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

**[2022] SGHC 69**

Suit No 1073 of 2016

Between

Thio Keng Thay

… *Plaintiff*

And

Sandy Island Pte Ltd

… *Defendant*

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# JUDGMENT

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[Building and Construction Law — Damages — Assessment of Damages]

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# Thio Keng Thay
# v
# Sandy Island Pte Ltd

**[2022] SGHC 69**

General Division of the High Court — Suit No 1073 of 2016
Lee Seiu Kin J
13, 14 April, 23 August, 8 November, 20 December 2021; 25 February, 21 March 2022

31 March 2022 Judgment Reserved

**Lee Seiu Kin J:**

## Introduction

1 This judgment is the second one issued in this suit, in which the plaintiff is seeking to recover damages from the defendant for breach of a sale and purchase agreement ("the SPA"). Under the SPA, the Plaintiff purchased a property ("the Property") developed by the Defendant at Sandy Island, Sentosa at the price of $14.32m. The first tranche of the trial was heard over eight days in 2018 and was adjourned on 25 October 2018 while the hearing on quantum was still ongoing. As the evidence on liability was completed by then, I gave my decision on the issue of liability on 29 July 2019 in *Thio Keng Thay v Sandy Island Pte Ltd* [2019] SGHC 175 ("the First Judgment"). The Defendant appealed against my decision, and the Court of Appeal dismissed the appeal on

28 August 2020 and gave its grounds in *Sandy Island Pte Ltd v Thio Keng Thay* [2020] SGCA 86 ("the CA Judgment").

2 Having settled the issue of liability, the trial was scheduled to resume on 13 April 2021 with the hearing of the remaining evidence pertaining to the quantum of damages. However, on the following day counsel for both parties informed me that they had reached an agreement to dispense with cross-examination of the remaining witnesses (who were all expert witnesses) and were prepared to proceed on the basis of their affidavits evidence-in-chief ("AEIC") and admitted documents. The trial was therefore adjourned for counsel to prepare written submissions which were eventually filed on 4 October 2021. On 8 November 2021, counsel appeared before me for oral reply submissions after which I reserved judgment. On 20 December 2021, at my request, counsel submitted further written submissions on a specific issue. I now give my decision concerning the quantum of damages in this suit.

**Two Categories of Defects**

3 As the background to the matter is set out in the First Judgment and the CA Judgment, I shall not go into the full details of the matter here and will only set out the facts relevant to this judgment. After taking possession of the Property on 15 March 2012, the Plaintiff discovered numerous defects. He engaged a building surveyor to inspect the Property and prepare a list of defects. What took place thereafter was several months of toing and froing between the Plaintiff and the Defendant, with the Plaintiff sending to the Defendant one defects list after another as new defects were discovered. The parties were in communication on arrangements for joint inspection, methods of rectification, and on whether certain items were truly defects that the Defendant was liable for. Although the Defendant offered to repair many of the defects in the list, the Plaintiff did not

permit it to enter the Property to do so, on the ground that he was not satisfied with the method statement put up by the Defendant for the repairs. This standoff continued and in February 2013, the Plaintiff called a tender based on specifications prepared by his building surveyor. The lowest tenderer submitted a price of $1,880,350. The Defendant took the view that this was excessive and informed the Plaintiff that it would not reimburse him on this basis. The Plaintiff called another tender based on specifications drawn up by a new building surveyor and the lowest bid for this was submitted by JTA Construction Pte Ltd ("JTA") at $1,213,200. The Plaintiff eventually awarded the contract to JTA ("JTA Contract") and the work was carried out from 1 September 2014 to 30 May 2015.

4 Therefore, there are two categories of defects. The first is those defects that the Defendant had admitted as defects under the SPA and were prepared to enter the premises to rectify ("Admitted Defects"). The second is those defects that the Defendant denied were defects under the SPA and had taken the position that it was not liable to rectify ("Non-admitted Defects"). In respect of the Admitted Defects, the first issue is whether the Plaintiff had failed to mitigate his damages because he had refused the Defendant access to the Property for the purpose of rectifying those defects. For the Non-admitted Defects, this will entail a determination of: (a) whether each item is a defect under the SPA such that the Defendant would be liable to rectify; and if so, (b) what would be the reasonable cost that would be incurred by the Plaintiff to rectify such defects.

