while this is not the case with a direction. Clause 1(2)(b) provides for all directions and instructions to be given in writing and verbal directions or instructions given by the architect are required to be confirmed in writing. In the absence of such confirmation, the contractor is not entitled to be compensated for an expense incurred with the compliance of the relevant direction or instruction. The effect of contractual provisions such as those cited here is that, except for situations which have been specifically exempted, a written variation order (or in the case of the SIA Form, a verbal instruction or direction which the architect has not expressly denied) serves as a condition precedent for payment of the variation work. If a contractor ignores the requirement for a written variation order, as a general principle, it cannot be found to complain subsequently if it is not paid for the varied work, nor can the contractor subsequently contend that it should be paid a reasonable sum for the work notwithstanding that the employer had the benefit of the variation work. However, in a suitable situation the employer may be estopped by its conduct from denying liability to pay notwithstanding the non-compliance with the formalities stipulated in the contract.

39 This proposition is similarly elucidated in *Hudson's* at para 5-024:

> As has been seen, the general rule is that a Contractor who has been requested to do work which is in fact a variation will be able to recover payment for it if the Employer has expressly or impliedly requested the work knowing it to be such. The

> Contractor, therefore, is unlikely to be in a difficulty in advancing a variation claim unless either:
>
> (a) the Employer does not know of and so has not authorised the variation; or
>
> (b) the contract has been so worded as to deny legal effect to any request or authorisation by or on behalf of the Employer or Contract Administrator acting for the Employer which is relied on by the Contractor.
>
> Additionally the courts have not been slow to apply principles of waiver or estoppel, implied promise or unjust enrichment, so as to prevent an Employer in appropriate circumstances from setting up a defence of non-compliance with contractual requirements of form for varied work.
>
> Broadly speaking, therefore, it will only be in cases where the Employer in the sense defined above does not know of and has not authorised a variation, or where the person who has authorised it is some official or representative of the Employer whose authority has been expressly denied by the contract, that it will then become necessary, at least in so far as the question of liability to pay an additional price is concerned, for contractors to bring themselves within the terms of a contractual variation clause. So far as valuation under the terms of that clause is concerned, however, if that is desired, both Contractor and Employer will usually have to show compliance with any formal requirements of the contract, except in cases of waiver or estoppel.

40 Such an approach comports with an additional commercial reality that intermediate contractors and sub-contractors in large-scale building projects are engaged in complex and overlapping scopes of work set out in "back-to-back" contracts. In the present case, cl 16 stipulates that variation work claims shall be on a "back-to-back" basis. As noted by the High Court in *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR(R) 918 ("*GIB Automation*") at [35] and [45]–[50], a "back-to-back" provision, while not uncommon in many sub-contracts in the construction industry, is not a term of art and must be construed in the light of the factual matrix known to the parties at the time they contracted and the contract as a whole. More importantly, the

effect of such a provision is to enable an intermediate contractor "who has undertaken certain obligations under a head contract … [to] pass on those obligations to a sub-contractor" and thereby avoid exposure under either contract (*GIB Automation* at [45]). But as the High Court noted in *GIB Automation* at [50]:

> 50 Just what is incorporated will depend in each case upon such things (among others) as what was objectively known to the parties at the time they entered into the contract, what specific references were made to the main contract document, and whether the terms of the main contract relevant to the back-to-back provision were of such a nature that they should have been and were specifically brought home to the sub-contractor or whether they were sufficiently general that they would fall within the general appreciation and knowledge of the parties. By way of example, it may be generally known to a sub-contractor that the main contractor would in due course make an application for payment to the employer in respect of works done by the sub-contractor. *On the other hand, it may not be generally known to the sub-contractor that requests have to be in a very particular format.*
>
> [emphasis added]

41 Clause 16 of the Subcontract provides that any variation works, (*viz*, additions, omissions or modifications), shall be on a back-to-back basis with Deluge's subcontract with Samsung but it goes on to provide that "[s]uch variation" shall be carried out "…only with the written instruction from [Deluge's] Project Manager…". Deluge thus reserves to itself control over sanctioning of variations and Vim has to base its claims on the unit rates in accordance with the Schedule of Rates in the sub-subcontract with Deluge; where the unit rates are not so contained in the Schedule of rates in the sub-subcontract, then the amount shall be such sum as "...in all circumstances be reasonable and agreed between the parties".

42 Deluge's approach that variation claims would be subject to Samsung's approval of such claims as forwarded to Samsung by Deluge is problematic on two levels. First because this is not provided for in the Subcontract and secondly, the main contract between Samsung and Deluge was not in evidence and Vim was not privy to any of Samsung's criteria for the approval of variation work claims. Even if Samsung had approved the variation work claims, nothing would have prevented Deluge from pretextually denying Vim for the same. It is therefore clear that Deluge "would have been obliged to make such applications in good faith and in a timely manner": *GIB Automation* at [54]. More importantly, although Mr Tamil and Mr Sundar repeatedly stated in writing that Vim's claims for variation works would be subject to Samsung's approval, it is not evident that Deluge ever conveyed to Vim whether Samsung had approved the variation work claims that Deluge had purportedly submitted on Vim's behalf. As the appellant points out, it is telling that Deluge does not in these proceedings rely on the "back-to-back" mechanism to argue that its approval of the variation works claims were subject to Samsung's approval and that Samsung had not approved those claims. This is relevant to the question of the clarity of the acknowledgment where Vim's argument of waiver by election is concerned.

43 The requirements for waiver by election are settled. When a party unequivocally chooses not to exercise one of two inconsistent rights, and he is aware of the circumstances giving rise to the existence of that right, he would be deemed as having elected to waive that right. As the Court of Appeal explained in *Audi Construction v Kian Hiap Construction* [2018] 1 SLR 317 at [54]:

> 54 As Lord Goff of Chieveley observed in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The*

> *"Kanchenjunga")* [1990] 1 Lloyd's Rep 391 ("*The Kanchenjunga*") at 397 col 2, "the expression 'waiver' is one which may, in law, bear different meanings" and "[i]n particular, it may refer to a forbearance from exercising a right or to an abandonment of a right". In the true sense of the word, however, waiver means a voluntary or intentional relinquishment of a known right, claim or privilege: Sean Wilken QC and Karim Ghaly, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) ("*Wilken and Ghaly*") at para 3.14. On this definition, the only form of waiver that befits that label is waiver by election. This doctrine concerns a situation where a party has a choice between two inconsistent rights. If he elects not to exercise one of those rights, he will be held to have abandoned that right if he has communicated his election in clear and unequivocal terms to the other party. He must also be aware of the facts which have given rise to the existence of the right he is said to have elected not to exercise. Once the election is made, it is final and binding, and the party is treated as having waived that right by his election: see *The Kanchenjunga* at 397–398, which was approved by this court in *Chai Cher Watt v SDL Technologies Pte Ltd* [2012] 1 SLR 152 at [33].

44 Quite aside from the fact that Deluge's representatives Mr Tamil and Mr Sundar signed 32 of the 34 variation work claims, what was of particular significance was the fact that, Deluge's employees made written comments on 24 of the 32 signed forms stating that the claims would be subject to Samsung's approval. Against the backdrop of the operating "back-to-back" mechanism as noted above, this was a clear acknowledgment that Deluge was not disallowing the claims on the basis of not having given written instruction under cl 16 of the Subcontract to carry out such work. Subsequently, even when the claims passed into the domain of Deluge's administrators, there was no evidence that the administrators rejected the variation work claims on the basis of the requirement of written notice nor did they appear to regard Mr Tamil and Mr Sundar to be in error for receiving and accepting the same invoices and forms. In fact, for variation work claims UIC/DE/007, UIC/DE/008 and UIC/DE/009, the handwritten comments directed Vim to "clarify" or "discuss with [the] contract

department". Thereafter, from form UIC/DE/012 onwards, the comments were ostensibly made with greater confidence as they stated that the claims would be subject to Samsung's approval. If any inference is to be drawn, it would be that on balance, Mr Sundar and Mr Tamil had sought such clarification and understood that such invoices/forms would be subject to Samsung's approval. Deluge's administrators must be taken to have known of the notice requirement in cl 16 and their silence amidst the passage of time indicates to us that there had been a voluntary relinquishment of this right.

45 In our judgment, it was irreconcilable for Deluge's representatives to sign the variation work claims *and include* written *comments that these would be subject to Samsung's approval*, and then for them to subsequently insist that the work ought to have been carried out only under written instructions from Deluge pursuant to cl 16 of the Subcontract. This is not to say that these acknowledgments, on their own, amounted to an acknowledgment that Vim would be paid for these works (given that this was subject to Samsung's approval). But we are amply satisfied that Deluge, by the totality of circumstances, had – in at least 24 of Vim's variation works claims – by election waived the requirement of written notice and could not now demand its strict adherence. As for Samsung's approval, Deluge did not at trial contend that Samsung had denied Vim's variation work claims. It is not open to Deluge to mount this argument now.

Authority of Mr Sundar and Mr Tamil

46 In the present appeal, Vim argues that Deluge had not pleaded a want of authority on the part of either Mr Sundar or Mr Tamil, and that accordingly, the Judge's finding that Mr Sundar and Mr Tamil did not have any authority to waive the written instruction requirement (at [36] of the GD), was

unsustainable.[53] In reply, Deluge does not deny that the issue of whether Mr Sundar or Mr Tamil had the authority to waive the written instruction requirement was not pleaded, only that this was an issue which had been raised at trial. In any case, the contention that neither Mr Sundar nor Mr Tamil had the authority of waiver was in line with the position Deluge had taken, that Vim had proceeded to carry out variation works without written instruction.[54]

47 As stated by the Court of Appeal in *V Nithia (co-administratrix of the estate of Ponnusamy Sivapakiam, deceased) v Buthmanaban s/o Vaithilingam and another* [2015] 5 SLR 1422 ("*V Nithia*"), "the general rule is that parties are bound by their pleadings and the court is precluded from deciding on a matter that the parties themselves had decided not to put into issue" (see also *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [37]). Although this general rule may be departed from in the limited circumstance where no prejudice would be caused to the other party or where it would be clearly unjust not to do so (*V Nithia* at [40]), this is clearly not the case in the present. The Judge's reasons appear to be the salutary objectives of a provision like cl 16 and appears to have been reasoned on the basis that a contract administrator has no usual authority to vary a contract beyond his authority as stipulated for in the contract itself, (see [37] and [38] of the GD), for which no authorities were cited. With respect, we cannot agree.

48 We can do no better than to refer to the standard texts. *Keating* opines at para 4-061:

> An architect or other agent of the employer in the position of the architect has no implied power to vary the terms of the

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53 AC at para 33.

54 RC at para 33.

> contract, or to vary the contract works such as by ordering extras, or to order as extras works impliedly included in the work for which the contract sum is payable. If therefore the contractor has carried out extra work under the authority of the architect it must show: (a) that the architect had an authority to order extra work, and (b) that the particular work for which it is claiming was properly ordered within the scope of that authority. If there is a written contract the question is one of construction, otherwise it is a question of fact.

This principle also extends to a relationship between an intermediate subcontractor and its own sub-subcontractor. In relation to written notices as conditions precedent, *Hudson's* states at para 5-044:

> It has already been submitted that no such provision, however explicitly worded, will bar a claim if the Employer personally, or, in the case of a public or private corporation, its board or highest level of management with power to contract, expressly or impliedly authorises the work. *But it may well effectively do so if the person whose authority is relied on is an officer or representative at a lower level*, or an Architect who otherwise might have had the ostensible authority to contract. Some of the earlier cases did, however, take a different view as to the effect of Employer knowledge. *Later cases, however, clearly regard Employer authorisation, express or implied, as avoiding the effect of condition precedent wording of the usual kind.*
>
> [emphasis added]

49 Deluge alleges that Vim only raised the issue of whether specific employees, such as Mr Sundar and Mr Tamil, had the authority to waive the requirement of written instruction at trial and submits that it could not specifically submit on an issue not canvassed by Vim on its own pleadings.[55] This is incorrect. In Vim's Statement of Claim at paragraph 3, it pleaded, *inter alia*, that it submitted 51 invoices for variation works and Deluge's site engineers, Mr Tamil and Mr Manivannan as well as Deluge's Project Manager, Mr Sundar, between them at various time acknowledged and accepted the hard

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[55] RC at para 33(a).

copy of the Progress Claims for variation works; the email copies of the said invoices "…were subsequently also signed, accepted and approved by Mr Sundar … on behalf of Deluge as shown below. The total quantum of Variation Works is substantial at about $697,130.58."[56] Vim repeated the essential allegation of acceptance of those works in para 11, and states at para 14: "…Deluge are now estopped from denying the validity and quantum of the claim herein, since the same was never refuted by Deluge at any time with any cogent or supporting evidence." With these allegations raised in the Statement of Claim, if Deluge wanted to take the point that Mr Sundar and Mr Tamil did not have the authority to waive compliance with the written instructions requirement in cl 16, then, it was incumbent on them to plead the same. Deluge did not do so. It is clear that Deluge chose to defend Vim's claims for variations only on the ground that the variations were not approved in writing as required by cl 16.

50 It is not in dispute that Mr Sundar was Deluge's Project Manager and Mr Tamil was its site engineer. Significantly therefore, Mr Sundar was the Project Manager with the authority to issue written instructions under cl 16. As he had signed on the hard copies of Vim's variation claims and later wrote comments as those set out in [53] below, Deluge is in no position to now contend that Vim's claims were invalid because they were not pursuant to written instructions under his hand. Mr Sundar was the one person who should have, but did not, reject Vim's variation claims at the material time as not being carried out pursuant to his written instructions. Neither did he protest or reserve Deluge's position in accepting them.

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[56] See ASCB at pp 7 – 11.

51 Moreover, Mr Sundar and Mr Tamil signed on Vim's printed forms which had the words "VARIATION WORK" on a bold strip across the top of the form, just under Vim's name, address, contact details, UEN number, and its logo and on some of the accompanying sheets of photographs or drawings, there were the printed words "ABORTIVE WORK" or sometimes in manuscript "ADDITIONAL" Work. There was no mistaking what they were signing. Mr Sundar's actions were cogent evidence of waiver of the requirement in cl 16. Mr Sundar testified that Mr Tamil's signatures on the variation work forms were as good as his signature.[57] Mr Tamil was a site engineer and it was evident from his own explanation regarding his role that Vim's employees had to abide by his instructions.[58] Further Mr Tamil also said under cross-examination that he would sign on behalf of Mr Sundar when he was not around.[59]

52 As for context, and as referenced in [2] above, Deluge was under pressure for being behind schedule and it engaged Vim, a sanitary and plumbing contractor (and who Deluge had previously used for part of its work, viz, the specific installation and testing of pipes from the 20th storey upwards) to help carry out *only a specified part* of their work. Mr Pradhan is correct to characterise this as a subset of Deluge's work. This is evident from the detailed work items set out in the Quotation. They were quite specific. Given this context of the kind of work Deluge and Vim were to carry out, Mr Sundar's and Mr Tamil's authority at the site here, as Project Manager and Site Engineer, was certainly a far cry from, for example, an unsigned sketch made by an architect's

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57 See the transcript of trial on 2 July 2020,at lines 1 to 23 of page 10, at ACB Vol II Part A 65, RA Vol III Part GG 15.

58 See the transcript of trial on 8 July 2020, at page 67, ACB Vol II Part A at p 78, RA Vol III Part II at p 72.

59 See ROP Vol III Part GG at p 269.

assistant which was argued unsuccessfully to be a "direction" by the architect's hand in writing, (see *Myers v Sarl* [1860] 3 E. & E. 306).

53 An examination of the evidence shows that in 32 of the 34 variation claims, (UIC/DE/001 to UIC/DE/036), submitted over a period of time, Mr Sundar or Mr Tamil had signed the same (UIC/DE/027 and UIC/DE/036 were not signed), and on 24 of these 32 variation claims, Mr Sundar or Mr Tamil had a handwritten comment to the effect that the variation claims would be submitted to Samsung and either "wait for [Samsung] respond" or "upon approval respond to Vim." In our judgment, this was a clear waiver of the written instruction requirement in cl 16. For the purposes of this appeal, we therefore find that Mr Sundar and Mr Tamil had waived the requirement of written instructions for variation claims, which waiver was binding on Deluge; Deluge was, for the reasons set out above, not entitled to raise a lack of authority of Mr Sundar or Mr Tamil to waive this requirement as it had not pleaded the same.

Scope and quantum of Vim's variation works claim

54 In the decision below, the Judge found it unnecessary to find which of Vim's variation claims concerned true "variations" outside the original scope of works, since the reason for the written notice requirement under cl 16 was to obviate this sort of dispute and Vim's witnesses Mr Arun and Mr Anand were not well placed to testify as to oral instructions given for such works to be carried out (at [51]–[52] of the GD). As to quantum, the Judge found that Vim failed to give credit for a stipulated 10% discount and had, outside the bounds of the agreement, imposed a 15% admin charge (at [60] of the GD) and that the reference to rates listed in an email by Ms Ngu dated 31 May 2017 was not an agreed schedule of rates and were purely for reference only (at [61] of the GD).

55 In this appeal, Vim takes issue with both the Judge's findings on the scope and quantum:

(a) On the issue of scope, Vim refers to the Quotation, which it says is the authoritative guidance on the original scope of works.

(b) On the issue of quantum, Vim accepts the Judge's observations as regards the 10% discount and the 15% admin charge, but nevertheless submits that the "Star Rate" applied by Vim to its variation work claims was the rate that had been provided by Deluge in a sample form which Deluge's contracts department had forwarded to Vim to permit Vim a second opportunity to "substantiate" its manpower claims.

56 The scope of the 24 variation works claims (see [53] above), as well as the quantum of each claim as asserted by the appellant and the respondent, are set out in the table below:[60]

Variation work invoice no.	**Description**	**Vim's claim (granting the 10% discount and discounting the 15% admin charge)**	**Deluge's submission on quantum as set out in Annex A of Deluge's Closing Submissions**
UIC/DE/005	Sanitary and water pipe rectification Tower ("Twr") RA-9 to 20 Unit BS3, A1, C1, B2, S3, AS2, AS3 as Deluge had improperly installed the pipes/pipes were damaged	54,528.00	8,871.30

[60] Enclosure dated 10 September 2021.

	by third parties and Vim had to rectify it for Deluge		
UIC/DE/006	Sanitary and water pipe rectification Twr A-L9 to 20 Unit BS1, S1, AS1, S2, BS2, B1 cold water pipe improperly installed by Deluge	45,720.00	6,822.90
UIC/DE/012	Housekeeping Twr RA-L25 to 33 clean up debris from other contractors	37,242.00	-
UIC/DE/013	Housekeeping Twr RAB NEA stop work order for other contractors	6,900.00	-
UIC/DE/014	Sanitary pipe rectification Twr RB-L52 pipe damaged by [Samsung]	492.00	62.70
UIC/DE/015	Chokage clearing with power vacuum Twr RAB-L9 to 15 damaged by [Samsung]	22,176.00	12,416.00
UIC/DE/016	Installation of additional inlet and outlet pipes Twr RAB-9 to 33 and 36 to 51 added in new drawing	44,832.00	7,862.40
UIC/DE/017	Chokage clearing with power vacuum Twr RAB-L16 to 51 third parties removed floor trap and threw debris	135,492.00	38,228.00
UIC/DE/018	Washing machine and kitchen sink pipe reinstallation Twr RAB-L9 to 33 due to changed setting point and damage by [Samsung]	34,008.00	13,677.12
UIC/DE/019	Sanitary pipe rectification Twr RA-L50 Unit C4 damaged by third parties	384.00	25.50
UIC/DE/020	Sanitary pipe rectification Twr RA-L22 Unit 20	552.00	144.00

	damaged by third parties		
UIC/DE/021	Unchoke washbasin pipe choked by debris Twr RAL40 Unit B3 [Samsung] archi team threw debris into wash basin pipe	336.00	144.00
UIC/DE/022	Water pipe rectification damaged by [Samsung] Twr RBL17 Unit S2 damaged by [Samsung] archi team	552.00	18.90
UIC/DE/023	Washing machine outlet pipe relocation Twr RB-L52 Unit PH1&2 instructed by [Samsung]	552.00	18.36
UIC/DE/024	Water pipe rectification work Twr RAL36,37,39,41,42,43,50 damaged by [Samsung] archi team	2,880.00	600.60
UIC/DE/025	Wash basin outlet choke clearing Twr RA-L14 Unit 18 damaged by [Samsung] archi team	276.00	144.00
UIC/DE/026	Sanitary pipe choke clearing Twr RA-L19 Unit 19 damaged by others	114.00	144.00
UIC/DE/028	Floor trap choke clearing Twr RA-L44 Unit S4 damaged by [Samsung] archi team	114.00	144.00
UIC/DE/029	Sanitary pipe choke clearing Twr RB-L43 Unit S5 damaged by [Samsung] archi team	114.00	144.00
UIC/DE/031	Sanitary pipe choke clearing Twr RA-L43 Unit S5 damaged by [Samsung] archi team	168.00	144.00

UIC/DE/032	Sanitary pipe choke clearing Twr RB-L43 Unit S4 damaged by [Samsung] archi team	168.00	144.00
UIC/DE/033	Sanitary pipe choke clearing Twr RB-L43 Unit C3 damaged by [Samsung] archi team	276.00	144.00
UIC/DE/034	Sanitary pipe choke clearing Twr RB-L43 Unit C2 damaged by [Samsung] archi team	276.00	144.00
UIC/DE/035	Sanitary pipe choke clearing for washing machine Twr RB-L43 Unit C2 damaged by [Samsung] archi team	276.00	144.00
Total		388,428	90,187.78

Scope

57 We begin by noting an important and relevant context when examining the scope of Vim's work under the Subcontract. Samsung had entered into a subcontract with Deluge in July 2015[61] for the design, supply and installation, engineering, project management and testing and commissioning of plumbing, sanitary and gas works, for the entirety of the redevelopment project, *ie*, both the office building and residential tower. As referenced above, because of Samsung's complaint on 23 February 2016, that Deluge had a "severe schedule delay" in carrying out its work, Deluge engaged Vim, sometime in March or April 2016 to help it carry out *some* of its work, *ie*, a limited scope of its work; this was the installation and testing of sanitary pipes of the residential tower from the 20th floor upwards. To address the delays, Deluge entered into

[61] AC at paras 9 and 10

negotiations with Vim for a sub-subcontract. This resulted in Purchase Order (No. P020017880) of 8 April 2016 (the "PO 17880"), a Tender Clarifications dated 25 July 2016, Vim's Quotation (VIM/QU/1408/Rev 3) dated 30 July 2016, and the Subcontract dated 3 August 2016. There is no explanation whether the PO 17880, which clearly specified works on a per unit basis, at a cost of $2,550, (and with a much earlier date compared to the other Subcontract documents), belonged to the earlier limited scope of work carried out by Vim or the Subcontract in question because the cost and scope of work in PO 17880 differs somewhat from those set out in the Quotation. We also note that Vim's first quotation is dated 11 March 2016,[62] however that was not the final quotation that became part of the contract. Nonetheless, Vim's scope of works was clearly only part of Deluge's scope of work *vis-à-vis* Samsung. It cannot be disputed, for example, that Vim did not undertake any design work, or any work in relation to the gas work in Deluge's subcontract with Samsung. This is a very relevant when one considers the validity or otherwise of the Variation Works, the Rectification Works and the back charges.

