

BETWEEN

Yap Fah Heng		...	Plaintiff
	AND		
Cheong Tien Li Elmer		...	Defendant
	AND		
Cekon Sdn Bhd		...	Third Party

(Intermediate Court of Brunei Darussalam)
(CS/COM/219/2017)

BETWEEN

Dayangku Nurul Ehsani binti Pg Mohammad		...	Plaintiff
	AND		
Cheong Tien Li Elmer		...	Defendant
	AND		
Cekon Sdn Bhd		...	Third Party

(Intermediate Court of Brunei Darussalam)
(CS/COM/222/2017)

Muhammad Alinorde bin Muhammad Deli		...	1st Plaintiff
Hajah Hartini Haji Abdul Halim		...	2nd Plaintiff
	AND		
Cheong Tien Li Elmer		...	Defendant
	AND		
Cekon Sdn Bhd		...	Third Party

(Intermediate Court of Brunei Darussalam)
(CS/COM/2/2018)

Hazarena Bte POKSJ DP Hj Hurairah, Judge
17th April 2021.

Breach of contract – sale and purchase agreement – property – house – good condition – workman like manner – construction – rescission – rectification – defects – non-installation – incomplete –

progress payment – pleadings – loss – damages – rental – contractor – developer – purchaser – breach – terms and conditions – schedule of payment – specification – practical completion – occupational permit – structural defects.

Ms. Azeemah of M/S Rudi Lee & Annie Kon for the Plaintiffs.
Defendant In Person and Unrepresented.

Cases cited in the Judgment:

- *Robinson v Harman* [1848] 18LJ Ex 202
- *Anglia TV v Reed* [1972] 1 QB 60
- *Addis v Gramophone Co. Ltd* [1909] AC 488
- *Jarvis v Swans Tours Ltd* [1973] 1 QB 233
- *Hadley V Baxendale* [1854] 9 Exch. 341
- *Contracts Act*, Chapter 106

JUDGMENT

Hazarena, Judge:

Introduction

1. This judgment pertains to three files that have been consolidated involving 4 plaintiffs. For the ease of all those involved this judgment is applicable to all three files. The parties who filed their respective claims are Mr. Yap Fah Heng ‘Yap’ (the plaintiff who filed the action in ICCS/COM/219/2017), Dayangku Nurul Ehsani binti Pg Mohammad ‘Dk. Nurul’ (the plaintiff who filed the action in ICCS/COM/222/2017), Muhammad Alinorde bin Muhammad Deli ‘Alinorde’ (the 1st plaintiff who filed the action in ICCS/COM/2/2018) and Hajah Hartini Haji Abdul Halim ‘Hjh Hartini’ (the 2nd plaintiff who filed the action in ICCS/COM/2/2018). The defendant ‘Elmer’ is the same for all three files.
2. I must also add that this judgment has been prepared to decide the action between the plaintiffs and the defendant only. The third party hearing has yet to be decided and would very much depend on the outcome of this hearing.
3. The facts of the case are more or less similar for all three files. Differences lie with respect to the exact damage suffered by each individual but issues pertaining to liability are all similar.
4. The claim is a breach of contract where sale and purchase agreement (S&P) was entered into between the defendant and each of the plaintiffs to construct a 2 storey detached house on EDR BD50470, Kg Belimbing Subok, Mukim kota Batu. The lot numbers for the individual houses and date of entering into the S&P and the expected completion date are:

5.

Plaintiff	Lot Number	Date of S&P	Completion Date
Yap	57013	12 th June 2015	12 th June 2016
Dk Nurul	57014	3 rd October 2013	1 th April 2016
Alinorde and Hjh Hartini	57017	3 rd October 2013	2 nd March 2016

6. All the plaintiff managed to secure housing loans with Baiduri Bank and once work commenced the claims and progress payments were paid out to the defendant by the respective plaintiffs. By May 2016 construction stopped for all three lots. Construction works resume temporarily in August 2016 but stopped again for all three lots in January 2017. To date, all three houses remain incomplete.

7. I must add that all three S&P's were signed between each of the plaintiffs, the defendant and the landowner, Musli bin Tali ('Musli'). Apart from being the registered landowner, Musli does not have beneficial interest in the property, nor is he liable for the issues to be decided between the plaintiffs and defendant.

8. I shall now turn to the various issues

Establishment of a valid contract – The S&P

A. Yap

9. The S&P can be found in the Plaintiff's Bundle of Documents (PBD) at Volume 9, Tab 23 pages 44 to 72 and. There is no disagreement or issue as to the existence of the S&P. The S&P fulfills the usual conditions of the contract. For the sake of completeness I shall briefly go through the issues that make the S&P legally enforceable.

i. Offer and Acceptance

10. Yap first found out about the house through Bess Perfect Property Agency. Yap then entered into a Letter of Intent on 27th February 2015 (PBD Volume 1, Tab 2 page 20 and Tab 3 page 21) with Elmer and paid a deposit of \$5000.00. Yap was then informed that Elmer was the developer and this subsequently led to the signing of the S&P agreement.

11. The offer therefore was presented by Elmer in the form of the S&P to purchase a two storey house on Lot 57013. Herein, I will refer to Yap's house as '57013'. This was accepted by Yap by signing the S&P.

ii. Intention to be legally bound

12. There is an obvious intent to make the S&P legally binding on the parties. This was a commercial transaction and it is safe to assume that parties intended to be bound by this agreement unless there is a clause in the S&P that says otherwise. No such clause exists in the S&P.

iii. Consideration

13. Consideration is the promise of something of value given in exchange for something. In this case it is quite clear that the consideration given in exchange for the house is the purchase price i.e. the consideration that Yap had to give was the payment of \$351,400.00. It is clear that some of the consideration had been paid over through progress claims. I will discuss the payment in more detail later.

iv. Capacity

14. Yap and Elmer both had the legal capacity and are both competent persons at the time of entering the S&P. Not much can be said on this point. Common examples of parties that may not be able to enter into agreements would be where there has been undue influence, the person is a minor or those who are mentally incapacitated. There is no evidence to suggest that either party did not have the capacity to enter into the S&P.

15. There are other elements to make a contract legally binding, but at this juncture I find that the basic elements have been established. Therefore the S&P between Yap and Elmer is legally binding and thus enforceable.

B. Dk Nurul

16. The S&P can be found in the Plaintiff's Bundle of Documents (PBD) at Volume 4, Tab 5, pages 22 to 51. There is no disagreement or issue about the existence of the S&P. The S&P fulfills the usual conditions of the contract. For the sake of completeness I shall briefly go through the issues that make the S&P legally enforceable.

i. Offer and Acceptance

17. Dk Nurul first found out about the house through Bess Perfect Property Agency. Dk Nurul then entered into a Letter of Intent on 27th February 2015 (PBD Volume 4, Tab 1, Page 1) with Elmer and paid a deposit of \$5,000.00. Dk Nurul was then informed that Elmer was the developer and this subsequently led to the signing of the S&P agreement.

18. The offer therefore that was presented by Elmer was to purchase a two storey house on Lot 57014. Herein, I will refer to Dk Nurul's house as '57014'. This was accepted by Dk Nurul by signing the S&P on 3rd October 2013.

ii. Intention to be legally bound

19. There is an obvious intent to make the S&P legally binding on the parties. This was a commercial transaction and it is safe to assume that parties intended to be bound by this agreement unless there is a clause in the S&P that says otherwise. No such clause exists in the S&P.

iii. Consideration

20. Consideration is the promise of something of value given in exchange for something. In this case it is quite clear that the consideration given in exchange for the house is the purchase price i.e. the consideration that Dk Nurul had to give was the payment of \$390,000.00. It is clear that some of the consideration had been paid over through progress claims. I will discuss the payment in more detail later. She also paid an additional \$3,131.00 for the preparation of the S&P.

iv. Capacity

21. Dk Nurul and Elmer both had the legal capacity and are both competent persons at the time of entering the S&P. Again, not much can be said on this point. Common examples of parties that may not be able to enter into agreements would be where there has been undue influence, the person is a minor or those who are mentally incapacitated. There is no evidence to suggest that either party did not have the capacity to enter into the S&P.
22. There are other elements to make a contract legally binding, but at this juncture I find that the basic elements have been established. Therefore the S&P between Dk Nurul and Elmer is legally binding and thus enforceable.

C. Alinorde and Hjh Hartini

23. The S&P can be found in the Plaintiff's Bundle of Documents (PBD) at Volume 4, Tab 2, pages 2 to 18. There is no disagreement or issue about the existence of the S&P. The S&P fulfills the usual conditions of the contract. For the sake of completeness I shall briefly go through the issues that make the S&P legally enforceable.

i. Offer and Acceptance

24. Alinorde and Hjh Hartini first found out about the house through Bess Perfect Property Agency. Alinorde and Hjh Hartini received a proposal from Bess Property Agency (PBD Volume 6, Tab 1, and Page 1017). Alinorde and Hjh Hartini was then informed that Elmer was the developer and this subsequently led to the signing of the S&P agreement.
25. The offer therefore presented by Elmer was to purchase a two storey house on Lot 57017. Herein, I will refer to Alinorde and Hjh Hartini's house as '57017'. This was accepted by Alinorde and Hjh Hartini by signing the S&P on 3rd October 2013.

ii. Intention to be legally bound

26. There is an obvious intent to make the S&P legally binding on the parties. This was a commercial transaction and it is safe to assume that parties intended to be bound by this agreement unless there is a clause in the S&P that says otherwise. No such clause exists in the S&P.

iii. Consideration

27. Consideration is the promise of something of value given in exchange for something. In this case it is quite clear that the consideration given in exchange for the house is the purchase price i.e. the consideration that Alinorde and Hjh Hartini had to give was the payment of \$376,000.00. It is clear that some of the consideration had been paid over through progress claims. I will discuss the payment in more detail later.

iv. Capacity

28. Alinorde and Hjh Hartini and Elmer both had the legal capacity and are both competent persons at the time of entering the S&P. Not much can be said on this point. Common examples of parties that may not be able to enter into agreements would be where there has been undue influence,

the person is a minor or those who are mentally incapacitated. There is no evidence to suggest that either party did not have the capacity to enter into the S&P.

29. There are other elements to make a contract legally binding, but at this juncture I find that the basic elements have been established. Therefore the S&P between Alinorde and Hjh Hartini and Elmer is legally binding and thus enforceable.

The pertinent Terms and Conditions.

30. I shall now discuss the pertinent terms and conditions that the Court has to consider. The specifications for each of the houses were attached to the individual S&P agreements.

A. Yap

31. I refer to the S&P (PBD Volume 1, Tab 21A, pages 44 to 72)

Clause C reads:

The vendor(s) has/have agreed to sell and the Purchaser(s) has/have agreed to purchase the Land together with ONE (1) unit of a double storey detached house (herein referred to as the 'Residential House(s)') to be erected thereon. The Land and the Residential House (s) shall hereinafter be jointly referred to as 'the said Property (ies)'

Clause D reads:

The Vendor(s) has/have agreed to construct the Residential Houses(s) on accordance with the Building Plans (subject always to any variations, alterations and amendments and changes thereto required by the relevant authorities) and the Specification. The Building Plans shall be referred to as 'The Building Plans' and are annexed hereto and marked as 'SPA-2' subject always to any variations, alterations and amendments and changes thereto required by the relevant authorities. The Specifications shall be hereinafter referred to as 'The specification' and is annexed hereto and marked as 'SPA-3' respectively.