5 There is a sub-category of the Admitted Defects. This concerns the passenger lift and vehicle lift (collectively, "the Lifts") in the Property. The Defendant's main contractor had engaged Gylet Elevator Co Pte Ltd ("Gylet") to supply and install the Lifts. The Plaintiff complained to the Defendant about defects in the Lifts, but did not permit Gylet access to the Property to rectify

those defects. I had found that the Defendant was in breach of the SPA in that the Lifts were defective, and that the Plaintiff was in breach of his obligation under cl 17 of the SPA to give an opportunity to the Defendant to rectify the defects. The issue concerning the Lifts will be dealt with separately from the Admitted Defects as special considerations apply.

**Mitigation of Damages**

6 I turn to the issue of mitigation of damages in relation to the Admitted Defects, excluding the defects in the Lifts.

7 At [103] of the First Judgment, I had found the Plaintiff to be in breach of cl 17 of the SPA which obliged him to give an opportunity to the Defendant to rectify the Admitted Defects. I have stated, in [117] of the First Judgment, that this issue will be dealt with when considering the quantum of damages. This was affirmed by the Court of Appeal at [104] of the CA Judgment, and that court stated the following:

> "The final point that the appellant raises, which is related to its point on circuity, is that there would be no costs involved if the appellant had been allowed to rectify the admitted defects. This was despite the fact that [the] Judge had explicitly stated that the question of whether it "would have cost the [appellant] nothing at all to rectify the said defects" would be addressed in the second tranche of proceedings (see the Judgment at [117])."

8 The issue is, in the circumstances of the present case, how is that mitigation to be assessed. It is the Defendant's position that, where an owner is in breach of a defects liability clause, he cannot recover more than what it would have cost the contractor to rectify the defects. The Defendant cited the English

case of *Pearce and High Ltd v Baxter* (1999) 66 Con LR 110 ("*Pearce*") and stated the following in written submissions:[1]

> "In *Pearce,* the English Court of Appeal recognised at 752 that the effect of breaching a defects liability clause was that the owner could not recover more than it would have cost the contractor to rectify the defects, given that the cost of employing a third-party repairer was likely to be higher than the cost to the contractor of doing the work itself. This was achieved through the lens of mitigation of damages, by setting off the amount by which the contractor has been disadvantaged against the owner's damages claim."

9 I agree fully with this statement. Had the Plaintiff permitted the Defendant to enter the Property to undertake the rectification, the Admitted Defects would have been repaired by the Defendant or its contractors who would, between themselves, have borne all costs in accordance with the contract between the latter two parties. Therefore, the damages that the Plaintiff is entitled to in this situation would be the amount that the Defendant would have incurred had the rectification been undertaken in accordance with the defects liability clause of the SPA. I therefore hold that the Plaintiff is only entitled to recover from the Defendant the sum of money that the Plaintiff would have incurred had the Plaintiff permitted the Defendant to enter the Property to carry out the rectification works for the Admitted Defects.

10 The issue then, is: what would it have cost the Defendant to undertake the repairs to the Admitted Defects? At the first tranche of the trial, the Defendant had submitted that it would not have incurred any costs in this regard, as noted in the First Judgment at [117]:

> "… the defendant has claimed that since it would have cost the defendant nothing at all to rectify the said defects (given that YTL was allegedly obligated to rectify the defects at no cost to the

[1] Defendant's Written Submission at para 50.

> defendant), the plaintiff cannot claim for any damages in respect of the rectification works ...".

The law is clear that the burden of proving this (that it would have caused the Defendant nothing to rectify the Admitted Defects), or indeed, how much it would have cost the Defendant to undertake the repairs, is a fact wholly within the Defendant's knowledge. In particular, s 108 of the Evidence Act (Cap 97, 1997 Rev Ed) provides that "[w]hen any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".

11 It is therefore surprising that the Defendant has not given any evidence at all in this regard. The Defendant did submit that under the contract it had entered into with its contractor, the latter was liable to rectify any defects within the defects liability period. However, the Defendant did not exhibit that contract nor produce any evidence of the sum that it would have incurred (whether zero or otherwise) to repair the Admitted Defects. I therefore find that the Defendant has not proven that the Plaintiff had failed to mitigate damages and proceed, on that basis, to assess the quantum of damages that the Plaintiff is entitled to for all defects (both Admitted Defects and Non-admitted Defects) that fall within the Defendant's liability under the SPA.

12 The upshot of this is that there is no difference between the Admitted Defects and Non-Admitted Defects. The only issue is whether a particular defect claimed to be such by the Plaintiff is one for which the Defendant is liable to rectify under the SPA. And if so, what is the reasonable cost to rectify that defect.