58 The scope of main works is set out in the Subcontract, the Tender Clarifications and the Quotation. As referenced above, clause 1 of the Subcontract provides that, if there was a discrepancy in the terms and conditions of the documentation, the Subcontract would take precedence, followed by the Purchase Order, the Tender Clarifications and the Quotation. Clause 4 of the Subcontract specifies that the main works include the work tabulated in the Quotation:

4 SCOPE OF WORKS

62 RC at para 9(a)(iv).

> Sub-Subcontractor's scope of work shall include, but not be limited to:
>
> 4.1 Provide construction management, site supervision and safety supervision
>
> *4.2 Scope of works as tabulated in the quotation*
>
> 4.3 Provide air testing and pressure testing
>
> 4.4 Assist in testing and commissioning
>
> **5 SUPPLEMENTARY WORKS**
>
> Sub-Subcontractor shall also provide the following supplementary works as part of this Contract:
>
> 5.1 Marking of pipe sleeves
>
> 5.2 Installation of pipe sleeves
>
> 5.3 Loading and unloading of all materials and equipment at site
>
> 5.4 Site co-ordination
>
> 5.5 Housekeeping and clearing of waste and debris daily
>
> 5.6 Insurance and workmen compensation for all site personnel
>
> 5.7 Attendance to daily meetings
>
> 5.8 Attendance to safety meetings / tool box meetings
>
> 5.9 Attendance to all tests and inspections
>
> 5.10 To provide markings on the drawings for works installed.
>
> [emphasis added]

59 The Quotation tabulates with particularity how the $1.75m fee would be split among 20 enumerated heads of the main Subcontract works. This tabulation could, on one view, be seen as a strong limiting factor as to what constitutes "main Subcontract works", given that the table in the Quotation particularises how the agreed fee of $1.75m would be divided among all the works that Vim promised to undertake. We note that Deluge strenuously disputes this. Deluge contends that the broad language of cll 4 and 5 of the

Subcontract provide that the Main Subcontract Works include but are not limited to the works enumerated in the Quotation. The Quotation also provides as follows:

> **Contract terms:-**
>
> 1) Defect liability 12 months from TOP.
>
> *2) If any additions/alterations to the works specified in this quotation, consider as variation.*
>
> 3) Scaffolding, lifting equipments & working platform by client (above 4m only).
>
> 4) Authority submission, Machineries & Materials by client.
>
> 5) We are not liable, which occurred progress related late charges prior VIM take over.
>
> 6) Any contract termination required 30 days[’] notice period with valid reason & all outstanding payment need to be clear with in notice period.
>
> [emphasis added]

60 The Tender Clarifications provide at item 17 that “[a]ny additional or omission work not stated in the contract is consider[ed] as Variation Order subject for evaluation and claim”. We reject Deluge’s case that cll 4 and 5 of the Subcontract means that the Main Subcontract Works are not limited to the works enumerated in the Quotation. This extravagant construction of Vim’s scope of works goes against the plain meaning of the general words used in cll 4 and 5 and defies the context of the Subcontract. For example, cl 4.1 cannot mean that Vim is to provide construction management, site supervision and safety supervision for the entirety of Deluge’s work given the differences in the scope of works between the two subcontracts pointed out above. Neither does cl 4.4, which provides for “Assist in testing and commissioning” mean that Vim has to assist in the testing and commissioning of Deluge’s work that is not within Vim’s scope of works, for example, testing and commissioning of gas

works. These provisions can be read harmoniously, the obligations under cll 4 and 5 only relate to associated or related work in relation to Vim's scope of work. Deluge cannot construe these clauses in such a way as to create a conflict when there is no discrepancy in the terms and conditions to start with. Indeed, this is quite clear from cl 4.2 which states that the "Scope of works as tabulated in the quotation" and the use of the word "supplementary" in cl 5. The nature of the items under cl 5 was agreed supplementary works, *viz*, associated or auxiliary work connected to the main Subcontract work, for example, the installation and marking of pipe sleeves, loading and unloading of all Vim's materials and equipment on site and its site co-ordination work. These are often spelt out in specifications in the more comprehensive construction contracts, which are not found in this Subcontract, hence the need to specifically set them out in cll 4 and 5. This includes making clear that Vim was to have its own insurance and workmen's compensation for all their site personnel at cl 5.6. Vim was also not entitled to charge, for example, for its time in attending site meetings or safety meetings as these were supplementary to its scope of Subcontract works. However, its supplementary daily housekeeping and clearing of debris, (which necessarily includes disposal), can only relate to Vim's work and not the entirety of Deluge's work.

61 The Quotation, as referenced above, sets out with great particularity the works Vim had agreed with Deluge to carry out. For example, in serial number 1 of the Quotation, it states that for levels 9 to 20, "Supply manpower and Hand tools for Installation, Commissioning and Testing only. Unit Type: 1 Toilet + 1 Kitchen." The three sub-items are "Copper pipe corridor & DMC", "Floor trap insulation" and "Sanitary wares Installation only"; for which the quantity ("Qty") was 84, the rate was $990.00 and the amount was $83,160.00. The descriptions of Vim's variation claims (see Table at [56] above) have not been

shown to fall within that scope. The descriptions in many documents were for the making good of damage caused by others ("… damaged by [Samsung] archi team...") or carrying our changes like "… Washing Machine outlet pipe relocation Twr RB-L52 Unit PH1&2 instructed by [Samsung]" (UIC/DE023), which would be beyond the scope of the main Subcontract Works.

62 In our judgment, Deluge's own conduct suggests that it did not consider this work to be part of the main works. We reiterate the point made earlier at [44] and [53] above that Mr Sundar and Mr Tamil had both signed the forms and further made written comments that such claims would be subject to Samsung's approval. This is a compelling indication that Deluge did not regard these works to be part of the main works. If they had in fact regarded such works to be part of the main works, then one would have expected Mr Tamil, Mr Sundar or the contracts administration team to reject the claims summarily on this basis.

63 Additionally, on the face of the documentation, it is not evident to us that the description of the works at [56] above can be shoehorned into any of the heads of main works set out in cll 4 and 5 of the Subcontract or the Quotation. The exception perhaps, on the face of the document, might be UIC/DE/012[63] – "housekeeping work" for Residential Tower-A "upper stack Level 25 to 33",[64] clean up debris from other contractors." However, Mr Tamil signed this Variation Claim and also a page containing four photographs of the work being carried out, both under the printed words: "INSTRUCTED AND ACKNOWLEDGED BY". There were also the following handwritten

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63 ACB Vol II Part B at pp 32-34.

64 ACB Vol II Part B at p 32.

comments on UIC/DE/012: "based on your submission we will submit to [Samsung] upon [Samsung] confirmation will move forward if cost confirmation by contract department." We note UIC/DE/012 states this was for clearing debris from other contractors, it was submitted as a variation claim by Vim, Mr Tamil signed on the document, did not reject the claim as not being in writing or that it was already a part of Vim's contracted work, and wrote his comments to seek approval from Samsung. We note that Deluge has not put forth any sufficient elaboration for its case. Given that Deluge does not contest that such works had in fact been completed by Vim, the evidential burden here moves to Deluge to show how the works completed come within the scope of main works under the Subcontract.

Quantum

64 As noted at [54] above, the Judge at [61] of the GD cast doubt as to whether the rates referred to in an email from Deluge's Ms Ngu (Deluge's quantity surveyor) were an agreed schedule of rates and held that these rates were simply for Vim's reference only.[65]

65 With respect, we disagree and we accept Mr Pradhan's point that this email required greater context and elucidation. Prior to this email, Vim had submitted two sets of invoices and forms – UIC/DE/001 to UIC/DE006 and UIC/DE007 to UIC/DE/011.[66] As Mr Arun testified in cross-examination, the rates in these forms were originally pegged to a daily rate[67] of $350 for

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65 PCS at para 18.

66 ACB Vol II Part A at p 137; ACB Vol II Part A at pp 139–143.

67 ABD at p 2268.

supervising manpower and $250 for general labour.[68] On 31 May 2017, Deluge's contract department sent Vim an email enclosing Deluge's sample invoice for, as the Judge noted, Vim's reference. The email requested for Vim to "please substantiate 350 for manpower and 250 for supervision".[69] As Mr Arun explained in cross-examination, Vim relied on Deluge's sample form for Vim's subsequent submission and re-submission of its variation work claims. In particular, Vim relied on the specific "star rates" mentioned in Deluge's sample invoice which, according to Mr Arun, was $20/hr for supervising manpower and $18/hr for general manpower.[70]

66 Before us, Mr Pradhan acknowledged that Vim did not have evidence to show that the star rates in the variation work claims were rates that had actually and already been paid or were not in dispute. Nevertheless, in our view, Deluge did not and has not put forward an explanation as to what those "star rates" were or ought to be, despite the fact that this was an expression utilised in its own sample form. At any rate, we emphasise that Mr Tamil and Mr Sundar acknowledged the forms in such a way as to indicate to a reasonable observer that the claims were forwarded to Samsung for approval. This again suggests to us that Deluge did not, in principle, object to the "star rates". Nor could they object, since these rates originated from the documentation which they had sent to Vim to follow. Indeed, if Deluge had further complaints as to the rates set out in the variation work claims, it had every opportunity to raise them but did not do so. We now proceed to consider each of the variation work orders:

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68 ACB Vol II Part A at pp 60–61.

69 ACB Vol II Part A at pp 144–149.

70 ACB Vol II Part A at pp 57–58.

(a) UIC/DE/005: $54,528.00. This work on sanitary and water pipes at Tower A Level 9 to 20 was clearly intended to rectify damage caused by Samsung's other contractors, namely the architecture team. Mr Tamil wrote "please take note that we had submitted to [Samsung] waiting for [a] reply".

(b) UIC/DE 006: $45,720.00. This work on sanitary and water pipes at Tower B Level 9 to 20 was a result of Deluge's incorrect installation, and Mr Tamil wrote that "those attached photos only able to accept" and Vim provided photos for works on Levels 9, 14–20. Accordingly, Deluge must have accepted these works to these levels at the very least.

(c) UIC/DE/012: $37,242.00. This was housekeeping work – "clean up debris from other contractors" done at Samsung's request and Deluge's instruction at Tower A from Levels 25 to 33. Mr Tamil wrote on the form that "based on your submission we will submit to [Samsung] upon [Samsung's] confirmation will move forward if cost confirmation by contract department".

(d) UIC/DE/013: $6,900.00. This housekeeping work – "Housekeeping Twr RAB NEA stop work order for other contractor" - was completed at Samsung's request and Deluge's instruction. Mr Tamil wrote "we will submit to [Samsung] accordingly based on the [Samsung] respond [*sic*] will move forward".

(e) UIC/DE/014: $492.00. This work was for the rectification or reparation of sanitary pipes on Tower B Level 52. The damage was caused by Samsung's "Archi Team (Kobe)". Photos indicated that pipe damage was occasioned by another contractor dealing with the wall.

(f) UIC/DE/015: $22,176.00. Vim was tasked to clear choke on floor traps on Tower A and B Levels 9–15. This extra work required the use of a vacuum machine, as Samsung's "Archi team" had removed the protection on the pipes and had thrown construction debris into the floor trap.[71] Mr Tamil wrote that "we had submit to [Samsung] wait for [Samsung] respond [*sic*] accordingly".

(g) UIC/DE/016: $44,832.00. Vim was required to install additional inlet and outlet pipes for a dishwasher in Tower A. This was done after a new drawing was issued only after the work had been completed according to the original specification. Mr Tamil acknowledged that "we had submit to [Samsung] wait for the respond [*sic*] once receive we respond".

(h) UIC/DE/017: $135,492.00. Vim was required to clean the floor trap choke for Towers A and B Levels 16–51. This was done because Samsung's team ("[Samsung] archi team") removed the floor trap protection. Mr Tamil acknowledged that "we had submit to [Samsung] wait for the [Samsung] respond [*sic*]".

(i) UIC/DE/018: $34,008.00. This required the reinstallation of a washing machine and kitchen sink pipe that had been damaged by other contractors on Towers A and B Levels 9–33. A new drawing had been issued only after the work was completed according to the original specification. Mr Tamil acknowledged "we will submit to [Samsung] accordingly wait for the respond [*sic*]".

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71 ACB Vol II Part B at p 42.

(j) UIC/DE/019: $384.00. A sanitary pipe needed to be rectified because it was "damaged by others". Photographs were provided showing a hole occasioned to the pipe. Mr Tamil acknowledged that "we will submit accordingly based on the [Samsung] respond [*sic*] we will move forward".

(k) UIC/DE/020: $552.00. A sanitary pipe needed to be rectified because it was "damaged by others". Photographs were provided and the pipe appeared to have been punctured by a wooden plank. Mr Tamil acknowledged with "will submit accordingly wait for the [Samsung] respond [*sic*]".

(l) UIC/DE/021: $336.00. Vim was required to unchoke a Tower A Level 40 washbasin pipe. "[Samsung] archi team" had put cement into the wash basin pipe. Photographs were provided.

(m) UIC/DE/022: $552.00. Vim was tasked to rectify a water pipe choke caused by the "[Samsung] archi team". Photographs were provided.

(n) UIC/DE/023: $552.00. Vim was required to change the washing machine outlet pipe, and was the result of Deluge requesting a change of location for this outlet pipe. Mr Tamil acknowledged that "we will submit accordingly based on the [Samsung] Respond [*sic*]".

(o) UIC/DE/024: $2,880.00. This was additional work for Tower A Levels 36, 37, 39, 41, 42, 43 and 50. The pipe that Vim installed had been damaged by Samsung's "archi team". Mr Tamil acknowledged that "we will submit to [Samsung] accordingly wait for [Samsung] respond [*sic*]".

(p) UIC/DE/025: $276.00. Vim was required to rectify a wash basin pipe choke for Tower A Level 14. The damage was caused by "[Samsung] archi".

(q) UIC/DE/026: $114.00. Vim was tasked to deal with chokes and defects, and this was caused by Samsung or its contractors.

(r) UIC/DE/028: $114.00. Vim was required to clear chokes. These were caused by Samsung or its contractors.

(s) UIC/DE/029: $114.00. Vim was required to clear chokes. These were caused by Samsung or its contractors.

(t) UIC/DE/031: $168.00. Vim was required to clear chokes. These were caused by Samsung or its contractors. Photographs were provided.

(u) UIC/DE/032: $168.00. Vim was required to clear chokes. These were caused by Samsung or its contractors. Photographs were provided.

(v) UIC/DE/033: $276.00. Vim was required to clear chokes. These were caused by Samsung or its contractors. Photographs were provided.

(w) UIC/DE/034: $276.00. Vim was required to clear chokes. These were caused by Samsung or its contractors. Photographs were provided.

(x) UIC/DE/035: $276.00. Vim was tasked to perform "sanitary pipe choke clear" for Tower B Level 43 (Washing Machine).[72]

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72 ACB Vol II Part B at p 88.

67 In our judgment, having considered the evidence in support of Vim's claims, all of which had been acknowledged by Deluge as being forwarded to Samsung and which employed "star rates", we are satisfied that Vim had substantiated the quantum sought for in respect of the variation work invoices and forms. We therefore allow the appeal on this issue. The Judge's decision on Vim's variation claims is set aside and we allow Vim's claim for variation works in the sum of **$388,428**.

Issue 2: Whether the Judge was correct in awarding Deluge $105,037.74 for its rectification works counterclaim

68 Vim takes specific issue with the Judge's decision at [65] of the GD to allow the computation of $105,300 in respect of rectification of works done by Deluge during the balance of the DLP when Vim was absent from the worksite. The Judge derived this figure from the AEIC of Mr Cheo Hwee Kwang ("Mr Cheo"), the Managing Director of Deluge, where he stated:[73]

> 120. In attending to the Defects Rectification Works, [Deluge] had to supply one supervisor and two workers for a period of 9 months at the rates of S$4,500.00 per supervisor per month and S$3,600.00 per worker per month. This meant that [Deluge] incurred a total of S$105,300 in manpower costs in attending to the Defects Rectification Works.

69 Leaving aside the question as to whether Vim left the worksite of its own volition, which in all likelihood it did, we note that this claim is allegedly for rectification of Vim's defective work. It is clear that Mr Cheo's evidence, as it stood, was a bare allegation without any of the necessary particulars like what part of Vim's work was defective, why or how was it defective, how it was rectified or repaired, by whom it was rectified and why Deluge required a full-

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[73] ACB Vol II Part B at p 256.

time supervisor and worker on site for 9 months. This is insufficient on its own to discharge Deluge's burden of proof. Deluge did not furnish any *legible* documentary evidence of the man-hours it spent attending to specific defects occasioned by Vim's work, in stark contrast to Vim's approach in documenting invoices and forms with respect to the variation work claims. We note Mr Cheo was the managing director of Deluge. The persons who should be able to provide and attest to such necessary evidence in support of this claim were most probably Mr Sundar and/or Mr Tamil. Under cross-examination, Mr Sundar was unable to point to any evidence of defective works.[74] Mr Tamil's AEIC had some evidence of defects,[75] however they were not particularised. Mr Tamil agreed in cross-examination that there was no evidence of the actual defects.[76]

70 Insofar as it is implied in Mr Cheo's evidence set out in his AEIC at para 120, that since Vim walked off the site, Deluge had to pay a supervisor and a worker for 9 months during the DLP to carry out Defects Rectification Works, we not only reject this as evidence supporting such a claim, we also reject this for the following reasons. First, we note that the TOP was obtained on 20 October 2017, DLP commenced on that date, and Vim left the site on 5 February 2018. Secondly, we agree with Vim that it is not common industry practice, especially for a sub-subcontractor like Vim, to maintain a presence by way of a supervisor and worker on site during the DLP to deal with complaints and rectification works. Thirdly, such sub-subcontractors are obliged to return to the site when called by their upstream subcontractor to attend to a complaint of a defect. It is therefore highly questionable, in addition to the foregoing reasons,

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74 ROA Vol III Part HH at p 164; Transcript 8 July 2020 at p 93 ln 3.

75 ROA Vol III Part J at p126 onwards.

76 ROA Vol III Part HH at pp 173 – 174.

whether Deluge had incurred the cost of a supervisor and a worker continuously for 9 months to attend to defects during the DLP due to its own obligations to Samsung upstream or whether it was genuinely in relation to defects caused by Vim or within Vim's Subcontract works.

71 We also note it was common ground that a *small* amount of Subcontract works had not been completed by Vim, contractually valued at $7,462.26, Deluge completed this at a slightly lower cost of $7,200 and gave credit for the $262.26 difference to Vim. This claim was therefore allowed by the Judge (see [63] and [64] of the GD). However, with respect, for the foregoing reasons, we cannot agree with the Judge's finding that based on Mr Cheo's evidence in his AEIC set out above, he was able to come to the following findings:

> 65 Deluge also claimed $105,300 for rectification of defects during the balance of the DLP after Vim left the site. Deluge assigned one supervisor and two workers for that purpose, which I accept as reasonable.
>
> 66 Accordingly for completing Vim's works, I found that Deluge had a good counterclaim and set-off in the sum of $105,037.74, *ie*, 7,200 - $7,462.26 + $105,300.

