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

[2025] SGHC(A) 4

Appellate Division / Civil Appeal No 2 of 2024

Between

Terrenus Energy SL2 Pte Ltd

… *Appellant*

And

Attika Interior + MEP Pte Ltd

… *Respondent*

Appellate Division / Civil Appeal No 4 of 2024

Between

Attika Interior + MEP Pte Ltd

… *Appellant*

And

Terrenus Energy SL2 Pte Ltd

… *Respondent*

In the matter of Suit No 173 of 2022

Between

Terrenus Energy SL2 Pte Ltd

… *Plaintiff*

And

Attika Interior + MEP Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Building and Construction Law — Contractors' duties — Extension of time and liquidated damages]
[Damages — Measure of damages — Contract — Cost of cure]

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v
Attika Interior + MEP Pte Ltd and another appeal

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Appellate Division of the High Court — Civil Appeals No 2 and 4 of 2024
Woo Bih Li JAD, Kannan Ramesh JAD and See Kee Oon JAD
24 October 2024

26 February 2025

Kannan Ramesh JAD (delivering the grounds of decision of the court):

Introduction

1 A party seeks the "cost of cure" as damages for loss suffered arising from a breach of a contract following defective construction of a building or structure or the supply or sale of defective goods. Despite seeking the "cost of cure" as damages, the party does not intend to rectify the defects. Is the party entitled to the "cost of cure" as damages? Framed another way, is the party's intention to rectify the defects relevant to the question of whether the "cost of cure" should be awarded as damages? This was one of the central questions in the present appeals.

2 There are competing considerations in the analysis of the appropriate response to the question. On one hand, as the overarching consideration for contractual damages is to put the claimant in a position as if the contract has been performed, the court is not generally concerned with the use to which a claimant intends to put an award of damages. On the other, there is an intuitive reluctance to grant the "cost of cure" where the claimant does not intend to effect the cure. The law on this question has not spoken with one voice and with clarity. The present appeals presented an opportunity to shed some light.

3 The present appeals were against the decision of the judge below (the "Judge") in *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd* [2023] SGHC 333 (the "Judgment") in HC/S 173/2022 (the "Suit"). The Suit concerned claims arising from a construction project involving Terrenus Energy SL2 Pte Ltd ("Terrenus"), the plaintiff below, and Attika Interior + MEP Pte Ltd ("Attika"), the defendant below. Attika principally prevailed in the Suit save on one issue. Terrenus appealed against the Judge's decision in AD/CA 2/2024 ("AD 2") and Attika cross-appealed in AD/CA 4/2024 ("AD 4").

4 On 24 October 2024, we dismissed AD 2 and allowed AD 4, giving brief reasons then. We now provide our full grounds.

Facts

5 On 5 April 2021, the parties entered into a Main Builder Agreement (the "MBA") for the construction of a solar power generation facility in Changi Business Park (the "Project"). Terrenus engaged Attika as the main contractor for the Project. The contract sum was $5,100,000 (the "Contract Sum").

6 The following terms of the MBA were pertinent for the purposes of the present appeals:

(a) Annex A set out Attika's scope of works (the "Works"). This included installing, testing and commissioning the Project. Terrenus was responsible for *inter alia* the supply of solar panels as well as the supply and installation of two power grid substations (the "Substations").

(b) Annex F – titled "Schedule of Payment", provided for the Contract Sum to be paid at three milestones: (a) 40% based on monthly progress per item; (b) 20% upon the issuance of the Temporary Occupation Permit ("TOP") by the Building and Construction Authority ("BCA"); and (c) 40% upon the issuance of the Certificate of Statutory Completion ("CSC") by the BCA.

(c) Clause 5.5 stipulated the various dates for completion of the Works. Under cl 5.5.1, Attika was obliged to complete the Works expeditiously by the "Date of Completion", which was stipulated in the Appendix to the MBA as 31 July 2021. Under cl 5.6.1, Attika was also obliged to meet the requirements of "Partial Completion", defined in cl 1.3.12 as "the time for completion of part of the Works to commission and energize at least 70% of the [Project] on or before 30 June 2021, prior to the Date of Completion". Clauses 5.5.5, 5.5.6, and 5.5.7 allowed Attika to submit formal requests for extensions of time ("EOTs"), and for Terrenus to accept or reject such requests.

(d) Clause 14.3 permitted Terrenus to terminate the MBA without default on the part of Attika. In that event, Terrenus would have to, *inter alia*, certify payment to Attika for "all work executed prior to the date of termination as set out in the [MBA]" as provided in cl 14.3.2.

(e) Clause 17.1 provided that Attika would pay Terrenus 0.1% of the Contract Sum as liquidated damages for each day of delay beyond

the date of Partial Completion and/or Date of Completion. Clause 17.1.4 provided that Attika could also recover other losses and damages which were not covered by the liquidated damages provided for in cl 17.1.

7 On 12 January 2022, the TOP for the Project was issued by the BCA. On 3 February 2022, Terrenus terminated Attika's engagement on a without default basis pursuant to cl 14.3 of the MBA. On 6 July 2023, approval from the National Parks Board ("NParks") for the CSC to be issued was obtained and the CSC was issued on 13 July 2023.

8 During the course of the Project, Terrenus failed to pay certain portions of the Contract Sum resulting in several rounds of adjudication proceedings between parties under the Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed).

9 Terrenus subsequently commenced the Suit. It made various claims. Its primary claim was for damages arising from defective works. In particular, Terrenus alleged that Attika failed to ensure that the solar panel mounting structure rods (the "PEG Rods") were embedded to a depth of at least 500mm below ground as provided for in the MBA. Terrenus contended that it was entitled to the cost of rectification of the PEG Rods as the failure to embed to the contractual minimum depth gave rise to the risk of structural failure of the solar panels during high winds. Attika contended that Terrenus had failed to prove both the extent of non-compliance and the risk of structural failure during high winds as a result of such non-compliance.

10 Terrenus also claimed liquidated damages and general damages arising from delays allegedly caused by Attika. Attika contended that a substantial part of the delays was in fact caused by Terrenus and it was therefore entitled to

EOTs, pursuant to cl 5.5. It was not disputed that Attika was not granted any EOTs, despite several requests.

11 Finally, Attika counterclaimed for payment of the unpaid balance of the Contract Sum in the sum of $3,139,836.60. This primarily comprised the balance 40% of the Contract Sum. We shall use "Balance Sum" to interchangeably describe the sum claimed by Attika as the unpaid balance of the Contract Sum and the balance 40% of the Contract Sum. Terrenus contended that Attika was not entitled to payment of the balance 40% because the MBA had been terminated (on a no-fault basis) before the CSC was issued and the CSC was a condition for payment of the sum in question under Annex F of the MBA. Attika contended that Annex F did not apply where the MBA was terminated without default and Terrenus was obliged to certify and pay the remaining portion of the Works as set out in the MBA, pursuant to cl 14.3.2.

The decision below

12 The Judge held as follows:

(a) Terrenus failed to make out its case that there were substantial defects in the works carried out by Attika. On the issue of the depth of the PEG Rods, while Terrenus had established that some of the PEG Rods were not embedded to the requisite depth, it had failed to discharge its burden of proving (a) the extent of non-compliance, and (b) the risk of structural failure in the event of high winds as a result of such non-compliance. Terrenus was therefore awarded nominal damages of $1,500.

(b) Attika only achieved Partial Completion on 23 November 2021, when it was supposed to have achieved this on or before 30 June 2021.

Absent any EOT, it would have been in delay until 22 November 2021, a total of 146 days. However, as Attika was entitled to an EOT of 140 days, Terrenus was only entitled to six days of liquidated damages in the sum of $30,600.