Clause 1 (i) reads:

IN CONSIDERTAION of the purchase Price (as defined hereinafter) payable by the Purchaser(s) to the Vendor(s) and the terms and Conditions hereinafter mentioned, the Vendor(s) hereby agree(s) to SELL and the Purchaser(s) hereby agree(s) to PURCHASE the said Property(ies) free of encumbrances save and expect for (ii) below.

Clause 4 (i) to (v) reads:

(i) The Purchase Price for the said Property shall be in the sum of BRUNEI DOLLARS THREE HINDRED AND NINETY SIX THOUSAND (B\$396,000.00) ONLY (herein referred to as 'the purchase price')

(ii) The Purchaser(s) has/have paid a sum of BRUNEI DOLLARS FIVE THOUSAND (B\$5,000.00) ONLY (hereinafter referred to as 'the booking fee') as stated in the Schedule of Payment (hereinafter defined) towards the Purchase Price to the Vendor(s), the receipt of which the Vendor(s) has/have acknowledges receipt of.

(iii) The Purchaser(s) shall immediately upon signing this Agreement pay to the Vendor(s) a sum of BRUNIE DOLLARS THIRTY NINE THOUSAND AND SIX HUNDRED (B\$39,600.00) ONLY (hereinafter referred to as 'the Deposit') as specified in the Schedule of Payment.

(iv) The balance Purchase Price for the said Property amounting to BRUNIE DOLLARS THREE HUNDRED FIFTY ONE THOUSAND AND FOUR HUNDRED (B\$351,400.00) ONLY (herein referred to as 'the balance Purchase Price') shall be payable by the Purchaser(s) to the Vendor(s) at the time, in the manner described herein below in the installments and in the amount in accordance with the Schedule of Payment (herein and hereinbefore referred to as 'the Schedule of Payment') annexed hereto and marked as SPA-6 within FOURTEEN (14) DAYS from date of receipt by the Purchaser(s) of the Vendor(s) notice in writing requesting for payment (hereinafter referred to as 'the due date').

(v) Each such notice in writing sent by the Vendor(s) requesting payment shall be supported by a certificate under the hand of the Project Architect and every certificate signed shall be proof of the facts stated therein and in a particular that the work therein referred to have been commence with.

Clause 9 (a) reads:

The Residential House(s) shall be constructed in a good workman like manner.

Clause 16(b) reads:

'Subject to the provisions of this Agreement the Residential House(s) shall be Practically Completed by the Vendor(s) as evidence by the Certificate of Practical Completion issues by the Project Architect within TWELVE (12) MONTHS from the date of this Agreement (herein referred to as 'the Practical Completion')

Clause 16(c) reads:

It is hereby expressly provided that notwithstanding anything herein contained in this Agreement contrary, the Vendor(s) shall be allowed without penalty, a reasonable period of extension of time to be decided by the Project Architect for Practical Completion of the Residential Houses(s) should the Practical Completion be delayed due to any of the following circumstances and the Vendor(s) shall in this connection furnish the Purchaser(s) with relevant documents and proof supporting the need for an extension of time for practical Completion

(i) ... variations, amendments, alterations, or changes to the Building Plan required by the relevant/appropriate authorities or by the mutual agreement of the parties hereto; or

(ii) Inclement weather, fire, haze or smoke...due to natural or unnatural causes...

(iii) Any notice directive or order issue by the Government to the Public to refrain from physical activities outdoors; or

(vi) any delayed inspection/approval of the works by the Project Architect or the relevant authorities beyond the control of the Vendor(s) PROVIDED ALWAYS THAT the Vendor(s) has/have made written application to Project Architect or the relevant/appropriate authorities for such inspection/approval; or

(v) Non availability of essential materials...

Clause 16(e) reads:

Subject to the provisions of this Agreement, if the Vendor(s) fail(s) to effect Practical Completion of the Residential House (s) within the period herein agreed then the Vendor(s) shall pay to the Purchaser(s) as liquidated and ascertained damages the sum of BRUNEI DOLLARS ONE THOUSAND (B\$1,000.00) ONLY per month until the Practical Completion of the Residential Houses(s) has been effected.

Clause 22 reads:

Time shall be of the essence in relation to all the provisions of this Agreement and in particular to the payment of all installments of the Purchase Price, interest thereon and all other monies payable in accordance with the provisions of this Agreement.

Clause 32 (f) reads:

'Practical Completion' means the completion of the construction works of the Residential Houses(s) as certified by the Project Architect notwithstanding the fact that any defects or matters of a minor nature may exist which the vendor(s) is/are liable to rectify and not including the supply of water, electricity, or other utilities supplied by the government.'

32. From the reading of the above clause, the expressed terms of the contract may be summarised as follows:

- Elmer has agreed to sell to Yap a piece of land on and a double storey house, this collectively forms 57013.
- Yap has agreed to buy 57013
- The construction is to be accordance with the Building Plans and the Specifications found in the S&P.
- The purchase price for 57013 is B\$396,000.00 and payment has been made and will be made as set out in the S&P and Payment schedule (this includes the deposit paid when the letter of intent was signed).
- The payment ought to be made in accordance to the Payment Schedule once the Project architect has certified that the works have been completed.
- The Residential House(s) shall be constructed in a good workman like manner.
- Practical Completion of the house should take place 12 months , however an extension may be allowed within reason
- In the event that the vendor fails to deliver the property within the stipulated time liquidated damages are chargeable at B\$1,000.00 per month.
- Time is of the essence, this means that the contract must be performed within a certain period and that any delays may result in breach of the terms and loss being incurred.

- Even after the property is complete, the vendor is still to rectify any defects.

B. Dk Nurul

33. The S& P between Dk Nurul and Elmer can be found at PBD Volume 4, Tab 2, pages 2 to 8. The terms and conditions are similar to those found in Yap's S & P. I will only highlight the variations in Dk Nurul's terms and conditions as see below:

'Clause 4 (i) to (iii)

(i) The Purchase Price for the said Property (ies) shall be the amount as specified in Section 6 of the SCHEDULE hereto (herein referred to as 'the Purchase Price')

(ii) Prior to the execution of this Agreement, the Purchaser(s) has/have paid a sum of BRUNEI DOLLARS FIVE THOUSAND (B\$5,000.00) ONLY (hereinafter referred to as 'the booking fee') towards the Purchase Price of the said Property (ies) to the Vendor(s), the payment of which the Vendor(s) has/have acknowledge (s) receipt of.

(iii) Subject to the approval of the disbursement of the Facility, the BALANCE Purchase Price of BRUNEI DOLLARS THREE HUNDRED AND NINETY THOUSEND (B\$390,000.00) ONLY herein referred to as 'the Balance Purchase Price' shall be payable by the purchaser (s) to the Vendors(s) at the time and manner described herein below, in the installments and in the amount in accordance with the Schedule pf Payment of the Purchase Price (herein referred to as 'The Schedule of Payment') annexed hereto and marked as 'SPA-4') within 14 days after receipt by the Purchaser(s) of a notice in writing from the Vendor(s) requesting payment (herein referred to as 'the Due Date').

Clause 9 (i) reads:

The Vendor(s) warrant(s) that the Residential House(s) shall be constructed in a good and workmanlike manner.

Clause 15 (i) and (ii) read:

(i) The Vendor(s) warrants (s) that the Vendor(s) shall commence the constructions of the Residential House(s) within SIX (6) MONTHS from the date of receipt of all the Required Approvals (hereinafter referred to as 'the Commencement Date). The Vendors(s) shall notify the Purchaser(s) of the Commencement Date in writing.

(ii) Subject to the provisions of this Agreement the Residential House (s) shall be Practically Completed by the Vendor (s) within the period/date specified in Section 7 of the SCHEDULE hereto.

Section 7 of the Schedule reads:

7. Date/Period for Practical Completion EIGHTEEN (18) MONTHS FROM THE COMMENCEMENT DATE

Section 7 of the Schedule reads:

8. Amount of Liquidated Damages BRUNEI DOLLARS EIGHT HUNDRED (B\$800.00) ONLY PER MONTH'

34. From the reading of the above clause, the expressed terms of the contract may be summarised as follows:
- Elmer has agreed to sell to Dk Nurul a piece of land on and a double storey house, this collectively forms 57014.
 - Dk Nurul has agreed to buy 57014.
 - The construction is to be accordance with the Building Plans and the Specifications found in the S&P.
 - The purchase price for 57017 is B\$390,000.00 and payment has been made and will be made as set out in the S&P and Payment schedule (this includes the deposit paid when the letter of intent was signed).
 - The payment ought to be made in accordance to the Payment Schedule once the Project architect has certified that the works have been completed.
 - The Residential House(s) shall be constructed in a good workman like manner.
 - Practical Completion of the house should take place 18 months from the construction date, however an extension may be allowed within reason
 - In the event that the vendor fails to deliver the property within the stipulated time liquidated damages are chargeable at B\$800.00 per month.
 - Time is of the essence, this means that the contract must be performed within a certain period and that any delays may result in breach of the terms and loss being incurred.
 - Even after the property is complete, the vendor is still to rectify any defects.

C. Alinorde and Hjh Hartini

35. The S&P between Alinorde and Hjh Hartini and Elmer can be found at PBD Volume 6, Tab 5, pages 29 to 58. The terms and conditions are similar to those of the other 2 plaintiffs. I will only highlight the variations in Alinorde and Hjh Hartini's terms and conditions as seen below:
36. Clause 4 (i) reads:
37. *The Purchase Price for the said Property shall be in the sum of BRUNEI DOLLARS THREE HUNDRED AND SEVENTY SIC THOSUAND ONLY (B\$376,000.00) (hereinafter referred to as 'The purchase price') ad shall be payable by the Purchasers to the Vendor at the time, in the manner described in sub-clause (iv) below, in the installments and in the amount in accordance with the SCHEDULE OF PAYMENTS (hereinafter referred to as 'the Schedule of Payment') annexed hereto and marked as 'SPA-4' within FOURTEEN 14 DYAS of receipt by the Purchasers a notice in writing from the Vendor(s) requesting payment (herein referred to as 'the Due Date').*

'Clause 9 (i) reads:

The Residential House shall be constructed in a good and workman like manner.

Clause 15 (i) and (ii) read:

(i) The Vendor shall commence the construction works of the Residential House within FOUR (4) MONTHS from the date of receipt of the Required Approvals (hereinafter referred to as 'the Commencement Date).

(ii) Subject to the provisions of this Agreement the Residential House shall be Practically Completed by the Vendor and vacant possession shall be delivered within (18) months from the Commencement Date.

Clause 15 (v) reads:

(v) Subject to the provisions of this Agreement, if the Vendor fail to deliver vacant possession of the Residential House within the period herein agreed then the Vendor(s) shall pay to the Purchaser(s) as liquidated and ascertained damages the sum of BRUNEI DOLLARS EIGHT HUNDRED ONLY (B\$800.00) ONLY vacant possession has been delivered to the Purchasers.'

38. From the reading of the above clause, the expressed terms of the contract may be summarised as follows:

- Elmer has agreed to sell to Alinorde and Hjh Hartini a piece of land on and a double storey house, this collectively forms 57017.
- Alinorde and Hjh Hartini have agreed to buy 57014.
- The construction is to be accordance with the Building Plans and the Specifications found in the S&P.
- The purchase price for 57017 is B\$376,000.00 and payment has been made and will be made as set out in the S&P and Payment schedule (this includes the deposit paid when the letter of intent was signed).
- The payment ought to be made in accordance to the Payment Schedule once the Project architect has certified that the works have been completed.
- The Residential House(s) shall be constructed in a good workman like manner.
- Practical Completion of the house should take place 18 months from the construction date, however an extension may be allowed within reason
- In the event that the vendor fails to deliver the property within the stipulated time liquidated damages are chargeable at B\$800.00 per month.
- Time is of the essence, this means that the contract must be performed within a certain period and that any delays may result in breach of the terms and loss being incurred.
- Even after the property is complete, the vendor is still to rectify any defects.