72 We hold that Deluge has not made out its claim of $105,037.74 for alleged rectification works during DLP. We allow the appeal on this issue and the Judge's award for this sum is set aside.

Issue 3: Whether the Judge was correct in awarding Deluge $858,604.36 for back-charges

73 We first set out the list of back-charges claimed from Vim by Deluge. We note separately, the amounts claimed by Deluge and the amounts awarded by the Judge after discounting the 15% administrative fee that had also been claimed by Deluge.

Back-charges invoice number	Date	Description	Amount claimed (S$)[77]	Amount awarded below (S$)[78]
BC/S13030/ UIC/VIM-001 ("BC1")	10 February 2017[79]	"Supply manpower for RESIDENTIAL TOWER A&B LOWER STACK L9 to L25 kitchen water pipe and waste pipe extension"	9,522	8,280
BC/S13030/ UIC/VIM-002 ("BC2")	10 February 2017[80]	"Supply manpower for L35 HIGH LEVEL sanitary pipe installation"	45,540	39,600
BC/S13030/ UIC/VIM-003 ("BC3")	10 February 2017[81]	"Supply manpower for RESIDENTIAL TOWER A&B L9 to L32 balcony RWDP rectification"	3,703	3,220
BC/S13030/ UIC/VIM-004 ("BC4")	10 February 2017[82]	Health and Safety infractions	1,100	1,100
BC/S13030/ UIC/VIM-005 ("BC5")	6 March 2017[83]	Safety non-compliance issues	2,300	2,000

77 See also a summary at ABD at p 2846, pp 4543–4544.

78 See GD at [105].

79 ABD at p 843; ACB Vol II Part B at p 155.

80 ABD at p 848.

81 ABD at p 854.

82 ABD at p 861.

83 ABD at p 1043.

Back-charges invoice number	Date	Description	Amount claimed (S$)[77]	Amount awarded below (S$)[78]
BC/S13030/ UIC/VIM-008 ("BC8")	7 April 2017[84]	"Supply of materials", "waste disposal" and "penalty charges" for "safety non-compliance issue"	2,905.48	2526.50
BC/S13030/ UIC/VIM-009 ("BC9")	7 April 2017[85]	"Penalty charges" for "safety non-compliance issues"	345	300
BC/S13030/ UIC/VIM-010 ("BC10")	7 April 2017[86]	"Waste disposal" and "Penalty charges" for "safety non-compliance issues"	1,288	1,120
BC/S13030/ UIC/VIM-011 ("BC11")	7 April 2017[87]	"Penalty charges" for "safety non-compliance issues"	1,840	1,600
BC/S13030/ UIC/VIM-012 ("BC12")	6 April 2017[88]	"Work done by third party: material purchase for installation of balcony rainwater PVC pipes and fittings", "supply of direct workers" and "RTO OT fee"	17,757.98	15,441.72

84 ABD at p 2230.

85 ABD at p 2231.

86 ABD at p 2232.

87 ABD at p 2233.

88 ABD at p 2511.

Back-charges invoice number	Date	Description	Amount claimed (S$)[77]	Amount awarded below (S$)[78]
BC/S13030/ UIC/VIM-013 ("BC13")	7 June 2017[89]	"Supply manpower" for "rainwater pipe installation", "vent pipe installation" and "cold water riser pipe installation" at "RESIDENTIAL TOWER (L34 MEP Level)"	17,210.90	14,966
BC/S13030/ UIC/VIM-014 ("BC14")	24 May 2017[90]	"Waste disposal" and "penalty charges" for "safety non-compliance issues"	4,749.50	4,130
BC/S13030/ UIC/VIM-015 ("BC15")	30 June 2017[91]	"Supply of materials", "waste disposal" and "penalty charges" for "safety non-compliance issues"	8,461.07	7,357.45
BC/S13030/ UIC/VIM-016A ("BC16A")	13 June 2017[92]	"Supply manpower for plumbing works" and "manpower supply for water riser copper pipe rectification work"	1,779.05	1,547
BC/S13030/ UIC/VIM-016 ("BC16")	18 September 2017[93]	Supply manpower for Residential Tower A&B L25 to L51 (along with attachment)	15,483.60	13,464

89 ABD at p 2405.

90 ABD at p 2217.

91 ABD at p 2634.

92 ABD at p 2799.

93 ACB Vol II Part B at p 189.

Back-charges invoice number	Date	Description	Amount claimed (S$)[77]	Amount awarded below (S$)[78]
BC/S13030/ UIC/VIM-017 ("BC17")[94]	7 June 2017 ("BC17-1")	"Pipes installation from main riser to all over units in resi Tower (L 27A) and Tower B from L 26 to 29"	29,211.15	25,401.00
	7 June 2017 ("BC17-2")	"Hubless pipes installation from main riser to all over units in resi Tower A from L50 to 54 including MEP level horizontal and riser pipes and Tower B from L50 to 53 including MCP level horizontal and riser pipes"	201,490.90	175,209.48
	7 June 2017 ("BC17-3")	"Hubless pipe installation resi Tower A from high level 52 & 53"	35,906.22	31,222.80
	27 July 2017 ("BC17-4")	"RWDP installation at residential balcony"	53,000.33	46,087.24
	27 July 2017 ("BC17-5")	"Sanitary floor trap rectification work"	37,777.50	32,850.00
	27 July 2017 ("BC17-6")	"Bath tub installation"	16,767.00	14,580.00

94 ABD at p 3407.

Back-charges invoice number	Date	Description	Amount claimed (S$)[77]	Amount awarded below (S$)[78]
	27 July 2017 ("BC17-7")	"RWDP installation at MEP Level"	12,420.00	10,800.00
	20 September 2017 ("BC17-8")	"RWDP installation at residential balcony"	51,649.67	44,912.76
	20 September 2017 ("BC17-9")	"Plumbing and sanitary works carried out by providing skilled workers during the period from 29 April to 15 May 2017"	37,449.75	32,565.00
	20 September 2017 ("BC17-10")	"Providing skilled workers for plumbing & sanitary works during the period from 16 May to 31 May 2017"	25,392.00	22,080.00
	20 September 2017 ("BC17-11")	"Providing skilled workers for plumbing & sanitary works during the period from 1 Jun to 15 Jun 2017"	25,392.00	22,080.00
	20 September 2017 ("BC17-12")	"Safety fine"	9,200.00	8,000.00
	20 September 2017 ("BC17-13")	"Waste disposal (Mar to July)"	8,878.00	7,720.00

Back-charges invoice number	Date	Description	Amount claimed (S$)[77]	Amount awarded below (S$)[78]
	20 September 2017 ("BC17-14")	"[Samsung] Direct Workers"	75,729.97	65,852.15
	17 October 2017 ("BC17-15")	"Third-Party-Back charge for copper piping system"	26,128.00	22,720.00
	7 December 2017 ("BC17-16")	"Providing skilled workers for plumbing and sanitary works during the period from 16 May to 31 May 2017"	69,086.25	60,075.00
	Total for BC17		715,478.74	622,155.43
BC/S13030/ UIC/VIM-018 ("BC18")	28 October 2017[95]	"Supply manpower for Residential Tower A&B L25 to L53 (See the attachment") and "Water heater thermal fuse"	24,219	21,060
BC/S13030/ UIC/VIM-019 ("BC19")	5 February 2018[96]	"Back charge for PPR Pipe for TA L27, 30, 31, 46, 47, TB 27, 28, 31, 46, 47"	103,008.95	89,573.45

95 ABD at p 4238.

96 ABD at p 4473 (read with DCS at para 232).

Back-charges invoice number	Date	Description	Amount claimed (S$)[77]	Amount awarded below (S$)[78]
		"Providing skilled workers for P & S works during 16 July 2017 to 16 August 2017"	3,891.23	3,383.68
		"Remove and reinstall kitchen appliance @ L9–L25 C1, L36–L43 C4 & C6"	6,339.54	5,512.64
		"Modification of base cover for floor drain work"	15,790.06	13,730.49
	Total for *BC19*		129,029.78	112,200.26

74 It is not disputed that the Subcontract gives Deluge the right to impose back-charges on Vim in the event of delays and/or defects in Vim's performance of its works. Clauses 6 and 19 of the Subcontract provide:

> **6. SCHEDULE OF WORKS**
>
> [Vim] shall follow [Samsung's] and [Deluge's] construction schedules. All necessary work force, tools and equipment required to complete the works within these schedules shall be deemed to be included in this Contract.
>
> In the event that [Vim] fails to meet the required work schedule stipulated by the [Samsung], [Deluge] may, at its own discretion, take actions to bring the progress of the works back on schedule by adding manpower, equipment and other resources, which shall not relieve [Vim] of its obligations and such inherent costs shall be back charged to [Vim], provided that the cause of such failures meeting the required work schedule is solely caused by [Vim].
>
> **…**
>
> **19. BACK-CHARGE**

> 19.1 If, under the provisions of this Subcontract, [Vim] is notified by [Deluge] to correct defective or non-conforming Subcontract works, or to perform Subcontract works in accordance with (and so as to comply with) the Subcontract's Programme, and [Vim] states or, by its actions, indicates that it is unable or unwilling to proceed with the Subcontract works or corrective action or otherwise fails to do so in a reasonable time, [Deluge] may, upon written notice, perform or procure the performance of the redesign, repair, rework or replacement of nonconforming or non-performed Subcontract works by any reasonable means available at [Vim's] cost including any cost for supervision and/or overhead.
>
> 19.2 [Deluge] will notify [Vim] of any work performed or procured by it pursuant to [Clause 19.1]. The performance or procurement of such work by [Deluge] shall not relieve [Vim] of any of its responsibilities under the Subcontract including, but not limited to, express or implied warranties, specified standards for quality, contractual liabilities and indemnifications and [Deluge's] Programme.
>
> 19.3 If at any time [Deluge] performs or procures the performance of work pursuant to [Clause 19.1], [Deluge] shall have the right to retain, deduct, withhold or set-off the cost thereof from any payment to be made by [Deluge] to [Vim] or otherwise claim such amount from [Vim] without the need for a notice or an order of a court or tribunal sanctioning the intent of any such notice.

75 Vim contends that the Subcontract imposed certain contractual condition precedents for Deluge's claim on back charges, namely (a) written notice on the part of Deluge and (b) proof of delay and proof that Vim had solely caused such delay. It was submitted that Deluge did not satisfy either of these requirements:

> (a) First, Deluge failed to: (i) notify Vim to "correct defective or non-conforming Subcontract works" under cl 19.1; (ii) notify Vim of "any work performed or procured by it pursuant to [Clause 19.1]" under cl 19.2; and (iii) provide "written notice … of the redesign, repair, rework or replacement of nonconforming or non-performed Subcontract works" under cl 19.1.

(b) Secondly, under cl 6, which had to be read with cl 19 because cl 19 referred to the "Subcontract's Programme", (we note the reference to the "Main Contractor and the Subcontractor's construction schedules in cl 6 of the Subcontract), proof of delay and causation was necessary for Deluge to succeed in claiming back-charges (*ie*, if Vim failed to meet the work schedule *and* Vim was solely responsible for this failure).

(i) As to the delay, Vim argues that it was never behind schedule and there was thus no cause for the imposition of back-charges. The minutes of two site meetings dated 21 December 2016 and 3 February 2017 were an insufficient basis for the Judge to conclude that Vim was in delay because it was not evident that that work was Vim's work rather than Deluge's work. Samsung's schedule provided to Vim in February 2017 was simply a plan and nothing else. Contrary to the Judge's holding that Vim had placed insufficient manpower onsite, Vim's email to Deluge dated 13 February 2017 stated that Vim was complying with requirements ahead of Samsung's schedule and thus did not require Deluge to furnish additional manpower.

(ii) As to causation, even if there had been delays, any purported delays were caused by Deluge or other subcontractors' and not Vim's. Deluge had delayed its provision of materials to Vim, while Vim's email dated 6 April 2017 notified Deluge that some works were delayed because "[s]caffolding not yet ready" and "[w]ater heater not yet ready"; these latter works were said to be outside Vim's scope of works.[97]

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97 ACB Vol II Part B at p 120.

76 Deluge rejected both submissions:

(a) With regard to written notice, Deluge pointed out that Vim's insistence on a strict construction of cl 19 is inconsistent with its request for a broader interpretation as regards cl 16. In any event, Deluge did comply with the notice requirement in cl 19.1. The first "notice" mentioned in cl 19.1 as well as the notification mentioned in cl 19.2 did not specify that such notice be *written*. The second "notice" mentioned in cl 19.1, that is "written notice", however, was asserted to be optional rather than mandatory as denoted by the word "may".

(b) With regard to delay and causation, Deluge argued that the numerous site memoranda considered by the Judge substantiated the conclusion that there had been delays. First, Samsung's schedule of works dated 12 January 2017 covered only the period from January to May 2017 and did not show that Vim had been timely in performing its works throughout the project. Vim relied on self-serving emails and Vim did not address the site memoranda. Secondly, the Judge had also accepted that Vim had put insufficient manpower onsite; Deluge's evidence was that based on toolbox meeting records, Vim only placed an average of 27 workers on-site each day, with a peak attendance of 53 workers. Thirdly, as to Vim's suggestion that Deluge had tarried in providing materials, Deluge's log of Vim's material requisitions dated 19 March 2019 showed that Vim had placed orders on extremely short notice and occasionally after the fact. Despite the fact that cl 8 of the Subcontract required Vim to provide its own consumables, Vim placed orders for these on 94 occasions.

Written notice under cl 19 of the Subcontract

77 We deal first with the issue of written notice under cl 19 of the Subcontract. At the outset, we note that the analysis here is not constrained by our findings at [32] above on cl 16. As the Judge noted at [92] of the GD, clauses 16 and 19 are drafted differently:

> 92 Clause 16 and clause 19 are drafted differently. Clause 16 says variation works 'shall be carried out *only* with written instructions from [Deluge's] Project Manager' [emphasis added]. Clause 19, on the other hand, does not say that Deluge can take action to redress defects and delays in Vim's works *only* upon written notice. Clause 19.1 says that '[Deluge] may, *upon written notice*, perform or procure the performance of the redesign, repair, rework or replacement of nonconforming or non-performed Subcontract works by any reasonable means available at the [Vim's] cost' [emphasis added] and clause 19.3 states that '[Deluge] shall have the right to retain, deduct, withhold or set-off the cost thereof from any payment to be made by [Deluge] to [Vim] or otherwise claim such amount from [Vim]'.

78 The construction of cl 19 depends upon the words used in the clause and must be construed in its proper context. This is an issue of mixed fact and law. As a matter of construction, Mr Pradhan argued that cl 19, when taken as a whole, had to be interpreted as comprising two distinct notifications: (a) under a first notification, Deluge was to notify Vim to correct defective works; and (b) only after Vim indicated that it was unable or unwilling to comply, then Deluge "may, upon written notice, perform or procure the performance …" under a second notification. Neither of these, Mr Pradhan said, had been done. On the other hand, counsel for Deluge, Mr Namazie Mirza Mohamed ("Mr Namazie"), argued that, if anything, cl 19 was less onerous than cl 16 because there was only one notice requirement and that the permissive "may" in the second half of cl 19.1 denoted that the notice requirement did not have to be given by writing; oral notice sufficed.

79 We do not, with respect, quite agree with either Mr Pradhan or Mr Namazie's construction of cl 19.

80 The requirement for notice to be given in relation to defects clauses is a fairly standard procedure adopted in construction contracts where notice is given downstream to the contractor (or in the present case, the subcontractor) thereby giving the contractor an opportunity to cure or remedy the defect. However, while failure to comply with a stipulation to provide notice in a defects clause may preclude an employer from relying on the defects clause as against the contractor (see *Keating* at para 11-031), in the absence of clear and express words or by a clear and strong implication from the words used, the employer's right to damages in respect of the cost of repairs is not extinguished (see *Pearce and High v Baxter* [1999] BLR 101 at 104, cited with approval in *Management Corporation Strata Title Plan No 1933 v Liang Huat Aluminium Ltd* [2001] 2 SLRI 91 at [21]).

81 The requirement of notification is necessary to balance the consequence that any other party who carries out such remedial work, is likely to do so at a greater cost. This is because the contractor is in the best position to carry out such remedial work, if justified, at the lowest cost. There is an element of the upstream party having to take reasonable steps to mitigate its damage. Where no notice is given and such remedial work is carried out, it is open to the subcontractor to argue that it should not be liable for the greater cost of remedial work but only to the lower cost it would have incurred in carrying out such remedial works if due notice had been given.

82 Thus, where the employer does not provide the contractor with a contractual opportunity to rectify defects during the defect liability period, the

employer can still recover the cost of repairing the defects, but the sum that the employer can recover may be limited to how much it would have cost the contractor to rectify the defects. These well-known considerations are set out in *Hudson's* at para 4-100:

> …failure to give notice under the clause or carrying out repairs by another contractor will not prevent a claim for damages.

as well as in *Keating* at para 11-031:

> … In the absence of notice, it would seem that the employer cannot recover more than the amount that it would have cost the contractor to remedy the defects. …

83 Turning to the present case, we first make the observation that cl 19 is worded more permissively in nature than cl 16. The intent of cl 19.1 is also clear:

> (a) First, if Vim is notified by Deluge, and there are no strictures on what the mode of notification should be:
>
> (i) to correct defective or non-conforming Subcontract works, or
>
> (ii) perform Subcontract works in accordance with Deluge's programme; and
>
> (b) Vim indicates again there are no strictures on whether this should be in writing or orally, or by its actions, that it is unable or unwilling to proceed with the Subcontract works or corrective action or otherwise fails to take the necessary action within a reasonable time;

(c) Secondly, Deluge may then, upon "written notice", proceed to perform or procure the re-design, repair, rework or replacement of non-conforming or non-performed Subcontract work by any reasonable means available, and

(d) Thirdly, that will be at Vim's cost, including, any cost for supervision and overheads.

84 Under cl 19.1, the first step is for Deluge to notify Vim of the defective or non-conforming Subcontract work. To notify someone means to tell or to let someone know something or to inform or to communicate something to someone. The use of the word "notified", in the past tense, means that Deluge has to give prior notice of the same and that notice can be in writing or given orally so long as Vim is informed that Deluge considers an item or Subcontract works to be defective or requires rectification or that Vim has not adhered to Deluge's programme.

85 If, after it has been notified of an alleged defect, Vim states in writing or by its actions indicates that it is unwilling to remedy the defects or does not do so within a reasonable time, then Deluge may proceed to the next step, *viz*, give written notice. Two things should be noted. First, the parties have chosen to use different phrases, "is notified" and in contradistinction, "upon written notice". That must have been for a purpose and the obligations attached to those phrases are not identical. The use of "notified" indicates that there has to be an effective notification, *ie*, the notification must be brought to the attention of the subcontractor; what is an effective notification must be measured by what is reasonable on all the relevant facts and circumstances. The use of "upon written notice" means that written notice must be given and served in accordance with

the notice provisions of the relevant contract. Secondly, it should be noted that the giving of notice in writing is a contractual obligation, the breach of which may sound in damages. The use of the word "may" in cl 19 does not qualify or attach to the obligation of written notice but to Deluge's option to perform or secure performance of the remedial work by any reasonable means available and that cost will be recovered from the subcontractor.

86 Clause 19.2 provides that Deluge will "notify" Vim of any work performed or procured by it pursuant to cl 19.1, (the stated reference to cl 18.1 being a clear error). The use of the word "notify" similarly does not impose any particular mode of notification, as in the use of the word "notified", in the past tense, first used in cl 19.1. Again, this is a contractual obligation, not a condition precedent, and the breach of which sounds in damages, if any. Clause 19.2 also states that Deluge's performance or procurement of such remedial work will not relieve Vim of any of its responsibilities under the Subcontract.

87 Finally, cl 19.3 gives Deluge the contractual right, if it has performed or procured remedial work under cl 19, to retain, deduct, withhold or set off the cost against any payment to be made to Vim or otherwise claim such amount from Vim without the need for a notice or an order of court or tribunal sanctioning the intent of any such notice.

88 On the facts, the Judge held at [96] of the GD that "Deluge had given Vim written notice that action would be taken if Vim did not redress defects and delays in its works". Notwithstanding this finding, the Judge reasoned that cl 21 of the Subcontract, which does not mandate any requirement of notice as a condition precedent to a claim for extra work, permits Deluge to claim against Vim for a breach of contract where Vim is liable for any delay in the completion

of its services (see [93]–[95] of the GD). However, as we made clear to Mr Namazie, we are not inclined to reason on this basis since, as Mr Pradhan pointed out, it was a line of argument going beyond Deluge's pleaded case.

89 Turning first to Deluge's Closing Submissions, para 172 laconically states:

> A simple perusal of the Agreed Bundle of Documents shows the sheer number of site memorandums issued by the main contractor, [Samsung], identifying delays and defects in the plumbing and sanitary portion of the UIC Project.