(c) Terrenus was not entitled to general damages for delay in addition to liquidated damages. Clause 17.1.4 of the MBA (which provided for general damages) specifically applied to "*other* losses and damages" which could not be covered by liquidated damages. Since cl 17.1.2 already provided for liquidated damages for delay, Terrenus could not also claim general damages in respect of delay under cl 17.1.4. In any event, the loss (even if proved) was too remote, and Terrenus had failed to discharge its duty to mitigate its losses.

(d) Attika was entitled to the Balance Sum. However, payment should be net of deductions for certain claims that parties had agreed would be subject to Neutral Evaluation ("NE"). These claims related to (a) replacement costs for fencing using concrete stumps; (b) damaged solar panels; and (c) ponding (the "Three Deducted Items"). The quantum of the Three Deducted Items was $49,861 and US$85,920.90 (the "Deducted Sums").

Parties' submissions on appeal

13 In AD 2, Terrenus argued that:

(a) The court should award Terrenus substantial damages for Attika's failure to install the PEG Rods to the contractual minimum depth. Terrenus had proved its case on the extent of non-compliance as the expert evidence it adduced was reliable and Attika did not provide

contrary measurements. Further, the Judge erred in holding that Terrenus must show that any deviation from the contractual minimum depth would cause structural risk in order to be entitled to substantial damages. The non-compliance was a breach which in itself entitled Terrenus to damages on the basis of the cost of cure.

(b) The Judge erred in finding that Attika was entitled to an EOT of 140 days or at all, since it was Attika rather than Terrenus who was responsible for the relevant delays.

(c) Terrenus was entitled to general damages for Attika's delay under cl 17.1.4 of the MBA. Clause 17.1.4 did not restrict the recovery of general damages only to the types of damages not addressed by liquidated damages. Rather, the "other losses and damages which cannot be recovered by such liquidated damages", referred to in cl 17.1.4, should be correctly understood as permitting Terrenus to recover as general damages any delay-related loss that was not covered by the liquidated damages.

(d) The Judge erred in awarding the Balance Sum. It was clear that the Schedule of Payment in Annex F applied to cl 14.3.2 making the CSC a condition precedent for payment of the Balance Sum. Thus, Attika did not have a claim to the 40% as (a) the CSC had not been issued by the time the MBA was terminated; and (b) Attika did not carry out the works necessary to obtain the CSC.

14 Attika put into issue Terrenus' arguments in AD 2. As regards AD 4, Attika argued that the Judge erred in deducting the Deducted Sums from the amount due to Attika. It contended that the Judge should not have considered the Three Deducted Items as parties had agreed to have them determined in NE

instead. They were therefore not before the Judge. By so deducting, Attika was prejudiced. Further, based on cl 14.3.2, Terrenus could only make the deductions if it was entitled to claim for the Three Deducted Items, which it was not. Terrenus submitted that the Judge did not err in deducting the Deducted Sums. The court had jurisdiction to do so, and cl 14.3.2 allowed provisional deductions to be made. Terrenus further argued that Attika did not suffer any prejudice contrary to their submissions.

Issues to be determined

15 The following issues arose in AD 2:

(a) whether Terrenus was entitled to substantial damages for Attika's failure to embed the PEG Rods to the contractual minimum depth ;

(b) whether Attika was entitled to any EOT and if so, to what extent;

(c) whether Terrenus was entitled to general damages for delay in addition to liquidated damages under cl 17.1.2; and

(d) whether Attika was entitled to the Balance Sum.

16 Attika's appeal in AD 4 was on a single issue, namely whether the Judge erred in deducting the Deducted Sums from the sum found to be payable to Attika.

AD 2 – Terrenus' appeal

Whether Terrenus was entitled to substantial damages for Attika's non-compliance with the contractual minimum embedment depth for the PEG Rods

17 Terrenus submitted that it was entitled to the cost of cure as damages for Attika's failure to embed the PEG Rods to the contractual minimum depth. This turned on two points. First, whether Terrenus had discharged its evidential burden of establishing the number and extent of non-compliant PEG Rods. Second, whether Terrenus was entitled to the cost of cure as damages.

Whether Terrenus had discharged its evidential burden of establishing the number and extent of non-compliant PEG Rods

18 On the first point, we agreed with the Judge that Terrenus had failed to discharge its evidential burden. Terrenus relied primarily on a document described as the Joint Inspection Reports purportedly of the experts ("JIRs"). We agree with the Judge that the JIRs were not satisfactory. In the first place, the JIRs were not *joint* reports of the experts. The JIRs were prepared based on inspections carried out solely by Terrenus' expert Mr Satchell. That aside, the JIRs did not assist in establishing non-compliance. The 847 photographs of PEG Rods they contained were not matched to the alleged non-compliant PEG Rods on site. In fact, some of the photographs were of *compliant* PEG Rods.

19 A partial re-survey was thereafter carried out in an effort to address the shortcomings. The partial re-survey only served to underline the unreliability of the JIRs. The re-survey did not measure all of the PEG Rods in the 847 photographs in the JIRs. Only 77 PEG Rods were re-surveyed. Thus, it could not verify the accuracy of a substantial portion of the JIRs. Further, the re-survey showed that some points marked as non-compliant in the JIRs were in fact

compliant. Thus, the number of solar panels marked as affected by non-compliant PEG Rods in the area covered by the re-survey was reduced from the number marked in the same area in the JIRs.

20 There were also issues with the *methodology* Mr Satchell used to estimate the number of non-compliant PEG Rods. Mr Satchell's fundamental assumption was that PEG Rods in a given area marked out by non-compliant data points would be non-compliant because the solar arrays rested on sloped ground. However, this assumption was never established. Mr Satchell in fact accepted that he did not know if all the arrays were on sloped ground. He conceded that in respect of one of the arrays (A06), there was not much of a slope, but he nevertheless marked the panels within the area as non-compliant. Further, although Mr Satchell's fundamental assumption was that there was non-compliance as described, he was not able to explain how he decided on the shape of the marked areas of non-compliance. For example, in respect of array C28, the initial triangular marked area was revised without explanation to a chevron in order to exclude PEG Rods within the initial triangle which were later discovered to be compliant. This appeared arbitrary.

Whether Terrenus was entitled to the cost of cure as damages

21 As Terrenus failed to discharge its evidential burden, its claim for the cost of cure as damages was not made out. Nevertheless, we considered the second point of whether the cost of cure would be available assuming non-compliance was made out as the parties had addressed it in their submissions.

22 Terrenus argued that it was entitled to the cost of cure as damages unless Attika could show that it was disproportionate. In the event the PEG Rods were not installed to the requisite depth, Attika would have breached the MBA

entitling Terrenus to the cost of cure as damages. The cost of cure was proportionate as the high wind could create a structural risk. Terrenus was seeking to remedy the risk of structural instability at one of the largest utility-scale solar plants in Singapore, and was only targeting the areas identified as subject to structural risk.

23 Attika argued that there was no real risk of structural failure and therefore it would be wholly disproportionate and unreasonable to award the cost of cure. Further, Attika observed that Terrenus had shown no intention to rectify the alleged non-compliance. Attika submitted that since there was no intention to rectify, the cost of cure should not be ordered.

24 As we had indicated at the outset, there are mixed views on whether and to what extent a claimant's intention to cure is relevant to the award of the cost of cure: see Edwin Peel, *Treitel on The Law of Contract* (Sweet & Maxwell, 15th Ed, 2020) ("*Treitel*") at para 20-046. In the recent decision of the General Division of the High Court in *JSD Corporation Pte Ltd v Tri-Line Express Pte Ltd* [2023] 3 SLR 1445 ("*JSD Corp*"), the court expressed the view that the intention to cure was a *weighty* factor in assessing the reasonableness of granting the cost of cure, to the extent that the failure to prove an intention to cure would, absent very special countervailing factors, result in the claim for the cost of cure being disallowed: *JSD Corp* at [82].

