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

[2023] SGHC 264

Suit No 1074 of 2019

Between

Seatrium New Energy Ltd
(formerly known as Keppel
FELS Ltd)

… *Plaintiff*

And

HJ Shipbuilding &
Construction Co, Ltd (formerly
known as Hanjin Heavy
Industries and Construction Co
Ltd)

… *Defendant*

JUDGMENT

[Contract — Breach — Whether sub-contractor's duties under shipbuilding sub-contract breached]
[Contract — Variation — Effect of variation of sub-contract — Whether recourse to sub-contractor limited to post-delivery warranty obligations]
[Tort — Negligence — Duty of care — Whether duty of care to be imposed in addition to contractual duty of due care, skill and diligence]

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Seatrium New Energy Ltd (formerly known as Keppel FELS Ltd)
v
HJ Shipbuilding & Construction Co, Ltd (formerly known as Hanjin Heavy Industries and Construction Co Ltd)

[2023] SGHC 264

General Division of the High Court — Suit No 1074 of 2019
S Mohan J
7–10, 14–17, 21, 22, 24, 28–30 March, 21 June 2023

20 September 2023 Judgment reserved.

S Mohan J:

Introduction

1 The case before me involves a shipbuilding dispute between a builder and its sub-contractor. The builder seeks to hold the sub-contractor liable for welding defects discovered in portions of the vessel built by the latter, and claims damages for alleged breaches by the sub-contractor of its contractual and tortious duties. The sub-contractor, on the other hand, denies responsibility for any defects and argues that in any case, the builder's claim is precluded pursuant to a variation in the parties' contract.

Facts

The parties

2 The plaintiff builder is Keppel FELS Ltd (now Seatrium New Energy Ltd) ("Keppel"), a Singapore incorporated company in the business of designing and building mobile offshore rigs and vessels. The defendant sub-contractor is Hanjin Heavy Industries and Construction Co, Ltd (now HJ Shipbuilding & Construction Co, Ltd) ("Hanjin"), a Korean incorporated company in the business of manufacturing various types of vessels and providing, among other things, ship repair and logistical services.[1]

The Floatel Project

3 By a contract dated 17 August 2012,[2] Keppel agreed with Floatel International Ltd to design, engineer, construct, build, launch, test, sell and deliver a DSS20-NS-DP3 semi-submersible accommodation unit (the "Vessel"). Through various addenda, the contract was novated to Floatel Endurance Ltd ("Floatel"), and it was agreed that the Vessel would be delivered to Floatel on 16 April 2015.[3] I will refer to the original agreement and addenda together as the "Main Contract".

4 The Vessel, eventually named the "Floatel Endurance" (see Figure 1 below), was designed to operate as an accommodation support vessel for

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1 Statement of Claim ("SOC") at paras 1–2; Plaintiff's Opening Statement ("POS") at para 1.

2 SOC at para 3; Lee Shu Rong's affidavit of evidence-in-chief ("AEIC"), Exhibit SL-1, Tab 2, at p 141.

3 Lee Shu Rong's AEIC at paras 8–9.

offshore production facilities on the Norwegian Continental Shelf, providing living quarters and other amenities for staff in these facilities.[4]

Figure 1: The Floatel Endurance

5 The Vessel was to be constructed under the supervision of its assigned classification society (or "class" for short), Det Norske Veritas ("DNV"), and in compliance with DNV's rules, regulations and requirements.[5] I discuss the significance of DNV's standards below at [37]. In brief, DNV's role as class is to (a) establish and maintain rules and standards for the construction of vessels; (b) establish and maintain survey rules during the operational phase of vessels; and (c) issue class certificates to confirm that a vessel satisfies the relevant rules and standards based on survey results.[6] These class certificates are relied upon

4 Lee Shu Rong's AEIC, Exhibit SL-1, Tab 2 at pp 251, 253.

5 Clause 2.4 of Main Contract, Lee Shu Rong's AEIC, Exhibit SL-1, Tab 2 at pp 147, 150.

6 Lu Quan's AEIC at para 11.

not only by regulatory authorities and flag states, but also by commercial parties like oil majors who may wish to charter the vessel in question.

The Sub-Contract

6 Keppel in turn appointed Hanjin as a sub-contractor for the project pursuant to an agreement dated 17 January 2013 (the "Sub-Contract").[7] Hanjin was responsible for, among others, the fabrication, assembly and erection of the pontoons and lower columns of the Vessel (the "Works"). The pontoons (pictured below in Figure 2) are the structures of the Vessel which are submerged underwater and help maintain the Vessel's buoyancy. The pontoons are joined perpendicular to lower columns by bracings which prevent them from splaying outwards.[8] The lower columns support the accommodation deck and other structures of the Vessel above the columns.

Figure 2: Pontoons of the Vessel (circled in green)

7 SOC at para 4; Lee Shu Rong's AEIC at para 10 and Exhibit SL-1, Tab 4 at pp 549–555.

8 POS at para 4.

7 The pontoons and lower columns were constructed by Hanjin at its shipyard in the Philippines.[9]

The Side Letter

8 Under the Sub-Contract, the Works were to be completed by 30 October 2013.[10] However, Hanjin could not meet this deadline for a variety of reasons. In light of this, the parties eventually came to an agreement for Keppel to take over part of the Works, with the value of these works to be set off against the amount payable to Hanjin. This agreement was eventually recorded in a Protocol of Delivery and Acceptance dated 27 December 2013, annexing a Letter Agreement and Price Schedule setting out the sums payable by Keppel to Hanjin.[11] I will refer to these documents collectively as the "Side Letter". The legal effect of the Side Letter on the Sub-Contract and Hanjin's liabilities is a key issue in this case and a major point of dispute between the parties, which I address in some detail later.

9 The Vessel was subsequently completed by Keppel, with Floatel accepting delivery on 16 April 2015.[12]

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9 Han Kwan Ho's AEIC at para 11.

10 Han Kwan Ho's AEIC, Exhibit HKH-2 at p 89, cl 1.2.

11 Lee Shu Rong's AEIC at paras 18–19, Exhibit SL-1, Tab 6 at p 4185.

12 SOC at para 8; Lee Shu Rong's AEIC at para 30.

Discovery of defects and repair works undertaken

The first inspection at Westcon Shipyard and initial partial repairs

10 In August 2016 (about 16 months after delivery of the Vessel to Floatel), Floatel notified Keppel of welding defects in the pontoons of the Vessel. These defects were discovered during a routine inspection while the Vessel was docked at a shipyard in Ølen, Norway, operated by Westcon Yard AS ("Westcon Shipyard"). In short, at DNV's suggestion, the bracing stubs of the Vessel had been checked during this routine inspection by way of non-destructive testing ("NDT") conducted by SolidTech AS ("SolidTech"), an independent NDT service provider.[13] Briefly, NDT refers to the testing of the physical condition of an object without affecting the object's ability to fulfil its intended function and without physically altering its characteristics; common NDT methods include magnetic testing, radiographic testing and ultrasonic testing.[14]

11 Following the inspection, SolidTech prepared a report (the "SolidTech August 2016 Report") detailing its findings that there were numerous welding defects on the bracing stubs of the pontoons and other areas.[15]

12 It was at this point that Keppel first notified Hanjin of the defects. This was done by way a letter dated 24 August 2016 sent by Keppel's Project Manager, Mr Lee Shu Rong ("Mr Lee"). The letter went further to attribute the defects to Hanjin's fabrication process: "… Preliminary investigation indicates

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13 Lee Shu Rong's AEIC at para 33.

14 Expert Report of Ken Kirby and Arron Jackaman, Glossary of Terms at pp 6–7.

15 Lee Shu Rong's AEIC at para 36.

the defects to have occurred during the course of fabrication, at HHIC-Phil (Subic Philippines)".[16]

13 The Vessel was due to commence her next charter program in or around the North Sea on 31 August 2016. In view of this, DNV directed that the welding defects in the bracing stubs had to be repaired before the Vessel could proceed, given that the bracing stubs were considered critical structures of the Vessel. Partial repairs were accordingly carried out at Westcon Shipyard and the Vessel departed on 4 September 2016.[17]

14 Given the partial nature of the repairs carried out at Westcon Shipyard, leaving some of the welding defects unrectified, DNV issued Condition of Class 4 for the Vessel on 4 October 2016. This meant that the Vessel was subject to an extended monitoring and inspection regime.[18] Pursuant to these requirements, further NDT was conducted by SolidTech in December 2016 whilst the Vessel was operating offshore.[19] SolidTech produced further reports detailing its findings during these inspections – I refer to these reports and the SolidTech August 2016 Report collectively as the "SolidTech Reports".