**The JTA Contract**

13 As a starting point, I find the pricing in the JTA Contract to be an accurate reflection of the reasonable costs for the rectification of those works that pertain

to this assessment. I find that the manner in which that tender was called and awarded was reasonable under the circumstances. Although the Defendant's expert gave reasons why this or that item was too high, I was not satisfied with the basis for those figures. With respect, while an expert's opinion might be useful in making estimates, this cannot compare with the real-world pricing manifested in the JTA Contract. So long as the tender was called in a competitive manner and properly conducted, which I find it was, that has to be the best measure of the reasonable cost of carrying out the works. The final account for the JTA Contract came in at $897,338.10 plus $47,924.87 for the swimming pool, totalling $945,262.97.

14 There is also the issue of whether each item of work in the JTA Contract amounts to a defect under the SPA and whether other factors are in play that would reduce the quantum that the Defendant would be contractually liable for. The Defendant submitted that in relation to certain items, the quantum of damages is affected on account of the following factors:

(a) Betterment: the scope of the works carried out went beyond simply rectifying the defect in question;

(b) Deterioration: the damage to the item had deteriorated because of the Plaintiff's delay in carrying out the works;

(c) Neglect: the damage to the item had worsened due to the Plaintiff's failure to maintain the Property;

(d) Architectural intent: certain items were built in a particular manner due to architectural intent and should not be considered defects; and

(e) Warranty: these items came with third party warranties which could have been invoked without charge.

15 I shall deal with these factors in turn. As I have stated above, the starting point is the pricing under the JTA Contract and I shall consider whether the prices are affected by any of the considerations listed in (a) to (e) above. In doing so I have referred to two documents submitted jointly by the parties:

(1) The Scott Schedule ("SS");

(2) Summary of Plaintiff's Position on Quantum (with Defendant's responses) ("SPQ").

***Betterment***

16 The Defendant submitted that some of the works carried out by JTA went beyond mere rectification and entail improvement to the item of work. I agree that the Plaintiff is only entitled to rectification of the defects and not to any additional costs to any works that improve the original works. However, there may be situations where the most reasonable or cheapest method of rectification results in an improvement to the item. In such a case the Plaintiff should be entitled to the full sum for that item. With these principles in mind, I turn to examine the individual items. The Defendant submitted that there are six items in the betterment category.

17 The first item in the SPQ is the addition of a glass canopy over the atrium, which is an open area leading to the front door of the Property.[2] The Plaintiff found that when it rained, water flowed under the front door as the atrium did

[2] SPQ at p 1.

not have a roof. The Plaintiff submitted that providing a glass canopy over the atrium was the most practical and least costly solution that is in keeping with the design philosophy and the overall aesthetics of the Property. The Defendant has not proposed anything that can solve this problem in a practical, and aesthetically acceptable manner. It seems to me that the problem is that the Italian themed design of the Property has not taken into account the high rainfall experienced in Singapore and has used aspects of design that might be applicable in a Mediterranean environment. I therefore agree that the Plaintiff's solution of a glass canopy is the most reasonable solution to the defect and there should not be any reduction in the award on the ground of betterment.

18 The second item involves the installation of powder coated aluminium coating.[3] The Plaintiff's position is that this is the most effective and practical method of rectifying the defect. I agree with the Plaintiff that its solution is a reasonable one. Further, the Defendant's solution is estimated to cost $9,180 as opposed to the Plaintiff's which costs $12,000, which is 25% cheaper. However, the Defendant's costing is an estimate as opposed to the Plaintiff's which is the actual price paid. In these circumstances, there may not be a substantive difference were the Defendant's method to go out to tender. I therefore agree with the Plaintiff's solution and pricing.

19 The third item is the glass screen and door to the attic bedroom.[4] The Defendant's position here turns mainly on there being no functional deficiency. However, given the quality of the Property, I am of the view that aesthetic

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3 SPQ at p 3.

4 SPQ at p 4.

deficiency is a substantive defect. In addition, there were a number of issues with the swing of the door. I agree with the Plaintiff's solution and pricing.

20 The fourth item relates to the glass screen at the shower cubicle in the master bedroom.[5] The Plaintiff's complaint is that the cubicle was only 840mm wide, which is too narrow for a high-end master bedroom that is designed for two people. Firstly, the Defendant has denied that it was designed for two people and the Plaintiff has not produced any evidence of this rather unusual design. Secondly, there would be floor plans in the brochure for the Property and the Plaintiff did not produce those to show that the cubicle actually built was not what was shown in the brochure. I therefore agree with the Defendant on this item. The Plaintiff's pricing for this is $11,200 (at items 180 and 181 of the SS), compared to the Defendant's pricing of $3,435. After taking into account GST, this amounts to a deduction of $8,308.55.