Performance of the contract

39. I will now delve into the way in which the contracted was performed (carried out) and the evidence of the parties.

A. Yap

40. According to Yap, when construction work began on 57013 he initially did not have any issues. On 10th June 2015 Yap paid B\$40,000.00 for the 2nd progressive claim and the 3rd progressive claim on 17th June 2015 in the amount of B\$60,000.00. On 11th August the 4th, 5th and 6th progress claim was paid amounting to \$178,200.00. These payments were made as set out in the Schedule of Payment.
41. It was only in September 2015, three months after signing the S&P did Yap take issue when the 7th and 8th progressive claim was issued by Elmer. The 7th progressive claim in the amount of B\$39,600.00 was for payment of the reinforced concrete (RC) roof beam, concrete house drain and RC apron whilst the 8th progressive claim in the amount of B\$39,600.00 was for the roof trusses ad brick wall laying.
42. Yap discovered that the drainage and garage had not been completed and informed Elmer of this matter. A letter was exhibited from Elmer (PBD Volume 1, Tab 54, page 140) to recognise the unfinished work. It was on this assertion by Elmer that Yap then proceeded to pay the 7th and 8th progressive payment when work had been completed on the roof trusses and brick wall laying.
43. By November 2015, five months into the agreement that Yap said he grew increasingly worried about the Elmer's inexperience as a developer and lack of monitoring of the site. Once such issue was the miscommunication and misinformation of the tiles that Yap arranged to pick up but later found out that no arrangements had been made.
44. By April 2016 Yap said that he became increasingly worried because work on site had slowed down significantly bearing in mind the completion date was 30th April 2016. It was in May 2016, that Yap discovered while visiting the site that work on site had stopped. By June 2016 a meeting was arranged between Yap and Elmer where Elmer informed Yap that the first contractor was facing financial issues.
45. This meeting was recorded by Yap and the transcript is found in PBD Vol 1, Tap 63, pages 155 to 175. At this meeting Yap expressed his disappointment in the project over different aspects of the project and Elmer confirmed that he would be paying a penalty of \$1,000.00.
46. On 2nd July 2016 Elmer created a group chat on WhatsApp called 'Subok Spg 429 Project'. The members of the group were Elmer, the plaintiffs and Darren (who represented the first contractor). 2 days after the group chat was created Darren left the group chat. By 17th July 2016, Elmer informed the plaintiffs that a new contractor (Elmar General Contractor Sdn Bhd) had been engaged and that a meeting was set-up on 18th July 2016 to discuss the defects and works that were required.
47. Several complaints were made to Elmer by the plaintiffs on the group chat.

48. The following month in August 2016, the new contractor took over the works and rectified some of the defects including:
- Removing and reinstalling some defective windows
 - Re-cement/re-skirt the first floor
 - Retiling on the ground floor dining area
 - Installation of water heater
 - Installation of the fire door
49. As Yap's house had not been completed, he informed the Court that he decided to rent a house in Sungai Tilog. I will come back to this issue when I decide on the damages.
50. On 24th October 2016 the 9th and 10th progressive claim was put in by Elmer for cement plastering, cement render floor and roofing. Yap refused to make the payment as the driveway was not in accordance to the specifications and the ground floor had yet to be retiled. This resulted in Yap issuing a warning letter on 3rd November 2016 to complete the driveway and to retile the ground floor and laminate the first floor. Yap also provided a list of defects during a meeting at Bess Agency where the plaintiffs and Elmer were present on 7th November 2016.
51. It was around the same time that the new contractor informed Yap that they were not able to carry out works because they had not been paid by Elmer. Therefore on 22nd November 2016 Yap paid the 9th progressive payment on the understanding that the money would be paid directly to the new contractor.
52. In mind December 2016 the driveway and road were finally constructed on Yap's property. On 19th December 2016 at yet another meeting the plaintiffs were informed that the new contractor would no longer be working on site and did not wish to take the responsibility of rectifying the defects from the original contractor. Instead a group of Vietnamese workers would be taking over.
53. On 20th December 2016 Elmer notified the group chat that fencing work had started. Yap visited the sight and found that the fence was made of reused broken old fiber wood and raised this issue on the group chat on 30th December 2016.
54. By January 2017 Yap discovered that construction had once again stopped, however there was still work that had not been done. During the course of giving evidence Yap raises numerous time the poor workmanship of the construction work.
55. By this time Yap sought legal advice and also sought a Civil Engineer's report (PBD Volume 3, Tab 222 pages 458 to 478 and Tab 248, pages 519 to 528). I shall explore this report separately. Mr. Yap also obtained report for the Occupational Permit, however 57013 was rejected (See PBD Vol 9, Tab 30, pages 61, 62 to 63 and 64 to 66).
56. On 17th October 2020 Yap visited 57013 only to find that the property had not been completed and that there were defects including an upraised manhole and incorrectly installed window

hinges. Yap then went on to seek quotations to rectify the defects and complete the work for 57013. I shall discuss this issue and the other damages claimed by Yap further in due course.

57. When cross examined Yap informed the Court that he often visited the house once a month but after the completion date passed he would often visit once a week. It was also put to Yap that the fence design and build was to be finalized by the developer that that when Yap visited the site the fence had unfinished. Yap clarified that the design may have well be finalized by the developer but that this did not mean that lower quality materials should be substituted.
58. I found Yap was a clear and truthful witness. His story remained consistent and despite dealing with the disappointment of not having a complete house and the stress of litigation he remained calm and composed during his evidence. He was able to answer the questions put to him and he was familiar with the facts of his case.
59. I accept that Yap carried out his obligations namely made payments in accordance to the S& P and the schedule of payment. I find no fault in Yap's behavior. I will discuss Elmer's obligations in due course.

B. Dk Nurul

60. Dk Nurul's evidence is not dissimilar to that of Yap's evidence. I remind myself that Dk Nurul's house is 57014.
61. On 16th October 2014 construction work began and was expected to be complete in 18 months i.e. 16th April 2016. The progressive claims paid by Dk. Nurul from October 2014 to September 2015 are as follows:

Progressive Claim	Date of Payment	Amount Paid
2 nd progressive claim	12 th December 2014	\$177,750.00
3 rd progressive claim		
4 th progressive claim		
5 th progressive claim	13 th February 2015	\$59,250.00
6 th progressive claim	30 th September 2015	\$98,750.00
7 th progressive claim		

62. On 20th May 2016 the 8th progressive payment was put in for cement plastering, cement render floor and roofing for \$19,750.00. This time Dk Nurul though it odd because the payment was to made into Elmer's Baiduri Bank account whereas previous payments were made through Elmer's United Overseas Bank account. The driveway and road work had not been completed, however as there had not been issues prior to this, Dk Nurul proceeded to pay the 8th progressive claim. The sum was deducted from her account on 30th September 2016.
63. Around this time construction work stopped and although she was anxious, Dk Nurul felt that she was reassured by Elmer who informed her that the contractor had temporarily moved his workers to another site. At the same time Dk Nurul noticed that the works that had been carried out thus far were below satisfactory and had notice several defects, use of low quality materials and the windows and doors had not been installed properly.

64. On 17th June 2016 Dk Nurul had learned that construction work had stopped but was reassured by Elmer that work would resume and be completed by August 2016.
65. Similar evidence was given as to the setting up of the '*Subok Spg 429 Project*'. The setting of the group chat and the persons in the group chat is consistent with the evidence of Yap. At this juncture I do not need to add anything else. I accept that a chat group was set up as a means of communication with Elmer and that this group chat was regularly used by the plaintiffs to air their grievances about the project.
66. It was on 17th July 2016 that Elmer informed the plaintiffs that Elmar General Contractor would be taking over as the new contractor. The sequence of events that followed are very much similar to what Yap had already said vis-à-vis the gypsum board, bricks and concrete that had been used for the fences. Dk Nurul raised this point because the specifications stated that the fence was supposed to be built out of bricks and concrete only.
67. By 24th October 2016 Dk Nurul signed off on the 9th Progressive Payment Claim for completing the tiling work. A series of meetings then followed on 7th December 2016 and 19th December 2016 where defects were highlighted. Dk Nurul gave evidence that the new contractor rectified some defects that included:
- Repairing the leaking roof
 - Waterproofing and reinstallation of windows
 - Reinstallation of the side doors
 - Replacing new windows
 - Repairing and reinstalling the front door
 - Installing toiler accessories
68. Dk Nurul also concurred that at the second meeting, the new contractor had pulled out his workers and group of Vietnamese workers would take over the work. The plaintiffs were also informed that the new contractor did not want to take on the responsibility of repairing the work carried out by the original contractor.
69. Dk Nurul expressed disappointment in the way in which Elmer had supervised the constructions works when the original contractor was still working. She believe that had Elmer been on site the work would have been done properly.
70. The property was deserted and work remained incomplete up to January 2017. It was on 8th February 2017 that Dk Nurul was surprised to learn from Elmer that 57014 was completed and the only work that was to be carried was repainting. According to Dk Nurul, the Occupational Permit (OP) would be applied for. Upon hearing this Dk Nurul visited the site but found that the fencing was still unfinished, electrical items had yet to be installed, house wiring had yet to be done and the site had to be cleared.

71. By 14th November 2017, Dk Nurul said Elmer sent a text message to her (PBD, Volume 4, Tab 47, Page 150) informing her of his financial issues and that he was trying to raise \$20,000.00 to complete the property. It was at this point that she sought legal advice together with a report from a Civil Engineer. I will discuss the expert report in more detail later.
72. Dk Nurul also found out that an Occupational permit could not be issued and was given a list of items that ought to be rectified by the various government agencies (PBD Volume 5, Tab 88, pages 441 to 442 and pages 443 to 445).
73. On a recent visit to the site on 17th October 202 Dk Nurul found that the 47014 remained unfinished and noticed that the cracks on her property were becoming more obvious. She now wishes to rectify the defects and complete the house and sought 5 contractors to provide quotations. I will examine this issue later on when I look at the damages.
74. During cross-examination specific issues were addressed about the gate that was to be replaced and also issues as to the gabion wall. These again were defects that had raised and been discussed between Dk Nurul and Elmer.
75. I found Dk Nurul to be a clear and accurate witness. She was a credible witness and she did not falter when questions were put to her notwithstanding that this matter has been in issue since 2016. She was clear on the issues and could identify the defects in relation to her house (57014). As such, accept her evidence as the truth.
76. I accept that Dk Nurul carried out her obligations namely made payments in accordance to the S&P and the schedule of payment. I find no fault in Dk Nurul's behavior. I will discuss Elmer's obligations in due course.