25 With respect, we are unable to agree with the view expressed in *JSD Corp*. An intention to cure is neither a prerequisite for the award of the cost of cure as damages nor does it generally carry the significant weight attributed in *JSD Corp*. In our view, an intention to cure is but one of the factors to be taken into account when assessing it is reasonable and proportionate to award the cost of cure as damages. We explain.

(1) The authorities

26 We start with the early English cases on this issue. Two cases appeared to regard the claimant's intention to effect the cure to be a *prerequisite* for awarding the cost of cure. In *Tito v Waddell (No 2)* [1977] Ch 106 ("*Tito*"), the defendant failed to replant trees and shrubs on an island when returning former mining lands to the plaintiff. The plaintiff had no intention to carry out the replanting. Megarry VC observed that "if the plaintiff … has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing the work which will never be done": *Tito* at 332–333. Thus, the cost of cure was not awarded. In *Radford v De Froberville* [1977] 1 WLR 1262 ("*Radford*"), the defendant failed to build a wall in breach of contract. Oliver J held that whether the plaintiff could claim damages representing the cost of building a wall depended on whether the plaintiff "has a genuine and serious intention of doing the work": *Radford* at 1283. As the plaintiff intended to do so to preserve the privacy of his land, the cost of cure was awarded.

27 *Tito* and *Radford* were approved by the House of Lords in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 ("*Ruxley*"). However, *Ruxley* appeared to view such intention as merely a *factor* in determining whether it was reasonable to award the cost of cure. Both Lord Jauncey and Lord Lloyd explained that the court had no concern with the use to which a plaintiff puts an award of damages. However, in their Lordships' view, intention could be relevant in showing the *reasonableness* of seeking the cost of cure, because it evidenced the extent of the loss which had truly been sustained (*Ruxley* at 359 per Lord Jauncey) and the genuineness of the claimant's desire to cure it (*Ruxley* at 372–373 per Lord Lloyd).

28 These cases concerned a situation where the contract entered into did not involve any third parties. The relevance of intention to cure has also received extensive treatment in cases involving contracts for the benefit of third parties. In *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 ("*Linden Gardens*"), the promisee, the lessee of a plot of land, engaged the promisor, a building contractor, to develop the land. The promisee later assigned its interest in the land to a third party, but the assignment was invalid. The works were discovered to be defective, and the difficulty was that neither the promisee nor the third party appeared to have a remedy. Lord Griffiths adopted the "broader ground" approach. Under this approach, the promisee could claim substantial damages from the promisor because not receiving the promised performance was itself the promisee's loss. In explaining the broader ground, Lord Griffiths appeared to give weight to the intention of the promisee to cure the breach. He stated that in awarding damages to the promisee, "the court will of course wish to be satisfied that the repairs have been or are likely to be carried out": *Linden Gardens* at 97. The view that intention to cure was essential to the award of the cost of cure was also accepted by the majority of the House of Lords in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 ("*Panatown*"), which also involved a contract for the benefit of a third party: see *Panatown* at 532–534 per Lord Clyde and 570–574 per Lord Jauncey. Notably, Lord Goff and Lord Millett disagreed in their dissenting speeches in *Panatown*. The minority's view is important. The minority was of the view that Lord Griffith's broader ground in *Linden Gardens* was based on the premise that not receiving the promised contractual performance constituted loss to the promisee in and of itself, without the need for the promisee to incur or intend to incur the cost of cure. Thus, the fact of breach *alone* sufficed for the promisee to claim substantial damages, irrespective of whether the promisee had incurred

or intended to incur the cost of cure: *Panatown* at 547–548 per Lord Goff and 592–593 per Lord Millett.

29 There are other cases that have taken differing positions. In some cases, the intention to cure was regarded as relevant to the question of whether reinstatement was reasonable in the first place: see *Harrison v Shepherd* [2011] EWHC 1811 (TCC) ("*Harrison*") at [263] and *De Beers UK Ltd (formerly Diamond Trading Co Ltd) v Atos Origin IT Services UK Ltd* [2010] EWHC 3276 (TCC) ("*De Beers*") at [345]. Other cases have attributed a higher weight stating that the intention to cure was a critical factor in the court's decision whether to award the cost of cure: see *St James's Oncology SPC Ltd v Lendlease Construction (Europe) Ltd & Ors* [2022] EWHC 2504 (TCC) (12 October 2022) ("*St James's Oncology*") at [345]–[349], as discussed in Lau Kwan Ho, "Recovering cost of cure damages: The necessity of showing an intention to cure" (2022) 140 LQR 342 ("Lau") at 343–344; and *London Fire and Emergency Planning Authority v Halcrow Gilbert Associates Ltd* [2007] EWHC 2546 at [659]–[673] ("*London Fire*"). The English position is therefore unsettled.

30 The position in Australia is more settled. In cases involving defectively constructed buildings, the intention to cure is generally less relevant in deciding whether to award the cost of cure: see *Bellgrove v Eldridge* [1954] HCA 36 at [8], where the High Court of Australia considered the promisee's intention to cure the unstable house to be "immaterial" to the question of whether the cost of cure should be awarded. A similar approach was taken in *De Cesare v Deluxe Motors Pty Ltd* (1966) 67 SASR 28 ("*De Cesare*"), where the Supreme Court of South Australia noted (at 5–6) that "[s]ometime [*sic*] the intention of the owner will be relevant to the reasonableness of a course of action … [o]n the other hand, when building work is clearly defective, it seems to me that the

absence of the intention of the building owner to remedy the defective work in no way supports or leads to the conclusion that it would be unreasonable to award the cost of remedying the defective work". The same court observed in *Unique Building Property Ltd v Brown* [2010] SASC 106 ("*Unique Building*") at [94] that:

> The measure of damages is the difference between the contract and the cost of making it conform to the contract with consideration of the reasonableness of what is necessary to conform to the contract. *This does not require consideration to be given as to the future intention of the respondents as to whether they subsequently wish to continue with the contracted building, or even whether they wish to sell the site*. If the only reasonable way to bring about conformity with the contract is by demolition and rebuilding because rectification and repair in itself would not be adequate to bring about conformity with the contract, and if such a course is reasonable, then demolition and rebuilding will be the measure of the damages. *What in fact the owner decides to do with the damages which arise from the decision of any court is a matter for itself*. [emphasis added]

It is apparent that the Australian position is broadly in line with the views of Lord Jauncey and Lord Lloyd in *Ruxley* and Ramsey J in *Harrison*, *ie*, intention to cure is at most a factor to be considered in determining whether to award the cost of cure.

31 In Singapore, the cases addressing this issue begin with *MCST Plan No 1166 v Chubb Singapore Pte Ltd* [1999] 2 SLR(R) 1035 ("*Chubb*"). *Chubb* involved the installation of a faulty security and communication system in a condominium. The court held that it would be unreasonable to award the cost of cure "because it was not clear that the plaintiffs would spend that amount and embark on such a replacement project": *Chubb* at [107].

32 The issue was also considered in cases involving contracts for the benefit of third parties. In *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR(R) 484

("*Chia Kok Leong*") at [57], the Court of Appeal applied the broader ground stated by Lord Griffiths in *Linden Gardens* and held that the promisee's intention to repair was *not* a prerequisite for claiming the cost of cure. Notably, this position is aligned with the views of the minority, Lord Goff and Lord Millett, and contrary to the views of two members of the majority, Lord Clyde and Lord Jauncey, in *Panatown* (see [28] above).