21 The fifth item is the installation of full height glass screen at the living room to replace the door that opened out to the patio.[6] The Plaintiff's position is that, like in the case of the front door, the exposed door here is vulnerable to water seepage during heavy rain. The Plaintiff pointed out that the brochure featured double height glass panels without a door. The Defendant does not dispute this but claimed that the design that was finally submitted to BCA provided for the door which was set into the double height glass panel. There is no evidence that the final design was shown to the Plaintiff, let alone approved by him. The Defendant had represented to the Plaintiff that this was what he was getting, but gave him something different, and more importantly, something that

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5 SPQ at p 5.

6 SPQ at p 6.

does not work in our climate. This was not what the Plaintiff had bargained for. I therefore hold that the Plaintiff is entitled to his rectification.

22 The sixth item is the installation of skylight canopy at the Airwell of bathroom 5 and the reading room.[7] I agree with the Plaintiff's position that this is the most practical and effective manner of rectification.

23 The seventh item concerns the installation of the swing door to the shower cubicle.[8] I find the Plaintiff's method to be reasonable.

24 The eighth and last item under betterment deals with tiling work to the Airwell.[9] I find the Plaintiff's method to be reasonable.

***Deterioration***

25 As a result of the Plaintiff not permitting the Defendant to enter the Property to effect the repairs and the resulting standoff, the rectification works only started on 1 September 2014. I find that, had the Plaintiff acted reasonably, the rectification works could have commenced, at the latest, by 1 January 2013, about nine months after the Property was handed over. Hence there was a delay of one year and eight months caused by the Plaintiff's unreasonable conduct. During this period, the Property was vacant. The Defendant claimed that there was extensive deterioration during this period which the Plaintiff denied. From the evidence of the experts, I am satisfied that there was some degree of deterioration, the only issue is its extent. The items are set out in 25 pages of the SPQ. Given the quantity and nature of the items I find that it is expedient to put

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7 SPQ at p 8.

8 SPQ at p 10.

9 SPQ at p 10.

an overall percentage discount on the cost of rectification for these items as a detailed examination of each item would not be worthwhile, nor would it necessarily result in a more accurate figure. I therefore invited counsel to make further submissions on a deterioration discount, based on my finding of a delay of one year and eight months.

26 The Plaintiff's submission was that there should be no deterioration discount because, essentially, the methods proposed by the Plaintiff generally involved wholesale replacement of the affected parts. The Plaintiff also submitted that there was no evidence of deterioration. However, I find that there was evidence of deterioration as it is the Plaintiff's own case that there was flooding and roof leaks. In my view, the Plaintiff's submission disregards the fact that had the rectification works been done timeously, some of the parts may not have deteriorated to such an extent that wholesale replacement is required.

27 I am therefore of the view that there should be a deterioration discount for the period of delay of one year and eight months. The Defendant had submitted various discounts for items that have suffered deterioration. I am of the view that it is appropriate in this case to take it in the round and apply a flat discount for those items. Taking into account the Defendant's submissions on the individual items, I assess the discount to be a flat 10% applied over the sum assessed for the items listed in [133] of the Defendant's Closing Submissions (Quantum). This amounts to $20,000 (rounded off).

***Neglect***

28 The SPQ also contains numerous items that the Defendant claimed were the result of neglect or lack of maintenance by the Plaintiff.[10]

29 Considering the description for those items, it is difficult to conclude that the condition of those parts of the Property was a natural outcome of the defect or that a lack of maintenance had worsened it. What is described were certainly defects in the Property. If the Defendant alleged that this was caused by neglect or lack of maintenance, then the burden of proof lies on them. I accept that it is difficult for the Defendant to mount such evidence, but that does not alter or relieve them of that burden. I find that the Defendant has not made out its case that these items were caused by or aggravated by neglect of lack of maintenance.

***Architectural intent***

30 The Defendant contends that the following five items listed in the SPQ are not defects as claimed by the Plaintiff, but were designed in that manner by the architect.[11] I shall consider each item in turn.