The second inspection and repairs at DVR Shipyard

15 From 14 December 2017 to 21 July 2018, the Vessel was berthed and dry docked at Damen Verolme Rotterdam Shipyard ("DVR Shipyard") in the Netherlands for a second round of inspections and repairs. These inspections

16 Lee Shu Rong's AEIC at para 44.

17 Lee Shu Rong's AEIC at paras 38–42.

18 Lu Quan's AEIC at paras 17–20.

19 Lu Quan's AEIC at para 21.

were conducted by Materiaal Metingen Testgroep BV ("MME") and witnessed by representatives of Keppel, Floatel, DNV and Hanjin's Mr Moon Seung Joon ("Mr Moon").[20]

16 MME issued a further set of NDT reports (the "MME Reports") setting out its findings following the second inspection. The MME reports detailed numerous welding defects at various locations.[21] However, there was insufficient time to repair all the defects at DVR Shipyard as the Vessel was due for her next charter program. Therefore, only limited repairs were carried out on the structurally sensitive areas or high stress areas of the Vessel.[22] On or about 20 July 2018, the Vessel departed DVR shipyard for her next charter program in or around the North Sea. The Vessel continued to be subject to certain operational restrictions and further monitoring pursuant to Condition of Class 7 issued by DNV.[23]

17 Relations between Keppel and Hanjin broke down following from the second inspection and repairs at DVR Shipyard, as the parties could not resolve their disputes over responsibility for the defects and the repair costs. Eventually, communications between the two ceased.[24]

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20 Lee Shu Rong's AEIC at paras 85, 88.

21 SOC at para 16; Lee Shu Rong's AEIC at para 89.

22 Lee Shu Rong's AEIC at paras 94–95.

23 Lee Shu Rong's AEIC at para 102; Lu Quan's AEIC at para 33.

24 Lee Shu Rong's AEIC at paras 103–106.

The third inspection and repairs at the SG Shipyard

18 Keppel thus undertook, at its own cost and expense, the remaining inspection and repairs at Keppel's shipyard in Singapore (the "SG Shipyard"), where it had control over the program, quality and costs of repairs.[25] In order to effect the repairs in Singapore, the Vessel was (after its bow thrusters had been removed) loaded onto a heavy lift vessel and transported from Europe to the SG Shipyard.[26]

19 A further round of NDT was conducted once the Vessel was brought to the SG Shipyard. This uncovered more welding defects, as recorded in NDT reports produced by Keppel (the "Keppel Reports").[27] All repairs to the Vessel were eventually completed and deemed satisfactory in July 2019. The Vessel was thereafter transported back to Europe where the bow thrusters were reinstalled before the Vessel was redelivered back to Floatel.[28]

20 Keppel, through its efforts, managed to save its working and commercial relationship with Floatel. However, the same could not be said for its relationship with Hanjin. That has culminated in the present suit.

The parties' cases

21 Keppel submits that the Works delivered by Hanjin to Keppel were defective, and consequently that Hanjin breached duties owed to Keppel pursuant to the Sub-Contract. Keppel further argues that Hanjin owed Keppel a

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25 SOC at para 22; Lee Shu Rong's AEIC at paras 107–108.

26 Lee Shu Rong's AEIC at paras 113–117.

27 Lee Shu Rong's AEIC at para 119.

28 Lee Shu Rong's AEIC at paras 122–129.

duty of care in tort to carry out the Works with due skill, care and diligence – a duty it also clearly breached. As such, Keppel claims damages from Hanjin for losses it says it suffered in undertaking the various inspections and repairs, amounting to US$14,176,001, €11,479,566 and S$5,635,924.[29]

22 Hanjin denies that the Works were defective. Hanjin submits that the Sub-Contract only required it to carry out the Works in compliance with the relevant DNV standards, and that it had done so.[30] It also denies that it owes any separate duty of care in tort to Keppel.[31] More significantly, Hanjin says that the Sub-Contract was varied by the Side Letter. The variation was such that Keppel was not entitled to make any claim whatsoever in respect of the defects save for calling on Hanjin's warranty obligations under cl 16.3 of the Sub-Contract,[32] and that even those warranty obligations had ended upon the expiry of the 12-month warranty period prescribed in cl 16.3.[33]

Issues to be determined

23 The following issues arise for my determination:

(a) whether the Works were defective;

(b) whether Hanjin breached its contractual duties;

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29 SOC at para 23.

30 Defence (Amendment No. 2) ("Defence") at paras 8, 16.

31 Defence at para 6.

32 Defence at para 7.

33 Defence at para 9.

(c) whether Hanjin owed and breached a separate duty of care in tort; and

(d) whether Keppel's claim is precluded by the Side Letter.

24 If I find that Hanjin is liable for breach of its duties (contractual and/or tortious) and Keppel's claim is not precluded by the terms of the Side Letter, I will also have to determine the quantum of damages, if any, that Keppel is entitled to recover.

Whether the Works were defective

25 The first issue is whether the Works were defective at all. Hanjin submits that the burden is on Keppel to prove on a balance of probabilities that there were "rejectable defects" detected in the Works, and that it has failed to do so.[34] Unsurprisingly, Keppel argues that they were objectively and undeniably defective.

26 Keppel raises the following points in support of its case:

(a) The defects were identified and documented in three separate inspections by three different parties (*ie*, SolidTech, MME and Keppel). The respective NDT reports they produced were reviewed, accepted and relied on by the parties in carrying out repairs (which would not have been necessary if there were no defects), and by DNV itself in issuing its Conditions of Class in respect of the Vessel.[35]

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34 Defendant's Closing Submissions ("DCS") at para 50.

35 Plaintiff's Closing Submissions ("PCS") at para 61.

(b) Mr Moon, who was Hanjin's representative to witness MME's inspections at DVR Shipyard, and himself a qualified NDT Level 3 inspector,[36] stated in a business trip report and other email correspondence to his Hanjin colleagues that there was a high defect rate in the Works.[37]

27 On the other hand, Hanjin argues that the NDT reports from the three inspections (*ie*, the SolidTech Reports, the MME Reports and the Keppel Reports) are all unreliable. Specifically, Hanjin contends that:

(a) The SolidTech Reports should be disregarded in their entirety because SolidTech's inspectors wrongly applied a stricter set of acceptance criteria in assessing indications detected during the testing process. Applying the wrong (stricter) criteria resulted in a higher (and accordingly, inaccurate) number of defects being reported. This called into question the competence of SolidTech's inspectors, and there was a real likelihood that the number of defects was overreported, making Hanjin liable for defects that it should not have been liable for at all.[38]

(b) There were two instances of inconsistent results (although Hanjin claims there were more which it did not list) between the different reports on the same welds – in one instance, a weld accepted by SolidTech was rejected by MME and Keppel; in the other, welds in two areas were accepted by Keppel but rejected by MME.[39]

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36 Moon Seung Joon's AEIC at para 5, Exhibit MSJ-11, Tab 11 at pp 262–268.

37 PCS at paras 62–63.

38 DCS at paras 51–60.

39 DCS at para 61.

Analysis and decision

28 Dealing first with the SolidTech Reports, I accept the evidence of Keppel's expert, Mr Duncan Campbell ("Mr Campbell"), that while SolidTech did use a more onerous acceptance criteria in assessing welds in some areas, this only affected welds in seven out of a total of 131 locations with defects identified. Furthermore, all the defects identified under the stricter criteria would still have been identified as defects *even if* the correct criteria were used.[40] On that basis, I find that Hanjin's contentions of a real risk of overreporting by SolidTech in the number of defects are not made out.

29 As for the instances of inconsistent results raised by Hanjin, Keppel points out that one of the alleged instances of inconsistent results (*ie*, of a discrepancy between SolidTech's and Keppel's reports) is misconceived given Mr Campbell's evidence that the two reports were referring to *different* locations.[41] In any case, all that Hanjin has done is to point out a few individual instances of discrepancies between the various reports – while Hanjin claims that these are "just some of the many instances of such discrepancies",[42] it has not drawn the court's attention to any evidence of such other instances. In my judgment, these few examples of inconsistencies, even if true, are in the final analysis *de minimis* and do not warrant the reports being discredited and rejected in their *entirety*.

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40 PCS at paras 69–70; PRS at para 4; Reply Expert Report of Duncan Iain Campbell at paras 2.3.5–2.3.6.

41 Plaintiff's Reply Submissions ("PRS") at para 7.

42 DCS at para 61.

30 Notably, the instances of inconsistency in results appear to be the only grounds on which Hanjin challenges the reliability of the MME and Keppel reports. I note however, that this was not a concern raised or shared by either of Hanjin's experts, Dr Kenneth Kirby ("Dr Kirby") and Mr Arron Jackaman ("Mr Jackaman"), in their joint expert report.