The footnote of para 172 in turn refers to documents within 56 Tabs in the Agreed Bundle of Documents ("ABD"). This kind of submission is particularly unhelpful to a first-instance court or an appellate court dealing with back-charges in a construction dispute as there has been no separation of the wheat from the chaff. Turning next to the Judge's findings, the Judge appeared to have accepted Deluge's evidence at [100] of the GD where he states:

> On the evidence, I found that Deluge had substantiated its claims against Vim in respect of the back-charges asserted and/or damages, save for the 15% admin charge which Deluge added to some of its back-charge invoices.

However, the Judge did not further elaborate on how he arrived at that finding. As can be seen in this judgment, Vim has appealed against the numerous items grouped under twenty back-charges. It is a very difficult task for an appellate court to assess if the challenge is valid or not when the finding is at the level set out above and without counsel providing any useful assistance whatsoever. As we have alluded to at [69] above on the claim for defective work carried out by Deluge during the DLP, there must be relevant details furnished to substantiate a claim. By the same token, the same kind of relevant detail is required for the back-charges. Generalisations are unhelpful. The relevant details should

include, for example, with sufficient specificity and particulars what is comprised in the back-charge being levied, a relation back to the reference to the relevant "notification", the details in the notification and distinguishing clearly between Deluge's Scope of works and Vim's scope of works, what the alleged incomplete or defective or incorrectly or badly done work is, the justification for the same, or, where relevant, show when the work should have been started and completed, why it was not done in a timely manner and how the amount in the back-charge relates to the same with details relating to the manpower deployed to carry out the rectification or incomplete work.

90 It is therefore not surprising that Vim submits, in its Appellant's Reply, at para 42, that it is not evident that the Judge applied his mind to "all the available evidence" (in answer to the Respondent's Case at para 57). Vim is able to undermine the Judge's finding by referring to the following Samsung Site Memos found in the 56 Tabs of the ABD which are, on the evidence as it stood, unrelated to Vim's works:

(a) site memorandum 03519, which relates to "B2 Putty Patch Up" when Vim did not work in B2;

(b) site memorandum 03629 which relates to "All involved Sub-contractors" and relates to "Architectural Work Milestone" but where no mention is made of plumbing and sanitary works;

(c) site memorandum 0690 relating to housekeeping for electrical wiring, which is not part of Vim's work; site memoranda 04088 which relates to shower mixer brackets provided by Samsung to Deluge, which does not concern Vim because Vim had no material supply obligations

apart from providing consumable items such as wiring tapes, screws, bolts, nuts, washers, terminal lugs, and labelling tapes;[98] and

(d) site memorandum 04609 which is directed to "All Respective Subcontractors" and identifies six areas "in critical condition for TOP completion", none of which, Vim alleges, relates to plumbing and sanitary works.

We agree with Vim's submission[99] that the "global" approach by Deluge and the Judge does not distinguish between delays caused by Vim and delays caused by Deluge or others. This is especially relevant where the sub-subcontract is but a subset of the subcontract works. There is unfortunately no short-cut to assessing back-charges of this nature. We pause to state that whilst we recognise that the time and cost spent on such detail in court may not be commercial or feasible, given the amounts at stake, the parties could and should have explored hiving off this detailed fact finding to a mutually acceptable mediator or neutral evaluator at a case management conference.

91 Having noted the foregoing, and doing the best we can in the circumstances, we nevertheless agree with the Judge that there was *some* evidence to show that the requirement of written notice had been satisfied as regards the most substantial back-charges. Deluge sent fourteen emails to Vim between 15 March 2017 and 4 January 2018 giving written notice that Vim needed to redress defects and delays in its works and, in those emails, warned that Vim would be held responsible if these were not carried out. Some of the emails enclosed site memoranda and Samsung's back-charges imposed on

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98 ROA Vol V Part A at p 233, Subcontract at cl 8; RA Vol III Part FF at page 192.

99 AC at para 43.

Deluge, while others particularised specific defects. A complete list of these emails and a brief summary of their contents are set out in a table in the appendix to this judgment labelled **Annex I**. We refer to these emails collectively as the "Annex I Emails" For present purposes, it suffices for us to state that we are satisfied that the two most substantial back-charges – **BC17** and the part of **BC19** concerning "PPR Pipe" (see the table at [73] above) – as well as **BC13** had been supported by some form of written notice.

92 In particular, we are prepared to accept that, on balance, **BC13** (supply of manpower for installation of pipes at level 34) correlates with the email dated 28 April 2017 (email at s/n 4 of the Annex I Emails):[100]

> **Sent**: Friday, 28 April 2017 8:41 PM
>
> …
>
> Dear Velumani,
>
> Residential tower A&B outstanding work complete date for information and necessary action, regarding to internal meeting conversation by 27/04/2017 (Deluge Mr Chianghuat.gn, Susan, Sundar, Tamil, Manivannan) (VIM Velumani, Manikandan)
>
> > 1) Tower A&B LS1 High level unit & Corridor PPR and copper pipe complete by 2/5/17
> >
> > 2) Tower B L52 to Roof plumbing riser pipe work complete by 30/4/17
> >
> > 3) Tower A L49 & 50 unit PPR pipe complete by 2/5/17
> >
> > 4) Tower A&B L52 & 53 High level unit & Corridor PPR and copper pipe complete by 10/5/17
> >
> > 5) Tower A&B L3S water tank, pump room & high level piping work complete by 10/5/17
> >
> > **6) Tower A&B L34 M&E level sanitary and rain water pipe work complete by 10/5/17**

[100] ABD at p 1862; ACB Vol II Part B at p 170.

> 7) Tower A&B Root water tank & pump room piping work complete by 17/5/17
>
> 8) Tower A&B 140 to 143 sanitary wares complete by 10/5/17
>
> 9) Tower A&B L20 to L40 Rain water inspection c/w flaw test complete by 15/5/17
>
> 10) Tower A&B 19 to roof unit and corridor all penetration seal up complete by 30/5/17
>
> **Please take note if cannot complete base on schedule we will arrange manpower to complete and back charge to you accordingly.**
>
> Thanks & Regards,
>
> Sundar.Vee
>
> Project Manager
>
> [emphasis added in bold]

93 Similarly, we are prepared to find that, on balance, **BC17** and the one part of **BC19** pertaining to "PPR Pipe" correlates with Deluge's email to Vim dated 10 December 2017 (email at s/n 13 of the Annex I Emails):[101]

> **Sent**: Sunday, 10 December 2017, 7:38 PM
>
> …
>
> **Attachments**: Illegal Hacking 1.pdf; Illegal Hacking 2.pdf; MCSM-DLG-01856- -(Final Notice] Delay of RWDP Installation at residential balcony .pdf; MCSM-DLG-03075-[Warning] Delay of Rectification of PPR Pipe and Remained Patching Up for Concealed Pipe.pdf; MCSM-DLG-03331-Meeting Minute for Catch Up Plan of Plumbing and Sanitary Wark.pdf, MCSM-DLG-O422S-Water Supply Pipe Rectification at A or B Core Shaft Service Area.pdf; MCSM DLG-04S60 .pdf; MCSM-DLG-04748-Notification for back charge about improper installation at 118 BS1 unit.pdf; MCSMDLG-04887 Non Installation of water tap a L18 & 20 unit Bl Tower B .pdf; MCSM-GEN-04928-Backcharge notification for choked drain pipe cleaning & pipe replacement.pdf
>
> Hi VIM,

---

101 ABD at p 4346; ACB Vol II Part B at Tab 167.

Refer to the attached site memo for [Samsung] backcharges.

Provide details of [Samsung] site memo by 11/12/17.

Site memo list as follow:-

1) Back charge for RWDP Installation at MEP level

2) Back charge for bath tub installation

3) Back charge for copper pipes installation from main riser to all over units in resi Tower A (L27A) and Tower B from L25 to 29

4) Back charge for hublees [*sic*] pipes installation residential tower A

5) from L50 to 54 including MEP level horizontal and riser pipes and tower B from L50 to 53 including MEP level horizontal and riser pipes

6) MCSM-DLG-01856--[Final Notice] Delay of RWDP Installation at residential balcony

7) MCSM-DLG-O3O75-[Warning] Delay of Rectification of PPR Pipe and Remained Patching Up for Concealed Pipe

8} MCSM-DLG-03331-Meeting Minute for Catch Up Plan of Plumbing and Sanitary Work

9) MCSM-DLG-04225-Water Supply Pipe Rectification at A or B Core Shaft Service Area

10) MCSM DLG-04560 Wrong kitchen waste water drain pipes and supply water pipe installation L36-51 Tower A&B

11) MCSM-DLG-04748-Notification for back charge about improper installation at L18 BS1 unit

12) MCSM-DLG-04887 Non Installation of water tap a L18 & 20 unit Bl Tower B

13) MCSM-GEN-04S28-Backcharge notification for choked drain pipe cleaning & pipe replacement

14) Illegal Hacking 1

15) Illegal Hacking 2

Thanks & Regards,

Sundar.Vee

> Project Manager
>
> [emphasis added in bold]

94 No evidence was placed before us to substantiate that written notice had been provided in respect of **BC1** (dated 10 February 2017), **BC2** (dated 10 February 2017), **BC3** (dated 10 February 2017), **BC4** (dated 10 February 2017)[102] and **BC8** (dated 7 April 2017). In this regard, we note, from our examination of the record, that the earliest email emanating from Deluge giving written notice of any sort was sent to Vim on 15 March 2017 (email at s/n 1 of the Annex I Emails). This email appended various site memos from Samsung stating the reasons why Samsung was issuing back-charge notices to Deluge.[103] For clarity, we add that these were back-charges imposed by Samsung as the main contractor against Deluge as the subcontractor, and are distinct from the back-charges that Deluge sought to claim against Vim in these proceedings. In total, in the 15 March 2017 email, there were 17 site memos from Samsung stating that back-charges would be issued to Deluge for the following reasons:

(a) housekeeping work;[104]

(b) common toilet floor screed hacking at Tower A Level 49;[105]

(c) rubbish clearing;[106]

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102 ABD Tab 65 (containing BC4) – there is no document or e-mail showing that written notice of BC4 had been provided by Deluge to Vim (only e-mail is an internal email of Deluge dated 7 February 2017 [ABD at p 863] saying that the back-charge notice needs to be forwarded to Vim but there is nothing showing that this back-charge notice (BC4) had in fact been forwarded).

103 RA Vol V Part F at pp 152 – 221.

104 RA Vol V Part F at pp 154, 165, 169, 175, 178, 190, and 193.

105 RA Vol V Part F at p 157.

106 RA Vol V Part F at pp 161 and 203

(d) rectification of the toilet w/c at Tower B Level 45;[107]

(e) cleaning of the toilet with water;[108]

(f) patching up of the ceiling closing inspection;[109]

(g) long bath bottom cleaning for inspection at Tower A Levels 16 to 23;[110]

(h) lobby riser cleaning for inspection.[111]

95 Crucially, none of the reasons for which Samsung had purportedly imposed back-charges on Deluge, which Deluge had in turn forwarded to Vim in the 15 March 2017 email, correlated with the back-charges invoices issued by Deluge to Vim subsequently (and which we have set out in the table at [73] above). In this regard, we would also express our disquiet with the quality of the documentation provided, which was for the most part undecipherable and required a significant measure of guesswork. It is also pertinent to note that BC1, BC2, and BC3 (all of which were dated 10 February 2017) were issued before Vim was even informed by Deluge (by way of the 15 March 2017 email) that Samsung would be imposing back-charges on Deluge.

96 Although the 10 December 2017 email (see [93] above) (which was submitted to constitute written notice) is, at first glance, problematic because

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107 RA Vol V Part F at p 172.

108 RA Vol V Part F at pp 181 and 184.

109 RA Vol V Part F at pp 187 and 199.

110 RA Vol V Part F at p 196.

111 RA Vol V Part F at p 209.

the various back-charge invoices in **BC17** were dated between 7 June 2017 and 7 December 2017[112] (**BC19** was acceptable in this regard as it was dated 5 February 2018), we observe that the 10 December 2017 email enclosed site memoranda numbers 01856,[113] 03075,[114] 03331,[115] 04225,[116] 04560,[117] 04748,[118] 04887,[119] and 04928,[120] the earliest of which was dated 19 October 2016 (site memorandum 01856) and the latest of which was dated 30 August 2017 (site memorandum 04928), all of which predate 10 December 2017. We therefore accept that *ex facie*, site memoranda attached to the 10 December 2017 email were sufficient, on the balance of probabilities, to establish written notice. The language used in **BC17**, which we have set out in the table at [73] above, also mirrored the items set out in the 10 December 2017 email and were sufficiently correlated. For completeness, we note that one component of **BC17**, namely, **BC17-12** consisted of fines levied by Samsung on Deluge on account of Vim's purported safety breaches (the "safety fines"). In this regard, all the relevant forms – HSE form numbers 00050, 00051, 00063, 00064, 00065, 00073, 00074, 00075, 00076, 00077, 00078, 00079, and 00080 appended in support of BC17-12 – were dated before 2 June 2017 and Vim accepted[121] that it had received these forms. We therefore accept that sufficient notice had been provided in

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112 ABD at p 3407.

113 ABD at p 4354.

114 ABD at p 4355.

115 ABD at p 4360.

116 ABD at p 4361.

117 ABD at p 4363.

118 ABD at p 4381.

119 ABD at p 4384.

120 ABD at p 4387.

121 See Enclosure sent after the oral hearing.

respect of the safety fines in **BC17-12**. We nonetheless note that the necessary details and correlation were not set out in the AEICs. The Appellant's Case on back-charges was replete with references to documents (with no references to evidence from the witnesses), and the Respondent's Case was no better than merely adopting the generalisations at trial.

97 In addition, it was not evident how any of the following back-charges related to the contents of any of the Annex I emails: **BC12** (material purchase for installation of balcony rain water PVC pipes and fittings, manpower and overtime fee), **BC15** (supply of materials, waste disposal and penalty charges), **BC16** (supply of manpower for Residential Tower A&B L25 to L51), **BC16A** (costs incurred to engage a third party to carry out water riser copper pipe rectification work), and **BC18** (manpower costs for plumbing and sanitary works at L25 to L51 of Residential Towers A&B and provision of thermal fuses). In the same vein, it was not shown by Deluge how any of the aforementioned emails correlated with **BC5**, **BC9**, **BC10**, **BC11** and **BC14**. In any case, it was not argued by Deluge that any of the Annex I Emails provided written notice of these back-charges. In these circumstances, we are unable to conclude that written notice had been furnished in respect of the back-charges in **BC5**, **BC9**, **BC10**, **BC11**, **BC12**, **BC14, BC15, BC16, BC16A,** and **BC 18.**

98 For these reasons, we are prepared to find that there was sufficient notice, given in writing, under cl 19 in relation to **BC13**, **BC17** and the one part of **BC19** pertaining to "PPR Pipe". For the avoidance of doubt, the remainder of the back-charges (*ie*, **BC1, BC2, BC3, BC4, BC5, BC8, BC9, BC10, BC11, BC12, BC14, BC15, BC16, BC16A,** and **BC18**) were not supported by any form of notification made by Deluge to Vim in accordance with cl 19.1 (see [94] and [97] above). That said, we note that Vim has not mounted a defence

that, in the event any of the back-charges were valid, then, if they had been informed of the same, they could have done those works at a lower or more cost-effective amount than that incurred by Deluge.

Whether Vim is liable for the amounts claimed in the back-charges

99 Before turning to address the question of Vim's liability for the claimed back-charges (see the table at [73] above) proper, we return to address a preliminary point alluded to at [21] above regarding "initial back-charges" totalling $116,772.93, which is also the aggregate sum of **BC1**, **BC2**, **BC3**, **BC4**, **BC5**, **BC8**, **BC9**, **BC10**, **BC11**, **BC12**, **BC13**, **BC14,** and **BC15**.[122] As noted at [9] of the GD, the initial back-charges were offset by Deluge in the progress payments UIC/S13030/VIM/PC/10, UIC/S13030/VIM/13, UIC/S13030/VIM/14, and UIC/S13030/VIM/15 that were made to Vim. Before us, Mr Namazie repeated an argument rejected by the Judge that because Vim had issued the invoices for progress payments that included a computation setting-off initial back-charges totalling $116,722.93, it was no longer open to Vim to dispute its liability with regard to this sum.

100 In our judgment, however, Vim's receipt of the progress payments did not mean that it accepted that Deluge was entitled to levy the back-charges. We agree with the Judge that "[Vim] was simply invoicing the amounts that Deluge indicated it would pay (which Deluge then paid)" (GD at [70]). Progress payments are only interim payments and a sub-subcontractor who issues invoices to enable it to get the monies from a subcontractor who signifies what it is prepared to pay, does not, without more, compromise the sub-subcontractor's right to dispute the set off. The payment certificates were only

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122 D&CC at para 15.

signed by Deluge's personnel and did not signify anything more. This is a crucial point because Deluge could not direct us to any site memoranda substantiating the claims for **BC1**, **BC2**, **BC3**, **BC4**, **BC5**, **BC8**, **BC9**, **BC10**, **BC11**, **BC12**, **BC13**, **BC14** and **BC15**.

101 Returning to the main question, in order to establish Vim's liability for the back-charges, the burden of proof was on Deluge to provide sufficient evidence to establish its claim for the back-charges imposed on Vim (see, for example, *Longyuan-Arrk (Macao) Pte Ltd v Show and Tell Productions Pte Ltd and another suit* [2013] SGHC 160 at [104]). In this regard, we find the case of *Impact Painting Ltd v. Man-Shield (Alta) Construction Inc* [2018] AWLD 582 ("*Impact Painting*") particularly instructive. Man-Shield (Alta) Construction Inc ("Man-Shield") was the main contractor in a construction project and had engaged Impact Painting Ltd ("Impact") as a subcontractor in respect of painting works and the installation of wallpapers. During the course of Impact's work, the relationship between the parties broke down completely, and the parties had difficulties meeting the construction deadlines. Similar to the present case, Impact's inability to meet the timelines was attributed to a lack of manpower on Impact's part. Man-shield then informed Impact that it would be engaging workers to assist with Impact's work. Man-shield subsequently issued several back-charges to Impact, claiming costs for the supply of the additional manpower as well as other rectification work related to Impact's scope of work.

102 In determining the question of whether Impact was liable for the various back-charges, B. R. Burrows J held at [28]:

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

In our view, such a pragmatic approach to the issue of whether a claimant is able to discharge its evidentiary burden in relation to the legal question of causation is the correct approach to be adopted.

103 That being said, the present case has one notable feature. As we shall see below, there was, in effect, no elaboration on or explanation of these back-charges by the witnesses as one would have expected to see in a construction dispute involving back-charges. In such circumstances, at the appellate stage, the only other recourse available was to examine the documentary evidence parties had adduced before the court below, and as will become evident in the course of this judgment, this would often entail educated guesswork which tested the boundaries of acceptable evidentiary examination. Notwithstanding, as a matter of practical application, we briefly set out the order in which we examined the evidence to determine the issue of whether Vim was liable for the said back-charges:

(a) Deluge has to first be able to provide sufficient evidence to show that back-charges were an expense that had actually been incurred by it. In the present case, such evidence would be either the relevant site memoranda or other documentary evidence.

(b) If the relevant back-charge was indeed incurred by Deluge, the court should then consider if the scope of the back-charge fell within the terms of the Subcontract or the Tender Clarifications.

(c) Should Deluge be able to cross both the threshold requirements above, the court should then consider if the evidence was also sufficient to show that the claimed loss had been caused solely by Vim.

(d) Should all the preceding requirements be met, the burden then shifts to Vim to provide evidence to persuade the court why the respective back-charge should not be imposed on it. And should Vim be unable to provide any evidence to rebut the evidence of Deluge whether in respect of the existence of the back-charge, the scope of the back-charge or causation of the claimed loss, liability would then be imposed on Vim.

104 We are reinforced in the approach we have set out above by the following passage from *Keating* at para 9-096 in relation to the issue of causation:

> **The burden of proof approach** The burden of proof approach requires a claimant to show what part of the claimed loss has been caused solely by the defendant in order for substantial damages to be recovered in respect of it. It therefore presupposes that the claimant may only recover damages insofar as the relevant loss has not been caused by the claimant's own default. Of course, in the event of concurrent causes of delay/loss in a claim under a building contract (one

> the contractor's responsibility, the other the employer's), it would follow that no recovery would be permitted if this approach were followed—because by definition the claimant contractor would be unable to show which part of the loss was exclusively the defendant employer's responsibility. To this extent it would therefore support the same result that would be achieved by a simple application of the "but for" test to the assessment.

105 With these principles in mind, we turn first to consider if the Judge had erred in his approach to the question of liability in the present case. In his GD at [75] the Judge had held that "[t]he evidence show[ed] that there were delays and defects in Vim's works, about which there were various [Samsung] site memoranda." The Judge then went on to hold at [76]–[78] of the GD that: (a) there was an insufficient placement of manpower on-site as an average of 27 of Vim's workers were ever on site at any given day and that Vim would have needed 80 or more workers on site per day to carry out its works; and (b) that Vim had placed orders for materials on very short notice.