31 The first is the timber flooring. The Plaintiff complained that the finish to the timber flooring throughout the Property was patchy and poorly sanded. The Defendant does not deny that this was the condition of the timber flooring but claims that this state of the flooring was intended by the architect. The

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10 SPQ at pp 35 – 49. These are listed in the Scott Schedule ("SS") as item numbers 7, 12, 23, 33, 41, 53, 78, 88, 89, 100, 105, 113, 115, 126, 129, 154, 158, 160, 163, 165, 167, 195, 197, 202, 208, 209, 210, 222, 223, 224, 225, 229, 233, 269, 282, 285, 290, 296, 300, 301, 310, 321, 325, 330, 336, 341, 345, 346, 347, 352, 353, 356, 358, 368, 371, 372, 374, 377, 378, 382, 386, 387, 400, 402, 406, 408, 409, 417, 418, 419, 423, 426, 428, 430, 432, 445, 447, 448, 455, 460, 465, 475, 477, 480 and 492.

11 SPQ at pp 49 – 51.

Defendant cited marketing material which stated that the Property would feature "undecorated planes", an absence of "embellishment of any kind" and an "uncompromising" use of natural material, which supported an intention to leave the timber in its natural, unembellished state to produce a rustic look. I am not sure with all that fine marble in the Property, that it can be described as "rustic". Patchy, unpolished timber floors certainly do not feature in the marketing material exhibited by the Plaintiff. In my view, the Defendant's submission had used words in the marketing material out of context in a vain attempt to reject these defects. I find that this is a defect that the Defendant is liable for.

32 The second is the sealant to the guard screen listed as item 177 in the SS. There is no evidence that the architectural intent was to have different colours on either side.

33 The third is the cabinet doors in the wet kitchen (SS item 252). The Plaintiff stated there were neither handles nor finger pulls to enable the doors to be opened easily. The Defendant asserts that they can be opened without explaining how. I find for the Plaintiff on this item.

34 The fourth is the external door to the guest room (SS item 302). The Plaintiff complained of poor finishing to both sides of the door. The Defendant stated that this staining is part of the architectural intent. I find it puzzling that this should be the only door that the architect intended to have such staining. I find for the Plaintiff on this item.

35 The fifth is the timber lattice screen (SS item 490). This is erected at one side of the atrium and is an architectural feature. The Plaintiff complained that this was constructed without any weather protection. Furthermore, it sits directly on the stone flooring and is affected by rainwater. The Plaintiff contends that

this is wholly unacceptable in the high rainfall environment. The Defendant contends that this being an external architectural feature, would be susceptible to the weather and, while some degree of maintenance would be necessary, it is not a defect. I would agree with the Defendant. The architect had designed the atrium to be bordered at one side with a wooden lattice structure. Wood, left in the open, would be susceptible to much quicker deterioration than most other building material. It is not a design defect like that of an unroofed atrium which results in water flooding through the front door. It is a matter of choice of material, and the one chosen requires more maintenance. I therefore hold for the Defendant on this item and agree with their cost estimation of $500 for this item. This amounts to a deduction of $3,745.00.

***Warranty***

36 The Defendant claims that the following four items listed in the SPQ are covered by warranties and the Plaintiff ought to have invoked them for rectification of those items.[12]

37 The first is SS item 43, a leak in the base of the wall in the Attic lift lobby through which an air-conditioning pipe passes. The Plaintiff states that this is not a matter that is covered by the water-proofing. The Defendant merely takes the position that the water leakage is a seepage through the slab and not through the hole where the pipe passes. I find for the Plaintiff on this item.

38 The second is SS item 95, leakage beneath the glass screen at the staircase between the Attic and the second storey. Again, I agree with the Plaintiff that this is not covered by the warranty.

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12 SPQ at pp 51 – 52.

39 The third is SS item 340, water ingress from the swimming pool. The Plaintiff stated that the warranty for basement substructure waterproofing would generally not cover a swimming pool as it is a water retaining structure. The Defendant, on whom the burden rests to prove this point, did not show how the warranty covered the swimming pool. I find for the Plaintiff on this point.

40 The fourth is SS item 494, leakage above swimming pool pump room door in the Laundry Room which is located in the basement. This is related to the leakage from the swimming pool. As with the swimming pool, I find for the Plaintiff on this point.

**High Value Items**

41 The parties have very helpfully provided detailed submissions on 18 high value items, to which it is worthwhile to pay special attention. I shall deal with each in turn.