33 This brings us back to *JSD Corp*. The plaintiff in this case was in the business of renting, repairing and servicing aircraft and air transport equipment, while the defendant was in the business of providing freight services. The parties entered into an agreement for the defendant to deliver several vehicles and spare parts from Australia to Singapore. Although the goods were delivered, the vehicles arrived damaged because they were not properly secured during transportation. The plaintiff sued for unpaid invoices, while the defendant counterclaimed for the damage caused to the vehicles, including the cost of repairs. On appeal, the parties were invited to address the issue of whether the defendant must show that it intended to carry out the as-yet unperformed repairs in order to claim the outstanding repair costs.

34 *JSD Corp* noted the contrasting conclusions on this issue in *Chubb* and *Chia Kok Leong,* and preferred the position expressed in *Chubb*. *Chia Kok Leong* was distinguished on the basis that it did not concern the archetypal two-party situation. Rather, it was about the protection of the performance interest of a promisee in the context of a contract for the benefit of a third party which was regarded as fundamentally different: *JSD Corp* at [42].

35 *JSD Corp* provided further elaboration on why the position in *Chubb* was sound in principle. While the use to which a plaintiff puts an award of damages was generally not material, that was applicable only where the plaintiff

had *already* incurred the loss, such as where the cost of cure had been paid: *JSD Corp* at [72]. Where it had not yet been incurred, it was not yet a loss, leaving the claimant with only a claim for diminution in value and any consequential loss, absent an intention to incur the cost of cure. We address this point below at [54]–[61]. Thus, whether the claimant intended to use the damages awarded to pay for the cost of cure in the future was a critical consideration. In the absence of such an intention, the plaintiff would simply not have suffered the cost of cure as a loss: *JSD Corp* at [73].

36 *JSD Corp* added that in terms of policy, considering the intention to cure would ensure that the plaintiff was not compensated beyond its loss: *JSD Corp* at [78]. On the other hand, the countervailing argument was that considering the intention to cure would go against the principle that how the plaintiff spends an award of damages was not the concern of the court: *JSD Corp* at [79]. The court rejected the countervailing argument as unsatisfactory because it ignored the more fundamental fact that the loss *had not been crystallised*: *JSD Corp* at [80].

37 *JSD Corp* acknowledged that this analysis suggested a preference for the intention to cure to be a *prerequisite* rather than a mere factor in deciding whether to award the cost of cure as damages: *JSD Corp* at [77]. However, in deference to existing precedent (primarily *Ruxley* and the subsequent case of *The Maersk Colombo* [2001] 2 Lloyd's Rep 275 at [56]), the court in *JSD Corp* restricted its conclusion to the intention to cure being a *weighty* factor in assessing the reasonableness of awarding the cost of cure as damages, albeit one without which, absent very special countervailing factors, a plaintiff's claim for cost of cure damages would be dismissed: *JSD Corp* at [77] and [82].

38 We note that there is academic commentary supporting the view in *JSD Corp*: see Solène Rowan, "Cost of cure damages and the relevance of the injured

promisee's intention to cure" (2017) 76.3 Cambridge Law Journal 616 ("Rowan") at 620 and 627; Alexander F H Loke, "Damages to Protect Performance Interest and the Reasonableness Requirement" (2001) SJLC 259 ("Loke (2001)") at 263–264; Alexander F H Loke, "Cost of Cure or Difference in Market Value? Towards a Sound Choice in the Basis for Quantifying Expectation Damages" (1996) 10 JCL 189 ("Loke (1996)"); Tareq Al-Tawil, "Damages for the Breach of Contract: Compensation, Cost of Cure and Vindication" (2013) 34 Adelaide Law Review 351 ("Al-Tawil") at 365–369; and Lau at 346. The commentaries draw a distinction between the function of an award for diminution in value and an award of the cost of cure. The former compensates the claimant for its expectation loss, *ie*, the gap in pecuniary terms between what was received and what was promised under the contract. The latter serves as the *means* to enable the claimant to obtain what was promised under the contract: Loke (1996) at 205; Loke (2001) at 263; and Al-Tawil at 365–366. Thus, it was argued that the proper measure of the expectation loss is the diminution in value. It was only where the cost of cure was actually applied towards rectification that it remedied the expectation loss suffered by the claimant and therefore could be awarded as damages: Al-Tawil at 368. To award the cost of cure where there was an absence of intention to cure would contradict the principle of compensating the claimant only for the loss suffered: Rowan at 627 and Loke (1996) at 205. In cases where the cost of cure exceeded the diminution in value, awarding it in the absence of an intention to cure would result in the claimant obtaining an unjustified windfall: Rowan at 620, Loke (2001) at 264, and Al-Tawil at 368.

(2) Our analysis

39 We have some difficulties with the view expressed in *JSD Corp*. We start with the fundamental principles underlying contractual damages. It is trite

that the objective of damages for breach of contract is to put the claimant, so far as money can, in the same situation as if the contract has been performed: see *Treitel* at para 20-024 and *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 ("*Turf Club*") at [124]. In short, the claimant is to be compensated for its *expectation loss*, *ie*, the gap between what was actually received and what was promised under the contract. There are other types of contractual damages available, such as damages for reliance loss or restitutionary damages. However, these types of damages are only available in limited circumstances and remain secondary to damages for expectation loss, which is the primary and default remedy for contractual breach: see *Treitel* at paras 20-029–20-031 and 20-036 and *Turf Club* at [250]–[255], discussing *Attorney General v Blake* [2001] AC 268.

40 There are two main methods of addressing expectation loss. First, diminution in value of the delivered product. This aims to place the claimant, as far as possible, in the *financial* position it would have been had the contract been performed. Second, cost of cure. This aims to place the claimant in the *actual* position it would have been had the contract been performed. The aim is to give the claimant the financial means to obtain *actual* performance. In this regard, we agree with the commentaries above that the cost of cure quantifies the *means* to obtain actual performance rather than the expectation loss. We note parenthetically that for certain types of contracts, especially those for services, the cost of cure might not be available as a matter of practicality – for example, in the case of a sub-standard holiday or ruined wedding photographs: see *Treitel* at para 20-049. In such cases, only damages based on diminution in value are available.

41 Per *pacta sunt servanda* (*ie*, agreements must be kept), a claimant is in principle always entitled to seek actual performance of the contract. The direct

way to achieve this is through the equitable remedy of specific performance. However, for practical, policy and historical reasons, courts are reluctant to compel a party to complete its end of the bargain and the remedy of specific performance is considered both special and extraordinary in character: see *Lee Chee Wei v Tan Hor Peow Victor and others and another appeal* [2007] 3 SLR(R) 537 at [52]–[53]. The concerns associated with compulsion of a contracting party are absent where awards for the cost of cure are concerned. In a sense, the cost of cure is the most logical and straightforward method of remedying the claimant's expectation loss, since it comes closest to giving the claimant actual performance without compelling the breaching party to perform.

42 Thus, where defective buildings were concerned, earlier cases often accepted the cost of cure as the normal measure of damages: see *McGregor on Damages* (Sweet & Maxwell, 21st Ed, 2021) at para 31-012, citing *Thornton v Place* (1832) 1 Moo. & Rob 218; *Dakin v Lee* [1916] 1 KBB 566 CA; *East Ham Corp v Bernard Sunley* [1966] AC 406 and *Imperial College of Science and Technology v Norman & Dawbarn* (1986) 2 Constr LJ 280.

43 However, considerations of reasonableness and proportionality operate as a *pragmatic* limitation to awarding the cost of cure as damages. This stems from the recognition that in certain situations, the quantum of the cost of cure may be disproportionate to the value of the expectation loss such that even though the claimant is in principle entitled to actual performance *via* the cost of cure, it does not make practical or economic sense to award it. One example is where a building has to be substantially demolished to enable replacement of non-compliant components that had been built into the structure. Where the cost of cure is greater than the value of the whole building or where replacement of the components will confer no tangible benefit, economic or otherwise, on the claimant, it will not be reasonable or proportionate to award the cost of cure:

see *Treitel* at para 20-044, citing *Jacob & Youngs v Kent* 129 N.E. 889 (1921); *Morris v Redland Bricks Ltd* [1970] AC 652; and *James v Hutton* [1950] 1 KB 9 respectively.