31 In fact, Hanjin's experts endorsed MME's procedures as being very robust. The only caveat they made was that they could not tell from the MME Reports alone whether the procedures were followed correctly by MME's inspectors.[43] I accept that the experts were in no position to comment on the performance of MME's inspectors, given that their opinion was based purely on a documentary review. However, Hanjin's Mr Moon was in such a position, as he had attended at DVR Shipyard to witness the inspection, and was himself a qualified NDT Level 3 inspector (see [26(b)] above). Mr Moon was in attendance at DVR Shipyard until 28 March 2018, by which time almost 98% of the NDT inspections had been completed.[44] In his affidavit of evidence-in-chief ("AEIC") at paras 49–50, Mr Moon spoke about the work of the MME inspectors in the following terms:[45]

> 49. … I also continuously monitored the methods and procedures used by the MME inspectors and repeatedly queried the reliability of the MME inspectors during my time at the DVR Shipyard.
>
> 50. *The procedures and methods used by MME inspectors were also appropriate and similar to what I would have done if I was the one carrying out the inspections.*
>
> [emphasis added]

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43 Expert Report of Ken Kirby and Arron Jackaman at para 6.17.

44 Moon Seung Joon's AEIC at para 44.

45 Moon Seung Joon's AEIC at paras 49–50.

32 On balance therefore, I am not persuaded by Hanjin's contention that the SolidTech Reports, MME Reports and Keppel Reports are unreliable and should be disregarded entirely.

33 As regards Mr Moon's statements regarding the high defect rate (see [26(b)] above), Hanjin now seeks to qualify those statements by contending that Mr Moon was only recording the opinion of Keppel's Mr Lee that there was a high defect rate, rather than expressing his own judgment of the matter.[46] However, I have not found it necessary to decide on the meaning of Mr Moon's statements and whether they evidenced his own opinions. On the basis of the information contained in the NDT reports, I am satisfied that on a balance of probabilities the Works were defective.

Whether Hanjin breached its contractual duties

34 Having found that the Works were defective, I turn next to consider whether Hanjin was therefore in breach of its contractual duties. This requires two questions to be determined:

(a) What exactly were Hanjin's duties to Keppel under the Sub-Contract?

(b) Did Hanjin breach those duties?

35 Keppel submits that Hanjin owed Keppel several contractual duties as set out in the following clauses of the Sub-Contract:[47]

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46 DCS at para 63, Defendant's Reply Closing Submissions ("DRS") at para 21.

47 SOC at para 5; Lee Shu Rong's AEIC, Exhibit SL-1, Tab 4 at pp 549–550, 559.

2.1 The Sub Contractor shall undertake, perform and complete the Sub Contract Works as specified in the Works Order and as described in the Plans and Specifications to be supplied from time to time by the Builder to the Sub Contractor including such variations as may be authorized under Clause 5 hereof.

2.2 The Sub Contractor shall *perform the Sub Contract Works to the extent necessary to ensure that the Builder completes and delivers the Vessel to the Owner* ~~in conformity~~ with ~~first class construction standards~~ Marine and Offshore Standard of Practice, which shall be approved by Builder applied by international shipyards ('Marine and Offshore Standard of Practice') and *in compliance with the requirements of this Sub Contract, the Main Contract (insofar as it relates to the Sub Contract Works) and all applicable laws, rules and regulations including all work incidental thereto*.

2.3 Notwithstanding any other provision in this Sub Contract, it shall be the Sub Contractor's responsibility to ensure that:

a. the Sub Contract Works when carried out or performed shall *fully comply with such requirements of the applicable Classification Society and Regulatory Bodies as the Builder may require*.

b. The Sub Contract Works are *performed with such standard of workmanship that upon performance of the Sub-Contract Works, those parts of the Vessel, insofar as pertains to or in connection with the Sub Contract Works, shall be in all respects a first class product capable of operating or functioning under the conditions in which it is intended to operate and function*.

…

8.1 The Sub Contract Works shall be *performed in strict compliance with this Sub Contract with all due skill, care and diligence, with first class workmanship, and in accordance with good and sound engineering practice* to the satisfaction of the Builder, the Owner and the Classification and Regulatory Bodies.

[emphasis added in italics; strikethrough and underline in original]

36 Keppel submits that Hanjin breached these contractual duties because of the defects found in the Works.[48] For the reasons I have explained at [25]–[33] above, I agree that there were in fact such defects in the Works. Keppel argues that these defects were attributable to Hanjin, relying on Mr Campbell's opinion that the defects were caused by Hanjin's poor workmanship.[49] Keppel further points out that Hanjin's expert, Dr Kirby, had accepted that some of the defects found in the welds (*ie*, non-planar defects such as slag inclusions and porosity, and some types of planar defects such as lack of fusion and lack of penetration) were attributable to the manufacturing process, *ie*, when Hanjin was performing the Works.[50]

37 In contrast, Hanjin presents a very different view as to what its contractual duties were. It does not deny the relevance of the clauses in the Sub-Contract as set out above at [35], but argues that Keppel has not particularised Hanjin's contractual duties arising from those clauses. Hanjin's case is that the collective effect of the relevant clauses in the Sub-Contract was to require it to carry out the Works in compliance with the applicable class standards – in particular, the DNV-OSS-101, DNV Offshore Specifications and Rules, Rules for Classification of Mobile Offshore Drilling and Support Units ("DNV-OSS-101"), and the Offshore Standard DNV-OS-C401, Fabrication and Testing of Offshore Structures, October 2010 ("DNV-OSS-C401").[51]

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48 PCS at para 59.

49 PCS at para 74.

50 Transcript (28 March 2023) at p 6, ln 7–16.

51 DCS at para 66; Expert Report of Ken Kirby and Arron Jackaman at para 4.8.

38 Following from that, Hanjin says that it fulfilled its duties under the Sub-Contract because it carried out the Works in compliance with DNV-OSS-101 and DNV-OS-C401.[52] Hanjin makes the following points in support of its case:

(a) Its welders were sufficiently qualified to perform the Works, with all of them either approved by DNV or exempted with equivalent certifications.[53]

(b) All of Hanjin's welders were made aware of its Welding Procedure Specification ("WPS") and Quality Standard Guidelines ("HPQS"), which were documents containing the standards and guidelines for the welding works to be performed.[54]

(c) A robust system of checks had been put in place to oversee its welders' works, with submanagers providing updates to Mr Song Suk Bae, the then-manager of the Erection Part in Hanjin's Philippines Shipyard.[55]

(d) Hanjin had met the standards of NDT testing as required under DNV-OSS-101 and DNV-OS-C401. Its NDT inspectors were qualified, and it had put in place proper testing procedures which were carried out in accordance with requirements.[56]

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52 DCS at para 67.

53 DCS at para 68.1.

54 DCS at paras 68.2–68.4.

55 DCS at para 68.5.

56 DCS at paras 69–72.2.

(e) Hanjin facilitated cross-check audits conducted by Keppel, and promptly investigated and rectified any defects identified by Keppel in its non-conformance reports.[57]

(f) Hanjin's NDT reports (produced following its NDT testing during the progress of the Works) were accepted without complaints or qualifications by Keppel, and were signed off by Keppel, Floatel and DNV.[58]

39 Hanjin emphasises that while it accepts that it was required to perform the Sub-Contract Works with due care, skill and diligence, its conduct must be assessed based on the knowledge reasonably available to it and the measures it could reasonably have adopted at the material time when the Works were being undertaken, rather than with the benefit of hindsight.[59]

Analysis and decision

40 As a preliminary point, I accept the evidence of Mr Campbell (with which Dr Kirby agreed at least in part) that the defects discovered are attributable to Hanjin's workmanship (at [36] above). The question that remains to be decided is whether that means that Hanjin has breached its contractual duties.

41 In that respect, the parties have adopted very different positions (as summarised at [35]–[39] above) as to the standard which Hanjin had to meet under the Sub-Contract. Hanjin essentially contends that it has discharged its

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57 DCS at paras 72.3–73.

58 DCS at para 74.

59 DRS at para 13.

duties by putting in proper procedures and personnel to perform and test the Works, whereas Keppel submits that "the proof is in the pudding",[60] *ie*, the defects are sufficient in themselves to show Hanjin's breach.