C. Alinorde

77. Alinorde's evidence was similar to that of the previous two plaintiff's. He gave evidence for himself and his wife, Hjh Hartini as their evidence was essentially the same.
78. The S&P was signed on 3rd October 2013, however it wasn't until 2nd September 2014 did the construction begin. The construction was to take 18 months and it was expected that 57017 would be completed by 2nd March 2016. Before any problems arose the following progressive claims were paid out by Alinorde and his wife as tabulated below:

Progressive Claim	Date of Payment	Amount Paid
2 nd progressive claim	23 rd January 2015	B\$266,000.00
3 rd progressive claim		
4 th progressive claim		
5 th progressive claim		
6 th progressive claim	16 th march 2015	B\$56,000.00

79. On 7th July 2015 the 7th Progressive Claim was put in for completing work on the roof truss amounting to B\$56,500.00 However on 9th July 2015 Alinorde discovered that the roof truss had not been installed and informed Elmer of such.

80. Alinorde expressed his disappointment in the lack of monitoring and supervision the site by Elmer. In addition, concern was raised to the numerous defects and poor quality. It was on 2nd March 2016 Alinorde had become impatient as construction work for 57017 remained unfinished. By 10th March 2016 the roof truss was completed and Alinorde signed off on the 7th Progressive claim in the amount of B\$56,500.00. On the same day 8th Progressive claim was issued for B\$11,000.00 for cement plastering, cement rendering, flooring and roofing work.
81. By 17th June 2016 Alinorde came to the realization that construction work had stopped but had been reassured by Elmer that the original contractor would resume work after a week. However, by July 2016 there was no progress and instead Alinorde was informed that Elmer was having financial issues with the original contractor.
82. The facts with respect to setting up the '*Subok Spg 429 Project*' group chat are similar to that of Yap and Dk Nurul. One incident recalled by Alinorde was on 13th July 2016 when Alinorde went to the site to send some materials only to find that his car could not enter the site as there were numerous hill pits. This matter was raised in the group chat.
83. As like the other witnesses who gave evidence before Alinorde, a new contractor was hired on 17th July 2016, but this was only temporary as the new contractor ceased working and a team of Vietnamese workers took over.
84. Alinorde prepared a list of work that was still pending and list of defects. I will look into this issue in further detail when deliberating on the damages.
85. Alinorde also took the same issue as already highlighted by Yap and Dk Nurul with the fence as gypsum board was used in its construction. Alinorde also took issue with the kitchen door when he discovered that the door was not a self-closing fire proof door. Later on 28th July 2016, he also found a 'huge hole' on the road and noticed that the boundary had been taken out. These issues were raised to Elmer but not explanation was given.
86. Alinorde was present at the same meetings on 7th December 2016 where a full list of defects was disclosed. By December 2016 some progress had been made where the new contractor completed the driveway to 57017, replaced and reinstalled windows, installed power supplies and the wiring for the gate and door bell, levelled the plastering of the floor outside the entrance and demolished a pantry kitchen wall that had been constructed wrongly by the original contractor.
87. On 16th and 17th January 2017 Alinorde visited the site and found that the fencing board had not been sand boarded. He also noticed that the painting job had been poorly carried out and once again he raised this matter to Elmer to no avail. It was in January 2017 that site was once again abandoned.
88. It was unclear when but Alinorde highlighted that as the site had been abandoned for a number of years some vandalism had occurred and that some tiles that had been left in the house were missing. Alinorde said that as Elmer was the only person with keys to the property, he should be responsible for keep the property safe from trespassers.

89. In July 2017 Alinorde sought legal advice and sought to have a Civil Engineer prepare a report. This report will be discussed shortly. Similarly, Alinorde was unable to obtain an Occupational Permit for his house (see PBD Volume 8, Tab 96, pages 538 to 539 and 540 to 542).
90. Alinorde then went on to seek quotations from several other contractors to estimate the costs of repairing and completing the house. This will be discussed in due course.
91. There was an accusation during cross examination that Alinorde did not know for sure as to the financial issues between Elmer and the original contractor. Alinorde explained that it was not difficult to figure out that there were financial issues because the construction work had not been completed.
92. Again, I found Alinorde's evidence to be clear, concise and precise. There is no doubt that stress of the last few years has taken a toll and he appeared to be emotional at times. However, despite this he was able to give a clear recollection of the events and issues. I believe him as a credible witness and accept that the facts he gave under oath both in his written affidavit and through his oral evidence to be the truth.

Mr. Nava

93. Mr. Nava was the only expert witness brought in by the plaintiffs. Mr. Nava who was in KL at the time gave evidence online via Zoom. He was present a neutral law firm as required by the court. I was satisfied that his evidence was taken properly.
94. When giving evidence Mr. Nava highlighted as a proviso that he had only conducted a visual examination. Mr. Nava did not have access to the construction drawings, structural and earthwork proposals and he had doubts as to whether the construction of the civil and structural works had been carried out properly. Through this visual inspection Mr. Nava came to the conclusion that the properties were poorly constructed and unsafe for dwelling.
95. A report was prepared by Mr. Nava 'Report 1' which can be found in PBD Volume 8, Tab 81, pages 478 to 498. A second report 'Report 2' was prepared on 30th January 2018 and can be found at PBD Volume 8, Tab 86, and Pages 505 to 514.

I. Report 1

96. Mr. Nava found that the gabion walls had not been constructed properly. There was evidence the Gabion walls to retain 57017 (Alinorde's house) were failing. He explained that the gabion was erected on steep slope and should have proper foundation. He found no foundation to stabilize the structure, and therefore the gabion would seep into soil. He further explained that a Gabion has steel cages and it will rust. A gabion is not a permanent structure and that gabions should only be used at the rear of houses to ensure that filling does not fail and grass grows over it to protect from UV light. If a gabion built in front of house, no grass would grow on top and ground/slope slide. The cages would rupture with UV light over time.
97. Instead, Mr. Nava opined that a reinforced concrete wall should have been constructed to support the soil of 57017 and reduce the flash flood risk.

98. Mr. Nava then went on to highlight the presence of soil erosion from the steep slopes found at the rear of 57013 and 57014. He explained that it appeared that the partitioning wall was not a reinforced concrete structure and opined that if the wall ruptured it would be a 'disaster' as the wall would break a soil would spill into the neighboring property.
99. My Nava also found indications of ground movement and settlement as there were crack and gaps between the main house and apron slabs. Water would enter these cracks which in turn could lead to colonisation of mold, bacteria, wood decaying mold and insect pests. In order to remedy these issues, Mr. Nava advised that the concrete be demolished and thereafter for the soil to be compacted and/or for proper structural reinforcement.
100. Mr. Nava also noticed cracks on the plastered brick walls which would eventually lead the wall becoming dislodged.

II. Report 2

101. Mr. Nava added that he noticed cracks on the first-floor slabs. It was his opinion that concrete coring should be conducted to determine to strength of the concrete to be able to fully determine the extent of the problem.
102. Mr. Nava also found a lack of waterproofing membranes on the exposed concrete slabs, RC gutters on the balconies and roofing. He also added that the waterproofing membrane on the bathroom floor had not been applied evenly. According to Mr. Nava this would result in water-ponding that will lead to a deterioration and breakdown of the slab surface.
103. Mr. Nava was able to detect the presence of efflorescence. This is caused by the incorrect handling and placing of concrete which results in the mineral salts being separated.
104. As a final issue he also noticed that soil vent pipes had not been installed. These pipes remove sewer gasses and allow air into the drainage system. Without these vents waste may clog the drainage system and case bad pungent smells in the properties.
105. Mr. Nava came to the conclusion that even though he did not supervise the works; the exterior parts were apparent enough as evidence to prove that the work had not been correctly. He also did not have the constructions drawings, Structural and earthwork proposals and could not say for certain as to whether the civil and structural works had been carried out properly.
106. He also highlighted that as the houses were still new the presence of structural cracks meant that work has not been correctly and are unsafe for dwelling.
107. When cross examined it was put to Mr. Nava that because grass was growing on the gabion erosion was not a factor. Mr. Nava explained that the pictures he took were not clear but if brought on site he would be able to show the presence of soil erosion.
108. I accept Mr. Nava's evidence as an expert witness. Mr. Nava has shown that he has knowledge or experience in the particular field or discipline of Civil or Structural Engineering beyond that to be expected of a layman. As a Chartered Professional Engineer, he has been in the same profession

since 1979. He had worked in Brunei for around 21 years and has had many years of experience. He had also been a witness in court 4 times prior to this case.

109. Despite only conducting a visual examination Mr. Nava was able to identify several serious defects. Therefore it would be reasonable to assume that if tests were carried out there would be additional defects. In my mind, there is little doubt as the accuracy of his findings.

Actions giving rise to the breach

110. I shall now turn to the incidents that the plaintiffs have alleged in the claim.

a. Failure to deliver the property and houses

111. I shall deal with the issue of the actual houses on Lots 57013, 57014 and 57017. Essentially all four plaintiffs entered into a Sale and Purchase agreement. The agreement or binding contract was an offer made by Elmer (the seller) to sell a piece of property (with the corresponding lot numbers) together with a two storey detached house within a stipulated period. The purchasers/landowner in turn agreed to buy the property together with the house for a certain sum. This principal is applicable to all the plaintiffs.

112. It is obvious that the property and the residential houses have not been provided as per the sale and purchase agreement. This is evidence by the rejection of the Occupational Permit. For ease of reference I have tabulated reasons why the Occupational Permit has not be released by the parties:

	57013	57014	57017
Remarks from Fire and Safety Department	The following items were not supplied: Fire extinguisher Fire blanket self-contained smoke detector	The following items were not supplied: Fire extinguisher Fire blanket self-contained smoke detector	The following items were not supplied: Fire extinguisher Fire blanket self-contained smoke detector
Remarks from TelBru	Manhole and accessories not installed	Manhole and accessories not installed	Manhole and accessories not installed
Remarks from the Electric Department	Switches were installed in the bathroom and under windows	Switches were installed in the bathroom and under windows In addition wiring was not completed	Switches were installed in the bathroom and under windows In addition wiring was not completed

	In addition wiring was not completed		
Remarks from ABCi	<p>The water could not be connected due to non-installation of:</p> <p>the place in which the pipe was to be connected</p> <p>pipe</p> <p>overcrossing pipe</p> <p>'Pili bomba'</p> <p>air valve</p> <p>washout</p> <p>marker post</p> <p>surface box</p> <p>There was no water meter including:</p> <p>stand meter</p> <p>concrete base</p> <p>presser gauge</p>	<p>The water could not be connected due to non-installation of:</p> <p>the place in which the pipe was to be connected</p> <p>pipe</p> <p>overcrossing pipe</p> <p>'Pili bomba'</p> <p>air valve</p> <p>washout</p> <p>marker post</p> <p>surface box</p> <p>There was no water meter including:</p> <p>stand meter</p> <p>concrete base</p> <p>presser gauge</p>	<p>The water could not be connected due to non-installation of:</p> <p>the place in which the pipe was to be connected</p> <p>pipe</p> <p>overcrossing pipe</p> <p>'Pili bomba'</p> <p>air valve</p> <p>washout</p> <p>marker post</p> <p>surface box</p> <p>There was no water meter including:</p> <p>stand meter</p> <p>concrete base</p> <p>presser gauge</p>
Other comments	<p>A drain that was placed was outside the boundary area</p> <p>Quality of construction was not satisfactory including:</p> <p>- rough workmanlike-water seepage</p> <p>-stones and sand in the drains</p> <p>-water collection drain</p>	<p>A drain that was placed was outside the boundary area</p> <p>Quality of construction was not satisfactory including:</p> <p>- rough workmanlike-water seepage</p> <p>-stones and sand in the drains</p> <p>-water collection drain</p>	<p>A drain that was placed was outside the boundary area</p> <p>Quality of construction was not satisfactory including:</p> <p>- rough workmanlike-water seepage</p> <p>-stones and sand in the drains</p> <p>-water collection drain</p> <p>-no ventilation pipe</p>

	-no ventilation pipe	-no ventilation pipe	
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113. Without an Occupational Permit the house is deemed as inhabitable and the purchasers cannot move-in. There has been evidence of payment made by all the plaintiffs i.e. the progressive claims that I have accepted. Elmer has not provided any documents or evidence to show that there are sums due and owing to him that would serve a defence not to hand over the properties. From the extensive evidence already discussed apart I am satisfied that the only reason why the property and the house has not been handed over is that the houses are all incomplete.