***Preliminaries***

42 The JTA Contract was awarded at $1,213,200 comprising of:

(1) Preliminaries: $100,000

(2) Rectification works: $998,000

(3) Provisional sum: $115,200

43 The Defendant submits that "the preliminaries form 13.91% of the total cost in JTA's progress claim 6". However, JTA's progress claim 6 is for $228,381.52 and it is not clear what is the relevance of this fact. If the Defendant's argument is that $100,000 is too high a figure for a building contract

of this scale, it should be made by comparing it with the total contract sum of $1,213,200 (which is 8.2%) or the total contract sum less provisional sum of $1,098,000 (which is 9.1%). By no measure is the preliminaries item anywhere near the rather puzzling 13.91% relied on by the Defendant in their submission. This puts paid to the Defendant's submission that as a percentage of the total contract this is too high because that is based on the figure of 13.91%. I would state that a preliminaries percentage of 8% to 10% appears, from my experience, to be a reasonable figure.

44 The Plaintiff submits that this pricing was obtained by way of a competitive tender and done at arm's length. I should state that at that time, it was by no means certain that the Plaintiff would succeed in its claim against the Defendant, particularly in view of the uncertainty on the issue of the defects liability clause. The Plaintiff had no reason to award a contract in which the price is not a competitive one.

45 Finally, I would add that it is well known that a contractor sets his figure for the preliminaries item in accordance with his pricing strategy. He may have front loaded some costs into the preliminaries, or distributed some of his overheads into the prices of the individual items of work. So long as a substantive part of the contract was performed, as was the case here, it is not fair to complain the preliminaries sum is too high, which in any event does not appear to be the case here.

46 I therefore find that the preliminaries sum is fair and reasonable. However, to the extent that the cost of any item is deducted because the Defendant is not found to be liable for it, I agree with the Defendant that the preliminaries should be reduced *pro rata*. The denominator should include the provisional sum as JTA is obliged to undertake additional works up to the entire

provisional sum without entitlement to additional preliminaries. This entails a reduction of $28,374.23.

***Paintwork***

47 Extensive painting was carried out on the Property after the repairs were done. The Defendant's main submission on this is that approximately half of the rectification works were due to maintenance and deterioration concerns. In view of my finding that the Defendant had failed to prove lack of maintenance, and that the deterioration would only justify a 10% reduction, I find that the extensive rectification works that had to be carried out over virtually the entirety of the Property justified the painting works claimed for.

***Timber strip flooring***

48 This item is considered at [31] above.

***Aluminium capping and lightning conductor tape***

49 This item is considered at [18] above.

***Aluminium glazing***

50 The bone of contention between the parties is an item for scaffolding priced at $3,000. The Plaintiff had altered the scope of works from the original JTA tender, but argued that it was brought down from the original price for this item of $50,000, to $38,950. The Defendant argued that a sum of $3,000 was priced in the revised works which should have been covered under the preliminaries. I am of the view that JTA would have priced for substantial scaffolding as there is much work at heights, including painting and works at the

upper levels and therefore the scaffolding ought not to have been priced in. There will therefore be a reduction of $3,210 under this item.

***Attic bedroom glass door***

51 This item is considered at [19] above.

***Shower cubicles in attic, 2F, 1F bedrooms***

52 The Plaintiff's position is that the shower cubicles in the various bedrooms were defective ranging from poor position of cut off drains to corroded screws and lack of panel to cut off water splashing from the showers. I accept the Plaintiff's evidence on these items.

***Timber decking***

53 I accept the Plaintiff's submission that the timber decking was defective and, in any event, needed to be removed for access to repair other defects.

***Flat roof***

54 The Defendant does not deny the Plaintiff's allegations of leaks to the flat roof over the attic bedroom, but avers that the Plaintiff should have made a claim on the warranty. I agree with the Plaintiff's submission that this is not covered by the warranty.

***Timber lattice in living/dining area***

55 I agree with the Plaintiff that this is defective and find for the Plaintiff on this issue.

***Replacement of full height glass door with glass panel at patio***

56 This is covered at [21] above.

***Basement toilet***

57 I find for the Plaintiff that the bathroom construction was defective in that the floor did not drain properly and that the repairs were necessary.

***Skylight at basement airwell***

58 This item is dealt with at [22] above.

***Repair works to basement walls***

59 The Plaintiff's expert noted that there was rainwater seepage due to poor detailing. The Defendant's expert accepted that there was water ingress. I find for the Plaintiff on this issue.

***Timber decking at patio***

60 The Plaintiff provided details of the defects affecting the timber decking at the patio. The Defendant's main contention is that the extent of the works carried out is not justified. I agree with the Plaintiff on this issue.

***Repair work to timber lattice***

61 The parties agree that there is a missing piece to the timber lattice above the air well, but disagree on costs. The Plaintiff's claim is for $6,000, which the Defendant submits is "astronomical". I also think that this appears high. I therefore accept the Defendant's estimate of $500. This results in a deduction of $5,885.00.