42 In my judgment, Hanjin's view of its contractual duties is misconceived. It is plain on the words of the Sub-Contract that Hanjin's duty was not merely one of reasonable care. Hanjin was required to carry out the Works under the Sub-Contract in compliance with the requirements of the Sub-Contract and Main Contract (which contained detailed technical specifications for the Vessel, including the environmental conditions in which it would have to operate) (cl 2.2). Hanjin had to ensure that the Works, *when carried out or performed*, would *fully comply* with the requirements of DNV (and other regulatory bodies) (cl 2.3(a)). Furthermore, it was required to perform the Works *with such standard of workmanship* such that the relevant parts of the Vessel constructed by Hanjin, when delivered, would be in all respects a first class product capable of operating or functioning under its intended conditions (cl 2.3(b)). In light of these provisions, I do not accept Hanjin's contention that the Sub-Contract clauses are vague and insufficiently particularised.

43 In light of these contractual obligations, Hanjin's duties cannot be discharged by it merely by having the requisite personnel and procedures in place. Ironically for Hanjin, the caveat made by its own experts in the context of the MME Reports (at [31]) is particularly apt here – the most robust procedures mean nothing if they are not followed correctly. Indeed, the sheer number of defects discovered spanning three different inspections (see [10]–[19] above) is, in my view, strong evidence that they were *not* followed.

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60 PCS at para 6.

44 To be clear, it is not my view that the presence of *any* defects would mean that Hanjin would, without more, be in breach of the Sub-Contract. That is clearly not what the Sub-Contract says. What is dispositive, however, is the fact that the defects were so extensive and serious as to warrant DNV's issuance of a Condition of Class in respect of the Vessel. Clearly, the Works, having been performed, were not fully compliant with DNV's requirements. Nor, in DNV's view, were they capable of operating in the Vessel's intended conditions without substantial monitoring and repairs. In my view, that suffices to place Hanjin in breach of cll 2.3(a) and (b) of the Sub-Contract.

45 Given my conclusions on Hanjin's breaches of cll 2.3(a) and (b), it is strictly unnecessary for me to decide whether it also breached its duty of due skill, care and diligence in order for Keppel to prove Hanjin's breach of the Sub-Contract. Nonetheless, if necessary for my decision, I would also find Hanjin in breach of this duty. Clause 8.1 of the Sub-Contract required Hanjin to *perform* the Works with all due skill, care and diligence and with first class workmanship.

46 As mentioned above at [39], Hanjin argues that its conduct should be assessed on the basis of what it reasonably knew or could have done at the time the Works were being performed. To support this proposition, Hanjin relies on the case of *JSI Shipping (S) Pte Ltd v Teofoongwonglcloong (a firm)* [2007] 4 SLR(R) 460 ("*JSI Shipping*") at [69]:

> 69 At this juncture, it is also necessary to reiterate that a court must always guard against the 'scapegoat effect' that often magnifies *ex post facto* and makes plausible culpability by employing the spectacles of hindsight. It is almost intuitive for a third party observer, after the occurrence of an unhappy event, to conclude that procedures could or should have been adopted to obviate the subsequently known risks. On the other hand, an auditor looking at the matter as it presented itself at

> the material time would usually quite naturally conclude that he or she was acting reasonably. It is crucial, in the interests of justice, that the standard of reasonable care be objectively assessed on the basis of knowledge then reasonably available as well as measures that could have been reasonably adopted at the material time. The acid test is certainly not one of retrospective plausibility. [emphasis in original]

47 With respect, I do not think *JSI Shipping* assists Hanjin. The court's remarks in that case must be understood in the context in which it was made, *ie*, the standard of care expected of an auditor carrying out a statutory audit. In that context, it is understandable that an external auditor tasked with the review of a company's internal systems and controls is not to be regarded as negligent just because he did not pick up on a particular risk which eventually materialised. Hanjin is in a very different position from that of an auditor – it was tasked to construct the Works and to carry out the necessary inspections to ensure they were of a satisfactory quality. Hanjin accepts that it was contractually obliged (under cl 8.1) to carry out the Works with due care, skill and diligence. The welding work which is what we are concerned with in this case was performed by its welders and purportedly checked by its NDT inspectors. To the extent that the welders and/or NDT inspectors were negligent, at law, so was Hanjin. I do not read *JSI Shipping* as standing for any general principle that the court should *never* have regard to any events happening after the material time when the Works were performed. If there was indeed such a principle, that would result in relevant evidence pointing to negligence having to be disregarded in many cases. Often enough, a claimant would only be able to establish negligence of a counterparty based on evidence uncovered after the fact.

48 Again, I do not accept Hanjin's contention that all it needed to do in order to discharge its duty under cl 8.1 was simply to demonstrate robust procedures on paper. In my judgment, he presence of such a large number (or

percentage) of defects in the welds (as reported in the SolidTech, MME, and Keppel Reports) speaks for itself. Against this, none of the welders or NDT inspectors who carried out the Works was called to give evidence at the trial on Hanjin's behalf. Having found that the extensive defects in the Works were attributable to Hanjin's poor workmanship, it is clear in my view that this was cogent objective evidence also pointing to Hanjin not performing the Works with due skill, care and diligence.

49 For the foregoing reasons, I am satisfied, on a balance of probabilities, that Hanjin did breach its contractual duties to Keppel in the performance of the Works.

Whether Hanjin owed Keppel a separate duty of care in tort

50 Keppel contends that over and above its contractual duties, Hanjin owed it a *separate* duty of care in tort to carry out the Works with due skill, care and diligence – a duty which Hanjin also duly breached, and it is to this issue that I now turn.

The law on negligence

51 It is well-established that a party seeking to impose a tortious duty of care on another must satisfy the test set out by the Court of Appeal in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"). The *Spandeck* test requires that a claimant first satisfy the court, as a threshold requirement, that the damage it suffered is factually foreseeable (*Spandeck* at [75]–[76]). If that threshold is crossed, the claimant must then establish, first, that there is sufficient legal proximity between the claimant and defendant for a duty of care to arise; and second, that

such a duty of care is not negated by policy considerations (*Spandeck* at [77]–[85]). Moreover, a duty of care has to be established incrementally through reference to decided cases in analogous situations (*Spandeck* at [73]).

Whether a duty of care is established in the present case

52 As a starting point, I do not think it can be seriously disputed in this case that it is factually foreseeable that defects would arise requiring repair if Hanjin did not carry out the Works with due care, skill and diligence. Thus, the threshold requirement to establish a duty of care is met.

53 As far as proximity is concerned, Keppel submits that proximity is established by virtue of Hanjin's *contractual* duty to carry out the Works with all due care, skill and diligence. Keppel further argues that there was an assumption of responsibility by Hanjin in respect of the Works and that Keppel relied on Hanjin to carry them out properly.[61]

54 While Keppel did not draw the court's attention to any analogous cases where such a duty of care was found, I accept that there is sufficient proximity between the parties. It would be difficult to deny such proximity especially since the Sub-Contract itself provides that Hanjin owes Keppel an express duty of skill, care and diligence. Hanjin itself accepts that any tortious duty of care it owed to Keppel would be the same as its contractual duties, *ie*, of "due skill, care and diligence".[62]

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61 PCS at para 58.

62 DCS at para 80.

55 The next question is whether there are policy considerations negating such a duty of care in tort. Keppel submits that there are none. Hanjin argues to the contrary.

56 Mr Kenneth Tan SC ("Mr Tan"), counsel for Hanjin, argues that since Hanjin's obligations and liabilities have been comprehensively set out in the Sub-Contract, and consequently contractually limited, Keppel cannot circumscribe those limitations by seeking a remedy in tort. In support, Mr Tan relies on the cases of *MCST Plan No 1166 v Chubb Singapore Pte Ltd* [1999] 2 SLR(R) 1035 ("*Chubb*") and *The Jian He* [1999] 3 SLR(R) 432 to support this proposition.[63]

57 *The Jian He* does not assist Hanjin as it is distinguishable from the present case. In *The Jian He*, the Court of Appeal was dealing with a different question in a very different context of a plaintiff seeking to evade an exclusive jurisdiction clause in a contract by making a claim in tort.

58 However, I agree that the presence of a contractual framework may constitute part of the policy considerations to be taken into account when establishing a duty of care in tort. Where the parties have privately agreed to an allocation risk by means of contract, that would militate against the imposition of a duty of care in tort. That appears to be what the court in *Chubb* was pointing towards with its reference (at [44]) to exemptions and limitations imposed by contract:

> 44 … It is a given that liability in tort and contract may co-exist. However, *it is also well-settled that by founding a cause of action in tort one cannot avoid the exemptions and limitations imposed by contract between the parties*. This position was

63 DCS at paras 78–80.

> affirmed in a later decision of the House of Lords: *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL). In the result the true proposition is that unless there is a definite advantage in founding a claim in tort, it would be unwise to infuse it into what is essentially a claim in contract. [emphasis added]

59 The point was made more clearly by the Court of Appeal in *Spandeck* at [114], where it expressly recognised that a duty of care should not be superimposed on a contractual framework, and that this constituted cogent policy reasons negating a duty of care even where proximity could be established.