114. As such, Elmer has failed to deliver the property and houses within the periods stipulated under the S&P agreement.

b. Failure to deliver within specification and failure to construct in a good and workman like manner.

115. I will deal with each plaintiff separately.

A. Yap

116. For ease of parties I have tabulated the issues and findings:

No.	Defect/Specification/Incomplete work/Issue	Documentary Evidence	Court's Findings
1.	Incomplete painting on bottom area of walls in all rooms including : <ul style="list-style-type: none"> • Bumps and distortions in the master bedroom wall • Paint marks on some interior doors 	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (13) (n) • PBD Vol 3 Tab 259, Page 560 (n) • PBD Vol 1, Tab 21A page 69 • PBD Vol 3 Tab 259, Page 559 • PBD Vol 3 Tab 259, Page 562 	<p>Elmer did not dispute the list of defects when they presented to him at the trial. I have already said that I found Yap to a credible and truthful witness and I accept his oral evidence as the truth. As such, I am satisfied that Elmer failed to construct the house in accordance to the specifications and materials that were provided for under the S&P agreement.</p> <p>It is obvious from the pictures and the consistent evidence given by all the plaintiffs that the fence had been constructed using gypsum or wooden boards. It is clear from Yap's specification under the fence was to be a concrete/brick wall fence with</p>
2.	Incomplete fencing including: <ul style="list-style-type: none"> • Multiple Deep crack in the cement of the fencing surrounding the house • Poor brick laying and broken bricks used in the unfinished portion of the fencing • Fencing pillar does not touch the ground 	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (13) (t) • PBD Vol 3 Tab 259, Page 563 to 564 • PBD Vol 1, Tab 21A page 70 Page 70 15 (h) • PBD Vol 3 Tab 259, Page 550 to 551 • PBD Vol 3 Tab 259, Page 551 to 552 • PBD Vol 3 Tab 259, Page 558 	

	<ul style="list-style-type: none"> • Use of alternative materials instead of concrete and cracks 		<p>stainless steel gate door. The developer was to finalise the design of the fence, however it has been expressly provided that the wall would be a concrete/brick wall.</p> <p>Yap's evidence remained largely un rebutted by Elmer and was mostly uncontested. I have already accepted Yap's evidence and find on a balance of probabilities that Elmer is in breach of the agreement and therefore is liable to the loss and damage suffered.</p> <p>Elmer was a truth and frank witness. He took responsibility for his actions and admitted when he was wrong. It is rare to find defendants and I appreciate his honesty.</p> <p>However, I am satisfied that Elmer has failed to carry out his obligations in providing a house built in accordance with the specifications specified in the S&P agreement.</p> <p>Therefore there has been a clear breach by the developer/Elmer.</p>
3.	No Installation of aluminum louver for the garage area	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (13) (u) (i) • PBD Vol 3 Tab 259, page 565 	
4.	Non-completion of the water taps for the two water outlets outside the house	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (13) (u) (iv) • PBD Vol 3 Tab 259, Page 567 (iv) • PBD Vol 1, Tab 21A page 70 (15) (b) 	
5.	Non installation of a 2000L stainless steel water tank with 1 HP pump	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (13) (u) (v) • PBD Vol 3 Tab 259, Page 568 • PBD Vol 1, Tab 21A page 70 (15) (g) 	
6.	Non installation of 6/ x 10' cloth line area with one set of stainless steel 'T' stand	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (13) (u) (vi) • PBD Vol 3 Tab 259, Page 569 • PBD Vol 1, Tab 21A page 70 (15) (c) 	
7.	The first floor has not been laminated	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (13) (u) (vii) • PBD Vol 3 Tab 259, Page 570 • PBD Vol 1, Tab 21A page 69 (7) 	
8.	Window frames have water ingress due to poor workmanship including: Window in toilet bedroom 1 cannot be opened	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (c) • PBD Vol 3 Tab 259, Page 554 	
9.	Water leaks on the first floor due to a hole in the ceiling outside the master bedroom	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (d) • PBD Vol 3 Tab 259, Page 554 	
10.	Low quality locks used in breach of the specification	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (e) 	
11.	Straight crack on the toilet wall tiles in bedroom 2	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (f) • PBD Vol 3 Tab 259, Page 555 	
12.	Damages floor tiles at the wet kitchen	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (g) • PBD Vol 3 Tab 259, Page 556 	
13.	Rusting on stainless steel gate	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (h) • PBD Vol 3 Tab 259, Page 556 to 577 	

14.	Mold and crack on the cement in the backyard including in the drains	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (i) 	
15.	Black marks and dirt on the paint both in the exterior and interior parts	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (k) • PBD Vol 3 Tab 259, Page 559 	
16.	Unsecured and incomplete sliding door from wet kitchen to the laundry area	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (o) 	
17.	Road with is not within the width specified	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (q) • PBD Volume 2 Tab 91 Page 219 photo 3 	
18.	Downlights on the interior ground floor are not flush thus leaving a gap	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (r) • PBD Vol 3 Tab 259, Page 561 	
19.	No autogate mechanism	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (13) (u) (ii) • PBD Vol 3 Tab 259, Page 566 • PBD Vol 1, Tab 21A page 70 (15 (i) 	
20.	Non fire-proof kitchen door with a self-closing mechanism	<ul style="list-style-type: none"> • PBP Tab 4, Page 36 (13) (u) (iii) • PBD Colum 3, Tab 259 page 567 (iii) 	Fireproof door installed but no self-closing mechanism.
21.	<p>Matters that affect the structural integrity:</p> <ul style="list-style-type: none"> • Presence of cracks • Steep slopes at the rea of the property • No piling record and ABCi approved structural drawings 	<ul style="list-style-type: none"> • PBD Volume 3, Tab 222, Pages 459 to 478 and Tab 248 pages 5619 to 528 	<p>As a newly built house Mr. Nava found it surprising that cracks were present after only 2 years from the start of construction.</p> <p>Mr. Nava only conducted a visual investigation and he could already tell by just looking at the building that there issues. The exact problem can only be identified upon conducting a concrete coring test and having sight of the piling records. There is no way of determining whether the piling work was done correctly. Not only does the structural drawing not have an ABCi endorsement, Elmer could not provide a copy of the</p>

			<p>approved structural drawing and the piling records.</p> <p>I accept this, however what is pertinent is the fact that there is a problem. This is further compounded by Elmer's admission that the house was not constructed in a good and workman like manner.</p> <p>I am therefore convinced on a balance of probabilities that there have been issues to establish that there is good reason to believe that the structural integrity of the house on 57013 has been compromised.</p>
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B. Dk Nurul

117. Again, I have tabulated the various issues:

No.	Defect/Specification/In complete work/Issue	Documentary Evidence	Court's Findings
1.	2000 litre water tank with 1 hp pump not installed	<ul style="list-style-type: none"> • PBP Tab 12, Page 117, Para 14 (m) • PBD Volume 4, Tab 5 Page 50 15(g) • PBD Volume 5, Tab 75 Pages 381 to 383 	<p>Elmer did not dispute the list of defects when they presented to him at the trial. I have already said that I found Dk Nurul to a credible and truthful witness and I accept his oral evidence as the truth. As such, I am satisfied that Elmer failed to construct the house in accordance to the specifications and materials that were provided for under the S&P agreement.</p> <p>It is obvious from the pictures and the consistent evidence given by all the plaintiffs that the fence had been</p>
2.	Portable cloth line not installed	<ul style="list-style-type: none"> • PBP Tab 12, Page 117, Para 14 (m) (1) • PBD Volume 4, Tab 5 Page 50 15(c) • PBD Volume 5, Tab 75 Pages 381 to 383 	
3.	2 Taps outside the property not installed	<ul style="list-style-type: none"> • PBP Tab 12, Page 117, Para 14 (m) (3) • PBD Volume 4, Tab 5 Page 50 15(b) • PBD Volume 5, Tab 75 Pages 381 • 	

4.	Incomplete cornice near kitchen and dining area	<ul style="list-style-type: none"> • PBP Tab 12, Page 118, Para 14 (m) (4) • PBD Volume 4, Tab 5 Page 50 11(c) • PBD Volume 5, Tab 85 Pages 425 abd 427 	<p>constructed using gypsum or wooden boards. It is clear from Dk Nurul's specification under the fence was to be a concrete/brick wall fence with stainless steel gate door. The developer was to finalise the design of the fence, however it has been expressly provided that the wall would be a concrete/brick wall.</p> <p>Dk Nurul's evidence remained largely un rebutted by Elmer and was mostly uncontested. I have already accepted Dk Nurul's evidence and find on a balance of probabilities that Elmer is in breach of the agreement and therefore is liable to the loss and damage suffered.</p> <p>Even if some photographs of the defects and missing items were not put forward, I am satisfied that Dk Nurul is telling the truth.</p> <p>Elmer was a truth and frank witness. He took responsibility for his actions an admitted when he was wrong. It is rare to find defendants and I appreciate his honesty.</p> <p>However, I am satisfied that Elmer has failed to carry out his obligations in providing a house built in accordance with the specifications specified in the S&P agreement.</p>
5.	Other items that were not installed: <ul style="list-style-type: none"> • Electrical appliances • Wiring • Completion of the fence • Site clearing 	<ul style="list-style-type: none"> • Refer to DK Nurul's oral affidavit evidence in chief at paragraph 41 • PBD Volume 5, Tab 75 Page 387 • PBD Volume 5, Tab 75 Page 385 • PBD Volume 5, Tab 86 Page 431 • PBD Volume 5, Tab 86 Page 425, 431 and 433 	
6.	Defective gabion wall and steep back slope	<ul style="list-style-type: none"> • PBP Tab 12, Page 118, Para 14 (a) 	
7.	Front gate was not built as per the specification	<ul style="list-style-type: none"> • PBP Tab 12, Page 118, Para 14 (b) • PBD Volume 4, Tab 5 page 50 15 (h) 	
8.	Mouldy and cracked concrete flooring surrounding the house and master bedroom	<ul style="list-style-type: none"> • PBP Tab 12, Page 118, Para 14 (e) and (j) • PBD Volume 4, Tab 86 page 424 and page 433 • PBD Volume 5, Tab 70 page 424 349 • PBD Volume 5, Tab 77 page 394 to 395 and page 400 • PBD Volume 9, Tab 32 page 69 • PBD Volume 5, Tab 96, Page 431 	
9.	Poor paint work	<ul style="list-style-type: none"> • PBP Tab 12, Page 118, Para 14 (f) • PBD Volume 3, Tab 259, page 571 • PBD Volume 5, Tab 9 page 82 • PBD Volume 5, Tab 86 page 427, 428, 430, 434 • PBD Volume 9, Tab 32 page 70 • 	
10.	Windows cannot be opened	<ul style="list-style-type: none"> • PBP Tab 12, Page 118, Para 14 (g) 	

