

Tang Soon Won **...Plaintiff**
(trading under the name and style of TSW FIDEL CONSTRUCTION)

AND

Chuon Tzu Construction Company Sdn Bhd **...Defendant**

(High Court of Brunei Darussalam)
(Civil Suit No. 88 of 2021)

AND

Chuon Tzu Construction Company Sdn Bhd **...Plaintiff**

AND

Tang Soon Won **...1st Defendant**
(trading under the name and style of TSW FIDEL CONSTRUCTION)

Lee Shiu Wei **...2nd Defendant**
(Action discontinued in March 2022)

(High Court of Brunei Darussalam)
(Civil Suit No. 12 of 2022)

Edward Timothy Starbuck Woolley, J.C.

Date of Hearing: 08th, 13th, 15th, 16th, 18th, 20th, 22nd-24th June, 2026.

Date of Judgment: 27th July 2026

Headnote: Claims arising out of a construction project – by the developer for liquidated damages for delay and damages for defects – by the contractor for return of retention monies and damages for delay by the developer – consideration of evidence of delay – terms of the contract – whether any defects attributable to the contractor.

Ms. Navrita Kaur and Mr. Kelvin Lim (Raed Lim Advocates and Solicitors) for the Plaintiff.

Mr. Andrew Wong and Ms. Goh Yi Xuan (CCW Partnership) for the Defendant.

Case cited:

Lim Ting Guan and Lim Ting Chai v Goodlink Enterprise (sued as a firm) [2004] 1 JCBD 200

State of Kerala v United Slippers and Developer Ltd AIR [1982] Kerala 281

J U D G M E N T

Woolley, J.C.:

This consolidated action concerns a contract entered into on 21st January 2016 for the construction of a commercial complex comprising two blocks of retail shops, offices, apartment units and a hotel on adjoining pieces of land in Kampung Kiulap, Mukim Gadong, Brunei/Muara District. Upon completion of the project claims were made against the contractor by the developer for delay in completion and a number of defects said to arise from the building works. The developer was Mr. Tang Soon Won, the Plaintiff in HCCS No. 88 of 2021, and the contractor Chuon Tzu Construction Company Sdn Bhd, the Defendant in that action. They remain as Plaintiff and Defendant in the consolidated action. Although one Lee Shiu Wei was included as a Defendant in HCCS No. 12 of 2022, the action was discontinued against that Defendant in March 2022.

Background

2 The Plaintiff, as developer, appointed the Defendant, as main contractor, to construct the complex in accordance with the terms of the contract, and the building plans and specifications provided by the Plaintiff's architect. It was a lump sum contract for a total of BND\$11,168,888.88. The Plaintiff's claim here is for liquidated damages for delay in completion of construction and damages for the cost of rectification of defects and ongoing maintenance as a result of defects. The Defendant counterclaims for the unpaid balance of the contract sum and damages for delays they say were caused by the Plaintiff.

3 Although the contract is dated 21st January 2016, possession of the site was given to the Defendant on 1st January 2016. The date for completion in the contract was 30th June 2017. On 8th June 2017 the Defendant applied to the architect for an extension of time of four months which was initially approved on 26th September 2017 but two days later was reduced to three months. Later further extensions of time were granted to 31st December 2017 and to 15th February 2018. The certificate of practical completion was issued for 31st May 2018.

4 The Plaintiff's claims fall into two parts: damages for the cost of rectifying defects and ongoing maintenance because of them, and liquidated damages for delay in completion under the contract in the sum of BND\$420,000.00. The Defendant counterclaims for damages in the sum of B\$718,838.89 for costs incurred as a result of delays of 335 days in completing the project, caused by the Plaintiff, and for the unpaid balance of the contract sum of BND\$970,884.70. In the course of the trial I was informed by the parties that the unpaid balance being retained by the Plaintiff is now agreed at BND\$736,133.54.