44 It is when the court assesses the reasonableness or proportionality of awarding the cost of cure that the intention to effect the cost of cure becomes relevant. However, it is but one of the factors to be taken on board in the assessment. To be clear, it is not a prerequisite for the award of the cost of cure (or, as *JSD Corp* suggests, always a weighty factor). This respects the established principle that a court is not concerned with the use to which a successful claimant puts the damages awarded: see *Ruxley* at 359 and *Darlington Borough Council v Wiltshier Northern Ltd* [1995] 1 WLR 68 (CA) at 80.

45 Various other factors are also pertinent. Without being exhaustive, some examples are: (a) the level of disproportionality between the cost of cure and the benefit that will accrue to the promisee (*Ruxley* at 353, 367 and 369); (b) the extent and seriousness of the damage or defect and its consequences (*Ruxley* at 357–358); (c) the nature and purpose of the contract, and the degree to which the contractual objective has been substantially achieved (*Ruxley* at 358); and (d) any personal subjective value attached to what had been promised under the contract to the claimant (also known as the "consumer surplus") (*Ruxley* at 360).

46 Many cases which considered intention to cure to be vital might be explicable on a plain application of the reasonableness assessment. For example, it was reasonable in *Radford* for the cost of building the omitted wall to be granted – the promisee wanted the wall to preserve the privacy of his land and nothing less than building a wall would have given him the agreed contractual performance: see *Radford* at 1268 and 1284. Similarly, it would

have been reasonable for the electrical and mechanical hub in *St James's Oncology*, which was not built in compliance with fire safety standards, to be reinstated regardless of the plaintiff's intention to cure. In contrast, it would have been unreasonable in *Tito* for the plaintiff to be awarded the substantial cost of replanting trees and shrubs on the island when such cost was out of proportion to the value of the expectation loss caused by the defendant's failure to perform, regardless of the plaintiff's intention to cure. In *JSD Corp* itself, it would have been unreasonable for the cost of repairing the antique car to be awarded since it far outstripped the diminution in value: *JSD Corp* at [90].

47 In our view, the analysis above applies equally in the contractual situation involving third parties. Under the broader ground expressed by Lord Griffiths in *Linden Gardens*, the promisee is claiming for *its own* expectation loss in the shape of the cost of cure. The cost of cure, subject to reasonableness and proportionality, remains available to the promisee as a method of satisfying the expectation loss. Once it is assessed that it is reasonable to award the cost of cure, the court is not concerned with whether the claimant intends to apply the moneys toward rectification. This was the view expressed by Lord Goff and Lord Millett in *Panatown* at 547–548 and 592–593 respectively. We disagree with the view of Lord Clyde and Lord Jauncey that in the absence of an intention to cure, the cost of cure should not be awarded because it would not accurately reflect the financial loss suffered by the promisee: *Panatown* at 532–534 and 570–574 respectively. The overarching point is that the promisee is *entitled* to the financial means to remedy the expectation loss provided that is reasonable and proportionate. The focus on the *financial* loss suffered by the promisee is underinclusive and omits the intangible loss suffered as a result of not receiving the agreed performance: see Lord Millett in *Panatown* at 587–592, where he advocated for an expanded concept of performance loss as a result of defeated

expectation, which went beyond "the narrow accountants' balance sheet quantification of loss".

48 We recognise that the focus on the intention to cure as a prerequisite for the promisee to obtain the cost of cure in contracts for the benefit of third parties stems from a concern that absent the intention to cure, the promisee would be able to keep the damages awarded *to the exclusion* of the third party owner or occupier of the building, who would be left without a remedy: see Rowan at 625–626 and Loke (2001) at 263–264.

49 However, the concern might be more illusory than real. Under the broader ground expressed by Lord Griffith, the promisee is recovering damages for *its* expectation loss. In so far as the third party wishes to obtain a remedy for the loss suffered, that is a matter between it and the promisee. In *Panatown*, Lord Millett observed that the arrangement between the group of companies involved in the construction project (which included the promisee and the third-party building owner) was such that the promisee would almost certainly be held on trust to apply any damages recovered at the direction of the group company which provided the building finance. In other situations where the promisee keeps the damages awarded for its own benefit, that may not necessarily constitute any intuitive injustice: *Panatown* at 592–593. Using the example cited by Lord Goff in *Panatown* at 547–548 to illustrate, where a philanthropist contracts for work to be done to a village hall, and the work is defective, it is the philanthropist's prerogative to recover the cost of cure from the builder for his or her expectation loss (assuming it is reasonable), and thereafter to decide *not* to apply it towards repairing the defective village hall.

50 Our observations above are in line with the decision of the Court of Appeal in *Chia Kok Leong*, where the court held as follows (at [57]):

> A related matter raised is whether it must be shown by the building employer that he has already carried out the repairs or intends to do so before he is entitled to claim for substantial damages. On the basis of the broad ground that a plaintiff recovers substantial damages for the loss in not getting what he contracted for, that *should not be a prerequisite* before such damages may be claimed. If, for example, an owner of a house were to engage a contractor to erect a koi pond and it was so badly done that it was of no use and the owner decided to abandon the project, there is no reason why he must have proceeded with the repairs, or intended so to do, before he may claim for substantial damages. At the end of the day, the entire circumstances of the case must be considered to determine whether the claim made was reasonable or was made with a view to obtaining an uncovenanted benefit. [emphasis added]

51 As noted above, *JSD Corp* distinguished *Chia Kok Leong* on the basis that the Court of Appeal did not address the relevance of intention to cure to the award of the cost of cure: *JSD Corp* at [42]. Instead, the issue was whether the claimant was entitled to *substantial damages* in situations involving contracts for the benefit of third parties regardless of the intention to cure: *JSD Corp* at [42]–[43].

52 We disagree with the manner in which *JSD Corp* distinguished *Chia Kok Leong*. We see no real difference between cases involving contracts for the benefit of third parties and the archetypal two-party scenario since under the broader ground. The promisee in both situations is claiming for its expectation loss.

53 Accordingly, we depart from the view expressed in *JSD Corp*, *ie*, that the intention to cure is a *weighty* factor in assessing the reasonableness of awarding the cost of cure as damages such that without such an intention and in the absence of very special countervailing factors, a plaintiff's claim for cost of cure damages will be dismissed. The intention to cure is neither a prerequisite nor generally a weighty factor. As stated above at [44], it is one of several

factors to be taken into account in assessing whether it is reasonable to award the cost of cure. This is the same role accorded to the intention to cure in *Ruxley* (at 359 and 372–373) and *Harrison* (at [263]), and also in the Australian cases of *De Cesare* (at 5–6) and *Unique Building* at [94]. The intention to cure as a factor in assessing reasonableness would be most relevant where it comes to showing the claimant's "consumer surplus", which is the subjective value of the agreed performance to the claimant over and above the objective value. For example, where a claimant insists that the builder's breach in constructing a house with blue instead of yellow windows greatly affects his or her enjoyment of the property, and yet displays no intention to change out the panels, this may raise doubts as to the true value of the "consumer surplus" provided by the yellow windows.