11.	Swing door between dry and wet kitchen not installed	<ul style="list-style-type: none"> • PBP Tab 12, Page 118, Para 14 (i) 	Therefore there has been a clear breach by the developer/Elmer.
12.	Poor quality and cracked drain	<ul style="list-style-type: none"> • PBP Tab 12, Page 118, Para 14 (k) • PBD Volume 5, Tab 75, Page 378 	
13.	Poor workmanship and unfinished fence	<ul style="list-style-type: none"> • PBD Volume 4, Tab 5 50 page 241 • PBD Volume 6, Tab 9, Page 83 • 	
14.	Defective laundry faucet	<ul style="list-style-type: none"> • PBD Volume 4, Tab 75, Page 387 	
15.	Uneven ceiling between ground floor and staircase	<ul style="list-style-type: none"> • PBP Tab 12, Page 117, para 14 (h) • PBD Volume 5, Tab 69, Page 344 • 	
16.	Absence of soil vents	<ul style="list-style-type: none"> • PBD Volume 3, Tab 222 pages 450 to 478 and Tab 248 Pages 519 to 528 	
17.	Matters that affect the structural integrity: <ul style="list-style-type: none"> • Presence of cracks • Steep slopes at the rea of the property • No piling record and ABCi approved structural drawings 	<ul style="list-style-type: none"> • PBD Volume 3, Tab 222, Pages 459 to 478 and Tab 248 pages 5619 to 528 	<p>As a newly built house Mr. Nava found it surprising that cracks were present after only 2 years from the start of construction.</p> <p>Mr. Nava only conducted a visual investigation and he could already tell by just looking at the building that there issues. The exact problem can only be identified upon conducting a concrete coring test and having sight of the piling records. There is no way of determining whether the piling work was done correctly. Not only does the structural drawing not have an ABCi endorsement, Elmer could not provide a copy of the approved structural drawing and the piling records.</p>

			<p>I accept this, however what is pertinent is the fact that there is a problem. This is further compounded by Elmer's admission that the house was not constructed in a good and workman like manner.</p> <p>I am therefore convinced on a balance of probabilities that there have been issues to establish that there is good reason to believe that the structural integrity of the house on 57014 has been compromised.</p>
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C. Alinorde and Hjh Hartini

118. Once again I have tabulated the issues in the table below:

No.	Defect/Specification/In complete work/Issue	Documentary Evidence	Court's Findings
1.	Rear grille door is not installed	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(o) • PBD Volume 8 Tab 99 Page 551 • PBD Volume 8 Tab 99 page 556 	<p>Elmer did not dispute the list of defects when they presented to him at the trial. I have already said that I found Alinorde to a credible and truthful witness and I accept his oral evidence as the truth. As such, I am satisfied that Elmer failed to construct the house in accordance to the specifications and materials that were provided for under the S&P agreement.</p> <p>It is obvious from the pictures and the consistent evidence given by all the plaintiffs that the fence had been constructed using gypsum or wooden boards. It is clear from Alinorde's specification under the fence was to be a concrete/brick wall fence with</p>
2.	2000 litre water tank with 1 hp pump not installed	<ul style="list-style-type: none"> • PBP Tab 20 page 216 para 2 (y) (ii) 	
3.	Water taps from the two water outlets outside the house not installed	<ul style="list-style-type: none"> • PBP Tab 20 page 216 para 2 (y) (i) 	
4.	6' x 10' clothesline area with stainless steel clothesline not installed	<ul style="list-style-type: none"> • PBP Tab 20 page 216 para 2 (y) (iii) • 	
5.	Ground floor guestroom ceiling and cornice has not been installed and finished	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(b) • PBD Volume 9 Tab 33 Page 77 • PBD Volume 6 Tab 5 page 56 (11) (c) 	
6.	Ground floor guest bedroom toilet piping not installed and finished properly where there is a hole on the	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(c) • PBD Volume 6 Tab 9 Page 88 • PBD Volume 6 Tab 5 page 56 (12) 	

	wall between the toilet and hallway		<p>stainless steel gate door. The developer was to finalise the design of the fence, however it has been expressly provided that the wall would be a concrete/brick wall.</p> <p>Alinorde's evidence remained largely unrebutted by Elmer and was mostly uncontested. I have already accepted Alinorde's evidence and find on a balance of probabilities that Elmer is in breach of the agreement and therefore is liable to the loss and damage suffered.</p> <p>Even if some photographs of the defects and missing items were not put forward, I am satisfied that Alinorde is telling the truth.</p> <p>Elmer was a truth and frank witness. He took responsibility for his actions and admitted when he was wrong. It is rare to find defendants and I appreciate his honesty.</p> <p>However, I am satisfied that Elmer has failed to carry out his obligations in providing a house built in accordance with the specifications specified in the S&P agreement.</p> <p>Therefore there has been a clear breach by the developer/Elmer.</p>
7.	The piping in the guest toilet near the entrance is not complete	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(d) • PBD Volume 9 Tab 33 Page 78 • PBD Volume 6 Tab 5 page 56 (12) 	
8.	All 7 toilet sanitary ware including bathtub and shower cubicle have not been installed	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(e) • PBD Volume 9 Tab 33 Page 88 • PBD Volume 6 Tab 5 page 56 (12) 	
9.	All floors and wall tiles are not installed (tiles were provided by Alinorde and Hjh Hartini)	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(f) • PBD Volume 6 Tab 9 Page 89 • PBD Volume 6 Tab 5 page 55 (7) 	
10.	Ceiling type exhaust fans were not installed	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(g) • PBD Volume 8 Tab 92 Page 523 • PBD Volume 6 Tab 5 page 56 (12) • Volume 8 Tab 99 page 563 	
11.	Doors not installed and not painted white <ul style="list-style-type: none"> • Door to living room not installed 	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(h) • PBD Volume 8 Tab 92 Page 527 • PBD Volume 6 Tab 5 page 55 (8) • PBD Volume 8 Tab 99 page 551 and 556 	
12.	Wet kitchen concrete kitchen shelf has not been installed	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(i) • PDB Volume 6 Tab 9 page 85 • PBD Volume 6 Tab 5 page 56 (15) (e) 	
13.	Concrete slab for sink in all toilets and kitchen not built	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(j) • PDB Volume 6 Tab 9 page 85 	
14.	Laminated floor not installed	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(l) • PDB Volume 6 Tab 9 pages 86 to 90 and 95 • PBD Volume 6 Tab 5 page 55 (7) 	
15.	Painting: <ul style="list-style-type: none"> • Outside not painted white 	<ul style="list-style-type: none"> • PBP Tab 20 page 214 para 2(p) • PBP Tab 20 page 216 (2) (v) • PDB Volume 8 Tab 92 page 523 • PDB Volume 6 Tab 9 page 88 to 89 	

	<ul style="list-style-type: none"> • Incomplete painting in the interior of the house • Incomplete painting to the fence • Did not use smart glo paint • Drainage grill not properly painted 	<ul style="list-style-type: none"> • PDB Volume 6 Tab 5 page 55(6) • PDB Volume 8 Tab 92 page 525 • PBP Tab 20 page 215 (2) (p) • PDB Volume 6 Tab 55 page 6(b) • PDB Volume 6 Tab 9 Page 81
16.	8 units of Panasonic air-conditioning split unit not supplied and installed	<ul style="list-style-type: none"> • PDP Tab 20 page 216 (z) • PDB Volume 6 Tab 5 page 57
17.	Fire door in kitchen not self-closing	<ul style="list-style-type: none"> • PDP Tab 20 page 214 2 (h) • PDB Volume 8 Tab 99 page 551 • PBD Volume 8 Tab 99 Page 556
18.	Low value and poor quality locks not as per the specification	<ul style="list-style-type: none"> • PBP Tab 20 page 215 (2) (n) • PDB Volume 6 Tab 55 page 8 (e)
19.	Roof truss ad roof tile caps not installed properly/not aligned	<ul style="list-style-type: none"> • PBP Tab 20 page 213 (14 (1)(a)) • PDB Volume 6 Tab 9 page 71
20.	Staircase not level	<ul style="list-style-type: none"> • PBP Tab 20 page 214 (2) (k) • PBD Volume 9 Tab 33 page 71
21.	Windows – <ul style="list-style-type: none"> • stains, • improper sealing • not installed properly • Gaps in window seal • Not properly plastered 	<ul style="list-style-type: none"> • PBP Tab 20 page 214 (2) (m) • PBD Volume 8 Tab 92 page 523 • PBD Volume 6 Tab 9 page 76 • PBD Volume 6 Tab 9 page 75 • PBD Volume 8 Tab 92 page 523
22.	Fencing wood and frill not painted properly ad poor quality grills	<ul style="list-style-type: none"> • PBP Tab 20 page 215 (2) (q) • PBD Volume 6 Tab 9 page 83
23.	Rusting on stainless steel verandah	<ul style="list-style-type: none"> • PBP Tab 20 page 215 (2) (r) • PBD Volume 6 Tab 9 page 83
24.	Various cracks: <ul style="list-style-type: none"> • Stair case wall • Master bedroom wall • Cement fence outside house 	<ul style="list-style-type: none"> • PBP Tab 20 page 216 (2) (s) • PBP Tab 20 page 216 (2) (x) • PBD Volume 9 Tab 33 page 73 to 74 • PBD Volume 6 Tab 9 page 80 • PBD Volume 9 Tab 33 page 73

	<ul style="list-style-type: none"> • Pipe crack in gabion wall 	<ul style="list-style-type: none"> • PBD Volume 6 Tab 9 page 67 	
25.	<p>Issues with the verandah:</p> <ul style="list-style-type: none"> • Sliding door has gaps • Floor is level without taking into account tiles have not been installed 	<ul style="list-style-type: none"> • PBP Tab 20 page 216 (2) (t) • PBP Tab 20 page 216 (2) (u) • PBD Volume 6 Tab 9 page 77 • 	
26.	<p>Fence is sitting on gabion wall</p>	<ul style="list-style-type: none"> • PBP Tab 20 page 216 (2) (w) • PBD Volume 6 Tab 9 page 67 to 68 • PBD Volume 6 Tab 33 page 71 	
27.	<p>Matters that affect the structural integrity:</p> <ul style="list-style-type: none"> • Presence of cracks in the gabion wall • Absence of waterproofing membrane • Presence of efflorescence • No piling record and ABCi approved structural drawings 	<ul style="list-style-type: none"> • PBD Volume 3, Tab 222, Pages 459 to 478 and Tab 248 pages 5619 to 528 	<p>As a newly built house Mr. Nava found it surprising that cracks were present after only 2 years from the start of construction.</p> <p>Mr. Nava only conducted a visual investigation and he could already tell by just looking at the building that there issues. The exact problem can only be identified upon conducting a concrete coring test and having sight of the piling records. There is no way of determining whether the piling work was done correctly. Not only does the structural drawing not have an ABCi endorsement, Elmer could not provide a copy of the approved structural drawing and the piling records.</p> <p>I accept this, however what is pertinent is the fact that there is a problem. This is further compounded by Elmer's admission that the house was not constructed in a good and workman like manner.</p>

			I am therefore convinced on a balance of probabilities that there have been issues to establish that there is good reason to believe that the structural integrity of the house on 57017 has been compromised.
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Damages or loss suffered

119. At this point, it has been established that Elmer is in breach of the S&P. The agreement provided that Elmer would provide a two storey house built using the specifications found in the S&P. This clearly has not been provided.

120. Plaintiff Counsel correctly eluded to Section 74(1) of the Contracts Act, Chapter 106 that reads:

'74. (1) When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.'