Delays

5 Before considering the matter of the alleged defects, it is convenient to look at the question of the delays claimed by both parties. The first is that claimed by the Plaintiff against the Defendant. As I have said, the date for completion in the contract was 30th June 2017. It is not in dispute that the Defendant, on 8th June 2017, requested from the architect an extension of time of four months. This was initially approved, but two days later was reduced to three months, to 30th September 2017. Two further extensions of time were granted, to 31st December 2017 and then to 15th February 2018, these extensions being granted retrospectively on 30th November 2018 and 23rd February 2021 respectively. It is not clear how, or whether, these were requested as there is no documentary evidence that they were. However, the fact of the extensions of time is not in dispute. The date of practical completion being certified by the architect as 31st May 2018, the Plaintiff now claims liquidated damages under clause 22 of the contract which reads as follows:

“If the Contractor fails to complete the Works by the Date for Completion stated in the appendix to these Conditions or within any extended time fixed under clause 23 or clause 32(1)(c) of these Conditions and the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed, then the Contractor

shall pay or allow to the Employer a sum calculated at the rate stated in the said appendix as Liquidated and Ascertained Damages for the period during which the Works shall so remain or have remained incomplete, and the Employer may deduct such sum from any monies due or to become due to the Contractor under this Contract.”

The rate stated in the appendix is BND\$4,000.00 per day making the total claimed by the Plaintiff BND\$420,000.00 being 105 days of delay from the expiry of the last extension of time on 15th February 2018 to 31st May 2018.

6 The Defendant in the defence and counterclaim claims that the delays were caused by the Plaintiff and counterclaims for prolongation costs from the original date for completion of 30th June 2017 to the date of practical completion on 31st May 2018, being 335 days. They support this with a report by Mr. Daniel Thomas Connors, who also gave evidence before me. I will consider the contents and effect of his report below.

7 The first contention of the Defendant in respect of the claim for liquidated damages is that, by a letter dated 8th April 2018, from the project architect to the Defendant, the date for completion under the contract was revised to 15th May 2018 thereby reducing any possible claim to a period of 16 days up to 31st May 2018. The letter reads as follows:

“With reference to our letter of 28th September 2017 (Ref.: A54/30117-122/2017-13) regarding to the last approved extension of time till 30th September 2017, and in view of the current progress, we would like to advise that the contract completion is now revised to 15th May 2018 as requested by our client.

This revision of project completion does not constitute any free extension of time subject to further application from your office and verification and approve by our office.”

Mr. Yapp Pow Khin, the project architect, who signed the letter, said in evidence that this was agreed between the Plaintiff and Defendant and appeared in giving evidence to concede that the date for completion was changed. However, the Plaintiff in evidence said that, although he was aware of the letter, he could not remember anything about it, and Mr. Chen Min Wei, the executive director of the Defendant, gave no evidence in respect of it at all either in his affidavits of evidence or before me. Indeed, until the

preparation for this hearing no mention was made by either party of any change in the contractual date for completion and it was not pleaded in the defence and counterclaim. If it was such a change, there would be no need for the second sentence of the letter as it would follow that time would automatically be extended to that date. It is therefore far from clear what exactly was agreed, and for a variation to be made to the contract in respect of the date for completion, such a variation would have to be clear and unambiguous. I therefore find that this did not change the dates under the contract as submitted on behalf of the Defendant.

8 I now turn to the report of Mr. Connors who, according to his *curriculum vitae*, has 41 years' experience in the construction industry having studied civil engineering technology in Canada, although I note that he claims no engineering or other degree or qualification. He admits that he has never visited the site or spoken to any of the consultants on the project team, but has drawn his conclusions solely from the documents provided to him. He also concedes, in paragraph 14 of his report, that there was a lack of "as-built" records in that there were no progress reports or minutes of site meetings, no records of progress of the Plaintiff's direct contractors, and the baseline programme was not contemporaneously updated by the Defendant to record activity "as-built start /finish dates". He accordingly relied on the activity completion percentage assessed by the quantity surveyor in each payment claim submission which he says enabled him to establish when the various works activities started and finished on a "generally month to month basis" and on recorded inspection records, correspondence, emails and engineer's instructions to establish work progress.

9 His methodology is explained at the beginning of his report using windows of time and identification and analysis of the critical path to completion. He then divides the time to completion into four windows and makes assessments of delay for each one. These windows are from 17th December 2015 (which is not explained as the earliest possible date is 1st January 2016) to 23rd April 2017, 24th April 2017 to 22nd August 2017, 23rd August 2017 to 18th January 2018 and 19th January 2018 to 31st May 2018. In Window 1 he assesses a cumulative delay of 174 days of which he apportions liability as to 80 days to the Defendant and 94 days to the Plaintiff which he categorizes as a right to extension of time only and excludes from his summary of delay overall. In Window 2 he assesses the delay to be 281 days all attributable to the Plaintiff. In Window 3 he found no delay at all, and in Window 4 a delay of 54 days apportioned to

the Plaintiff which in the report comes to a total of 335 days, precisely the number of days from the original date for completion to the certified date of practical completion.