54 Before we conclude on this point, we make a further observation. It would be apparent from our analysis above, that an integral part of the reasoning in *JSD Corp* was that until the cost of cure had in fact been incurred, it was not yet a loss. Thus, absent any intention to incur the cost of cure, the only loss that had been suffered was the diminution in value and consequential loss. *JSD Corp* explained that the above principle was discernible from *Tito* (at 332) and *Ruxley* (at 373). *JSD Corp* at [72]–[73] stated as follows:

> 72 Buttressing my views above based on precedent, I turn to first principles. In this regard, it is true that the courts routinely state that they have no concern with the use to which a plaintiff puts an award of damages. However, that statement is to be understood in the context where the plaintiff has *already* incurred the loss. This can happen where the plaintiff is claiming for the difference in value between an undamaged property and a damaged property. That loss would have crystallised upon breach. Similarly, this can also happen where the plaintiff is claiming for *incurred* costs of cure. In that situation, the courts are not concerned with whether the plaintiff will use the damages it receives to pay for the cost of cure it has *already* incurred

> 73 **In contrast, where the cost of cure has not yet been incurred, it is not yet a loss, and if it is never incurred, it will never be a loss, in which case the only loss suffered by the plaintiff is the ordinary measure of the difference in value plus consequential losses.** As such, as a matter of principle, the courts *should* be concerned with whether the plaintiff will use the damages to pay for the cost of cure *it says it will incur*. Indeed, Rowan suggests that the lack of an intention to effect the cure seems likely fatal to the claim (at 621). This is because, in the absence of such intention, the plaintiff will not suffer the cost of curing the breach as a loss. In this instance, only when the plaintiff genuinely intends to cure the breach will he suffer this loss.
>
> [emphasis in italics in original; emphasis in bold added]

55 With respect, we are of the view that *JSD Corp* erred in this regard. This view is contrary to the general principle that any loss arising from a breach of contract is suffered at the time of the breach and the court is not concerned with the use to which the claimant puts the award of damages.

56 We turn to consider the two cases cited in *JSD Corp* in support. In *Tito* it was said that "if the plaintiff … has no intention of applying any damages towards carrying out the work contracted for … [i]t would be a mere pretence to say that this cost was a loss and so should be recoverable as damages": *Tito* at 332. To the extent that *Tito* suggested that the cost of cure would only constitute a loss if the claimant has done the work or can establish that the work will be done, we disagree. That is at odds with the principle that the purpose of damages is to compensate the plaintiff for his loss *by putting him as nearly as possible in the same position as he would have been in had he not suffered the wrong*. The damages are awarded to remedy the *expectation loss* which crystallises at the point the breach is suffered. Whether the claimant intends to incur the cost of cure does not change the date of crystallisation of the loss. As explained above at [41], damages for cost of cure are available by default

(subject to reasonableness and proportionality) as a means of addressing the expectation loss.

57 In *Ruxley* (at 373), Lord Lloyd stated that "if … [the plaintiff] had no intention of rebuilding the pool, he has lost nothing except the difference in value, if any". A similar view was expressed in Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 4th Ed, 2019) at p 213 where it was said that if the claimant has not, and would never incur the cost of repair, "those costs do not constitute a loss to the claimant" and "[i]t is a fiction to pretend that the claimant has suffered such a loss".

58 Lord Lloyd's statement should be read in context of what Lord Jauncey also stated in *Ruxley*. He said that the trial judge, in finding that it would be *unreasonable* to incur the cost of demolishing the existing pool and building a new, deeper pool, had "implicitly recognised that the respondent's loss did not extend to the cost of reinstatement" (*Ruxley* at 359).

59 In our view, the issue that the court in *Ruxley* was grappling with was not whether damages in the form of the cost of reinstatement had been suffered. Rather, it was whether the cost of reinstatement was *disproportionate* to the respondent's *expectation loss*, and hence regarded as unreasonable. We therefore did not see *Ruxley* as supporting the position expressed in *JSD Corp.*

60 It is trite that any loss which arises from a breach of contract is suffered at the time of the breach . The consequent question is which measure of damages should be awarded. That depends on which is the fairer method of addressing the promisee's loss as dictated by reasonableness and proportionality. The issues of whether loss has been suffered and whether it is reasonable and

proportionate to award the cost of cure should not be conflated. It appears that *JSD Corp* conflated the existence of a loss and the quantification of that loss.

61 Indeed, that the claimant suffers any loss arising from a breach of contract at the time of *breach* with the consequential question being what measure of damages is to be awarded is supported by the view of Lord Mustill in *Ruxley*. Lord Mustill stated as follows (*Ruxley* at 360):

> In my opinion there would indeed be something wrong if, on the hypothesis that cost of reinstatement and the depreciation in value were the only available measures of recovery, the rejection of the former necessarily entailed the adoption of the latter; and the court might be driven to opt for the cost of reinstatement, absurd as the consequence might often be, simply to escape from the conclusion that the promisor can please himself whether or not to comply with the wishes of the [promisee] which, as embodied in the contract, formed part of the consideration for the price. Having taken on the job the contractor is morally as well as legally obliged to give the employer what he stipulated to obtain, and this obligation ought not to be devalued. In my opinion however the hypothesis is not correct. *There are not two alternative measures of damage, at opposite poles, but only one; namely, the loss truly suffered by the promisee. In some cases the loss cannot be fairly measured except by reference to the full cost of repairing the deficiency in performance. In others, and in particular those where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract.* But these remedies are not exhaustive, for the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. …
>
> [emphasis added]

62 It is clear that the cost of cure addresses the loss which arises at the point of breach and cannot be viewed as loss which only arises upon incurrence of the same.

(3) Application to the facts

63 Notwithstanding that Terrenus claimed the cost of cure in relation to the defective installation of the PEG Rods in the sum of $388,566.72, it was apparent that Terrenus did not intend to rectify the alleged defects. It was also apparent that Terrenus did not intend to do so because there was no structural risk. On appeal, counsel for Terrenus, Mr Kelvin Teo ("Mr Teo"), made clear that he was not challenging the Judge's finding that the defects in the embedment of the PEG Rods did not give rise to any structural risk. Indeed, we noted that Terrenus' conduct following the termination of the MBA was consistent with there being no structural risk. Despite the alleged concerns over the structural risk posed by the defective installation, Terrenus had not taken any steps to rectify notwithstanding that the works were completed in 2021. When questioned on whether Terrenus intended to rectify regardless of the outcome of the appeals, Mr Teo was unable to confirm that it would. Further, in the absence of a structural risk and any intention to effect the cure, we did not think it reasonable or proportionate to award the cost of cure. As Terrenus led no evidence of a diminution in value, the Judge was correct in awarding only nominal damages in respect of the PEG Rods.

64 Terrenus argued that it was not necessary to prove structural risk in order to be entitled to the cost of cure – it was sufficient that the agreed performance was not rendered. We disagreed. Structural risk, in the form of the solar panels being possibly swept away or damaged by the wind, was the chief ingredient in Terrenus' own argument before the Judge that it would be reasonable to grant the cost of cure in respect of the PEG Rods. Absent any structural risk, it was not clear to us how any minimal deviation from the contractually specified embedment depth would justify granting the cost of cure particularly given that the amount claimed, $388,566.72, was substantial. It would not be reasonable

or proportionate to award the cost of cure in such circumstances. It was also not Terrenus' case that there was any "consumer surplus" or subjective value to be garnered by actual performance in respect of the agreed embedment depth – this was after all a commercial solar panel farm.

The EOTs to which Attika was entitled

65 We agreed with the Judge that Attika was entitled to an EOT of 140 days and Terrenus was entitled only to liquidated damages of $5,100 per day for six days of delay totalling $30,600. The Judge's analysis was based on four time periods which were described as Windows 1 to 4 in the Judgment and in the appeal papers. We adopt the same description for present purposes. It is important to observe at the outset that apart from Window 3, Terrenus accepted the Judge's preference of the evidence of Attika's expert, Mr Chan Fook Thim ("Mr Chan"), in respect of the critical path analysis. This had implications for the arguments which Terrenus advanced in relation to Windows 2 and 4 in particular.