106 In particular, at [80]–[81] of the GD, the Judge had made reference to site minutes and a memorandum which referred to *Samsung's* complaints regarding the delays and defects in plumbing and supervision works. From these documents, he concluded that Vim knew that if the manpower situation did not improve, Samsung would be deploying manpower to rectify the resulting delays, and would in turn look to Deluge for the costs of doing so, and that Deluge would in turn look to Vim (GD at [82]).

107 With respect, we find this approach unsatisfactory for the following reasons.

108 First, to answer the question as to whether the claims of defects and delays had been substantiated by the contemporaneous notes made in the site

memoranda, we agree with counsel for Vim, Mr Pradhan, that we cannot rely on one or two memoranda to conclude, in sweeping generalisations, that all the alleged defects and delays had been or had not been made out on the evidence. Significantly, the minutes and memoranda by Samsung were addressed *to Deluge*, not Vim. Deluge still had to link these complaints to Vim's work and for which Vim was liable. In such claims, a more detailed approach is required to make out a claim for a back-charge. As Mr Pradhan pointed out, the Judge had adopted a global approach at [82] of the GD to ascertain whether there had been any delays or defects, when, as referenced above, a detailed analysis was called for, *viz*, an examination of each back-charge and description of that work, correlation to a defect and delay mentioned in the site memoranda and linking it to Vim's scope of works and liability therefor. Deluge had the legal burden of establishing this on the facts (see [101] – [103] above). We agree with Mr Pradhan's submission.

109 On the other hand, Mr Namazie's contention on this aspect was laden with difficulties. Although we note that Deluge did file a defects rectification table in evidence, this table was *completely unreadable* given the minuscule font and the dismal quality of the printing and/or photocopying. Aside from his submission of that table, Mr Namazie was not able to shed further light on how this table supported the imposition of the respective back-charges when we asked him to clarify or explain the same. In the absence of counsel's assistance, the only recourse we had was to what was available in the Record of Appeal. This comprised of three main categories of documents: (a) the documents found in the ABD; (b) the documents found in the AEICs; (c) Deluge's written closing submissions filed on 17 September 2020.[123]

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123 ROA Vol IV Part E at pp 83 – 100, 122-124.

110 Secondly, Deluge's claim for the various back-charges, as set out in its Defence & Counterclaim (Amendment No 1) ("D&CC"), consists of only general allegations without the requisite particulars. The majority of the back-charges are not substantiated or accompanied by any further explanation.[124] Some explanation is provided for the back-charges in BC16A, BC17, BC18 and BC19 but it was also in the nature of general allegations, with no elaboration on the nature of the defects or delays for which Vim was being back-charged. We note that Vim did make a request to Deluge for Further and Better Particulars, but Deluge's chosen response was largely in the nature of a reiteration of what had already been pleaded in the D&CC.[125]

111 Thirdly, while the AEIC of Mr Tamil contained the back-charge invoices and the documents purporting to justify the back-charges, this was attached in the form of an uncategorised tab of some 1,140 pages of documents from "pages 477 to 1,617".[126] Like Deluge's D&CC, Mr Tamil's AEIC contained only brief generalisations in relation to the back-charges, some of which we shall refer to below as illustration of the woefully inadequate substantiation put forward by Deluge.

112 Fourthly, Deluge's written submissions filed on 17 September 2020 only provides justification for **BC16A**, **BC17**, **BC18** and **BC19**, as Deluge takes the position that Vim has accepted its liability for the preceding 13 back charges which were incorporated into Deluges payment certificates.[127] However, as

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124 D&CC at paras 15–17.

125 See Deluge's Response to Vim's request for further and better particulars dated 21 March 2019.

126 ROA Vol III Part J at p 112, AEIC of Mr Tamil at para 81.

127 DCS at para 203.

stated above at [100100], Vim's receipt of the progress payments did not mean that the relevant back-charges were accepted, and in failing to properly justify those back-charges as a fall-back measure, Deluge ran the risk of failing to discharge its evidential burden in the event it failed in its threshold argument of acceptance of the back-charges by Vim.

113 Fifthly, we agree with Mr Pradhan's submission that the Judge's reliance on Vim's apparent staffing deficiencies may not have been the appropriate approach because the need for the workers' presence at the worksite varies; it may not be constant throughout the subcontract period but may vary according to the stage of subcontract works, the inter-phasing with the rest of the works being carried out and generally subject to the needs of each project. What was evident from the catch-up schedule dated 20 February 2017 was that many aspects of work that Vim needed to complete were "[b]ased on archi work schedule". It was also not clear that Mr Tamil's opinion on the matter could be accorded much weight given that he was not a plumbing expert. In any case, while we accepted that in certain instances Vim had placed orders for consumables on short notice and could, in those instances, be held responsible for delays occasioned in consequence, Deluge did not identify which of the works had been adversely affected as a result of and for which a back-charge had been imposed. In our judgment, the presence of manpower or the lack thereof as well as Vim's tardiness in placing orders for consumables, do not adequately address the issue of whether Vim was the *sole cause* of these delays and defects.

114 By the same token, however, Vim's email to Deluge dated 13 February 2017 notifying that it was in compliance with Samsung's schedule ahead of time was a bare statement and equally insufficient to conclude that Vim was not

responsible for any delays or defects. We also agree with the Judge's finding at [84] of the GD that Vim's suggestion that Samsung's workers had damaged its completed pipe work "purposely" in order to incriminate Vim, without providing a reason why Samsung's workers would wish to do so, rendered Vim's account highly questionable. It might have been different if Vim ran the argument that Samsung's workers had damaged Vim's pipework through carelessness, negligence or callous onsite behaviour (like clogging up toilet bowls or sinks or floor traps with carelessly discarded rubbish or food waste or wrapping). Moreover, as the Judge accepted at [85] of the GD, Vim did not claim that it had delayed its works because of payment issues and, in any event, "progress claims 6 through 11 [had] no delays".

115 The issue of causation in this case could not be argued and dealt with at a generalised level of abstraction; it had to descend into the details with regard to every back-charge and to every defence raised. Everything turns on the evidence or the lack thereof and on whom the burden of proof rests. With the foregoing observations in mind, we now turn to each of the individual back-charges.

(1) BC1

116 BC1, a back-charge of $9,522, states that it was imposed for:

> Supply [of] manpower RESIDENTIAL TOWER A&B LOWER STACK L9-25 kitchen water pipe and waste pipe extension.

117 This was filed in the parties' ABD together with documents supporting the back-charge.[128] These documents consisted of an email from Mr Tamil to

[128] ROA Vol V Part D at pp 8 – 12; ABD at Tab 62.

Deluge's staff, dated 8 February 2017, stating that the levels 9 to 25 "...kitchen & WB water pipe and WP extinction [*sic*] done by deluge P&S (due lack of manpower for VIM)". Also appended were six photographs of such bad quality that nothing could be made out other than varying shades of white to darker black, purporting to show the work done. We find this kind of evidence unacceptable and of no evidential value whatsoever. In his AEIC, Mr Tamil states, at para 96:

> I set out a brief description of / justification for each back-charge invoice as follows:
>
> > BC/S13030/UIC/VIM-001: The Defendant had to utilise its own manpower to perform plumbing and sanitary works for the installation and extension of water pipes on the 9th to 25th storeys of UIC Building, which works should have been carried out by the Plaintiff.

118 In our judgment, this could not be considered adequate substantiation from Deluge to impose a back-charge by any stretch of the imagination, even on a *prima facie* basis so as to shift the evidential burden on to Vim to give an explanation. The phrase "kitchen & WB water pipe and WP extinction" used in Mr Tamil's email dated 8 February 2017 does not tell us what those items meant and it is not the court's function to guess or make assumptions, for example, as to what "WB" and "WP" or "extinction" means. There is no evidence to either explain how or why this is within Vim's scope of works or why it was Vim's responsibility, for example, because it was defective work, and how it was defective, so that Vim had to carry out the "kitchen & WB pipe and WP extinction". Nor is the court expected, in the absence of any explanation from Mr Tamil to guess what the word "extinction" meant, for example, was it an error in using that word for "extension". If indeed that was the case, then there was no explanation why any pipes needed to be "extended" and why that was

the fault of Vim. There was no allegation, for example, that Vim installed water pipes that were too short or shorter than required, thereby necessitating extensions. There were also no attached site memoranda substantiating BC1.

119 Given the absence of clarification from Deluge, we turn to the Subcontract[129] and in particular the Quotation[130] (see [3] above). Even then, there is no indication that Vim was to "extend" "WP" pipes, noting that we have not been told what "WP" means. The relevant description of the items of work that covered levels 9 to 20 of the project was, to quote from the description of works in respect of item 1 of the Quotation (which is also the main item in the Quotation touching on the scope of works for levels 9 to 20 of the project):

> Level 9 to 20:
>
> Supply manpower and Hand tools for Installation, Commissioning & Testing only.Unit type : 1 Toilet +1 Kitchen
>
> a Copper pipe corridor & DMC
>
> b Floor trap Insulation
>
> c Sanitary wares installation only

120 Vim submits that its scope of works for levels 9 to 20 did not include works for kitchen water pipes and waste pipes and that Deluge has not provided any project records to prove that the work claimed for was done.[131] In Deluge's Respondent's Case, they have relied on generalisations and not given any details to refute Vim's submissions on, *inter alia*, BC1.[132] There is no evidence on the "copper pipe corridor" and whether or how it is related to the alleged defect

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129 ACB Vol II Part A at p 120.

130 ACB Vol II Part A at p 110.

131 AC at para 71.

132 RC at paras 56 to 58

claimed in BC1, nor is there any explanation of what "DMC" was. One would have expected evidence to the effect, for example, why the particular pipes fell within Vim's scope of works, how they had to be extended, why this was the fault or defective work of Vim and that Vim failed or refused to rectify its defective work after being given an opportunity to do so, thereby causing Deluge to take over such rectification work. There was also no reference to work schedules as to when Vim should have carried out the works, no evidence of Vim's shortage of manpower on site at the relevant time in relation to this back-charge, if that was the allegation and why they were in delay in doing so. In this respect, Deluge has failed to discharge its evidential burden of showing that additional manpower that had to be supplied for the scope of works in BC1 was the result of delay or a defect in pipe works attributable to Vim. Why this is a defect for which Vim is liable on the evidence as it stands, has not been made out even on a *prima facie* basis, let alone as being substantiation therefor. In our judgment, Deluge has failed to discharge its evidential burden in relation to BC1 and it is open to Vim to successfully take the position that with Deluge not having made out its claim on a *prima facie* basis, so that the evidential burden has not shifted to Vim to rebut the same. BC1 is accordingly disallowed.

(2) BC2

121 BC2, a back-charge of $45,540, states that it was imposed for:

> Supply manpower for L35 HIGH LEVEL sanitary pipe installation

122 The invoice for BC2 was filed in the parties' ABD together with documents supposedly providing support for this back-charge.[133] Attached to

[133] ROA Vol V Part D at pp 13 – 18; ABD at Tab 63.

the invoice for BC2 was an *internal* Deluge email from Mr Tamil stating that Deluge had provided its manpower for "L-35 sanitary pipe installation" due to lack of manpower from Vim. In the email, Mr Tamil states that the back-charge to be imposed should be higher due to the height of the work taking place at more than 13 metres, requiring additional manpower and scaffolding. Attached to BC2 were what appears to have been two pages of un-readable schematic drawings which again, like the photographs in BC1, were of no evidential value. There were also no site memoranda produced by Deluge to substantiate the claimed back-charge in BC2. In his AEIC, Mr Tamil's justification for this back-charge is as follows:[134]

> BC/S13030/UIC/VIM-002: [Deluge] had to utilise its own manpower to install sanitary piping on the 35th storey of UIC Building, which works should have been carried out by [Vim]. Moreover, as this is a high floor, [Deluge] had to install scaffolding for these works.

123 No details were provided by Deluge in relation to when Vim had to carry out these works, no reference was made to any work schedule that Vim had to comply with, or how long Vim had delayed in carrying out these works before Deluge had to do so. Given the state of the evidence, in our view, Deluge has not even made out its claim in BC2 on a *prima facie* basis, and so the evidential burden has not shifted to Vim to rebut the same. We additionally observe that, even if BC2 were properly substantiated as such, Deluge still faces one more hurdle in making out its claim on a *prima facie* basis. This is because, on Mr Tamil's evidence, BC2 also seeks to recover from Vim the additional costs associated with high level scaffolding. Under item 30 of the Tender Clarifications, however, it was Deluge's obligation to "provide scaffolding and

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134 See Mr Tamil's AEIC, para 96(b) at RA Vol III Part J at p 116.

lifting equipment" for works above 4m in height.[135] Therefore, under the Subcontract (read with the Tender Clarifications), Deluge is only entitled to recover the part of BC2 attributable to manpower costs alone, and so only that part of BC2 can be levied as a back-charge. The evidential burden is on Deluge to establish what part of BC2 consisted of manpower costs but quite clearly, it has not done so (the sum of $45,540 is claimed as a lumpsum with no breakdown between the scaffolding costs and manpower costs) Thus, even if Deluge had provided some substantiation for BC2, it would still have failed to establish a *prima facie* case as it failed to isolate or establish the part of BC2 that was attributable to manpower costs and for which Vim could be liable. BC2 is therefore disallowed.

(3) BC3

124 BC3, a back-charge of $3,220, states that it was imposed for:

> Supply manpower for RESIDENTIAL TOWER A&B L9 TO L32 balcony RWDP rectification.

125 The invoice for BC3 was filed in the parties' ABD together with documents supposed to support the back-charge.[136] Attached was an *internal* Deluge email from Mr Tamil, stating that Deluge had done the rectification works due to Vim's lack of manpower. Attached to BC3 were what appears to have been three pages of un-readable or un-decipherable photographs, again of no evidential value. There were no attached site memoranda to substantiate the back-charge claimed in BC3.

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135 ACB Vol II Part A at p 118.

136 ROA Vol V Part D at pp 19 – 25; ABD at Tab 64.

126 In his AEIC, Mr Tamil deposes that this back-charge relates to carrying defects rectification works on "rainwater drain pipe":[137]

> [Deluge] had to assign manpower to carry out defects rectification works on rainwater drain pipes on the 9th to 32nd storeys of UIC Building, which works should have been carried out by [Vim].

127 Again, Deluge has provided no supporting facts for this claimed back-charge in terms of where exactly these pipes were, how these pipes were defective, when the alleged defects were brought to Vim's attention, and when did Deluge carry out these rectification works, *etc*. When we turn to the Quotation, we note that at item 13, there is a provision for the installation of "corridor rainwater pipe" for 43 floors for both Towers A and B of the project, but not "balcony rainwater pipe". On the other hand, items 3 to 9 of the Quotation refer to "balcony rainwater stack and branch" from level 21 upwards; items 1 and 2 of the Quotation pertaining to works coming within levels 9 to 20 make no provision for works relating to "rainwater" pipes of any sort. Vim submits,[138] that balcony RWDP works for levels 9 to 20 fall outside Vim's scope of works under the Subcontract. Deluge does not provide any answer to this in their Respondent's Case. Therefore, on the face of the Quotation and the evidence before us, balcony rainwater pipe works from levels 9 to 20 are not within the Subcontract. The evidential burden is on Deluge to show that, notwithstanding what is provided for on the face of the Quotation, balcony rainwater pipe works from levels 9 to 20 do fall within the Subcontract. Deluge has not done so. This back-charge is therefore disallowed.

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137 ROA Vol III Part GG at p 129.

138 AC at para 72.

(4) BC4

128 BC4, a back-charge of $1,100, appears to have been in relation to back-charges imposed by Samsung on Deluge in relation to various health and safety infractions. Attached were five notices labelled DLG-00045, DLG-00046, DLG-00047, DLG-00048 and DLG-00049.[139] These notices detailed various safety lapses, but did not state who the personnel involved were, or if they related to Deluge's staff or to Vim's staff. Deluge claim these were penalties imposed on Deluge by Samsung for health and safety violations committed by Vim but none of the Samsung Notices contained anything to link them to Vim or otherwise substantiate this and Deluge has provided no evidence to show the link. It remains a bare allegation without any apparent basis.

129 In the context of these kinds of back-charges (including those referred to below), where Samsung has imposed such back-charges on Deluge and Deluge then correspondingly imposed back-charges on Vim, the cross-examination of Deluge's director, Mr AK Tan, who was challenged on whether it was right to just pass it on or impose the same on Vim, gave some telling responses:[140]

> Q: …I'm saying it does not mean you can just pass it on. And you are not justified –
>
> A: Okay, my---my---my answer, yes, cannot just pass it on, okay.
>
> Q: Your answer is?
>
> A: Yes
>
> Q: Yes, what?
>
> A: No, cannot just pass it on, okay.

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139 ROA Vol V Part D at pp 26 – 34 (see also ABD Tab 65).

140 ROA Vol III Part JJ at pp 82 – 83.

130 In further cross-examination, Mr AK Tan accepted that Samsung, in levying back-charges on Deluge should give Deluge "the details or justification" or "supporting document".[141] Mr AK Tan then conceded that he assumed Samsung would provide information on the back-charge but did not actually know whether such information was provided.[142] Under further cross-examination, Mr AK Tan said:[143]

> Q: ..So I am saying, alright, based on your answer, that because you do not know what information or details there is for the back charge, for this reason, you cannot be sure whether these back charges are justified in the first place [?]
>
> A: Yes
>
> Q: So you are saying yes, you cannot be sure, right?
>
> A: Yes, yah.

Mr AK Tan's evidence shows the attitude of Deluge – if back-charges were imposed by Samsung on Deluge, Deluge just passed them on to Vim and they expected Vim to query the same or to ask for substantiation or to refute the same.[144] To this Mr AK Tan was asked whether it was right to "push" it to Vim to justify (or refute) the back-charges imposed by Samsung on Deluge and his answer was this: [145]

> Q: So you are pushing it to Vim to justify the back charges?
>
> A: I—I do not want to use the word, 'push'. I would say this is the---this is the---the---the---what the contract provides for.

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141 ROA Vol III Part JJ at p 82.

142 ROA Vol III Part JJ at p 84 – 86.

143 ROA Vol III Part JJ at p 86.

144 ROA Vol III Part JJ at p 87.

145 ROA Vol III Part JJ at p 87.

Mr AK Tan is mistaken. There is no contractual provision which entitles Deluge to impose back-charges, emanating upstream from Samsung to Deluge, on Vim without the need to show how or why Vim is responsible or liable for the same. In our judgment, Deluge has failed to discharge its evidential burden to show that the back-charges imposed by Samsung which were the subject of BC4 were in relation to Vim. BC4 is therefore disallowed.

(5) BC5, BC8, BC9, BC10, BC11, BS12, BC14, BC15, BC16A

131 BC5, BC8, BC9, BC10, BC11, BS12, BC14, BC15, BC16, and BC16A are all tainted, to slightly differing degrees, with the same shortcomings of BC4 and/or the shortcomings noted above. For similar reasons, they are disallowed.

(6) BC13

132 BC13, a back-charge of $17,210 (or $14,966 after deducting the additional 15% administrative fee levied by Deluge), was stated to have been imposed for the supply of manpower for the installation of various pipes at level 34 of the residential tower of the project.[146] In his AEIC, Mr Tamil deposes[147] that these were for back-charges for manpower *to complete* plumbing works that should have been carried out by Vim, in particular works relating to the installation of pipes like: (a) rain water pipes; (b) cold water riser pipes; and (c) vent pipes. Attached to BC13 were various contemporaneous timesheets which documented the staff deployed to assist with Vim's work. Some of the

146 ROA Vol V Part J at pp 4 – 59 (see also ABD at Tab 148).

147 Mr Tamil's AEIC at para 96(k)

timesheets were labelled "Deluge"[148] and some were labelled "SUPPLY TO MANPOWER VIM REPORT SHEET".[149]

133 In this regard, we observe that this back-charge was for *incomplete work* and the amount of this back-charge seems inconsistent with the *agreed* position that the work left outstanding was only $7,462.26, which was completed by Deluge for $7,200 (see [16] above). Further, there is no identification of where these incomplete works were located. Separately, unlike the other back-charges that were mostly unsubstantiated, the invoice for BC13 does contain a "remark" column providing references to the various timesheets that we have referred to at [132] above. We also note that the numbers in the timesheets labelled "SUPPLY TO MANPOWER VIM REPORT SHEET" generally tally with the various amounts claimed by the back-charge in BC13. In our view, the contemporaneous records would, on balance, go some way to show that Deluge has been able to discharge its evidential burden to substantiate the validity of the back-charge in BC13 whereupon the burden would have shifted to Vim to respond. We note that Vim did ask for further and better particulars as to "[w]hat was the basis for the alleged backcharges imposed" and that Deluge "[p]rovide itemised details or breakdown of the alleged cumulative backcharges". Deluge did respond with the requested particulars but they were largely in the nature of reiteration of what had already been pleaded in its D&CC.[150]

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148 For example, ABD at p 2419.