60 In this case, the tortious duty of care which Keppel seeks to impose appears to be co-terminous and no different in content from the contractual duty of care already owed by Hanjin pursuant to the Sub-Contract. I therefore see no reason to depart from the general policy against superimposing tortious duties of care on a contractual framework. Accordingly, I reject Keppel's claim that Hanjin also owed it a tortious duty of care.

Whether Keppel's claim is precluded by the Side Letter

61 Having found Hanjin to be in breach of its contractual obligations to Keppel under the Sub-Contract, I next consider the critical issue of whether Keppel's claim is in any case precluded because of a variation in the Sub-Contract by means of the Side Letter. As prefaced at [8] above, this issue was hotly contested by the parties.

The effect of the Side Letter

62 Hanjin's case is that the parties had agreed to a variation of the Sub-Contract on 27 December 2013, as recorded in the Side Letter (see [8] above). The effect of this agreement was that:[64]

> … save for [Hanjin's] warranty obligations for the Sub-Contract Works which it has carried out, [Keppel] shall not have any claims whatsoever against [Hanjin] for the works which will have to be carried out by [Keppel] to complete/remedy the Sub-Contract Works.

63 Hanjin says that Keppel's claims fall squarely within that agreement, and thus Keppel's only recourse is to Hanjin's warranty obligations under cl 16.3 of the Sub-Contract. Those warranty obligations, in turn, had already expired by the time Keppel first notified Hanjin of its claim in respect of the defects.[65]

64 Clause 16 of the Sub-Contract provides as follows:[66]

> 16.1 The Sub Contractor warrants and guarantees that:
>
> a. the Sub Contract Works shall be performed in accordance with the requirements and conditions of this Sub Contract, ~~in a first class and workmanlike manner~~ and in accordance with Marine and Offshore Standard of Practice and good and sound engineering and construction practices;
>
> b. the Sub Contract Works and all materials and equipment incorporated into the Sub Contract Works and all parts thereof shall be of merchantable quality, fit for the purpose and use for which the parties intended and shall be free from defects; and

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64 DCS at para 83.

65 DCS at paras 101–102.

66 Lee Shu Rong's AEIC, Exhibit SL-1, Tab 4 at pp 552, 571.

> c. upon performance of the Sub Contract Works, those parts of the Vessel, insofar as pertains to or in connection with the Sub Contract Works, shall perform in accordance with the requirements and conditions of this Sub Contract.
>
> 16.2 Any work required to meet the requirements and conditions set forth in this Sub Contract shall be for the account and responsibility of the Sub Contractor until such work so meets such requirements and conditions.
>
> 16.3 Irrespective of whether any designs, data or information have been provided or approved by the Builder, the Sub Contractor undertakes to maintain and keep the Sub Contract Works in proper working order and guarantees and warrants ~~the design,~~ workmanship and all materials and equipment fabricated or provided by it against any and all defects for the period stated in the Works Order, or, *if no such period is stated, then for a period of twelve (12) months from the date of official delivery of the Vessel to the Owner ('Warranty Period')*. Unless otherwise stated, any period stated to be the Warranty Period in the Works Order shall commence from the date of official delivery of the Vessel to the Owner.
>
> 16.4 The Sub Contractor shall promptly execute, at its own cost, all such work of repair, rectification, replacement, making good of defects, imperfections and other faults in the Sub Contract Works attributable to the Sub Contractor.
>
> 16.5 Any work performed by the Sub Contractor under this Clause shall be further warranted for the balance of the Warranty Period specified in Clause 16.3 or six (6) months after completion of such work, whichever is later.
>
> 16.6 The Sub Contractor's obligations under this Clause are without prejudice to any other rights and remedies the Builder may have.
>
> [emphasis added in italics; strikethrough and underline in original]

65 I also set out the wording of the Side Letter here verbatim:[67]

> We refer to the certain works order dated 17 January 2013 ('Works Order') between Sub-Contractor and Keppel FELS Limited ('Builder') pursuant to which Sub-Contractor shall

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67 Lee Shu Rong's AEIC, Exhibit SL-1, Tab 6 at p 4187.

> undertake, perform and complete *the Sub-Contract Works as specified in the Works Order* and as described in the Plans and Specifications to be supplied from time to time by the Builder to the Sub-Contractor including such variations as may be authorized. *Unless otherwise defined herein, terms defined in the Works Order shall have the same meaning(s) when used in this letter agreement.*
>
> Builder is agreeable to take delivery of the Sub-Contract Works to the extent completed by the Sub-Contractor on [27] December 2013. Sub-Contractor and Builder agree that however, as at [27] December 2013, ***certain incomplete or outstanding work items ('Outstanding Items')*** remain to the Sub-Contract Works. ***The Outstanding Items are set out in Appendix 1 to the Protocol of Delivery & Acceptance.***
>
> Sub-Contractor and Builder agree that, taking into account the original sub-contract price, the additional work carried out by Sub-Contractor, the reduction / credit required for Builder to complete the Outstanding Items, and the payments already received by the Sub-Contractor from Builder, the balance amount of United States Dollars Two Millions and Seven Hundred sixteen Thousands and Seven Hundred eleven point ninety six only (USD 2,716,711.96) ('Balance Amount') remains payable by [Builder] to [Sub-Contractor] in connection to the Works Order and the Sub-Contract Works.
>
> Upon [Builder's] payment of the Balance Amount to [Sub-Contractor], the [Sub-Contractor] acknowledges and agrees that there is no other or further amount due or outstanding from the Builder in connection to the Works Order or the Sub-Contract Works, and that Builder shall not have any further or other claims whatsoever against [Sub-Contractor] in connection to the Works Order or the Sub-Contract Works.
>
> *In consideration for Sub-Contractor's acknowledgement and agreement above, Builder acknowledges and agrees that, save for Sub-Contractor's warranty obligations for the Sub-Contract Works which it has carried out,* ***Builder shall not have any claims whatsoever against [Sub-Contractor] for the works which will have to be carried out by Builder to complete/remedy the Sub-Contract Works.***
>
> …
>
> [emphasis added in italics and bold italics]

66 Mr Adrian Wong ("Mr Wong"), counsel for Keppel, raises multiple objections to Hanjin's contentions on the effect of the Side Letter. First,

Mr Wong submits that the Side Letter cannot be read in isolation and must be construed in its proper context, which Keppel says relates only to the outstanding works it had to *take over* from Hanjin. Keppel points out that in the lead up to the deadline for Hanjin to complete the Works, there were still works which were incomplete and others which were defective – these were set out in various punch lists sent by Keppel to Hanjin. Eventually, it was agreed that Keppel would take over (or in its words, "complete and remedy") those incomplete and defective works outstanding from Hanjin. The value of those works would be deducted from the sum originally payable by Keppel to Hanjin.[68] On that basis, Mr Wong argues that the Side Letter could only have related to claims which Keppel could have made against Hanjin in relation to the *outstanding* works, and no more than that.[69]

67 Keppel further questions the commercial sensibility of Hanjin's interpretation of the Side Letter. It contends that the welding defects had not even been discovered as at the date of the Side Letter, and therefore, it would be commercially absurd for Keppel to agree to waive all future claims against Hanjin (including for the welding defects) when it had no reason to do so.[70]

68 Second, Mr Wong appears to suggest that no consideration was furnished for the variation of the Sub-Contract. This was largely in response to Hanjin's attempt to raise certain unpleaded matters in its submissions, namely

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68 PCS at para 118.

69 PCS at para 119.

70 PCS at para 119(2).

that it had provided consideration for the variation by forbearing from making claims against Keppel for changes to the construction schedule.[71]

69 Third, Mr Wong alleges that Hanjin did not raise the Side Letter as a defence up until the commencement of this suit. He contends that it is telling that Hanjin did not initially regard the Side Letter as a defence and that it is being raised as an afterthought.[72]

70 Fourth, Mr Wong argues that Hanjin is in any case estopped from relying on the Side Letter because it had admitted to the defects and/or its liability for them.[73]

71 Finally, Mr Wong contends that even if Hanjin's interpretation of the Side Letter is accepted, Hanjin nonetheless remains liable to Keppel under its warranty obligations.[74]

Analysis and decision

72 After considering the Side Letter and the parties' arguments carefully, I find that Keppel's claim *is* precluded by the terms of the Side Letter and that consequently, Hanjin is not liable to Keppel. I elaborate below.

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71 PRS at paras 25–29.