121. I also wish to bear in mind Section 74(3) that states:

'(3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

Explanation. — In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations

(f) A. contracts to repair B.'s house in a certain manner and receives payments in advance. A. repairs the house, but not according to contract. B. is entitled to recover from A. the cost of making the repairs conform to the contract.

(l) A., a builder, contracts to erect and finish a house by the 1st of January, in order that B. may give possession of it at that time to C., to whom B. has contracted to let it. A. is informed of the contract between B. and C. A. builds the house so badly that, before the 1st of January, it falls down and has to be rebuilt by B., who, in consequence, loses the rent which he was to have received from C., and is obliged to make compensation to C. for the breach of his contract. A. must make

compensation to B. for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.'

122. The long established case *of Hadley V Baxendale* [1854] 9 Exch. 341 was also referred to. I remind myself that the accepted principals in this case when determining consequential damages from a breach of contract: the party who is in breach is liable for all losses that the contracting parties should or could have foreseen. The test used is whether it was reasonable for that party to have contemplated that this loss would have occurred at the time the contract was formed. In this case the Court held that *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."*
123. In order to claim substantial losses, the plaintiffs must prove that they have suffered an actual loss.

A. Yap

Rectification of 57013

124. I accept that 57013 has not been built according to the specifications found in the S& P. I have already dealt with the evidence establishing the various breaches. Therefore Yap ought to be compensated the loss that he has incurred in order to rectify the property. The issue in question is whether the quotation provided by Encore Sdn Bhd (found at Volume 9, Tab 38 pages 91 to 93) can be relied on. Mr. Nava gave evidence that the quotation was on the low side. This quotation is not a final quotation as it does not take into account the expert fees for an Architect and Engineer to inspect and supervise the site. Further, some works such as hidden defects have not been provided for.
125. Plaintiff Counsel themselves admit that they would be unable to provide a fixed quotation based on visual inspection. Proper inspections have yet to be done to confirm the structural integrity of the house. This in my opinion is important so as to ensure that the house is safe to live in and that no further issues arise in the future.
126. Another issue is, whether Yap has suffered any losses as a result of the breach. It is trite law for any compensatory damages to be awarded a loss must have occurred as result of the breach that can be equated into a monetary value. As far as I know, Yap has not paid out any monies to rectify the losses yet. As such, he has not incurred any costs and has not suffered any losses for rectifying the property.
127. In order to ensure that the correct and reasonable costs are incurred a proper report must be prepared to:
- Determine the structural integrity of the property
 - Determine any other issues that may affect the structure of the property

- Any other reports that may be required in order to obtain ABCi approval and the Occupational Permit
 - A proper listing of all defects that must be rectified
 - A proper listing of the work that has yet to be carried out in accordance to the S&P
 - A proper costing of all the work that is listed above
128. I am not satisfied that this has been done and as such am unable to quantify the damages at this juncture. I do not believe that it would be plausible for parties to try rectify all the damages. Counsel for the plaintiff themselves have said that it is difficult to get an exact quotation of work that is needed to be done as very few contractors wish to take on the responsibility of rectifying work done by another contractor. Rightly so, because if rectification work was carried out and an issue arose after rectification works had been done, it would be extremely difficult to pinpoint which contractor would be responsible.
129. There was an argument put forward by Counsel for the Court to reserve its decision on damages for the rectification work upon receiving pending documents. This seems to be an afterthought by counsel that was formulated when the submissions were prepared. Unfortunately at the trial stage all arguments must be put forward so that the Court is able to make a final determination on the matter. To require further quotations would mean that the court had not concluded the trial or had split the trial.
130. No such directions were sought or given to split the trial and as such parties ought to have been prepared with all the necessary documents in order for the Court to be able to quantify the damages. I feel that this argument is an afterthought by the plaintiff.

Declaration of rescission.

131. As I have found that I am not to award the plaintiffs anything in order to rectify the property it would seem unfair not to award any damages. Clearly they have been through a lot of hassle and distress as a result of entering into their respective S&P's. Parties are bound by their pleadings and although it has not been put forward in the written submissions, I may refer to the pleadings.
132. Yap's pleadings clearly state ask for the following:
- 'a. A declaration of rescission by reason of the breach of the said Agreement made on 12 June 2015 by the Defendant, the Plaintiff is relieved of all liability for the further performance of his obligation thereunder.*
- b. A refund of total sum of B\$382,200.00 being the amount already paid pursuant to the Sale and Purchase agreement*
- c. Interest at the rate of -1.0% the bank's Prime Lending Rate thereof constituted the effective rate to be 4.5% monthly reducing for a loan amount of \$311,000.00 for 20 years effective from 30th September 2015 being the interest for bank loan secured in purchasing the residential property under the Sale and Purchase Agreement'*

Alternatively, Yap asked for the sums that will be incurred for the defective and/or uncompleted works under the Sale and Purchase Agreement as of November 2017 and continuing'

133. Section 40 of the Contract's Act reads:

'40. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.'

134. I am happy to order that the because of Elmer's breach, the Court is able to make a declaration that the S&P is rescinded and that all sums paid by Yap under the agreement including the interest that was charged by the bank be refunded to him.

Liquidated damages from August 2017 to November 2020

135. Clause 16 (e) provides for the payment of liquidated damages for \$1,000.00 per month until practical completion has been effected. Again, looking at the Contracts Act, I turn to Section 75 that reads:

'75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.'

136. The liquidated damages is clearly provided for and is also permissible under the Contracts Act. I am slightly confused as to why Counsel had initially asked for liquidated damages from August 2017 to November 2020 and the later on for liquidated damages to run until the date of judgment. The S&P clearly provided that the liquidated damages should continue to run until the house is 'practically completed'. Elmer himself confirmed that the 57013 has not been 'practically completed'.

137. That being said, because I have already found the costs of rectifying and competing the house has not been incurred by Yap and I have instead deemed that the S&P agreement be rescinded, this head of damage fails because the S&P and the terms and conditions herein are void. Therefore no damages for liquidated damages is awarded.

Loss of rental and electricity bills

138. Elmer was aware that Yap was renting a house and had only intended to rent until he was able to move to 57013. As such, the additional rent paid by Yap on top of paying for his housing loan meant that Yap had suffered a loss as a result of the breach. The costs incurred with renting his house such as electricity, moving costs are also reasonable.

139. As such, I am satisfied that Yap ought to be awarded the damages as follows:

140. Rental from July 2016 to October 2016: \$3,200.00

141. Electricity only from July 2016 onwards to October 2016 at \$50 per month for the house in Panaga: \$200.00
142. With respect to the rental from Sungai Tilong from 31st October 2016 onwards, I accept that it was reasonable for Yap to move to Bandar and that the rental rates are higher in Bandar. I remind myself that, losses can only be awarded if there is a degree of certainty. Yap would not be paying rent if 57013 had been completed, but because Elmer has failed to deliver the house Yap has no choice but to rent the house.
143. As such, Yap should awarded further damages of \$1, 1000.00 per month from 31st October 2016 to the date of judgment. He is also awarded electricity charges at \$50.00 per month from 21st October 2016 to the date of judgment.
144. I also except that that Yap should be given the \$600.00 for the costs of moving from KB to Sg Tilong and award the sum accordingly.
145. The money spent by Yap for tinting the bedroom window could not have been reasonably foreseen by Elmer. As such, I do not award anything for this.

Dry Kitchen Counter and Cabinet

146. In the submissions Counsel has said that payment came out from Yap's own pocket (PBD Volume 9, Tab 11 Page 35). As such he should be given back the deposit of RM\$22,500.00 he paid for the kitchen cabinets, this is approximately \$8,211.67 based on a conversion rate of 2.71.

QED Konsult report

147. I accept that this report was reasonably incurred, it was not only useful at the trial but is a useful report moving forward so that rectification works have an overview of areas that need to be looked into. I therefore award the sum of \$4,333.33.

B. Dk Nurul

148. I remind myself that damages for breach of contract is intended to compensate the innocent party. The primary purpose of damages in contract law is to place the injured party in the position they would have been in had the contract been performed. In this case, had the contract been performed then the Dk Nurul would have had a house on Lot 57014. The whole principal is premised on compensating the victim for the actual loss as a result of the wrongdoer's breach rather than to punish the wrongdoer.
149. As such, DK Nurul must show that she has suffered a loss as a result of the breach.

Rectification work and completing the house

150. Plaintiff Counsel themselves admit that they would be unable to provide a fixed quotation based on visual inspection. Proper inspections have yet to be done to confirm the structural integrity of the house. This in my opinion is important so as to ensure that the house is safe to live in and that no further issues arise in the future.

151. A further issue to consider is whether Dk Nurul has suffered any losses as a result of the breach. It is trite law for any compensatory damages to be awarded a loss must have been incurred as result of the breach that can be equated into a monetary value. As far as I know, Dk Nurul has not paid out any monies to rectify the losses yet. As such, he has not incurred any costs and has not suffered any losses for rectifying the property.
152. In order to ensure that the correct and reasonable costs are incurred a proper report must be prepared to:
- Determine the structural integrity of the property
 - Determine any other issues that may affect the structure of the property
 - Any other reports that may be required in order to obtain ABCi approval and the Occupational Permit
 - A proper of listing of all defects that must be rectified
 - A proper listing of the work that has yet to be carried out in accordance to the S&P
 - A proper costing of all the work that is listed above
153. Again, I am not satisfied that this has been done and as such am unable to quantify the damages at this juncture. I do not believe that it would be plausible for parties to try rectify all the damages. Counsel for the plaintiff themselves have said that it is difficult to get an exact quotation of work that is needs to be done as very few contractors wish to take on the responsibility of rectifying work done by another contractor. Rightly so, because if rectification work was carried out and issue arose after rectifications works had been carried out, it would be extremely difficult to pinpoint which contractor would be responsible.
154. There was an argument put forward by Counsel for the Court to reserve its decision on damages for the rectification work upon receiving pending document. Unfortunately at the trial stage all arguments must be put forward so that the Court is able to make a final determination on the matter. To require further quotations would mean that the court had not concluded the trial or had split the trial.
155. No such directions were sought or given to split the trial and as such parties ought to have been prepared with all the necessary documents in order for the Court to be able to quantify the damages. Again, I feel as this issue may be an afterthought and it is simply too late to plead this.

Declaration of rescission.

156. As I have found that I am not be not to award the plaintiffs anything in order to rectify the property it would seem unfair not to award any damages. Clearly they have been through a lot of hassle and distress as a result of entering into their respective S& P's. Parties are bound by their pleadings and although it has not been put forward in the written submissions, I may refer to the pleadings. Dk Nurul's pleadings clearly state ask for the following:

'a. A declaration of rescission by reason of the breach of the said Agreement made on 3rd October 2013 by the Defendant, the Plaintiff is relieved of all liability for the further performance of his obligation thereunder.

b. A refund of total sum of B\$356,000.00 being the amount already paid pursuant to the Sale and Purchase agreement

c. The sum of B\$3,131.00 being the amount paid for the sale and purchase agreements.

d. Interest at the rate of 1.00% below the bank's Prime Lending Rate thereof constituted the effective rate to be 4.50% per annum for a loan amounting to \$390,000.00 for 25 years effective from December 2014 being the interest for bank loan secured in purchasing the residential property under the Sale and Purchase Agreement'

157. Section 40 of the Contract's Act reads:

'40. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.'