149 For example, ABD at pp 2418, 2420.

150 See s/n 4 and 21 of Further and Better Particulars of D&CC by Deluge (pursuant to Vim's request dated 5 March 2019).

134 In its Appellant's Case, Vim disputes the back-charge in BC13[151] on the basis that the evidence shows that the delays to the plumbing and sanitary works on level 34 were due to delays by Samsung's architectural team, and not due to Vim. Vim relied on an email thread between March and June 2017[152] in which it stated that the architectural clearance at level 34 was not yet ready, and also a document headed "ARCHI CLEARANCE DELAY" at Tower A & B, Level 34, "Unit No : MEP level" together with photographs, and disavowed responsibility for the work delay and related back charges.[153] However, the pipe shown in the photographs was a *sanitary* pipe and one of the photographs had the notation: "Sanitary distribution pipe already slot inside MEP level and waiting for Archi clearance". This is not an answer to Deluge's allegation which related to rain water pipes, cold water riser pipes and vent pipes at level 34. We also note that Vim's response in its Appellant's Case to this back-charge – that it had been occasioned by delay due to architectural clearance rather than Vim's delay – implicitly shows that Vim accepts that the scope of works in BC13 come within the scope of the Subcontract.

135 In any event, Vim also does not put forward any evidence to the contrary to show that there were other causes which made the deployment of additional manpower necessary which was documented in the contemporaneous timesheets. On balance, we find that Vim was unable to rebut Deluge's evidence which showed on a *prima facie* basis that Vim caused the loss claimed in this back-charge. Deluge's claim in BC13 for the sum of $14,966 against Vim is therefore allowed.

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151 AC at para 74

152 ACB Vol II Part B at p 249; ROA Vol V Part P at p 185.

153 See ACB II Part B at pp 250 and 251; ROA Vol V Part P at pp 195 – 196.

(7) BC17

136 Deluge purported to substantiate each of the 16 sub-back-charges claimed in BC17 (*ie*, BC17-1 to BC17-16) with site memoranda from Samsung and the various corresponding invoices showing the costs of the work that had been done and back-charged by Samsung to Deluge, and for which Deluge then sought to back-charge to Vim in BC17.[154] We should add that the Samsung site memoranda, which Deluge had also relied on in its written closing submissions below as the main source of evidence for each of the back-charges,[155] are key to shedding light on what the defects or delays had been, and whether and to what extent they come within Vim's scope of works under the Subcontract, and/or whether they are attributable to Vim at all. The invoices do of course contain a description of what work had been done but on their own they do not state or suggest how such work had been necessitated by Vim's default under the Subcontract.

137 We set out in the following table the site memoranda relied on by Deluge for each of the sub-back-charges in BC17. A similar table was also produced by Deluge in Annex C of its written closing submissions below.

Back-charge	Scope of work	Site memoranda relied on by Deluge
BC17-1	"Pipes installation from main riser to all over units in resi Tower (L 27A) and Tower B from L 26 to 29"	Site Memo 03331 dated 6 February 2017[156]

154 DCS at para 212.

155 DCS at paras 218–219.

156 ABD at p 3410.

Back-charge	Scope of work	Site memoranda relied on by Deluge
BC17-2	"Hubless pipes installation from main riser to all over units in resi Tower A from L50 to 54 including MEP level horizontal and riser pipes and Tower B from L50 to 53 including MCP level horizontal and riser pipes"	Site Memo 03215 dated 24 January 2017[157]
BC17-3	"Hubless pipe installation resi Tower A from high level 52 & 53"	Site Memo 03886 dated 28 March 2017[158]
BC17-4	"RWDP installation at residential balcony"	Site Memo 01856 dated 19 October 2016[159]
BC17-5	"Sanitary floor trap rectification work"	Site Memo 04686 dated 21 July 2017[160] Site Memo 04751 dated 27 July 2017[161]
BC17-6	"Bath tub installation"	Site Memo 03331
BC17-7	"RWDP installation at MEP Level"	Site Memo 04137 dated 3 May 2017[162]
BC17-8	"RWDP installation at residential balcony"	Site Memo 03331

157 ABD at p 3424.

158 ABD at p 3439.

159 ABD at p 3474.

160 ABD at p 2816.

161 ABD at p 3542.

162 ABD at p 3604.

Back-charge	Scope of work	Site memoranda relied on by Deluge
BC17-9	"Plumbing and sanitary works carried out by providing skilled workers during the period from 29 April to 15 May 2017"	Site Memo 03331
BC17-10	"Providing skilled workers for plumbing & sanitary works during the period from 16 May to 31 May 2017"	Site Memo 03331
BC17-11	"Providing skilled workers for plumbing & sanitary works during the period from 1 Jun to 15 Jun 2017"	Site Memo 03331
BC17-12	"Safety fine"	Site Memo 03331 Health, Safety and Environmental discrepancy form ("HSE Form") nos 00050, 00051, 00063, 00064, 00065, 00073, 00074, 00075, 00080, 00079, 00078, 00077, 00076
BC17-13	"Waste disposal (Mar to July)"	Site Memo 03331
BC17-14	"[Samsung] Direct Workers"	Site Memo 03331 Main Contractor's Direction Nos 0690, 0691 and 0692 dated 18 April 2017[163] Site Memo 04132 dated 4 May 2017[164]

[163] ABD at pp 1796, 1804 and 1810.

[164] ABD at p 2048.

Back-charge	Scope of work	Site memoranda relied on by Deluge
		Site Memo 04167 dated 9 May 2017[165] Site Memo 04183 dated 11 May 2017[166] Site Memo 04220 dated 13 May 2017[167] Site Memo 04581 dated 3 July 2017[168] Site Memo 04609 dated 6 July 2017[169]
BC17-15	"Third-Party-Back charge for copper piping system"	Site Memo 03331
BC17-16	"Providing skilled workers for plumbing and sanitary works during the period from 16 May to 31 May 2017"	Site Memo 03331

138 Mr Tamil's AEIC on BC17 is similarly unhelpful and does not provide the requisite details:

> These back-charges relate to [Deluge's] corresponding back-charges imposed by [Samsung] on [Deluge] for *inter alia,* provision of manpower (skilled and unskilled) by third-party contractors to complete [Vim's] sub-contractual works and defects rectification works as well as and [*sic*] penalties imposed on [Deluge] by [Samsung] in respect of health and safety violations (which [Deluge] avers [Vim] is responsible for.

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165 ABD at p 2107.

166 ABD at p 2148.

167 ABD at p 2172.

168 ABD at p 2680, referenced in DCS as "Site Memo 04589".

169 ABD at p 2686, referenced in DCS as "Site Memo 04609".

139 We now proceed to consider whether the defects and delays alleged in the back-charges have been substantiated in the Samsung site memoranda or were otherwise substantiated by other documentary evidence. It should be emphasised that we are hampered by a lack of oral evidence from witnesses and our main source of evidence is from the documentary evidence which was often of poor-quality print or indecipherable photocopies. Deluge bears the burden of substantiation and has to link the site memorandum or other documents that they rely upon to the back-charges they want to levy on Vim.

(A) BC17-1

140 **BC17-1** is a back-charge of $25,401 for: "Pipes installation from main riser to all over units in resi Tower (L 27A) and Tower B from L 26 to 29". Vim does not dispute, as Deluge claims, that the pipes referred to in BC17-1 are copper pipes.[170] Deluge relies on site memorandum 03331 dated 6 February 2017[171] for substantiation. As site memorandum 03331 is relied on by Deluge for several of the sub-back-charges in BC17, we set out in full the material parts of site memorandum 03331:[172]

> On behalf of [Deluge], Mr Tony and [Mr Tamil] had acknowledge the delay in their Plumbing & Sanitary Work to the UIC project and committed to [Samsung] to immediately mobilize the following to expedite and catch up with the work:
>
> 1. Deluge take note and committed to improve site work progress and supervision for P&S works as highlighted by [Samsung] of the following during meeting:

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170 ABD at p 3409 (Deluge's invoice in support); AC at para 78 (Vim states that the pipes are copper pipes).

171 ABD at Tab 195, ABD at p 3410 and AC at para 78.

172 ABD at p 3410.

> i) Unit Ceiling Clearance for lower stack are delayed for more than 2 weeks based on revised schedule due to pipe was installed wrongly.
>
> ii) [Samsung] also noted one of the reasons your work delay is due to lack of manpower and supervision.
>
> iii) [Samsung] highlighted that [Samsung] with no other alternative had to mobilize our workforce to rectify your faulty pipe installation and to catch up delay work which had caused 'bottle neck' to other subsequent works.
>
> 2. Deluge shall increase the manpower (currently 47) and improve site supervision to prevent rework as affected site progress.
>
> 3. Deluge agreed the manpower mobilized by [Samsung] working together to catch up schedule until site progress is stabilizing.
>
> [Samsung] shall monitor the Deluge commitment. [Samsung] shall maintain our right in taking necessary in mitigating the delay in your works during critical time period if the site progress is not improving.

141 Also adduced in support of BC17-1 is an invoice by Samsung to Deluge with an undecipherable date, in which it was stated that Samsung's third-party contractor, Systems Engg & Resources Pte Ltd ("SER") had performed works for "copper pipe installation from main riser to all over units in resi Tower A (L27A) and Tower B from L26 to 29" for $25,401.60 (excluding GST).[173] We should emphasise that this part of the invoice (as well as of the rest of it) was barely decipherable. We note that the pipe works referred to in BC17-1 can be said to fall within item 16 of the Quotation, which provides for the "installation of sanitary riser hubless pipe @ level 21 to Roof (Tower A & B)". However, we accept, as Vim has submitted, that Site Memo 03331, which is relied on by Deluge in support of BC17-1, makes no reference to the installation of copper pipes at the locations specified in BC17-1. On the face of the evidence relied

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173 ABD at p 3409.

upon, there is nothing to substantiate Deluge's position in its claim for the back-charge in BC17-1. We therefore find that Deluge's claim in BC17-1 is not made out on a *prima facie* case and it is disallowed.

(B) BC17-2

142 **BC17-2** is a back-charge of $175,209.48 for "hubless pipes installation from main riser to all over units in resi Tower A from L50 to 54 including MEP level horizontal and riser pipes and Tower B from L50 to 53 including MCP level horizontal and riser pipes". We accept that these works can come within the scope of item 16 of the Quotation, which we have just referred to at [141] above. Deluge relies on site memorandum 03215 dated 24 January 2017 for substantiation which states, among other things:[174]

> Till to date as 23rd of Jan 2017, despite [Samsung] have informed to install, there was No WORK PROGRESS on the installation of Pipe for MEP level below L24, L34 and 52.

143 Even if we a*ssume* (and this is a big assumption), *arguendo,* that this site memorandum 03215 is indeed a reference to the "hubless pipes" for the MEP level below L24, L34, and L52, there is nothing in this site memorandum that refers to the installation of pipes in levels 50 to 54 (for Tower A of the project) and levels 50 to 53 (for Tower B of the project), which is the subject of the claimed back-charge in BC17-2. Site memoranda could arguably cover level 52, but on its face, it does not cover the other floors claimed in BC17-2. The burden is on Deluge to make good its claimed back-charge in BC17-2 by providing the necessary details, in addition to site memorandum 03215 (and that is if site memorandum 03215 is in the first place read with the various assumptions we make in Deluge's favour). As Deluge has not adduced such evidence, we find

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174 ABD at p 3424.

that Deluge has similarly not substantiated its claim for this back-charge in BC17-2. We therefore also disallow this back-charge.

(C) BC17-3

144 **BC17-3** is a back-charge of $31,222.80 for: "Hubless pipe installation resi Tower A from high level 52 & 53". Deluge relies on site memorandum 03886 dated 28 March 2017[175] which stated, among other things, that:

> Subject of the Site Memo: Delay of installation of 'Final Vent pipe Riser' at Phase 2, Lift Lobby of L 53 for Tower A & L 52 for Tower B.
>
> …
>
> Till to date as 27th of MAR 2017, despite [Samsung] have many times informed, there was NO work progress on the installation of Horizontal part of 'Final Vent pipe Riser".
>
> Since Morning site walk dated 20th of MAR, we have instructed those works, but you haven't proceeded with excuse.
>
> We hereby notify your office to complete Main vent pipe after riser to Top Coal by 29th of MAR.
>
> *If fail, we regard as Deluge PS don't have manpower, that's why cannot carry out those work.*
>
> *In this case, You must provide material as attached to us by 30th of MAR.*
>
> Otherwise [Samsung] will purchase and backcharge to you.
>
> Please take note, you will [be] held responsible of [*sic*] any COST & TIME IMPACT.
>
> [emphasis added]

145 Also adduced in support of BC17-3 is an invoice by SER to Samsung dated 3 May 2017.[176] This invoice, like many other documents adduced by

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175 See ABD at p 3439; Invoice at ABD at p 3442; AC at para 80.

176 ABD at p 3442.

Deluge for its claimed back-charges, is barely readable. We set out the material parts of this invoice that we could decipher:

> Tower A:
>
> 1. Payment claim for providing skilled labour and supervision, tools/machines for the installation of HUBLESS pipes & fittings in Residential Tower A from High level[s] 52 & 53 as per customer's approved Drawing No …
>
> | | |
> |---|---|
> | 6" DTA [undecipherable text] … | $13,390.20 |
> | 4" DTA [undecipherable text] … | $2,532.60 |
>
> Tower B
>
> 2. Payment for Providing skilled labour and supervision, tools/machines for [undecipherable text] installation of HUBLESS Pipes & fittings in Residential Tower A from High levels 52 & 53.
>
> | | |
> |---|---|
> | 6" DTA [undecipherable text] … | $12,767.40 |
> | 4" DTA [undecipherable text] … | $2,532.60 |
> | Sub-Total Amount (SGD) | $31,222.80 |
>
> …

146 We accept that the works in BC17-3 (hubless pipe installation in Tower A at levels 52 and 53) can come within item 16 of the Quotation (see [141] above). Although site memorandum 03886 refers to the "final vent pipe riser" for Tower A level 53 and Tower B level 52 (and not hubless pipes), we accept that when the site memorandum is read together with the SER invoice also adduced by Deluge in support of BC17-3, on the whole, there was sufficient documentary evidence to justify this back-charge. However, we observe that the back-charge in BC17-3 as formulated by Deluge *only* covers the works for Tower A. This is in contradistinction to the amount of $31,222.80 invoiced by SER, which covers works for *both* Tower A and Tower B. In our view, the sum

relating to Tower B as set out in the SER invoice should be excluded since that was not the subject of BC17-3 as claimed by Deluge.

147 In summary, having examined the record, we accept that the works in BC 17-3 come within the ambit of the Quotation and this creates a rebuttable presumption that Vim had been the cause of the claimed loss. Accordingly, the burden is now shifted to Vim to show why it should not be held liable for the claimed loss.

148 In this respect, Vim makes three contentions. First, it argues that the delay in the installation of hubless pipes was due to Deluge's delay in delivering the necessary materials. It points to site memorandum 03886 in which Samsung stated, "You must provide material as attached to us by 30th of MAR". Secondly, Vim points out that Samsung's SER invoice provides completely no breakdown, quantity, or unit price for the hubless pipe installation, and is also defective for other reasons like absence of proof of payment. Thirdly, Vim also argues that there is no evidence that it was ever notified of site memorandum 03886 by Deluge.[177]

149 We see no merit in Vim's first argument, which takes the quoted words in site memorandum 03886 out of context. The reference by Samsung to Deluge "providing material" is in the event that Deluge (as subcontractor) still fails to ensure that the relevant works were completed by the stated date (29 March) so that Samsung has to complete those works itself, and in that event, Deluge was to provide materials, otherwise Samsung would purchase those materials itself and then back-charge Deluge. As for Vim's second argument, there is no

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177 AC at para 80.

requirement that the materials supporting a back-charge must provide an exhaustive itemised breakdown of what is claimed by the back-charge; the only question is whether the evidence as adduced demonstrates that the back-charge had been incurred and whether the evidence shows that the claimed loss has been caused by Vim (see [103(c)] above). As we have explained, the SER invoice *read together* with site memorandum 03886 provides sufficient evidence in this regard. If Vim wishes to challenge this, or seek a justification by examining the breakdown, they could have done so in cross-examination of Mr Tamil, but Vim did not adopt this course of action. Finally, we do not see any merit in Vim's third argument. Logically, if the state of affairs were such that Samsung had to bring in its own sub-contractor (SER) to complete works that otherwise fell within the scope of the Subcontract and/or Quotation and which Vim was to perform, then Vim surely must have been aware that there has been a significant delay with its works. The fact that Vim had never been specifically notified of the site memorandum is neither here nor there.

150 In our view, Vim has not rebutted Deluge's case on BC17-3.

151 Accordingly, the back-charge that Deluge should be allowed to recover in respect of BC17-3 must exclude the cost of works relating to Tower B; the Tower A back-charge for BC17-3 works out to $15,922.80 (being $31,222.80 – $12,767.40 – $2,532.60).[178]

[178] ABD at p 3442

(D) BC17-4

152 **BC17-4** is a back-charge of $46,087.24 for "RWDP installation at residential balcony". Site memorandum 01856 dated 19 October 2016,[179] which is adduced by Deluge in support of BC17-4, states that:

> Till to date as 18th of Oct 2016, [Samsung] noticed and observed that there was no work progress on the Installation of Rain Water Down Pipe at Balcony of Upper stack. That is due to shortage of material & Lack of manpower.
>
> Therefore … [Samsung] take all necessary action as below,
>
> > a. [Samsung] MOBILIZE the direct worker/sub-contractor to conduct from L41 to L50 due to delay of work
> >
> > b. [Samsung] PROVIDE the material as Pipe, Fitting and miscellaneous for from L29 to L33 due to shortage of material.

153 We note, from our examination of the record, that an invoice by Samsung to Deluge dated 22 August 2017 (which, again, was barely decipherable) lends support to the claimed back-charge in BC17-4.[180] This invoice consisted of the following payments which Deluge was to make to Samsung:

> Work done by third party
>
> …
>
> - RWDP installation at residential balcony: $46,087.24
>
> - Material supply for RWDP installation at residential balcony: $6,452.91
>
> - Sanitary floor trap rectification work: $32,850.00
>
> - Bathtub installation: $14,580.00
>
> - RWDP Installation at MEP level: $10,800.00

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179 ABD at p 3474; Site Memo 09388 at ABD at p 3511.

180 ABD at p 3461.

154 We accept that site memorandum 01856 was, on balance, a reference to the installation works claimed in the back-charge for BC17-4. We also accept that, on the face of the evidence, the sum of $46,087.24 as set out in Samsung's invoice to Deluge (which corresponds to the amount claimed in BC17-4) represented the manpower and labour cost of such works, which is separate from the costs of "material supply for RWDP installation at residential balcony" in the Samsung invoice. In other words, we accept that $46,087.24 represents the manpower and labour cost of the "RWDP installation" works and not the material costs of those works, (as Vim is not liable for the latter under the Subcontract). Given the state of the evidence, we find that Deluge has established a *prima facie* case for the claimed back-charge in BC17-4 and the evidential burden now shifts to Vim to rebut the same.

155 Vim has two main contentions in response.[181] First, Vim argues that it was only informed by Deluge of the need to expedite the "RWDP installation" works for the "Upperstack" on 17 October 2016, and prior to that date, Samsung had already deployed its own manpower for those "RWDP installation" works. Secondly, any delay to the "RWDP installation" works was a result of Deluge's delay in delivering the material required for the installation, *ie*, the rainwater down pipes. Vim points to the correspondence in which it had complained to Deluge on 14 October 2016 about this delay in the supply of material.[182] Both of Vim's contentions seek to demonstrate that it was not the cause of the claimed loss in BC17-4.

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181 AC at para 81.

182 ACB Vol II Part B at pp 150 and 153.

156 We note from site memorandum 01856 that the lack of progress with the "Rain Water Down Pipe" installation at the "Upperstack" of the development (which, based on the documentary evidence appears to refer to levels 36 and above of the residential tower)[183] was caused by two factors: a "delay of work" in respect of levels 41 to 50 and a "shortage of material" for levels 29 to 33. On the evidence, the "delay of work" in respect of levels 41 to 50 would appear to be attributable to Vim's default (items 5 to 7 of the Quotation cover various plumbing and sanitary works from levels 37 to 51 of the project). Indeed, Vim does not dispute that, but it argues that Samsung had deployed its own contractor to perform those works early. However, Vim has not referred us to any evidence of a works schedule in those arguments to show that the rectification works forming the subject of BC17-4 had been done ahead of time. We therefore reject the first contention made by Vim.

157 However, we accept that the documentary evidence identified by Vim, taken together with the terms of site memorandum 01856, indeed shows that the delay in the "RWDP installation" works from levels 29 to 33 (coming within items 3 and 4 of the Quotation) was the result of a shortage of materials. As referenced above, Vim's obligations under the Subcontract did not include the provision of material, it was Deluge's obligation to supply the material. Thus, we find Vim has discharged its evidential burden of proving that it was *not* entirely responsible for the delay in the "RWDP installation" works from levels 29 to 33 complained of in BC17-4, in that that part of the delay had been the result of a shortage of materials for which it is not liable under the Subcontract. On the existing evidence, however, it is unclear to us what part of the claimed loss BC17-4 is attributable to the "RWDP installation" works from levels 41 to

183 See, for example, ABD at p 2817.

50 and levels 29 to 33. The onus is on Deluge to establish this, and if not, it must prove that, notwithstanding the Subcontract which shows that Vim ought not be liable for any delay arising from shortage of material, Vim had caused the entirety of the claimed loss in BC17-4. As Deluge has not done so, there is no evidential basis for us to determine what part of BC17-4 Deluge should be allowed to recover. We therefore only award a nominal sum of $100 for this back-charge.