72 PCS at para 121.

73 PCS at paras 134-135.

74 PCS at paras 126–132.

(1) The Side Letter is supported by consideration

73 Keppel's suggestion that the variation of the Sub-Contract (as effected by the Side Letter) is unsupported by consideration can be disposed of quickly. I am prepared to accept that Hanjin is not entitled to rely on its alleged forbearance from claiming compensation against Keppel; this was clearly a matter that should have been pleaded but wasn't. However, notwithstanding this and putting the unpleaded allegation to one side, the consideration for the variation is, in my judgment, clearly recorded in the plain words of the Side Letter itself (see [65] above) – in consideration for Hanjin accepting a reduction in the amount payable to it by Keppel, Keppel agreed that it would have no claims against Hanjin for the works it would have to carry out to complete/remedy the Sub-Contract Works. I find that, in itself, to be sufficient consideration irrespective of whether or not there was any (separate) forbearance on the part of Hanjin.

74 In any case, it does not appear that Keppel is seriously arguing that the variation as recorded in the Side Letter is null and void or invalid for lack of consideration. If so, that would also render invalid the reduction in the amount payable by Keppel to Hanjin.

(2) The proper interpretation of the Side Letter

75 I move on to the key issue, *ie*, how should the Side Letter be interpreted?

76 It is uncontroversial that the court adopts a contextual approach to contractual interpretation. This approach is laid out in detail by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 (see [114], [121] and [131]–[132])

and as more recently summarised in *CIFG Special Assets Capital I Ltd (formerly known as Diamond Kendall Ltd) v Ong Puay Koon and others and another appeal* [2018] 1 SLR 170 at [19], and I need not revisit it here. For present purposes, I summarise just a few relevant principles. First, the court's purpose is to determine the parties' objective intentions, as expressed in the words of the contract. The starting point is to look at the words the parties have used. In this regard, the contract must be read as a whole rather than with undue focus on an individual word or phrase, and the court can also take into consideration its external context or surrounding circumstances provided they are clear, obvious and known to both parties.

77 The court must also pay heed to the context in which the contractual document itself was made, taking into account the nature of the contracting parties, and whether it was drafted by lawyers or with input from lawyers: see *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732 at [45]–[48]. It is thus important to bear in mind that the parties in this case are sophisticated commercial entities. Furthermore, it is in evidence that the Protocol of Delivery and Acceptance and the Letter Agreement (*ie*, the components of the Side Letter) were drafted by Keppel's in-house legal team and also considered by Hanjin's in-house legal team. Mr Lee for Keppel gave the following evidence during his cross-examination on this topic:[75]

> A: Right, looking back at page 21622, under attachments, the file names is "Protocol of Delivery Acceptance (HHIC) (Legal's [revision] 5-12-2013)".
>
> Q: What does that mean?
>
> A: It means that this draft came from legal.
>
> …

[75] Transcript (8 March 2023) at p 37 ln 6–19.

> Q: *So is it your evidence that the protocol of delivery and acceptance at page 21623, and the letter agreement, pages 21626 and 21627, were drafted by Keppel FELS's legal department?*
>
> A: *That's correct.*
>
> [emphasis added]

Mr Jun Sung Il for Hanjin correspondingly gave the following evidence:[76]

> Q: Mr Jun, can I ask you to take a look at paragraph 38 of your affidavit. And I want you to focus on the line, I think the fifth line in paragraph 38. *It was internally suggested that I propose a revision [to the draft Letter Agreement by adding the word 'whatsoever']*. Do you see those words?
>
> A: Yes, I see it.
>
> Q: Now my question is this: the person who made the internal suggestion to you was Mr KJ Chung, correct?
>
> A: KJ Chung, but *when I made an enquiry to our legal team, that was the view of the legal team.*
>
> [emphasis added]

78 Indeed, it is clear from the language used in the Letter Agreement that the parties have been reasonably careful and precise in their use of words and phrases. The attention to detail and use of particular words is also clear from their negotiations – significantly, Hanjin had proposed the additions of the words "whatsoever" and "be" in the last paragraph of the Letter Agreement.[77] Given this context, where it is clear that the parties have consciously applied their minds to the precise language used in the agreement, it is only right that they should be held to their words, and to the definitions they have given to those words. With these points in mind, I turn to the Letter Agreement.

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76 Transcript (17 March 2023) at p 29 ln 1–10.

77 Transcript (8 March 2023) at p 40 ln 8 – p 41 ln 14.

79 Hanjin relies primarily on the last paragraph of the Letter Agreement, which reads as follows: "Builder shall not have any claims whatsoever against [Sub-Contractor] for the works which will have to be carried out by Builder to complete/remedy the Sub-Contract Works."

80 Keppel's argument, as I have set out above at [66], is that this sentence should be read as a reference only to its claims for works it had to carry out in respect of the outstanding works leftover by Hanjin as at 27 December 2013. However, I cannot accept this interpretation as it contradicts the plain words of the Letter Agreement. Those outstanding works that Keppel had to complete or remedy had already been defined as "Outstanding Items" in the second paragraph of the Letter Agreement:

> Builder is agreeable to take delivery of the Sub-Contract Works to the extent completed by the Sub-Contractor on [27] December 2013. Sub-Contractor and Builder agree that however, as at [27] December 2013, ***certain incomplete or outstanding work items ('Outstanding Items')*** remain to the Sub-Contract Works. ***The Outstanding Items are set out in Appendix 1 to the Protocol of Delivery & Acceptance.*** [emphasis added]

81 The term "Outstanding Items" was specifically used in the next paragraph of the Letter Agreement, in the context of reducing the amount payable by Keppel to Hanjin to give credit for Keppel having to complete those items (and Appendix 1 of the Side Letter contained the list of items outstanding from the various punch lists submitted by Keppel to Hanjin – see [65] above):

> Sub-Contractor and Builder agree that, taking into account the original sub-contract price, the additional work carried out by Sub-Contractor, ***the reduction / credit required for Builder to complete the Outstanding Items***, and the payments already received by the Sub-Contractor from Builder, the balance amount of United States Dollars Two Millions and Seven Hundred sixteen Thousands and Seven Hundred eleven point ninety six only (USD 2,716,711.96) ('Balance Amount')

> remains payable by [Builder] to [Sub-Contractor] in connection to the Works Order and the Sub-Contract Works. [emphasis added]

82 However, in contrast, the last paragraph of the Letter Agreement provides that Keppel shall not have any claims whatsoever against Hanjin for the works which will have to be carried out by Keppel to complete/remedy the **"Sub-Contract Works", <u>not</u> the "Outstanding Items"**. In re-examination, Keppel's Mr Lee, in response to a question from Mr Wong, attempted to equate the two phrases.[78] However, I find that this is insufficient to overcome the clear objective evidence to the contrary, apparent within the document itself. As I explain below, "Sub-Contract Works" is *separately* defined in the Letter Agreement. Nor are the terms used interchangeably within the text of the Letter Agreement. Reading the Letter Agreement as a whole, it is clear, in my view, that there was a conscious choice of words used in respect of each substantive paragraph. If, as Keppel contends, the parties had intended for the last paragraph (and the penultimate paragraph) to apply only to claims in respect of the outstanding works that Hanjin had not carried out and left for Keppel to take over, then they would have used the term "Outstanding Items" instead of "Sub-Contract Works".

83 What remains is to determine the meaning of the "Sub-Contract Works". The first paragraph of the Letter Agreement stipulates that the term is "as specified in the Works Order" and further states that "[u]nless otherwise defined herein, terms defined in the Works Order shall have the same meaning(s) as when used in this letter agreement." When one refers back to the Works Order

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78 Transcript (9 March 2023) at p 97 ln 5–11.

(*ie*, the Sub-Contract), "Sub-Contract Works" is defined in cl 1.2 of the Sub-Contract as follows:

> 'Sub Contract Works' means the work to be performed by the Sub Contractor under the Sub Contract as set out in the Works Order as may be supplemented from time to time by Plans and Specifications and any Variations of such work.

84 Thus, whenever the words "Sub-Contract Works" appear in the Letter Agreement, they bear the same meaning as they do in the Sub-Contract. In other words, the effect of the plain words of the last paragraph of the Letter Agreement (when read, not in isolation, but together with the Sub-Contract) was that, save for Hanjin's warranty obligations under cl 16.3 of the Sub-Contract, Keppel would have no claims "whatsoever" for the works it would have to carry out to *either* complete *or* remedy *all* the work already performed or meant to be performed by Hanjin under the Sub-Contract (*ie*, the "Sub-Contract Works"), as the case may be. Put another way, Keppel would have no claims whatsoever against Hanjin, save for Hanjin's warranty obligations, for any Sub-Contract Works that Keppel had to "complete" or any Sub-Contract Works that Keppel had to "remedy"; this would also make sense of the words "which will have to be carried out by Builder [Keppel]". The use of the future tense was simply a reference to anything Keppel would be required to do in the future, including during the 12-month warranty period following the Vessel's delivery to Floatel.