Window 1

66 Window 1 covered the period from 14 April 2021 to 3 May 2021. The delay in this period was caused by a delay in procuring NParks' approval for tree removal works. The Judge found that since item 4 in Part B of Annex B of the MBA essentially identified Terrenus' consultant, PEC Civil Consultant Pte Ltd ("PEC"), as the party responsible for "submission and approval to technical agencies and SPPG", it was Terrenus which bore the risk of any late submission or delayed approval from NParks: the Judgment at [142]. Hence, Attika was entitled to an EOT of 19 days: the Judgment at [143].

67 Terrenus argued that there was no evidence which showed that the 19 days of delay were due to Terrenus and/or PEC. Thus, Attika failed to meet its burden of showing that Terrenus was in fact responsible for delays to the permit. Further, the Judge gave insufficient consideration to cl 15 of the MBA, which stated that Attika shall ensure that the Works are performed in full compliance with all relevant legislation and the requirements of any public authority.

68 Attika argued that Annex B made clear that the risk of obtaining NParks' approval had been undertaken by Terrenus. Further, Terrenus' case was solely based on its assertion that Attika bore the risk of delay pursuant to cl 15 of the MBA – there was no assertion that Attika had somehow delayed the obtaining of NParks' approval. Finally, Attika submitted that cl 15 of the MBA only required the works carried out by Attika to comply with the requirements of public authorities, and was irrelevant to the question of who bore responsibility for delays in approval by public authorities.

69 Clause 15 of the MBA, which stipulated Attika's responsibility for compliance with statutory requirements, reads as follows:

> **15. COMPLIANCE WITH STATUTORY REQUIREMENTS**
>
> **15.1. COMPLIANCE WITH STATUTORY REQUIREMENTS**
>
> 15.1.1. The Contractor shall ensure that the Works to be performed under the Agreement are performed in full compliance with all relevant legislation and all subsidiary legislation made thereunder.
>
> 15.1.2. The Contractor shall be wholly responsible for compliance with the requirements of any law, regulation, by-law, or public authority as stipulated in Clause 15.1.1.

70 We agreed with Attika that cl 15 of the MBA did not affect Terrenus' responsibility (through PEC) to obtain the NParks permit. While cl 15 of the MBA stipulated that Attika was responsible for compliance with statutory

requirements, this was different from Terrenus' *specific obligation* to submit and obtain the relevant permits under Annex B of the MBA. We also agreed with Attika that it was not Terrenus' case in the proceedings below that Attika had somehow caused the delay in NParks' approval. In fact, Attika's witness, Mr Tan Buan Joo (Attika's Managing Director), gave unchallenged evidence that Attika was not responsible for the delay in obtaining NParks' approval. In the circumstances, the risk of delay in obtaining NParks' approval was allocated to Terrenus under the MBA. Attika was therefore entitled to the EOT granted in respect of Window 1.

Window 2

71 Window 2 covered the period from 10 May 2021 to 21 June 2021. The Judge found that the late delivery of solar panels by Terrenus caused a delay from 20 May 2021 to 19 June 2021, and thus Attika was entitled to 21 days of EOT: the Judgment at [165].

72 Terrenus argued that much of the delay in Window 2 was caused not by the late delivery of the solar panels, but because Attika was not ready to install the solar panels since there was data to show that the PEG Rods (on which the solar panels were to be installed) were installed late. In response, Attika argued that it delayed the installation of the PEG Rods because Terrenus had notified Attika that the delivery of the solar panels would be delayed. Installing all the mounting structures before the arrival of the solar panels would have obstructed site access for the solar panel delivery and installation.

73 Attika's position was supported by Mr Chan's expert evidence, which Terrenus did not challenge on appeal. In the circumstances, Terrenus' case in respect of Window 2 was a non-starter.

Window 3

74 Window 3 covered the period from 12 July 2021 to 25 August 2021. The Judge found that delay in this period was caused by Terrenus' subcontractor, Bulox, taking longer than planned to complete the installation of the Substations.

75 Terrenus submitted that Mr Chan had admitted at trial that applying the methodology agreed between the experts and looking only at Window 3, without looking at Window 4, he could not tell what the critical path in Window 3 was. On the other hand, Attika submitted that it was not put to Mr Chan that the agreed methodology precluded an expert from looking at a later window to explain the critical path in an earlier window. Moreover, Mr Chan did not say that on the facts of the present case he could not say what the critical path from Window 3 was without looking at Window 4.

76 The relevant exchange at trial read as follows:

Court:	Let me put it this way. Inverters are in delay.
Mr Chan:	Yes.
Court:	Mobile substation is in delay.
Mr Chan:	Yes.
Court:	Neither affects each other's work.
Mr Chan:	No, they don't affect.
Court:	So on what basis then do we say that there's a critical path delay event in so far as the mobile substation is concerned? Why is it more critical?
Mr Chan:	As I have mentioned, I have---
Court:	It is only critical if we look at the next window, right? But if you just cut it off at 25th August, how do I tell that's a critical delay. Because both are just in delay, right?

> Mr Chan: *Yah, if I were to stop looking at the subsequent window, without knowing what actually transpired for the downstream activities, yah, I agree that is difficulty to explain the rationale of it being critical.*
>
> Court: Okay. You see, that's why I looked at the end, but then Mr Teo was saying, well, you have looked at it in terms of window 4. So I have confined myself to window 3, which is the methodology that both experts have agreed to. So if I just apply, that's why I was having some difficulty saying is there a critical path at window 3, critical path to do. And you are saying that you also accept that it's difficult to put up one just on the basis of window 3, is that right?
>
> Mr Chan: Yes, on the face of, yes
>
> [emphasis added]

77 However, counsel for Terrenus accepted at the appeal hearing that he did not put to Mr Chan that the agreed methodology precluded an expert from looking at a later window to determine the critical path of an earlier window. Looking at the agreed methodology in the experts' Joint Statement No 1, we were also of the view that it did not preclude that approach. We also agreed with Attika that Mr Chan did not in fact concede that he did not know what caused critical delay in Window 3 without looking at Window 4. Rather, he was responding to a specific question by the Judge as to how one would gauge critical delay in a specific window in the situation where there is no knowledge of downstream activities. Our reading of Mr Chan's evidence in this regard was that he was making the point that the causative event for delay in Window 3 was apparent once the circumstances in Windows 3 and 4 were assessed together. In fact, Mr Chan did go on to explain his view why the inverter works did *not* in fact cause the relevant delay in Window 3.

78 As Attika also pointed out, it was unsurprising for Mr Chan to say that it was difficult to explain whether an event was on the critical path without

having regard to subsequent activities, since the assessment of critical path delay is ultimately related to what affected the achievement of the overall timelines for the Project (see the Judgment at [177]). Further, there was evidence that the installation of the Substations was on the critical path, since it was undisputed that SP Powergrid Ltd ("SPPG") would not carry out a handover inspection of the Substations until the works for them were completed: see the Judgment at [176].

79 Since Terrenus' submissions on appeal were centred on Mr Chan's "concession" and did not challenge the rest of Mr Chan's expert evidence in respect of Window 3, there was no reason to depart from the Judge's decision in this regard.

Window 4

80 Window 4 was the period from 26 August 2021 to 11 November 2021. The Judge found that the relevant delay was in the handover of the Substations to SPPG for operation (due to Bulox, Terrenus' subcontractor, having to carry out rectification works required following SPPG's inspection of the Substations): the Judgment at [188]. This entitled Attika to a further EOT of 77 days: the Judgment at [194].