(E) BC17-5

158 **BC17-5** is a back-charge of $32,850 for "sanitary floor trap ("S trap") rectification work". Deluge relies on two site memoranda in support of this back-charge: site memorandum 04686 dated 21 July 2017[184] and site memorandum 04751 dated 27 July 2017.[185] Site memorandum 04686 stated, among other things:

> [Samsung] hereby strongly warn you that your work status is so behind than discussed T/C plan.
>
> [Samsung] numerously have instructed to prepare T/C regarding discussed plan, however it is already behind schedule and your site management haven't submitted proper inspection forms.
>
> Refer to attached progress status, and please take note that all defect clearance should be done 1day before planned T/C date and internal test with [Samsung] staff should be done 1day before T/C date.
>
> …

159 Site memorandum 04751 referred to site memorandum 04686. It stated, among other things:

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184 ABD at p 2816.

185 ABD at p 3542.

> Subject of Site Memo: Confirmation for residential tower sanitary pipe rectification work regarding [site memoranda 04686] to clear defect from T/C Inspection
>
> [Samsung] hereby firmly instruct you to clear all defects for T/C properly and warn you that your site personnel doesn't [*sic*] follow [Samsung's] proper instruction at some units to clear defects of sanitary pipe rectification work insisting they didn't proceed [with the] work. Therefore SCT hereby confirm you works related to typical unit sanitary pipe work that was arrange by Systems engineering [*ie*, SER].
>
> Totally 95 points of PVC U-Bend were rectified by Systems engineering because of your improper installation and sanitary pipes at AS3 from L16 to L22 & L25 to L32 were rectified. In addition sanitary pipes at B2 on L9, from L11 to L16, and L22 were rectified by Systems engineering. Sanitary pipes at BS1 on L9, from L13 to L16, and L 21 were rectified and also sanitary pipes at AS1 on L9, from L13 to L15, and from L19 to L21 were rectified by Systems engineering. Besides uPVC pipes at S4 on L46&L47 and S5 on L47 were rectified by Systems engineering.
>
> …

For completeness, we note that Deluge stated in its written closing submissions that "T/C" referred to "testing and commissioning".[186]

160 It will be seen that site memorandum 04751 sets out the specific levels where the rectification works had been undertaken. The reference is to "PVC U-Bends", which will create the water seals for the waste water piping. Mr Tamil states in his AEIC at para 14[187] that "sanitary ware installation" (a sub-item in the Quotation) entails the connection of the installed pipes with architectural fittings such as sinks, cabinets and ceilings. We accept that such a description of "sanitary ware installation" would have, generally speaking, included the installation of PVC U-bends which are indispensable parts of the waste water system for sinks, water closets, bathtubs, and floor traps.

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186 DCS at para 92.

187 ROA Vol III Part J at p 101.

161 However, it is important to note, first, that site memorandum 04751 *does not* state what the defect was, or why the installation of the sanitary pipes was improper or what rectification was carried out. Site memorandum 04751 therefore cannot be said to substantiate the back-charge claimed in BC17-5. Secondly, Mr Tamil's AEIC refers to sanitary ware installation connected to sinks, cabinets, and ceilings, but the claim as formulated by Deluge for the back-charge in BC17-5 was for "sanitary floor trap rectification work". Whilst PVC U-Bends could or might have been part of the requirement for Vim's floor trap works (which were described as "floor trap insulation" in the Quotation), this was not explained in evidence. In any event, Deluge has failed to identify the defect or link the complaint in site memorandum 04751 to Vim's works and show what rectification was necessary and why Vim was liable for this cost of rectification. Deluge has therefore failed to substantiate the claimed back-charge BC17-5 and we therefore disallow it.

162 Although it is unnecessary for us to go further, we nonetheless note that Vim, in its Appellant's Case,[188] relies on contemporaneous documentary evidence to show that, based on the Work Inspection Reports ("WIRs"), Vim had completed the sanitary floor S-trap works for levels 21 to 33 of residential towers A and B in July 2016 (with levels 9 to 20 being part of Deluge's work).[189] Vim had submitted these WIRs in support of its Payment Claim No 5 on 1 March 2017, about four months before site memorandum 04751 came to be issued. Also, Vim states that it highlighted to Deluge on 1 March 2017 that Samsung had made certain modifications to the completed S-traps as there were

188 AC at para.83.

189 ACB II Part B at pp 144 – 149.

issues with ceiling height, which was therefore through no fault of Vim's.[190] Vim points out that there was no reply from Deluge to its inquiry on 1 March 2017. If there were limitations in how far below the ceiling the S-traps were to be installed or if there were drawings indicating this, one would have expected Deluge to answer accordingly. If as between Samsung and Deluge there were such limitations, it certainly would not have bound Vim. We also note that Deluge's Respondent's Case has not provided any answer to this part of Vim's Appellant's Case.

(F) BC17-6

163 **BC17-6** is a back-charge of $14,850 for "bath tub installation". Deluge relies on site memorandum 03331 (see [140] above) in support of this back-charge. We accept that the installation of bath tubs comes within the scope of sanitary wares which Vim is to install under the terms of the Subcontract, read with the Quotation and the Tender Clarifications.

164 For BC17-6, Vim makes three arguments.[191] First, there is nothing in site memorandum 03331 that refers to bathtub installation. Secondly, Vim argues that a third-party contractor engaged by SCT for the bathtub installation works claimed in BC17-6 (which appears to have been SER) had been deployed on site ahead of schedule. Thirdly, Vim points us to an invoice by SER to Samsung dated 24 June 2017[192] for the sum of $14,580.00, which corresponds to the back-charge claimed in BC17-6. The SER invoice states:

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190 ACB Vol II Part B at pp 161 – 162.

191 AC at para 84.

192 ABD at p 3592.

> 1. Payment for providing skilled labour and supervision, tools for the installation of New Bathtub in Residential Tower A & Tower B from level 25 to level 33 … : $12,960.00
>
> 2. Hacking of the concrete portion just for the purpose of installing the Bathtub … : $1,620.00

165 With reference to item two of the SER invoice, Vim argues that in any event, even if there had been a delay in installing the bathtub, that was the result of the concrete slab, (probably more correctly the plinth), below the bathtub being too high or not at the correct level, and this was not something that Vim was responsible for.

166 The legal burden is on Deluge to make good its case on the back-charges. Site memorandum 03331, which is the only evidence that Deluge has adduced in support of BC17-6, makes no reference to bathtub installation whatsoever. On that basis, we find that Deluge has not established its case that Vim was liable for the back-charge and we accordingly disallow the back-charge.

167 For completeness, although it does not affect our findings and conclusion on BC17-6 above, we point out that if Vim alleges that rectification works for which it is back-charged were carried out ahead of schedule, it is for Vim to adduce evidence of some work schedule or programme to support its contention; Vim has not done so.

(G) BC17-7

168 **BC17-7** is a back-charge of $10,800 for "RWDP installation at MEP Level". Site memorandum 04137 dated 3 May 2017, which is adduced by Deluge in support of this back-charge, states:[193]

> [Samsung] hereby inform you that RWDP & Sanitary pipe installation work progress & management for L34 MEP level is so execrable.
>
> [Samsung] have instructed you to complete RWDP work many times since 2 weeks ago however we are so disappointed about your execrable management.
>
> 1. RWDP installation is not following drawing & some FDs are remained with not connected. This is a serious quality issue.
>
> 2. [Samsung] instructed to complete L34 MEP level RWDP installation work for GL16-20 by 18th of April, however, your work progress is so behind target day.
>
> 3. [Samsung] instructed to begin L34 MEP level RWDP installation work for GL 13–16 on 24th of April, however your work is not even started for 4 days.
>
> 4. As a result, RWDP at GL13, connected to L36 C2 unit, is fulfilled with water and overflowed to L36 C2 unit balcony and the water damaged balcony panel & L34 HL ceiling.
>
> 5. Furthermore, L34 MEP level sanitary pipe installation work is also so slow. Your progress is so exercrable as marked on attached drawing.
>
> As providing a basis above, [Samsung] will assign a 3rd party to proceed RWDP & Sanitary pipe installation work for GL 13–16 from 29th of April to end further delay of work.
>
> …

169 We accept that site memorandum 04137 was, on balance, a reference to the installation claimed in the back-charge and that there had been a delay associated with the "RWDP installation" works at the level 34 mechanical,

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193 ABD at p 3604.

electrical and plumbing ("MEP") level. We also note that, although there is no item in the Quotation specifically pertaining to works at the MEP level at level 34, we accept that, on balance, the "RWDP installation" works referred to in site memorandum 04137 and in BC17-7 are the "rain water pipe" installation works covered by item 13 of the Quotation, and so these works come within the scope of the Subcontract. We therefore find, on the evidence, that Deluge has established its case for the back-charges in BC17-7 by proving that Vim was the cause of the claimed loss in BC17-7, and that the evidential burden therefore shifts to Vim to rebut the same.

170 In response,[194] Vim argues that it had only been instructed by Deluge to complete the "RWDP installation" works for the MEP level at level 34 by way of a written notice on 28 April 2017, which stated that such works were to be completed by 10 May 2017.[195] Vim also points out that Samsung had already complained of the delay with such works two weeks before site memorandum 04137. It is not apparent to us what the substance of Vim's contention is, for example, whether it is Vim's case there had been no delays with those works, or that Samsung had gone ahead of schedule to perform those works. The fact that Deluge only notified Vim to complete the relevant works on 28 April 2017 was neither here nor there – Vim's obligation to perform works under the Subcontract cannot be contingent on when Deluge comes to remind Vim to rectify its delayed or outstanding works. Vim has not adduced evidence of any schedule of works to show that by 28 April 2017 the time for the completion of those works complained of in site memorandum 04137 was not yet up. In fact, it will appear from site memorandum 04137 that the delay with the "RWDP

194 AC at para 85.

195 ACB Vol II Part B at p 170.

installation" works had begun some time *before* 28 April 2017. We therefore find that, on balance, Vim has not rebutted Deluge's case for the back-charges in BC17-7; Deluge's claim in BC17-7 is therefore allowed.

(H) BC17-8

171 **BC17-8** is a back-charge of $44,912.76 for: "RWDP installation at residential balcony". Deluge relies on site memorandum 03331 (see [140] above) in support of this back-charge. There is nothing in this site memorandum referring to rain water drain pipes. As we have emphasised, the legal burden is on Deluge to make good its case on each of the claimed back-charges. On the state of the evidence, we find that Deluge has not even established a *prima facie* case for the back-charge claimed in BC17-8 and we therefore disallow it.

(I) BC17-9, BC17-10 AND BC17-11

172 **BC17-9**, **BC17-10** and **BC17-11** are each back-charges for plumbing and sanitary works carried out by skilled workers, the cost of which had been charged to Deluge for three time periods: 29 April to 15 May 2017; 16 May to 31 May 2017; and 1 June to 15 June 2017. For these three back-charges, Deluge relies on site memorandum 03331 (see [140] above) in support, as well as the timesheets signed by the various workers that have performed these works. On its face, site memorandum 03331 does refer to a delay in plumbing and sanitary works in the project, which Deluge had promised Samsung to expedite. Although the claimed periods and rates were not necessarily supported by the documentary evidence, we are satisfied that, on balance, by a reference to "Plumbing and Sanitary Works", site memorandum 03331 can be said to refer to the plumbing and sanitary works claimed in BC17-9, BC17-10 and BC17-11.

173 However, we also note that site memorandum 03331 states in no uncertain terms that Deluge had "acknowledged the delay…and committed to [Samsung] to…expedite and catch up with the work". This included "improv[ing] site work progress and supervision for P&S works" and to "increase the manpower (currently 47)". Site memorandum 03331 does not in any way state that Vim was at fault for the manpower shortages, and apart from the fact that several of Vim's employees were present at the site meeting, Vim was not in any way implicated in the delay.

174 In order for Deluge to establish its claim against Vim, it was incumbent on Deluge to provide clear and cogent evidence linking Vim to the claimed loss in BC17-9, BC17-10 and BC17-11. Without more, the site memorandum 03331 itself does not provide sufficient description or particularisation as to who had performed the plumbing and sanitary works that required rectification and who had caused or were responsible for the delays in rectification. In our view, Deluge has not been able to show that the claimed loss had been caused solely by Vim. Failing which, the burden does not shift to Vim to rebut Deluge's evidence. Accordingly, as Deluge has been unable to substantiate the back-charges in BC17-9, BC17-10 and BC17-11, they are therefore disallowed.

(J) BC17-12

175 **BC17-12** is a back-charge of $8,000 for "safety fine". Deluge relies on site memorandum 03331 (see [140] above) and various HSE Forms in support of this back-charge. While the HSE Forms proved the existence of $3,300 worth of fines (corresponding to the amount of the back-charge claimed in BC17-12), site memorandum 03331 did not even mention the safety fines. Also, the HSE Forms do not actually mention Vim at all, and it is not clear on the face of the documentation whether it was Deluge's or Vim's personnel who committed the

safety breaches. We should also add that several of the HSE Forms post-dated site memorandum 03331. It follows that Deluge has not established Vim's liability for the back-charge claimed in BC17-12 and it is therefore disallowed.

(K) BC17-13

176 **BC17-13** is a back-charge of $7,720 for "Waste disposal (Mar to July)". Deluge relies on site memorandum 03331 (see [140] above) in support of this back-charge. Again, there is nothing in site memorandum 03331 referring to waste disposal whatsoever. It follows that Deluge has not even established a *prima facie* case for the back-charge claimed in BC17-13 and it is therefore disallowed.

(L) BC17-14

177 **BC17-14** is a back-charge of $65,852.15 for: "[Samsung] Direct Workers". It is undisputed that the works referred to in BC17-14 are those works that Samsung had back-charged to Deluge and which Deluge in turn sought to back-charge to Vim in respect of manpower. There is no breakdown of this sum of $65,812. Deluge relies on various site memoranda in support. They include site memorandum 03331, which stated that "[Samsung] with no other alternative had to mobilize our workforce to rectify your faulty pipe installation and to catch up delay work which had caused 'bottle neck' to other subsequent works" (see [140] above), as well as the following information:

(a) Main Contractor's Direction No 0690 dated 18 April 2017, which stated, among other things:[196]

[196] ABD at p 1796.

> Subject of Direction: … [Riser Housekeeping at L36–43, Tower B]
>
> …
>
> Please see attached time record of [Samsung] direct workers and photos for your reference.

(b) Main Contractor's Direction No 0691 dated 18 April 2017, which stated, among other things.[197]

> Subject: Riser Housekeeping at L23–32, Tower B
>
> …
>
> Please see attached time record of [Samsung] direct workers and photos for your reference.

(c) Main Contractor's Direction No 0692 dated 18 April 2017, which stated, among other things:[198]

> Subject of Direction: … [Riser Area Housekeeping at L23–32, Tower B]
>
> …
>
> Please see attached time record of [Samsung] direct workers and photos for your reference.

(d) Site memorandum 04132 dated 4 May 2017, which stated:[199]

> …
>
> Subject of Site Memo: L51 Tower-A patching up Mechanical services penetration hole by [Samsung] worker
>
> … your site team is not following to patch up the hole surrounding your services even though [Samsung] has highlighted through several occasion and due to the cased always failed Archie and M&E Inspection

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197 ABD at p 1804.

198 ABD at p 1810.

199 ABD at p 2048.

> However, due to your late response therefore [Samsung] will engage own worker to do the said incomplete work and that cost shall be back charge to you accordingly.

(e) Site memorandum 04167 dated 9 May 2017, which stated:[200]

> Sub-contract: All involved Sub-contracts
>
> Sub-contractor: All involved Sub-contractors
>
> …
>
> Subject of Site Memo: Notice to Complete Unfinished and Defective Works [L21, Tower A&B]
>
> …
>
> Refer to [site memorandum 03901], issued on 30-March-2017 regarding Inspection Procedure and Schedule for Completion of Work, appendices are the outstanding and defect list of L11, Tower A&B for your prompt and specific action.
>
> Target completion of the attached unfinished and defective works is on 15 May 2017.
>
> Failure to comply on the given timeline, [Samsung] will engage third party to complete the defects and outstanding works. All arising costs will be borne by respective subcontractor.
>
> …

(f) Site memorandum 04183 dated 11 May 2017, which stated:[201]

> Sub-contract: All involved Sub-contracts
>
> Sub-contractor: All involved Sub-contractors
>
> …
>
> Subject of Site Memo: Notice to Complete Unfinished and Defective Works [L41, Tower A&B]
>
> …

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200 ABD at p 2107.

201 ABD at p 2148.

> Refer to [site memorandum 03901], issued on 30-March-2017 regarding Inspection Procedure and Schedule for Completion of Work, appendices are the outstanding and defect list of L11, Tower A&B for your prompt and specific action.
>
> Target completion of the attached unfinished and defective works is on 17 of May 2017.
>
> Failure to comply on the given timeline, [Samsung] will engage third party to complete the defects and outstanding works. All arising costs will be borne by respective subcontractor.
>
> …

(g) Site memorandum 04220 dated 13 May 2017. The sub-contract to which this memorandum relates and the sub-contractor to which this memorandum is addressed are not decipherable. The body of this memorandum, which is decipherable, stated:[202]

> As per site observation, [Samsung] found Deluge has damaged finished wall at Riser Areas L9–33 Tower A & B. This is not acceptable … It has affected the handover area to the subsequent contractors. You must finish properly and handover to respective contractors with good condition.
>
> Hereby, [Samsung] instruct Deluge to arrange of the damaged finished wall at Riser Areas L9–33 Tower A & B rectification works as per previous good condition by no later than 17th May 2017. The quality of rectification should be good condition to hand over to subsequent contractors. If you fail to comply to the timeline given or to achieve quality standard by given date, [Samsung] will make the necessary actions and the cost and time implication arise directly borne by you.

178 We have spent some length setting out each of the documents relied on by Deluge for its claimed back-charge in BC17-14 in full to demonstrate that Deluge has absolutely not provided any substantiation for this back-charge. We

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202 ABD at p 2172.

accept that site memorandum 03331 does refer to Samsung mobilising its own workers to perform delayed plumbing and sanitary works. However, Deluge has not provided any breakdown of the sum of $65,852.15 it claimed Samsung had back-charged to it, and whether this sum covered the cost of plumbing and sanitary works that Samsung had stated in site memorandum 03331 it would mobilise its own workers to perform. It is for Deluge to make good its claim on this back-charge and not for the court to engage in guesswork. As for the other documents relied on by Deluge in support of this back-charge (see [177(a)]–[177(b)] above), there is no mention at all of the plumbing and sanitary works. Several of these documents appear to us to be *general* site memoranda addressed to all sub-contractors of the project. Even if we were to accept for the sake of argument that the works contemplated in each of these documents were indeed plumbing and sanitary works, there is simply nothing on the face of the documents to show that the defects or rectification works related to works coming within the scope of the Subcontract and which are attributable to Vim. We do not see how, by any stretch of the imagination, those documents can be said to provide substantiation for the back-charge claimed in BC17-14. We therefore find that Deluge has not even made out a *prima facie* case for the back-charge claimed in BC17-14 and it is accordingly disallowed.

179 For completeness, we note that in its Appellant's Case, Vim has referred to various documents (consisting in the main of various site memoranda) which it claimed Deluge had relied on in support of this back-charge in BC17-14; Vim criticises these documents as being irrelevant and falling outside the scope of the Subcontract.[203] Given the conclusion that we have reached at [178] above, it is strictly speaking unnecessary for us to address this submission by Vim.

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[203] AC at para 88.

However we point out that these documents were in fact *not* the ones relied on by Deluge in support of BC17-14; it appears to us that Vim came to that conclusion because these documents were located some pages after a Samsung invoice to Deluge dated 2 November 2017 in which Deluge was invoiced a sum of $62,397.10 for "[w]ork done by third party" and $633.80 for "[s]upply of direct workers".[204] It is not apparent to us that the sums stated in this invoice correspond to the back-charge in BC17-14, and in any event, there is no apparent relationship between the site memoranda and the sums claimed in this invoice.

(M) BC17-15

180 **BC17-15** is a back-charge of $22,720 for "copper piping system". Deluge relies on site memorandum 03331 in support of this back-charge. As we have previously explained in respect of BC17-1, there is nothing in site memorandum 03331 referring to copper pipes. Similar to the case for BC17-1, on the face of the evidence, there is nothing to substantiate Deluge's position for the claimed back-charge in BC17-15. We therefore also disallow this back-charge.

(N) BC17-16

181 **BC17-16** is a back-charge of $60,075 for: "Providing skilled workers for Plumbing and Sanitary works during the period from 16 May to 31 May 2017". Deluge relies solely on site memorandum 03331 in support of this back-charge. We note, however, that Deluge has already claimed $22,080 by way of BC17-10 for providing skilled workers for plumbing and sanitary works for this

[204] ABD at p 3972.

same period (16 May to 31 May 2017). We do not see how the same site memorandum 03331 can lend support to *both* BC17-10 and BC17-16 when the claim pertains to works for the identical time period. Given the absence of any other document substantiating this back-charge, we find that Deluge has not even established a *prima facie* case for the back-charge claimed in BC17-16 and it is accordingly disallowed.[205]

(O) CONCLUSION ON BC17

182 In summary we only allow the following back-charges in BC17:

(a) BC17-3: $15,922.80 (see [151] above).