***Turfing adjacent to car lift***

62 The Plaintiff complained that the turfed area adjacent to the car lift was uneven. The Plaintiff produced photographs to show the uneven ground. The Defendant contends that this was due to lack of maintenance of the grass and underlying soil. I accept that if there was subsidence over the 2-year period between TOP and the repair works, it would not be a defect. However, the evidence appears to be that the ground was uneven from TOP. I therefore find for the Plaintiff on this issue.

***Glass canopy***

63 This issue has been dealt with at [17] above.

***Leak at basement laundry room***

64 I have dealt with the issue of warranty at [40] above.

**Lifts**

65 The issue concerning the lifts is a bit of a saga, which is set out in [28] to [34] and [118] to [130] of the First Judgment. I found the lifts to be defective and held that the Plaintiff had a right to claim damages even though he had denied access to the lift supplier, Gylet, to perform the repairs (First Judgment at [131]). I further held, at [132] of the First Judgment, that whether this refusal constituted failure on the part of the Plaintiff to mitigate damages would be determined at this assessment of damages.

66 The Plaintiff's main reason for his refusal to permit Gylet to undertake the rectification is that its managing director, Er Gay Yun Lin ("Gay"), had falsely declared that he had made an inspection of the Car Lift on

16 March 2012. Gay had certified that he had conducted a load test on that day when in fact he did not turn up at the Property at all. When the Plaintiff asked for photographs of the test, Gay compounded the lie by producing photographs of tests done at a neighbouring unit. The Plaintiff complained that Gay had also provided signed but undated certificates to a neighbouring unit and that Gylet was not registered with BCA to carry out lift maintenance works.

67 The Plaintiff also gave evidence that two of Gylet's technicians had told him on two separate occasions that the car lift was unsafe for use and yet Gay had sent him an email to state that it was safe. The final straw for the Plaintiff was when "copious amounts of rain" were entering the car lift, an event that the Plaintiff recorded on video. The Plaintiff found that the Defendant was dismissive of his complaint, telling him that Gylet had informed them that the car lift was safe to use if he adhered to their recommendations and were cautious during usage. This was despite video evidence of substantial water coming in from the car lift.

68 The Plaintiff set out a litany of other issues with the Lifts and his efforts to deal with it. Although the Plaintiff did appear somewhat abrasive towards the Defendant and Gylet, I find that on such an important matter of safety as passenger and car lifts, the response of the Defendant and Gylet did appear cavalier and dismissive. In addition, the clear dishonesty of Gay on a matter as important as certification and testing is something that would be alarming to anyone, what more the owner of the property in which Gay had installed potentially dangerous equipment. I find that the rather unique circumstances of the case justified the Plaintiff in taking the position that Gylet can no longer be trusted to rectify the defects in the lifts. I therefore find for the Plaintiff on this issue and award the sum of $297,500.00.

## Other Claims

### *Loss of use of the Property*

69 The Plaintiff claimed for loss of use of the Property from the date of possession, 15 March 2012 until 27 May 2015, when JTA completed the works under the JTA Contract, on the ground that the Property was uninhabitable during this period on account of the defects as well as rectification works. The Plaintiff quantified these damages as follows:

(a) $845,225.71 based on a rental rate of $22,000 for the entire period; and

(b) $22,293.93 being the maintenance charges and other fees paid to Sentosa Cove Resort Management Pte Ltd over the same period.

70 The Plaintiff gave the following evidence in respect of this item of claim. In his AEIC, he said that he was claiming for:[13]

> "loss of use of the Property arising from the Plaintiff's deprivation of the use of the Property from the time I took possession on 15 March 2012 till 27 May 2015, when JTA Construction completed the rectification works, amounting to $845,225.71 (calculated at a rate of S$22,000 per month or $709.67 per day, as reflected in the Letter of Intent) plus maintenance charges and other fees paid to Sentosa Cove Resort Management Pte Ltd amounting to $22,293.93. Copies of a Letter of Intent for tenancy of the Property and supporting invoices for maintenance charges and other fees paid to Sentosa Cove Resort Management Pte Ltd are annexed hereto …"

71 The Letter of Intent ("LOI") exhibited by the Plaintiff is on a standard form of ERA Realty Network Pte Ltd ("ERA"). It is dated 22 May 2015 and states that it is "Subject to Contract". It is not addressed specifically to the

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13 Plaintiff's AEIC at para 220(c).