81 Terrenus submitted that the Judge had given no or insufficient weight to Attika's site-wide works, testing and commissioning, which Terrenus submitted were more critical than Bulox's works at the Substations. However, as was the case for Window 2, Terrenus accepted that it was not challenging Mr Chan's expert evidence in this regard, which was that Bulox's works rather than Attika's lay on the critical path. In the circumstances, we saw no reason to prefer Terrenus' submissions over the uncontested expert evidence.

Whether Terrenus was entitled to general damages for delay in addition to liquidated damages

82 Terrenus argued that cl 17.1.4 of the MBA entitled it to a claim for general damages for delay which could not be covered by liquidated damages under cl 17.1.1 read with cl 17.1.2. Thus, it was entitled to claim general damages for losses it suffered in relation to a Renewable Energy Purchase Agreement ("REPA"), which it had entered into with another party, *ie*, Malkoha Pte Ltd, arising from Attika's delay in completing the contract works as scheduled.

83 The entirety of cl 17.1 of the MBA provides as follows:

> 17. LIQUIDATED DAMAGES
>
> **17.1. LIQUIDATED DAMAGES**
>
> 17.1. l. The Parties hereby agree if the Contractor fail to achieve completion within the time prescribed by Clause 5.5.1 and/or Clause 5.6.1 hereof, or such extended time as may be allowed under Clause 5.5.4 hereof, then the Contractor shall pay to the Employer the amount specified hereunder and shall be construed as a reasonable estimate of losses/damages suffered by the Employer.
>
> 17.1.2. The Contractor shall pay the Employer 0.1 % of Contract Sum per day for each day of delay as liquidated damages. For the avoidance of doubt, the total liquidated damages payable to Employer if any, shall be limited to the amount of not more than Contract Sum.
>
> 17.1.3. For the avoidance of doubt, if the Contractor shall have failed to complete the Works or any phase or part of the Works by the date of Partial Completion and/or Date of Completion, the Employer's right to liquidated damages shall not be affected thereby but, subject to compliance by the Contractor with Clause 5.5.3, the Employer Rep shall grant an extension of time pursuant to Clause 5.5.4. Such extension of time shall be added to the Revised Date of Completion of the Works (or of the relevant phase or part).
>
> 17.1.4. If the Employer suffers other losses and damages which cannot be covered by such liquidated damages, such losses and damages incurred by the Employer shall be deemed as its losses

> and damages resulting from the Contractor's default and shall be reimbursed by the Contractor to the Employer.

84 We agreed with Attika's and the Judge's interpretation of cl 17.1.4. Clause 17.1.4 must be read in the context of cl 17.1.1, which states that the liquidated damages payable for delay "shall be construed as a reasonable estimate of losses/damages suffered by the Employer". This indicated that the liquidated damages under cll 17.1.1 and 17.1.2 were meant to deal comprehensively with damages for delay. Clause 17.1.4 then specified that if Terrenus "suffers *other* losses and damages which cannot be covered by such liquidated damages" [emphasis added], Attika shall pay Terrenus those damages. The natural interpretation was that "other losses and damages" referred to other *types* of loss and damages which did not fall within the ambit of the liquidated damages clauses. Thus, general damages could not be claimed under cl 17.1.4 in respect of delay. As Terrenus' claim for general damages was predicated on Attika's delay, it did not fall within the exception in cl 17.1.4.

85 We also noted that Terrenus did not challenge on appeal the Judge's finding that it had not established either the first or second limb of the remoteness test in *Hadley v Baxendale* (1854) 9 Exch 341 in respect of the general damages sought in association with the REPA. This presented a further barrier to Terrenus' claim, even if we had accepted its submission on the construction of cl 17.1.4 of the MBA.

Whether Attika was entitled to the Balance Sum

86 In respect of this issue, Terrenus relied heavily on Annex F of the MBA, which was titled "Schedule for Payment" and provided that 40% of the Contract Sum would be payable upon issuance of the CSC. In the case of no-fault

termination under cl 14.3 of the MBA, Terrenus was obliged to certify payment to Attika for:

(a) "all work executed prior to the date of termination *as set out in the Agreement*" [emphasis added] (under cl 14.3.2(a)); and

(b) the costs of materials or goods ordered for the works under the MBA which will become the property of Terrenus upon payment being made to Attika, less relevant deductibles (under cl 14.3.2(b)).

Terrenus submitted that the phrase "as set out in the Agreement" in cl 14.3.2(a) incorporated Annex F, such that obtaining the CSC was a condition precedent for payment of the Balance Sum. Thus, Attika was not entitled to claim the Balance Sum as (a) the CSC was not obtained at the point of termination; and (b) Attika did not achieve the works necessary to fulfil the condition precedent of achieving the CSC.

87 We disagreed with Terrenus' submissions. The phrase "as set out in the Agreement" in cl 14.3.2(a) made it clear that only work stipulated in the Scope of Works of the MBA that Attika had carried out prior to termination qualified for payment under cl 14.3.2. Clause 14.3.2 did not make certification and payment subject to and conditional upon satisfaction of Annex F of the MBA.

88 We were also not persuaded by Terrenus' attempt to rely on cl 31.4.2(a) of the Public Sector Standard Conditions of Contract for Construction Works ("PSSCOC") (which Terrenus claimed was *in pari materia* to cl 14.3.2(a) of the MBA), in support of its interpretation that cl 14.3.2(a) was meant to incorporate the applicable contractual payment mechanism in Annex F. Clause 31.4.2(a) of the PSSCOC was contextually different and, in terms of language, not *in pari*

materia with cl 14.3.2(a) of the MBA. Further, counsel for Terrenus conceded at the hearing before us that Terrenus had adduced no evidence at trial that the parties had in mind cl 31.4.2(a) when executing the MBA.

89 The Judge found that all the work provided for under the MBA had been carried out prior to termination, subject to the three alleged defects discussed below. Terrenus had also acknowledged this repeatedly at the trial below. It followed that the Scope of Works under the MBA was substantially performed by Attika, and it was entitled to the Balance Sum save for relevant deductibles.

AD 4 – Attika's appeal

Whether the Judge erred in deducting the Deducted Sums from the sum payable to Attika

90 Following from the above, the remaining issue was whether the Judge had erred in allowing the Deducted Sums for the Three Deducted Items – totalling sums of $49,861 and US$85,920.90 which arose from the alleged defects in (a) fencing using concrete stumps; (b) damaged solar panels; and (c) ponding (issues which the parties agreed to send for NE). In our view, he had erred. Although the claims as regards the defects were initially pleaded by Terrenus, the parties subsequently agreed to send them for NE and informed the Judge that those claims were not to be adjudicated upon in the Suit. As such, the claims in relation to the Three Deducted Items were not before the Judge and he therefore did not have the jurisdiction to make the deductions that he did, for the purpose of cl 14.3.2 of the MBA. Neither should the Judge have simply adopted the quantum claimed by Terrenus without more even though that decision would be subject to NE. We thus allowed AD 4. For the avoidance of doubt, we allowed AD 4 primarily on the basis that the Judge did not have jurisdiction to make the deductions. We did not decide the merits of the claims

regarding the three alleged defects. Accordingly, Attika was entitled to the Balance Sum in full.

Conclusion

91 For the reasons above, we dismissed AD 2 and allowed AD 4. As Attika prevailed in both appeals, we ordered costs of both appeals to Attika fixed at $83,000 inclusive of disbursements, with the usual consequential orders.

Woo Bih Li
Judge of the Appellate Division

Kannan Ramesh
Judge of the Appellate Division

See Kee Oon
Judge of the Appellate Division

Teo Wei Xian Kelvin, Zhao Junning and Chua Calen Craig (Drew & Napier LLC) for the appellant in AD/CA 2/2024 and the respondent in AD/CA 4/2024;
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