10 While Mr. Connors is to be commended on the detail with which he has approached his analysis, my first problem with it is that it reads more as an academic exercise than a realistic view of the progress of a project such as this which is better judged by those engaged on it at the time on the site. Documents being studied later cannot always produce an accurate picture of what was happening at the time and do not record all discussions and agreements entered into verbally as the work progresses. Particularly here where he uses as a baseline programme the master work programme from the contract which was varied and amended as the work progressed. Further, although the Protocol which he purported to follow requires him to refer to the express terms of the contract with its procedural requirements, as has been pointed out by counsel for the Plaintiff, he has failed to do so. The contract itself deals with delay and extensions of time at length in clause 23, to which he has not referred. This clause sets out the reasons for delay which entitle the contractor to apply for an extension of time. None of these have been referred to. He appears to have attempted to find from the papers evidence of any delay, try to work out the length of such delay, and automatically add it to the total. Any such delays as occurred may well have entitled the Defendant to apply to the architect for an extension of time, but in the event, I have evidence of only one such application being made, on 8th June 2017.

11 I have several reservations about Mr. Connors' conclusions. First is the method of calculation of delays in progress of the works. As I have noted in paragraph 8 above, this was assessed from the documents supplied to him without consulting with any of those engaged on the project. Further he makes no attempt to compare any delays with the list of reasons for which extensions of time may be given under clause 23 of the contract, and indeed, makes no allowance for the 230 days of extensions of time allowed by the project architect. In paragraph 73 onwards of his report he deals with alleged delays in completing the roof structure of Block A concluding that there was a delay of 281 days from the date planned in the master work programme, being 14th November 2016, and the date it was completed, 22nd August 2017, owing to the delay by the Plaintiff in supplying detailed construction drawings. This, however, was only one part of what was a very large project and this figure is meaningless without evidence that it prevented other work on the site and caused actual delay of the project. Indeed, the delay here was assessed by the Defendant in their letter of 8th June 2017 at just 45 days.

The same criticism can be made of the other numbers of days of delay he finds. I also find I am not convinced by his conclusion that, had the delays alleged not occurred, and deducting his claimed 335 days of delay, practical completion would have been reached on the date stated in the contract for completion. On a project of this size that would have been extremely unusual.

12 It is also significant that, apart from the Defendant's letters of 3rd March 2017 expressing concern regarding the delay in receiving construction drawings for Block A roof slab, and of 8th June 2017 requesting an extension of time, there is no evidence of any complaint by the Defendant of delay as the works progressed, giving the impression that, subject to extensions of time, which in any event were granted, any delays could be accommodated within the contractual time frame. Indeed, in their letter of 24th December 2018 in which they say they have no objection to the approved date of practical completion on 31st May 2018, with the proviso that no claim is made for liquidated damages, there is again no complaints of delay by the Plaintiff. I should add that they also repeated a claim in that letter that they had practically completed the original scope of works by 31st October 2017. However, under the contract, this was for the architect to certify, not for the Defendant to state, and clearly the architect was of the view that the remaining works, which the Defendant describes as minor, meant that they had not reached practical completion. The outstanding works, according to the Defendant's own quantity surveyor Mr. Foo Toon Ken, in paragraph 8.14 of his affidavit evidence, included "completion of Block B structural works".

13 It is submitted by the Defendant that further delays were caused to the mechanical and electrical (M&E) works undertaken by Syarikat Adabena Sdn Bhd, the nominated subcontractor, owing to changes made by the Plaintiff's designers, and Mr. Foo refers to a letter dated 22nd December 2018 to the Defendant setting out a list of those delays. However, the majority of those were in the course of 2017, and the letter clearly says that the M&E works were completed by 31st December 2017 "as per our contract", and other works were additional works requested by the client. Of the listed items, the last three involved work carried out in 2018, the last being work carried out in June and July 2018, well after the date of completion. Of those in 2017, they clearly did not delay the overall works as they admit the contract work was completed by the end of December, with an extension of time given to the Defendant to then, and the fact that additional work carried on after the date of practical completion appears to mean that the architect did not consider this part of the works necessary for completion, and

could not therefore cause delay to the Defendant. In this regard, Mr. Connors, in paragraphs 136 to 149 of his report, admits to a lack of documentary evidence, relying largely on photographs taken after fit out and his own assessment of how long works would have taken, to arrive at a delay of 54 days. As he does not attempt to make a detailed calculation as to how he arrives at this figure, and from what I have said above, I have little confidence in the accuracy of this.