158. I am happy to order that the because of Elmer's breach, the Court is able to make a declaration that the S&P is rescinded and that all sums paid by Dk Nurul under the agreement including the interest that was charged by the bank be refunded to her.

Liquidated damages from April 2016 to November 2020

159. Clause 15 (v) provides for the payment of liquidated damages for \$800.00 per month until practical completion has been effected. Again, looking at the Contracts Act, I turn to Section 75 that reads:

'75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.'

160. The liquidated damages is clearly provided for and is also permissible under the Contracts Act. I am slightly confused as to why Counsel had initially asked for liquidated damages from August 2017 to November 2020 and the later on for liquidated damages to run until the date of judgment. The S&P clearly provided that the liquidated damages should continue to run until the house is 'practically completed'. Elmer himself confirmed that the 57013 has not been 'practically completed'.

161. That being said, because I have already found the costs of rectifying and competing the house has not been incurred by Dk Nurul and I have instead deemed that the S&P agreement be rescinded, this head of damage fails because the S&P and the terms and conditions herein are void. Therefore no damages for liquidated damages is awarded.

Additional items purchased

162. I am satisfied that all the items listed under paragraph 21 of the Statement of claim i.e. items a to s were real expenses and losses incurred by Dk Nurul.
163. As such, Dk Nurul is to be given a full refund of the sums she paid amounting to \$31,049.94

Sum of Loss of benefit in living in 57014 in the form of rental payment

164. Dk Nurul is asking for \$1,500.00 being loss of benefit in living at 57014. Counsel has chosen a peculiar way of quantifying this damage and has equated this to paying rental. There has been no proof that actual rent has been paid and it is obvious from the evidence (paragraph 3 of her affidavit evidence) that Dk Nurul intended to live in the property with her family.
165. There have been no legal arguments or case law to support this claim and I do not understand Counsel's submissions on this point. As such, nothing is awarded.

QED Konsult report

166. I accept that this report was reasonably incurred, it was not only useful at the trial but is a useful report moving forward so that rectification works have an overview of areas that need to be looked into. I therefore award the sum of \$4,333.33.

C. Alinorde and Hjh Hartini

167. Having already discussed damages that are available as a result of a breach of contract I shall expand on the how to calculate or decide on the measure of damages. The measure of damages is the method for calculating the damages to which the innocent party is entitled to losses. It covers loss of bargain or expectation loss. The Court should put the innocent party in the position he would have been in had the contract been properly performed (*Robinson v Harman [1848] 18 LJ Ex 202*). Typically the two usual approaches of assessing the measure of damages are either the difference in value or the cost of cure. The court will generally use the more appropriate.
168. Some circumstances may allow for reliance loss where loss of expectation is difficult to prove. The aim of reliance loss is to put the innocent party into the position he would have been in had the contract never been made, that is, an indemnity for his out of pocket expenses incurred in reliance on the contract (*Anglia TV v Reed [1972] 1 QB 60*).
169. As a general rule loss for disappointment or mental distress are not generally awarded (*Addis v Gramophone Co. Ltd [1909] AC 488*) unless the contract is, for example, a holiday contract (*Jarvis v Swans Tours Ltd [1973] 1 QB 233*).
170. As such, Alinorde and Hjh Hartini must show that they suffered a loss as a result of the breach and that upon that, the Court must decide which the appropriate way to measure the loss.

Rectification works and completing the house

171. Plaintiff Counsel themselves admit that they would be unable to provide a fixed quotation based on visual inspection. Proper inspections have yet to be done to confirm the structural integrity of

the house. This in my opinion is important so as to ensure that the house is safe to live in and that no further issues arise in the future.

172. The issue is, whether Alinorde and Hjh Hartini have suffered any losses as a result of the breach. It is trite law for any compensatory damages to be awarded a loss must have been incurred as result of the breach that can be equated into a monetary value. As far as I know, Alinorde and Hjh Hartini have not paid out any monies to rectify the losses yet. As such, he has not incurred any costs and has not suffered any losses for rectifying the property.
173. In order to ensure that the correct and reasonable costs are incurred proper a proper report must be prepared to:
- Determine the structural integrity of the property
 - Determine any other issues that may affect the structure of the property
 - Any other reports that may be required in order to obtain ABCi approval and the Occupational Permit
 - A proper of listing of all defects that must be rectified
 - A proper listing of the work that has yet to be carried out in accordance to the S&P
 - A proper costing of all the work that is listed above
174. Again, I am not satisfied that this has been done and as such am unable to quantify the damages at this juncture. I do not believe that it would be plausible for parties to try rectify all the damages. Counsel for the plaintiff themselves have said that it is difficult to get an exact quotation of work that is needs to be done as very few contractors wish to take on the responsibility of rectifying work done by another contractor. Rightly so, because if rectification work was carried out and issue arose after rectifications works had been, it would be extremely difficult to pinpoint which contractor would be responsible.
175. By way of addition, by ordering this, this would save the plaintiffs further hassle in being involved in both the rectification work and completing the house. At this point all four plaintiffs have been through enough, and a refund of all the sums would allow them to look for other suitable properties.
176. There was an argument put forward by Counsel for the Court to reserve its decision on damages for the rectification work upon receiving pending document. Unfortunately at the trial stage all arguments must be put forward so that the Court is able to make a final determination on the matter. To require further quotations would mean that the court had not concluded the trial or had split the trial.
177. No such directions were sought or given to split the trial and as such parties ought to have been prepared with all the necessary documents in order for the Court to be able to quantify the damages. I do not wish this matter to be prolonged any further and as such will not allow any further hearings with respect to this head of damage.

Declaration of rescission.

178. My decision in awarding that the S & P be rescinded is exactly the same as what I have said for Yap and Dk. Nurul. As Alinorde and Hjh Hartini have not incurred any losses for rectifying the property I turn to her pleadings. Her pleadings clearly state ask for the following:

'a. A declaration of rescission by reason of the breach of the said Agreement made on 11th March 2011 by the Defendant, the Plaintiff is relieved of all liability for the further performance of his obligation thereunder.

b. A refund of total sum of B\$356,000.00 being the amount already paid pursuant to the Sale and Purchase agreement

d. Interest at the rate of 0.50% below the bank's Prime Lending Rate thereof constituted the effective rate to be 4.50% per annum for a loan amounting to \$390,000.00 for 204 monthly repayment effective from February 2015 being the interest for bank loan secured in purchasing the residential property under the Sale and Purchase Agreement'

179. Section 40 of the Contract's Act reads:

'40. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.'

180. I am happy to order that the because of Elmer's breach, the Court is able to make a declaration that the S&P is rescinded and that all sums paid by Alinorde and Hjh Hartini under the agreement including the interest that was charged by the bank be refunded to them.

Liquidated damages from December 2017 to November 2020

181. Clause (v) provides for the payment of liquidated damages for \$800.00 per month until practical completion has been effected. Again, looking at the Contracts Act, I turn to Section 75 that reads:

'75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.'

182. The liquidated damages is clearly provided for and is also permissible under the Contracts Act. I am slightly confused as to why Counsel had initially asked for liquidated damages from December 2017 to November 2020 and the later on for liquidated damages to run until the date of judgment. The S&P clearly provided that the liquidated damages should continue to run until the house is 'practically completed'. Elmer himself confirmed that the 57017 has not been 'practically completed'.

183. That being said, because I have already found the costs of rectifying and competing the house has not been incurred by Alinorde and Hjh Hartini and I have instead deemed that the S&P agreement

be rescinded, this head of damage fails because the S&P and the terms and conditions herein are void. Therefore no damages for liquidated damages is awarded.

Additional items purchased

- 184. I am satisfied that all the items listed and evidence under paragraph 65 of Alinorde’s affidavit were items that were bought by him to improve the property. These were real expenses and losses incurred by Alinorde and Hjh Hartini
- 185. As such, Alinorde and Hjh Hartini are to be given a full refund of the sums they paid amounting to \$60,816.54.
- 186. I also accept that Alinorde and Hjh Hartini purchased marble tiles> Evidence of the tiles is seen at PBD Volume 6 Tab 43, Page 195 and PBD Volume 7, Tab 62 Page 239 and Tab 74 Page 397. As such, Alinorde and Hjh Hartini are awarded a further \$10,259.20.

Sum of Loss of benefit in living in 57017 in the form of rental payment

- 187. Alinorde and Hjh Hartini are asking for \$2,000.00 being loss of benefit in living at 57017. Counsel has chosen a peculiar way of quantifying this damage and has equated this to paying rental. There has been no proof that actual rent has been paid and it is obvious from the evidence (paragraph 3 of Alinorde’s affidavit evidence) that Alinorde and Hjh Hartini intended to live in the property with their family.
- 188. There have been no legal arguments or case law to support this claim and I do not understand Counsel’s submissions on this point. As such, nothing is awarded.

QED Konsult report

- 189. I accept that this report was reasonably incurred, it was not only useful at the trial but is a useful report moving forward so that rectification works have an overview of areas that need to be looked into. I therefore award the sum of \$4,333.33.

Conclusion

- 190. I am satisfied that the defendant is in breach of the sale and purchase agreement entered with all four plaintiffs. The defendant has failed to:
 - Deliver a two storey detached house as provided for under the individual sale and purchase agreements
 - Failed to construct the house in a good and work man like manner

191. The damages awarded to the plaintiffs are as follows:

Yap	DK Nurul	Alinorde and Hjh Hartini
1. A full refund of all sums paid under the sale and purchase agreement amounting to \$382,200.00 including	1. A full refund of all sums paid under the sale and purchase agreement amounting to \$380,250.00 including	1. A full refund of all sums paid under the sale and purchase agreement amounting to \$356,000.00 including

<p>interest chargeable by the bank (to be calculated).</p> <p>2. Refund of rental paid amounting to:</p> <ul style="list-style-type: none"> - \$3,200.00 (KB from July 2016 to October 2016) - \$59,400.00 (\$1,100.00 from October 2016 to April 2021) <p>3. Refund of expenses incurred as a result of renting property amounting to:</p> <ul style="list-style-type: none"> -\$200.00 (electricity in KB) - \$2,700 (\$50 per month from October 2016 to April 2021) - \$600.00 (moving charges) <p>4. Loss of dry kitchen amounting to B\$8,211.67</p> <p>5. Sum of engaging QED Konsult Service amounting to \$4,333.33</p> <p>6. Interest at the rate of 6% on all sums awarded until full and final settlement</p>	<p>interest chargeable by the bank (to be calculated).</p> <p>2. An additional \$3,131.00 for the preparation of the S&P.</p> <p>3. Additional expenses incurred in improving the property amounting to \$31,049.94</p> <p>4. Sum of engaging QED Konsult Service amounting to \$4,333.33</p> <p>5. Interest at the rate of 6% on all sums awarded until full and final settlement</p>	<p>interest chargeable by the bank (to be calculated).</p> <p>2. Additional expenses incurred in improving the property amounting to:</p> <ul style="list-style-type: none"> - \$60,816.54 (household items) - \$10,259.20 (marble tile) <p>3. Sum of engaging QED Konsult Service amounting to \$4,333.33</p> <p>4. Interest at the rate of 6% on all sums awarded until full and final settlement</p>
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Costs

192. It is apparent that the general rule should apply with respect to costs i.e. the losing party should pay costs. Therefore I make an order nisi that the defendant pay for costs for all plaintiffs. In the event parties feel that they have an argument with respect costs submissions ought to made to the court within two weeks from today. Costs to be taxed if not agreed.

HAZARENA BTE POKSJ DP HJ HURAIRAH
Judge, Intermediate Court