85 In my judgment, the interpretation I have arrived at above pays due regard to the text used by the parties and gives effect to the plain meaning of those words, bearing in mind the relevant context in which they were used. Keppel's interpretation on the other hand, would require one to ignore the use of the different definitions for "Outstanding Items" and "Sub-Contract Works", and to ignore the word "remedy" or construe it synonymously with "complete".

In my view, that would involve giving, overall, a strained interpretation to the words concerned and to assume that the paragraph in question contained unnecessary or useless surplusage.

86 Keppel complains that such an interpretation would be commercially absurd, and therefore cannot be right as Keppel had no reason to waive all future claims against Hanjin, including for defects which had not even been discovered (see [67] above). However, Keppel's contention is, in my judgment, overly narrow and one-sided. One would be hard-pressed to find a commercial agreement which did not involve some element of give and take on the part of each contracting party; it cannot be that every provision which may disadvantage a party is then to be regarded as commercially absurd.

87 Taking a broader view of the transaction as a whole, the fact that Keppel had even agreed to take over some of Hanjin's works shows that it was in Keppel's commercial interest to do so. Keppel was concerned with Hanjin falling behind on its promised delivery date.[79] Further delays to the completion of the pontoons would likely have resulted in delays to the completion of the Vessel as a whole; delays for which Keppel would have to answer to its customer, Floatel. It is apparent that through this whole process, Keppel was anxious to maintain its working and commercial relationship with Floatel – Mr Lee himself attested to the fact of Floatel's gratitude towards Keppel with discernible pride.[80] Therefore, it was in Keppel's interest to take over and complete the outstanding works itself rather than jeopardise its relationship with Floatel on account of further delays by Hanjin. On the other hand, Hanjin had

79 Lee Shu Rong's AEIC at para 18.

80 Lee Shu Rong's AEIC at para 130.

its own concerns because it had no knowledge of the additional works Keppel intended to carry out on the pontoons and whether they would affect Hanjin's own works that had already been completed. Once the pontoons were handed over by Hanjin to Keppel in whatever unfinished state they were in, Hanjin would have no more control of or visibility over any works that would be carried out on the pontoons by Keppel, including any effect those works may have on the works already completed by Hanjin. From that perspective, Hanjin would have a legitimate concern that it could potentially be made liable for matters over which it had no control.[81] Given those concerns, it would not, in my judgment, be commercially absurd for Hanjin to wish to be protected against, or to limit its exposure to, claims by Keppel even in respect of (and *especially for*) the Works which it had completed.

88 Therefore, I do not think that the ordinary or plain meaning of the final paragraph of the Letter Agreement could be characterised, objectively, as commercially absurd or illogical, as contended by Keppel. Keppel may complain that it has (with hindsight) come off the worse in this bargain, but it is not the role of the court to come to a party's aid to help it escape or avoid the consequences of a commercially disadvantageous bargain.

(3) Hanjin is entitled to rely on the Side Letter

89 I next address Keppel's arguments in relation to Hanjin's entitlement to raise the Side Letter as a defence, *viz* that Hanjin only raised the Side Letter after the commencement of this suit, and is estopped from relying on it because it had admitted to the defects in its correspondence.

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[81] Jun Sung-Il's AEIC at para 35.

90 For the latter argument, Keppel relies on the doctrine of promissory estoppel. The elements to establish promissory estoppel are uncontroversial. It must be shown that (1) the promisor made a clear and unequivocal promise; (2) the promisee acted in reliance on that promise; and (3) the promisee suffered detriment as a result of the reliance. It must also be shown that it would be inequitable for the promisor to resile from his promise: see *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd* [2013] 1 SLR 1182 at [83].

91 Keppel contends that Hanjin's Mr Han Kwan Ho had made numerous clear and unequivocal admissions that there were defects in the Works in his email correspondence with Keppel. Keppel says that it relied on these admissions to its detriment by arranging for the inspections and repairs at the DVR Shipyard and SG Shipyard, and bearing the costs of the inspections and repairs at all three shipyards. Thus, Keppel says it is inequitable to now allow Hanjin to resile from its admissions and be permitted to rely on the Side Letter.

92 Keppel points to numerous email correspondence between the parties; I set out just a few representative ones here. Keppel's Mr Lee sent the following email to Hanjin's Mr Kang Tae Kyu on 24 August 2016:[82]

> Dear Mr. Kang,
>
> Weld defect on the bracing stub have been [*sic*] identified on B348 – Floatel Endurance.
>
> Attached for your reference:
>
> 1) Notification of Bracing Stub Weld Defect
> 2) B348-H1000 – Structural Category Plan
> 3) Preliminary Investigation Photos (part 1 of 2)
>
> We will keep you informed of the ongoing investigations.

[82] Han Kwan Ho's AEIC, Exhibit HKH-3 at pp 145–146.

> Kindly let us know on your response to the notification.
>
> …

93 Mr Han responded to Keppel by an email dated 6 September 2016, stating that there was a possibility of defects which had escaped Hanjin's testing, but at the same time raising the point that Hanjin's warranty obligations had expired:[83]

> Dear Sir,
>
> We confirm that we have received your message.
>
> Regarding the guarantee period of the Floatel pontoon, *our records indicate that the period expires one (1) year after the delivery date of the vessel, which was completed on April 2015. As such, we confirm that the guarantee has expired.*
>
> …
>
> The NDT inspection results were reviewed together with the Builder (Keppel) and the Class (DNV GL). This helped to ensure certainty with respect to the Radio-tested parts, which would have been required to be checked together.
>
> There may have been some parts that could not be soundly detected by use of [ultrasonic testing] because of the shape of structure. As such, *there is a possibility of inside defects that could have escaped from detection.* Nonetheless, we can confirm that the welding seam passed the general inspection.
>
> …
>
> [emphasis added]

94 Mr Lee replied to this email on 17 October 2016, requesting for a meeting with Hanjin's representatives, and setting out his position that Keppel's claim did not fall within the scope of the warranty:[84]

> Dear Mr. Han,

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83 Han Kwan Ho's AEIC, Exhibit HKH-3 at p 145.

84 Han Kwan Ho's AEIC, Exhibit HKH-5 at pp 152–153.

> Based on our current findings, we are requesting for a meet up with representative from HHIC, to share the details of investigations.
>
> This will not be accepted as Guarantee Claims, as the defects were inherent during the construction period, and was not picked up during NDT inspections.
>
> …

95 Mr Han, however, maintained Hanjin's position in his response two days later on 19 October 2016:[85]

> Dear Mr. Shawn Lee,
>
> We are sorry to advise you that our position remains unchanged, i.e. the guarantee period of the Floatel pontoon has already expired in our record.
>
> *Guarantee claims are not always referred to as the defects which were generated after ship delivery. Many of them may originate in the imperfectness of the state as constructed at the time of delivery.*
>
> …
>
> [emphasis added]

96 It is apparent just from the emails set out above that while Mr Han had discussed the possibility that there might be defects in the Works, he had at the same time maintained from his very first reply on 6 September 2016 that Hanjin's warranty obligations had already expired (*ie*, after the expiry of 12 months following the Vessel's delivery to Floatel in April 2015).

97 There was further correspondence exchanged back and forth between Mr Lee and Mr Han over the next two years, which largely followed the same theme of Mr Lee asserting that Hanjin was responsible for the defects, and

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85 Han Kwan Ho's AEIC, Exhibit HKH-5 at p 152.

Mr Han repeating that the warranty had expired.[86] Even when it had become clear that the Works were defective, Mr Han nonetheless maintained the same position, as can be seen from his last email to Mr Lee dated 18 September 2018:[87]

> Dear Mr. Lee,
>
> Someday, we may need to have a talk over this issue. But, we don't think now is the proper time to sit vis-a-vis.
>
> As A/S engineers, we cannot overstep our authority in executing our job. *It is to be reminded that the welding claim was received after the warranty expiry date.* The rest issues must be considered from the legal aspect of view.
>
> Technically, it is obvious that such welding defects were identified. But, it is hard to define the reason why the defects are there, in that the welding inspections were carried out, partly, together with your site representatives or double-checked by your own expert team. The explanation should also include such cases as the defects missed by our inspectors during construction or personal difference in judging the defects between the inspectors that time and now.
>
> …
>
> [emphasis added]

98 Having examined the email correspondence closely, I do not consider that any of the statements by Mr Han, singly or collectively, constitute a clear and unequivocal admission as to Hanjin's liability for the defects. Even when he accepted at later stages in the correspondence that there were, based on the technical evidence, in fact welding defects in the Works, Mr Han consistently maintained the primary position that the warranty period had expired – this is consistent with Hanjin's present position, which is that Keppel's only recourse for any defects in the Works was to Hanjin's warranty obligations under cl 16.3

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86 Han Kwan Ho's AEIC, Exhibits HKH-16, HKH-20, HKH-23 and HKH-57.