14 The relevant part of clause 23 of the contract reads as follows:

“Upon it becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice of the cause of the delay to the Architect, and if in the opinion of the Architect the completion of the Works is likely to be or has been delayed beyond the Date for Completion stated in the appendix to these Conditions or beyond any extended time previously fixed under either this clause or clause 32(1)(c) of these Conditions,

.....then the Architect shall so soon as he is able to estimate the length of the delay beyond the date or time aforesaid make in writing a fair and reasonable extension of time for completion of the Works.....

The clause also lists those reasons for delay which are covered by this clause. There is no suggestion that the delays complained of here are not arising from matters covered. It follows that the contract enables the contractor, when a delay is apparent, to apply to the architect for an extension of time, and it is solely within the province of the architect whether, and for how long, such extension should be given. Mr. Yapp says that this was done after consultation with the rest of the project team. A total of 230 days extension were granted to the Defendant on this project, which was not taken into account by Mr. Connors, as indeed neither was whether the delays he found to have occurred justified any further extensions of time.

15 For these reasons I do not find Mr. Connors’ report convincing and I am not satisfied that the Defendant has established any delays caused by the Plaintiff beyond those already accepted by the architect and reflected in the extensions of time given by him. For the same reasons I do not accept the losses he has listed in Appendix C of his report, being merely a calculation of daily or other costs multiplied by the days of delay claimed.

16 Returning to the matter of the liquidated damages, Mr. Wong for the Defendant has put forward two further submissions in support of his contention that these should not be awarded here. The first of these is that clause 22 of the contract requires that “*the Architect certifies in writing that in his opinion the same ought reasonably so to have been completed,...*”, and he submits that no such certificate has been issued. Counsel for the Plaintiff has pointed out that there is no prescribed form in which the architect’s opinion must be expressed, and as long as there is documentary evidence from the architect which indicates that opinion then that is sufficient to comply with clause 22. This was confirmed by the evidence of Mr. Yapp. This must be right. Any extension of time granted in writing by the architect is in itself an opinion by the architect that the work should reasonably to have been completed by that date, subject to any further extensions of time. Once the last extension has been given, then that is the date “certified” by the architect as the last date the work should have been completed. In this case that date was 15th February 2018.

17 The second of Mr. Wong’s submissions on the matter of liquidated damages is that clause 22 is subject to Section 75 of the Contracts Act, Cap 106 requires that, before liquidated damages may be awarded, some material must be put before the Court to establish that a plaintiff has suffered some loss or damage. Section 75 reads as follows:

“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.”

This was considered at length by the Court of Appeal in *Lim Ting Guan and Lim Ting Chai v Goodlink Enterprise (sued as a firm)* [2004] 1 JCBD 200 where it was held that there must be some materials before the Court to assess what is reasonable compensation before the damages could be awarded. Noting that this section was taken verbatim from section 74 of the Indian Contract Act, 1872, they supported their view with the case of *State of Kerala v United Slippers and Developer Ltd* AIR [1982] Kerala 281 where it was said, at p.286, referring to the phrase “whether or not actual damage or loss is proved to have been caused thereby”:

“The phrase referred to above finding a place in section 74 only means that unlike England, a party faced with a breach of contract in India is not compelled to prove the extent of the loss or damage suffered by him in fact or actually. He need not prove in an exact manner the extent of the real loss or damage suffered by him or the loss or damage suffered by him in fact. However, if he proves it, that will certainly help the Court to arrive at the proper compensation. Even if he fails to prove it, the Court cannot throw out his case on that ground, but must proceed to assess reasonable compensation which is to be awarded to him, on the materials before the Court and subject to the limit of the amount stipulated in the contract.”

and later:

“There may be cases where the actual loss or damage is incapable of proof; facts may be so complicated that it may be difficult for the party to to prove actual extent of the loss or damage. Section 74 exempts him from such responsibility and enables him to claim compensation in spite of his failure to prove the actual extent of the loss and damage provided of course he establishes the basic requirement for award of “compensation”, viz., the fact that he has suffered some loss or damage. The proof of this basic requirement is not dispensed with by section 74 of the Act.”