Plaintiff, but to "Owner". However, the address of the premises it relates to is not specified. The tenor of the LOI is a statement by ERA that it has a tenant who has the intention to rent the unspecified premises from the "Owner" of the said unspecified premises at $22,000 per month from 1 June 2015. The LOI states that a cheque for $22,000 is enclosed but the space for the cheque number is left blank. The LOI is signed by one Moh Kim Choo, a registered housing agent and by one Zhang Qiao Wen as the tenant. The section for the landlord's acceptance is blank. Neither the agent nor the prospective tenant was called by the Plaintiff to give evidence. The Plaintiff bears the burden of proof on this issue and I find the evidence he has adduced to be insufficient to prove that the market rental was $22,000.

72 During cross-examination, the Plaintiff agreed that the Property was never tenanted out after 27 May 2015. He said that his primary residence was on the mainland and his intention was to stay at the Property from time to time. His loss of use of the Property, therefore, did not extend to the full period he is claiming but only to the unspecified periods that he had intended to stay in it.

73 Furthermore, I have found that the Plaintiff had breached the defects liability clause in not permitting the Defendant to enter the premises to carry out rectification works. I had also found that he had acted unreasonably in dealing with this matter and this had caused delays to the rectification. Even if the Plaintiff were entitled on the basis of equivalent rental, it cannot be for the entire period.

74 Therefore, having rejected his claim that the loss should be computed at $22,000 per month for the entire period, and in the absence of any other evidence, this part of his loss of use claim must fail entirely. In relation to the fees that the Plaintiff had paid to Sentosa Cove Resort Management Pte Ltd

amounting to $22,293.93, the Defendant does not dispute that this sum had been paid. However, as I have found above, the Plaintiff is not entitled to his loss over the entire period that he had claimed. As he had also claimed for a specific sum, this claim also fails.

***Investigation costs***

75 In his statement of claim, the Plaintiff claimed the following:[14]

> "costs incurred in engaging independent third parties to investigate the defects in the Property, to prepare lists to notify the Defendant of these defects and to engage architects and engineers in respect of the rectification works, amounting to $135,405.29 to date, and all and any such continuing costs."

76 The evidence in support of this claim is found in the Plaintiff's AEIC.[15] He said that he had engaged independent third parties to investigate the defects in the Property, to prepare lists to notify the Defendant of the defects and to engage architects and engineers in respect of the rectification works. He exhibited invoices from a number of building professionals and other entities.

77 The Defendant submitted that the Plaintiff was not entitled to the fees for the following consultants:

(a) IAQ Consultants Pte Ltd, as the Plaintiff had not provided evidence to justify their engagement.

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14 Plaintiff's Statement of Claim (Amendment No 1) at para 66(B).

15 Plaintiff's AEIC at para 220(b).

(b) RG Building Surveyors as the Plaintiff had provided no valid reason for engaging them when he had already engaged Mr Casimir whose fees are claimed under CC Building Surveyors Pte Ltd.

(c) YF Chan Consulting Engineers as the Plaintiff had not provided evidence to justify this engagement.

78 The Plaintiff had asserted in his AEIC that these three consultants were necessary and was not cross-examined on his reasons. In my view, given the extent of the defects, it was reasonable for the Plaintiff to engage these three consultants. The Defendant did not challenge the fees paid to the other entities. I therefore allow the Plaintiff's claim of $135,405.29 for investigation costs.

**Conclusion**

79 I have therefore found six deductions from [20], [27], [35], [46], [50], [61] above, totalling $69,522.78. There are two additions, $297,500.00 for the Lifts at [68] and $135,405.29 for Investigation costs at [78]. The final figure is computed as follows:

| | |
|---|---|
| Final sum under JTA: | $ 945,262.97 |
| Less Deductions: | $ 69,522.78 |
| Add | |
| Lifts: | $ 297,500.00 |
| Investigation costs: | $ 135,405.29 |
| Total: | $1,308,645.48 |

80 Accordingly, I give judgment for the Plaintiff in the sum of $1,308,645.48. Unless any party has a submission that a different costs order

ought to be made, for which there is liberty to apply, I make the usual order of costs to be paid by the Defendant to the Plaintiff to be taxed unless agreed.

81 Finally, I wish to record my deep gratitude to both Mr Daniel Cai and Mr Qabir Singh Sandhu for their written submissions and invaluable assistance which facilitated the swift conclusion of this rather complicated assessment of damages.

Lee Seiu Kin
Judge of the High Court

Daniel Cai and Tan Sih Si (Drew &Napier LLC) for the plaintiff.
Joseph Lee and Qabir Singh Sandhu (LVM Law Chambers LLC) for the defendant.

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