(b) BC17-4: $100 (see [157] above).

(c) BC17-7: $10,800 (see [170] above).

(8) BC18

183 BC18 was stated to have been imposed for the supply of manpower and for the supply of water heater thermal fuses.[206] Attached were various timesheets, but none were legible. There were also no invoices for the supply of water heater thermal fuses. In our view, Deluge has been unable to discharge its evidential burden to substantiate the back-charges which were the subject of BC18. We therefore also disallow BC18.

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205 AC at para 89.

206 ABD at Tab 201.

(9) BC19

184 In respect of the four back-charges claimed in BC19, Deluge also relies on various site memoranda as supporting evidence. We summarise this in the following table, adapting from the table produced by Deluge at para 228 of its written closing submissions in the trial below.

Scope of work	Site memoranda relied on by Deluge
"Back charge for PPR Pipe for TA L27, 30, 31, 46, 47, TB 27, 28, 31, 46, 47" ("**BC19-1**")	Site memorandum 03075 dated 18 January 2017[207]
"Providing skilled workers for P & S works during 16 July 2017 to 16 August 2017" ("**BC19-2**")	Site memorandum 04928 dated 30 August 2017[208]
"Remove and reinstall kitchen appliance @ L9–L25 C1, L36–L43 C4 & C6" ("**BC19-3**")	Site memorandum 04560 dated 28 June 2017[209]
"Modification of base cover for floor drain work" ("**BC19-4**")	Site memorandum 05053 dated 3 October 2017[210]

185 At this juncture, we first make the preliminary observation that the supporting documents relied on by Deluge for BC19 were first identified in its written closing submissions filed on 17 September 2020. In fact, BC19, as it had been set out in the parties' ABD, was not accompanied by any supporting documents even though it was labelled "Revised Summary of Defendant's Back-Charge Invoice BC/S13030/UIC/VIM-019 with supporting

207 ABD at p 3975.

208 ABD at p 4018.

209 ABD at p 4363.

210 ACB Vol II Part A at p 100.

documents".[211] Nevertheless, we turn to consider whether the defects and delays alleged in the back-charges claimed in BC19 are substantiated by the site memoranda identified by Deluge or any other documentation.

(A) BC19-1

186 Site memorandum 03075 dated 18 January 2017 stated:[212]

> Till to date as 17th of Jan, 2017, despite [Samsung] have many times informed, there was Slow WORK PROGRESS on the rectification of PPR pipe and remained patching up for concealed pipe.
>
> a) Lower stack, we are suffering from PPR pipe issue. Therefore, we instructed that consider that issue when install PPR pipe, but site condition is same as lower stack. Nobody manage/supervise this PPR pipe installation and handle this issue.
>
> b) Through site walk today, we observed that unit wall plastering/skin coat were done up to L47.
>
> However, I found that not installed PPR concealed pipe at kitchen and damaged Archi finishing due to your installation delayed.
>
> We hereby notify your office to expedite as below,
>
> a) Rectification of PPR pipe and educate your subcon to follow PUB requirement[s].
>
> b) Concealed the pipe, finish patching at that same time, do not leave it.
>
> c) Please take note, you will [be] held responsible of any COST & TIME IMPACT.
>
> d) [Samsung] will record and back charge to you.

187 Vim points out that the PPR pipe issues complained of in site memorandum 03075 relate to the lower stack of the development, which fell

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211 ABD at Tab 195.

212 ABD at p 3975.

within Deluge's scope of works, and not Vim's, which was only limited to the PPR pipes for the upper stack.[213] We note, from the documentary evidence, that it appears that the upper stack refers to levels 36 to 51, while the lower stack refers to levels 9 to 33.[214] Vim accepts that there had been some issues with the PPR pipes it installed for level 20 of Tower A, but that had been part of rectification works performed by Vim for works originally completed by Deluge.[215] For this submission, Vim points to an invoice for variation work dated 27 March 2017 that it had issued to Deluge for various plumbing and sanitary works for lower stack levels 9 to 20, which also included a note that the works stated therein were not part of the Subcontract.[216]

188 We note from items 1 and 2 of the Quotation that the installation of PPR pipes from levels 9 to 20 is indeed not part of Vim's scope of works under the Subcontract; Vim is only required to install PPR pipes from levels 21 and onwards. The PPR pipe issues complained of in site memorandum 03075 are for the "lower stack", that is, from levels 9 to 33. We therefore accept that the bulk of the PPR pipe issues complained in that memorandum, in so far as they pertained to levels 9 to 20, do not come within the Subcontract. For Deluge to make out its claimed back-charge in BC19-1, it must go further and show that the PPR pipe works identified in site memorandum 03075 were indeed performed by Vim, for instance, as part of the rectification works which Vim accepts that it had performed for Deluge. Deluge however has adduced no such evidence. Therefore, on the face of the evidence before us, we find that Deluge

213 AC at para 93.

214 ABD at p 2817.

215 AC at para 93.

216 ABD at p 1640.

has not discharged its evidential burden for the claimed back-charge in BC19-1. We therefore disallow this back-charge.

189 We should add that the back-charge claimed in BC19-1 is for PPR pipe works performed at levels 27, 30, 31, 46 and 47 (for Tower A) and levels 27, 28, 31, 46, and 47 (for Tower B). In other words, the bulk of the back-charge pertains to PPR pipe works for the upper stack of the project. Site memorandum 03075 only identifies issues with the PPR pipe works for the lower stack of the project. On the face of it, site memorandum 03075 cannot provide any substantiation for the claimed back-charge in BC19-1.

(B) BC19-2

190 **BC19-2** is a back-charge of $3,383.68 for "providing skilled workers for P & S workers during 16 July 2017 to 16 August 2017". Deluge relies on site memorandum 04928 dated 30 August 2017 in support of this back-charge. Site memorandum 04928 stated:[217]

> …
>
> Sub-contractor: Sim Khong Hong Construction LLP, Kobe Construction Pte Ltd, Total Rebar Solution Pte Ltd, Deluge (P&S), PQ Builders, Heng Boon Seng Construction Pte Ltd
>
> …
>
> Subject of Site Memo: Back-charge notification for choked drain pipe cleaning & pipe replacement
>
> …
>
> [Samsung] hereby notify you that cost for choked drain pipe cleaning & pipe replacement work will be back-charged to you.
>
> …

[217] ABD at p 4018.

> [Samsung] found that a lot of cement was put inside the pipe that caused it to be choked and on the reason of your lack of work management for pipe protection, [Samsung] will charge the cost of the work to you.
>
> [Samsung] had numerously informed you about the importance of pipe protection to prevent this kind of issue, however so many cements are found inside pipe, therefore [Samsung] is so disappointed about your poor work management.
>
> …

191 We do not see how site memorandum 04928 in any way substantiates the back-charge claimed in BC19-2. First, this site memorandum *post-dates* the relevant period for which the claimed works in BC19-2 relate. That does not make any sense. Logically, one would expect that a site memorandum setting out complaints by a main contractor and for which the sub-contractor (or sub-sub-contractor) is asked to rectify should pre-date those rectification works. Secondly, site memorandum 04928 appears to be a *general* memorandum addressed to various sub-contractors including Deluge for the presence of cement found in the pipes of the project. In other words, while it does contain a reference to piping issues, it is not a complaint about defective piping installed by Vim or Vim's delayed works (for which Vim could be back-charged). If Deluge's case is that Vim had been responsible for the cement found in the pipes and for which it was being back-charged by Samsung, then Deluge must go beyond site memorandum 04928 to make good that contention. They have not done so and this back-charge is disallowed.

(C) BC19-3

192 **BC19-3** is a back-charge of $5,512.64 for "Remove and reinstall kitchen appliance @ L9–L25 C1, L36–L43 C4 & C6". Deluge relies on site

memorandum 04560 in support of this back-charge.[218] Site memorandum 04560 stated:

> …
>
> As per site observation, [Samsung] found Deluge has wrongly installed waste water drain pipes and supply water pipe at wrong position at L36-51 Tower A & B. This is not acceptable and is against contract clause 2.8.3. It has affected the floor marble, wall finishing and kitchen back panel installation. After Deluge has removed drain pipes, rectification works are needed for the finishing …
>
> Hereby, [Samsung] instruct Deluge to finish properly and handover to [Samsung] with good condition by no later than 30th June 2017. …

Site memorandum 04560 shows Samsung's complaint that the defective installation of waste water and supply water pipes at levels 36 to 51 of the project affected the floor marble, wall finishing and kitchen back panel installation. We accept that the installation of both categories of pipes are works coming within the scope of the Subcontract. However, on the face of site memorandum 04560, there are, first, no details or evidence of the wrong installation or why it was wrongly installed and secondly, how as a result of that a kitchen appliance had to be removed or reinstalled. Thirdly there is nothing in the site memorandum to suggest that the defective pipe installation resulted in rectification works comprising the removal and reinstallation of a kitchen appliance; site memorandum 04560 only states that the installation of "floor marble, wall finishing and kitchen back panel" has been affected. As in the many of the back-charge claims made, Deluge has made disparate complaints and references but has not connected these references into a comprehensible complaint in relation to defective or incorrect Subcontract works by Vim requiring rectification. We therefore find that Deluge has not discharged its

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218 ABD at p 4363.

evidential burden for the back-charge claimed in BC19-3 and it is therefore disallowed.

(D) BC19-4

193 **BC19-4** is a back-charge of $13,730.49 for "Modification of base cover for floor drain work". Deluge relies on site memorandum 05053 dated 3 October 2017[219] in support of this back-charge. Site memorandum 05053 states:

> [Samsung] hereby instruct you to complete ALL Remaining Works inclusive T&C Outstanding Defects from L9~L33 before 1-Nov-17 prior to 'HOUSE OWNER HANDING OVER SCHEDULE' stated in the attached for your self explanatory and immediate action.

Attached to site memorandum 05053 were various documents setting out the list of outstanding defects and the schedule for handing over of the units in the project to the subsidiary proprietors.[220] Site memorandum 05053 itself makes no mention of the modification of base cover for floor drain work. The list of outstanding defects attached to site memorandum 05053 does set out various plumbing and sanitary defects, but the most part of these defects were associated with plumbing and sanitary accessories and there is no specific mention of any base cover of the defective floor drain work. It is not for the court to engage in guesswork and speculate that "floor drain work" somehow came in the list of outstanding defects accompanying site memorandum 05053; the legal burden is on Deluge to make good its claim on the back-charges. We therefore also find that Deluge has not discharged its evidential burden for the back-charge claimed in BC19-4 and therefore disallow it.

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219 ACB Vol II Part A p 100.

220 ROA Vol III Part T at p 101 – 132.

Summary on the back-charges that Deluge has made out a claim

194 To summarise, we are of the view that Deluge has only been able to show that the following back-charges were attributable to Vim:

Back-charge	Scope of works	Amount (S$)
BC13	"Supply manpower" for "rainwater pipe installation", "vent pipe installation" and "cold water riser pipe installation" at "RESIDENTIAL TOWER (L34 MEP Level)"	14,966
BC17-3	"Hubless pipe installation resi Tower A from high level 52 & 53"	15,922.80
BC17-4	"RWDP installation at residential balcony"	100
BC17-7	"RWDP installation at MEP Level"	10,800.00
Total		41,788.80

195 In this regard, we are content to adopt the Judge's reasoning to exclude the additional 15% admin charge that Deluge had levied (see [104] and [105(p)] of the GD). Accordingly, we hold that Deluge is entitled to back-charges to the sum of $41,788.80.

Conclusion

196 For the reasons set out above, we allow Vim's appeal in so far as we:

(a) allow Vim's claim for variation works in the sum of **$388,428**

(b) dismiss Deluge's counterclaim of $105,037.74 for rectification works.

(c) reduce Deluge's counterclaim for back-charges from $858,604.36 to **$** 41,788.80.

197 Setting-off the claims (inclusive of Vim's claim below for main works that is not the subject of appeal) against the counterclaims, we hold that Deluge is liable to Vim for a net sum of $453,912.94 (main works) + $388,428 (variation works) – $41,788.80 (back-charges) = **$800,552.14.**

198 For these reasons, we allow the appeal in part. We will hear parties on costs.

Woo Bih Li
Judge of the Appellate Division

See Kee Oon
Judge of the High Court

Quentin Loh
Senior Judge

Avinash Vinayak Pradhan and Jasmine Thng Khai Fang (Rajah & Tann Singapore LLP) for the appellant;
Namazie Mirza Mohamed and Tay Jing En (Mallal & Namazie) for the respondent.

Annex I: Emails from Deluge to Vim constituting written notice under cl 19

S/N	Email	Relevant Content
1	Email dated 15 March 2017: ABD at p 1508	Please refer to the attached site memo of UIC- MCD-DLG-0083-0103- Back Charge Notices For your information Do you have any proper evidence with rectification report forward us to by soon accordingly we will reply to the rather than [Samsung] will deduct the payment Please take note that we has mentioned clearly any back charges from [Samsung] we hold on your responsibility and forward to you accordingly
2	Email dated 20 April 2017: ABD at p 1790	Please refer to the attached site memo of MCSM-DLG-04027 - Damaged Floor Tiles at L25 Unit S2 Kitchen Resi B information and necessary action Do you have any proper evidence after rectification report quickly forward us to close the site memo rather than [Samsung] will issue a back charges Please take note that due to this delays any back charges from [Samsung] we hold on your responsibility and forward to you accordingly
3	Email dated 20 April 2017: ABD at p 1795	Please refer to the attached copy information Do you have any proper evidence quickly forward us to close the site memo rather than [Samsung] will issue a back charges Please take note that any back charges from [Samung] we hold on your responsibility and forward to you Accordingly [Email dated 20 April 2017 from Samsung enclosed] Please find the enclosed HSE Discrepancy, for your kind attention. UIC/EHS/DLG/00063 - Failed to follow buddy system and using wrong ladder. UlC/EHS/DLG/00064 - Improper materials stacking and stagnant water inside the materials (mosquito breeding hazard) UIC/EHS/DLG/00065 - Poor Supervision, workers working on unsafe scaffolding.
4	Email dated 28 April 2017: ABD at p 1862	Residential tower A&B outstanding work complete date for information and necessary action, regarding to internal meeting conversation by 27/04/2017 …

		1) Tower A&B L51 High level unit & Corridor PPR and copper pipe complete by 2/5/17 2) Tower B L52 to Roof plumbing riser pipe work complete by 30/4/17 3) Tower A L49 & 50 unit PPR pipe complete by 2/5/17 4) Tower A&B L52 & 53 High level unit & Corridor PPR and copper pipe complete by 10/5/17 5) Tower A&B L35 water tank, pump room & high level piping work complete by 10/5/17 6) Tower A&B L34 M&E level sanitary and rain water pipe work complete by 10/5/17 7) Tower A&B Roof water tank & pump room piping work complete by 17/5/17 8) Tower A&B L40 to L48 sanitary wares complete by 10/5/17 9) Tower A&B L20 to L40 Rain water inspection c/w flow test complete by 15/5/17 10) Tower A&B L9 to roof unit and corridor all penetration seal up complete by 30/5/17 Please take note if cannot complete base on schedule we will arrange manpower to complete and back charge to you accordingly
5	Email dated 2 May 2017: ABD at p 1892	Please refer to the attached site memo of MCSM-DLG-04106-No manpower and delay work at TA & TB L33 Lift Lobby (ppr pipe pressure test)for your information and necessary action If you have these work completion report quickly forward to me accordingly we will close the site memo by ASAP Please take note that due to this delays any back charges from [Samsung] we hold on your responsibility and forward to you accordingly
6	Email dated 8 May 2017: ABD at p 2068	Please comply to the above mentioned remaining work and revert to us by shortly 1) Tower A&B L51 High level unit & Corridor PPR and copper pipe complete by 2/5/17 – please reply 2) Tower B L52 to Roof plumbing riser pipe work complete by 30/4/17 – please reply 3) Tower A L49 & 50 unit PPR pipe complete by 2/5/17 – please reply There was any delay in achieving affecting water turn on and TOP due to you noncompliance to the above, VIM will be held responsible for the consequences.

7	Email dated 11 July 2017: ABD at p 2737	Please see the enclosed here with For your information. Unsafe act [Samsung] had issue a penalty do you have a any proper evidence please forward to us Accordingly will close the site memo by shortly. --- [Email dated 10 July 2017 from Samsung enclosed] Please find the enclosed HSE Discrepancy, for your kind attention. UIC/EHS/DLG/00073 - Failure to secure gas cylinders bottle left free standing. UIC/EHS/DLG/00074 - Failure to hook safety harness while working at height.
8	Email dated 24 July 2017: ABD at p 2810	Please refer to the attached site memo MCSM-DLG-045712 sanitary wares proper protection for your information and necessary action. We are request level by level sanitary wares proper protection photos c/w date. Investigate to your site team and close site memo by 26/7/17. Otherwise it will be held responsibility by yours. Please note that you will take responsible of all cost and time impact.
9	Email dated 25 July 2017: ABD at p 2822	Please see the enclosed here with Site Memo of UIC-MCSM-DLG-04700 - 04703 For your information and necessary advice. Please investigate your site PIC to give us a proper evidence to close the site memo by shortly, Otherwise it will be held responsibility by yours and your good company. Any back charges from [Samsung] we will forward to you accordingly
10	Email dated 1 August 2017: ABD at p 2848	Please refer to the attached site memo MCSM-DLG-04752 & 04753 delay work your information and necessary action. Improve your dish washer & washing machine installation and close site memo by 4/8/17. Increase manpower and catch up [Samsung] T&C schedule by 4/8/17. Otherwise it will be held responsibility by yours. Please note that you will take responsible of all cost and time impact. --- Ref: MCSM-DLG-04752 MCSM-DLG-04753 Date: 28-July-2017

		Re : (1) Warning for improper installation of dish washer joints & washer taps at residential tower (2) Improper work management which cause serious delay of T&C and quality problem
11	Email dated 31 August 2017: ABD at p 3257	Please refer to the attached site memo L17&22 (BS2) Toilet tile need to hack due to Shower Mixer adjustment / Notice to clear defects for Tower-A L21 ~ 123 for handling over inspection on 1st sept your information and necessary action. Immediately arrange manpower and complete clear outstanding works & defects by 3/9/17. Otherwise it will be held responsibility by yours. Please note that you will take responsible of all cost and time impact.
12	Email dated 6 December 2017: ABD at p 4329	Please see the enclosed here with for your information and necessary action Regards MCSM-DLG-05174-Back Charge warning for illegal hacking at L50-20 Master Toilet Please investigate to your site PIC to give us a proper evidence to close the site memo as soon as possible please take note that if we not able to close this site memo these back charges cost will you're your responsibility on this issues.
13	Email dated 10 December 2017: ABD at p 4346	Refer to the attached site memo for [Samsung] backcharges. Provide details of [Samsung] site memo by 11/12/17. Site memo list as follow:- 1) Back charge for RWDP Installation at MEP level 2) Back charge for bath tub installation 3) Back charge for copper pipes installation from main riser to all over units in rest Tower A (L27A) and Tower B from L25 to 29 4) Back charge for hubless pipes installation residential tower A 5) from L50 to 54 including MEP level horizontal and riser pipes and tower B from 150 to 53 including MEP level horizontal and riser pipes 6) MCSM-DLG-01856--[Final Notice) Delay of RWDP Installation at residential balcony 7) MCSM-DLG-O3O75-[Warning) Delay of Rectification of PPR Pipe and Remained Patching Up for Concealed Pipe 8} MCSM-DLG-03331-Meeting Minute for Catch Up Plan of Plumbing and Sanitary Work

		9) MCSM-DLG-04225-Water Supply Pipe Rectification at A or B Core Shaft Service Area 10) MCSM DLG-04560 Wrong kitchen waste water drain pipes and supply water pipe installation 136-51 Tower A&B 11) MCSM-DLG-04748-Notification for back charge about improper installation at L18 BS1 unit 12) MCSM-DLG-04887 Non Installation of water tap a L18 & 20 unit Bl Tower B 13) MCSM-GEN-04S28-Backcharge notification for choked drain pipe cleaning & pipe replacement 14) Illegal Hacking 1 15) Illegal Hacking 2
14	Email dated 4 January 2018: ABD at p 4444	Please see the enclosed here with for your information and necessary advice regards PH all the toilet extra tap point provision issues. As I remember that when we during the mock up it has been install, based on the mock up the rest all follow up Can I have these whatsapp conversation records also inspection record of concealed pipe pressure test reports. Once get it please forward to me Accordingly I will reply the site memo to close it as soon as possible. [Undated email from Samsung enclosed] Please find the enclosed MCSM-DLG-05189 - Unnecessary Water Points at Penthouse Toilets Nearby WC for your reference and necessary action. Kindly collect the hard copy from our office, acknowledge and revert with signed copy.