18 On the facts of the *Lim Ting Guan* case the Court of Appeal found that there was no material before the Court to establish that the appellants had suffered some loss or damage and agreed with the judge in the Court below that no liquidated damages should be awarded. Mr. Wong submits that, similarly, there is nothing before the Court now. I cannot agree with that. The evidence that is before me shows that Plaintiff as developer invested a large sum of over BND\$11 million in a commercial development from which he expected to make a profit by selling and renting retail units, apartments and a hotel. As a matter of common sense it is inevitable that any delay in completing the development also delays the point at which he can realise profits and receive income. It is not necessary for there to be sworn evidence of something which, on other facts before the Court, are obvious. I have no difficulty in finding that the provisions of section 75 have been complied with.

19 The amount of BND\$4,000.00 a day is set out in the contract and was accepted by the Defendant at that time. There is no suggestion that this was not considered then a reasonable daily estimate of the loss that would be caused by delay, and I can see no

reason why therefore it can be considered a penalty. I accordingly find that the Plaintiff is entitled to the liquidated damages claimed in the sum of BND\$420,000.00.

Defects

20 In the amended statement of claim the Plaintiff sets out 11 matters he claims are defects in the work of the Defendant and for which he seeks damages. However, only 8 of those are now pursued. I will consider those in the order in which they are listed in the amended statement of claim.

“Ponding at the basement entrance and carpark area during rain period due to the basement’s uneven floor finishing and issues with the sewerage pipes.”

21 The basement car park covers a very large area of about 7000 square metres beneath both blocks and the drawings and plans for its construction show a slotted drain around the perimeter, one across the base of the ramps for entry and exit and across the top of the ramps. The complaint by the Plaintiff is that when there is wet weather, water collects in areas of the basement and do not drain off. Three explanations were given in evidence as to the cause of entry of water into the car park: being carried in by vehicles entering out of the rain, running down the ramps and not all being collected in the drains at top and bottom, and overflow from the drainage sump near the bottom of one of the ramps. It is also claimed by the Plaintiff that the reason the water does not disperse, but collects in some areas, is that the floor was unevenly laid by the Defendant. It is submitted by the Defendant that water collecting in the basement is a result of poor design rather than defective workmanship in that there was no gradient specified for the floor in the plans and drawings, just a flat floor, so water cannot drain off into the perimeter drain, and apart from the ramp drains, there were no other drains within the perimeter.

22 A number of opinions have been given by the parties’ experts as to the reasons for the apparent uneven parts of the floor. Mr. Yapp considers it was caused by substandard concrete finishing. Mr. Loh Chong Sia of Jurutera Perunding RCS Sdn Bhd who were the engineers on the project team, and Mr. Joseph Chin Tsun Fung of Hanafi Konsaltan, the quantity surveyors on the project, and Mr. Chung Sze Kiat of Alamsejagat Consulting Engineers Sdn Bhd, are of the view that, had the screed originally intended to finish the flooring of the car park been used, the level of the floor could have been evened out even if the concrete base was not completely flat. The plans

for the floor of the basement originally included a concrete base with a screed covering. On 6th April 2016 the Defendant wrote to the architect proposing an alternative floor coating instead of the floor screed, which was approved by the architect by letter dated 24th April 2016. This was a product called CemCoat which was considerably thinner than the 30mm of screed would have been. This required enhanced finishing techniques to ensure that the concrete slab would be completely even and flat. However, I am told by Mr. Loh that this was not done and the Defendant relied on a “power float” to finish the surface of the concrete which, he says, is insufficient for achieving stringent flatness tolerances over such a large area. Mr. Lee Yun San, an architect and the principal of Arkitekta Design, on behalf of the Defendant, in his report considered that any ponding in the basement was the result of lack of any drainage within the perimeter, and of a gradient in the design to allow water to flow to the drains, and said that unevenness in the flooring was typical of car park floors and was fit for purpose as a car park.