87 Han Kwan Ho's AEIC, Exhibit HKH-57 at p 1168.

of the Sub-Contract, and which had already expired. While it is true that Mr Han did not raise the Side Letter *expressly*, the position he took in his correspondence with Mr Lee was, in substance, in no way inconsistent with Hanjin's reliance on the Side Letter now.

99 Keppel also points to the fact that Hanjin had offered to pay Keppel US$2.3m as its purported share of the repair costs at various points as further evidence of an admission of liability to Keppel.[88] In my judgment, those offers are not dispositive one way or the other. Offers to settle do not necessarily amount to admissions of liability. As is apparent from the discussion above, Hanjin had always maintained that it was no longer liable by reason of the warranty expiring. This remains clear from the language of Hanjin's offer, set out below:[89]

> Dear Sir,
>
> We regret to inform you that the result of our review of the estimation (USD 13,000,000) presented by you is difficult for us to accept for the following reasons.
>
> 1) Not enough/precise information is available at present, i.e. repair period (docking period) and workforce is hardly predictable, needing further clarification and consideration of them later.
>
> …
>
> *Our basic policy on this matter is still to cooperate with your company to solve this problem favorably*, but it is still difficult to accept the unreasonable level of repairs, even considering the contract price (USD 7,014,000) of the pontoon units.
>
> In conclusion, we should, as mentioned in (1), have a more detailed review of the repair period (docking period) and workforce. *For the moment, we would like to propose to share*

88 PCS at para 121(4).

89 Han Kwan Ho's AEIC, Exhibit HKH-20 at p 295.

> *USD 2,300,000 for the cost* reviewed as per our above-mentioned standard.
>
> We hope for your positive consideration of our position as above.
>
> [emphasis added]

I do not read Hanjin's offer to be in any way an admission of liability for the welding defects – in fact, there is no reference to liability for the defects at all. Rather, the language suggests that Hanjin was making the offer to pay some money out of goodwill, perhaps in an attempt to salvage the relationship with Keppel *ie,* "to cooperate with your company to solve this problem favorably".

100 For the foregoing reasons, I find that no clear and unequivocal representations were made by Hanjin amounting to a clear admission of liability for the defects, and consequently no estoppel arises to prevent Hanjin from relying on the Side Letter.

101 As regards Keppel's complaint that Hanjin had only raised the Side Letter expressly after the commencement of this suit, I find that this point is irrelevant, even if true. First, Keppel does not allege that the Side Letter was a document prepared or created only after the present dispute arose. Second, even if Hanjin did not realise the significance of the Side Letter up until the point this action was commenced, that does not diminish the legal effect of the Side Letter and its effectiveness as a defence to Keppel's claim. Third, as I have said above, the position taken by Hanjin in its correspondence prior to the commencement of this suit is, in substance, consistent with its express reliance on the Side Letter now. Accordingly, I do not find any substance to Keppel's complaint.

(4) Hanjin's warranty obligations have expired

102 I turn to Keppel's next and final argument that Hanjin remains liable under its warranty obligations despite the terms of the Side Letter.

103 First, Keppel submits that Hanjin is liable for the defects under its warranty obligations in cl 16.3 of the Sub-Contract because the defects were inherent in Hanjin's construction of the Works, and that contrary to Hanjin's claims, no notice is required to be given to Hanjin to trigger those obligations.[90] The latter point on notice may be dispensed with as Hanjin has clarified in its submissions that it does *not* contend that there is any such notice requirement in order for cl 16.3 to apply.[91]

104 As for Keppel's primary argument that Hanjin remains liable under cl 16.3 for inherent defects, I find no merit to this argument based on the clear words of the clause, set out below:

> Irrespective of whether any designs, data or information have been provided or approved by the Builder, the Sub Contractor undertakes to maintain and keep the Sub Contract Works in proper working order and guarantees and warrants ~~the design,~~ workmanship and all materials and equipment fabricated or provided by it against *any and all defects* for the period stated in the Works Order, or, *if no such period is stated, then for a period of twelve (12) months from the date of official delivery of the Vessel to the Owner ('Warranty Period').* Unless otherwise stated, any period stated to be the Warranty Period in the Works Order shall commence from the date of official delivery of the Vessel to the Owner.
>
> [emphasis added; strikethrough in original]

90 PCS at paras 126–129.

91 DRS at para 53.

On its plain words, the clause provides that Hanjin warrants the workmanship and all material and equipment fabricated by it against *any and all defects* for a period of 12 months from the date of delivery of the Vessel to Floatel. No distinction is made regarding the types of defects or when the defects arise – the 12-month warranty period applies all the same. That warranty period expired one year after the delivery of the Vessel to Floatel, *ie*, on 16 April 2016 based on the delivery date of 16 April 2015. As such, I reject Keppel's argument that Hanjin remains liable for the defects under its warranty obligations – those warranty obligations had expired by the time the defects were first discovered in August 2016 (see [10] above) and notified to Hanjin by Keppel.

105 Second, Keppel argues that its claim is not confined to the warranty obligations; its right to pursue *other* remedies (for example, damages) are not excluded by cl 16.3 and are in fact expressly preserved by cl 16.6 which stipulates that Hanjin's obligations under cl 16 "are without prejudice to any other rights and remedies the Builder [Keppel] may have".[92] In support of this argument, Keppel relies on the case of *Raymond Construction Pte Ltd v Low Yang Tong and Another* [1997] SGHC 262 ("*Raymond Construction*") for the proposition that in the absence of clear words, a defects liability clause in a contract does not preclude a claimant seeking other remedies available under the common law, such as a claim for damages.

106 In my judgment, Keppel's argument is misconceived. While I accept the *general principle* of law as stated in *Raymond Construction*, the present case is not about the impact of cl 16.3 on Keppel's claim. It is about the *combined effect* of the Side Letter *and* cl 16.3 on Keppel's entitlement to make its claim. I have

92 PCS at paras 130–132.

set out my analysis and conclusions above at [80]–[84] that the variation effected by the Side Letter was to preclude Keppel from making any claim whatsoever against Hanjin in respect of the welding defects in the Works, except by calling on Hanjin's warranty obligations – that was the only recourse available to Keppel. Therefore, it does not assist Keppel to say that its rights to *other* remedies are not precluded under cl 16.3 and are preserved by cl 16.6 – in my judgment, any such rights are precluded by *the Side Letter*. The words of cl 16.6 only seek to preserve any other rights or remedies that Keppel "may" have, but this merely invites the very question I have considered – what other rights or remedies does Keppel have? If the Side Letter precludes *all* other rights or remedies save for Hanjin's warranty obligations under cl 16.3 (as I have concluded), cl 16.6 does not (and indeed, cannot) confer on Keppel or preserve any new or further rights or remedies. Clause 16.6 merely means that *to the extent* that Keppel *may* have other rights and remedies, those are preserved.

Conclusion on the effect of the Side Letter

107 To summarise my conclusions on this key issue, I find that while Keppel has established that there were defects in the Works and that Hanjin was in breach of the terms of the Sub-Contract, Keppel's claim against Hanjin in respect of the welding defects is precluded by the Side Letter. Pursuant to the Side Letter, Keppel's only recourse against Hanjin was via Hanjin's warranty obligations under cl 16.3 of the Sub-Contract. However, Hanjin can no longer be held liable for those warranty obligations, given that the warranty expired on 16 April 2016, before the defects were discovered in August 2016. In my judgment, the sum effect of this is that Keppel has no recourse left against Hanjin and thus, its claims for damages against Hanjin fails.

Conclusion

108 For the reasons elaborated above, I dismiss Keppel's claim against Hanjin as Hanjin is not legally liable to Keppel. Given my decision on liability, there is no need for me to consider the parties' arguments on the question of the damages claimed by Keppel.

109 I will hear the parties on costs separately.

S Mohan
Judge of the High Court

Wong Soon Peng Adrian, Sara Sim Hui Li, Wayne Yeo (Yang Weien) and Sia Bao Huei (Rajah & Tann Singapore LLP) for the plaintiff;
Tan Wee Kheng Kenneth Michael SC (Kenneth Tan Partnership) (instructed), Daryll Richard Ng, Ang Kaili and Shannon Yeo Feng Ting (Virtus Law LLP) for the defendant.