23 It is apparent from the evidence and the photographs exhibited that there are still parts of the car park floor which are sufficiently uneven to allow water to pond when brought into or draining into the basement. Although he is incorrect in saying that the change in floor finishing was not approved, I otherwise accept the evidence of Mr. Loh that the Defendant failed to allow for the reduced thinness of the alternative coating and the concrete base was clearly not finished to the standard required to provide a floor that was completely level. While I accept that the finishing of the floor of a car park need not be to the standard of that in residential or retail premises, the evidence here of water collecting in some areas is overwhelming that the floor here was not completed with the workmanship expected of the contractor.

24 Having said that, I also find that there is some merit in Mr. Loh’s report as to the lack of drainage. As I have said, this was a very large area of basement car park of some 7000 square metres, if water were to be brought in, or leak into the area as it clearly does, where is it to go? The only difference with a perfectly flat floor would be that it would evaporate faster, but there would still be a period when, without any gradient, it would remain on the surface. This draws me to the inevitable conclusion that the design itself must bear some responsibility for water remaining in the car park. As to this, Mr. Lee also points out that the slotted drains at the bottom of the ramps are placed 4 metres away from the edge of the ramps meaning water flowing down the ramps has to travel this distance to be removed through the drain. He further says that the slotted drains at the top of the ramps are too short with surface gaps which allow water

to flow down the ramps with not enough being caught by the drains. Additionally he gives his opinion that with no roof over the ramps a larger than necessary amount of rainfall would fall directly on to the ramps themselves. This may well be the case, but the water collecting in areas of the basement is not really the complaint here, it is merely evidence of the defective workmanship by the Defendant in not ensuring an even floor. The source of the water is another matter.

25 Which brings me to the matter of the drain sump near the base of the ramp and the pipework leading from it to the oil trap and large sump. It is not in dispute that this was shown in the design drawings to be a straight pipe without any deviation but was constructed with two 90° bends which Mr. Chen concedes had to be added due to a minor deviation in the alignment of the sumps by the Defendant during construction, but as it was for water only not sewage, this should not have been a problem. However, it is clear that debris such as plastic bags and cigarette butts from the floor of the car park passed into the drain causing a reduced flow through the pipe as the bends create choke points where the debris accumulates. Mr. Chen also says that the matter had been discussed with the engineer's and the Defendant's representatives on site who had not objected, although we have heard no evidence from them except to the extent that Mr. Loh admitted that he and his clerk of works Mr. Jason had been present at times during construction of the drain pipe. Various attempts have been made to improve the situation including wire mesh to prevent debris entering the pipe and the installation by the Defendant of a submersible pump to assist removal of water in the sump. I would add here that the cost of running the pump has been claimed by the Plaintiff as an additional cost for which the Defendant should be liable. However, it is clear from the evidence that this is a small pump which could easily be removed and the Plaintiff has not sought to do so.

26 On the evidence before me it is clear that the bends in the pipes have caused the reduced flow of water through them as it is inevitable that some debris, oil and dirt will pass from the floor of the car park and the ramps into the drain sump and then into the pipe. However, whether the Plaintiff and his representatives knew of the addition of the bends is not clear, but it is possible on the evidence that they were made aware of the problem and did not object to the solution put forward by the Defendant. I am accordingly not satisfied that this is a defect for which the Defendant should be held responsible.

27 For the reasons above I find that the Defendant is liable for defective workmanship in failing to ensure that the basement car park floor was finished to an adequate degree of evenness but not in respect of the pipework from the drain sump. In the amended statement of claim the Plaintiff claims rectification costs arising from the defects. These have been assessed by Mr. Joseph Chin in his report and he arrives at a figure of BND\$378,890.20 for work to correct the floor of the basement. This is a slightly lower figure than that earlier obtained by the Plaintiff by way of quotations, but is the sum now claimed by Mr. Tang in his affidavit evidence in chief. It has been carefully calculated by Mr. Chin and no alternative figures have been put forward. I accordingly accept Mr. Chin's evidence and find that the Plaintiff is entitled to the sum of BND\$378,890.20 as rectification costs for this item.

“Water leakage from the basement's soffit ceiling also causing the ceiling to be discoloured.”

28 This refers to the finding of some water leakage from above the car park where the ceiling slab is also the foundation of the driveways outside the building. The evidence is by no means conclusive about this. While it is clear that there has been some leakage, the cause is less so except to the extent that the water has to come from crack lines of the ceiling slab. The Plaintiff's experts conclude that the only way that this can be caused is by poor workmanship: (i) in the construction by pouring concrete in wet weather thus allowing excess water to be added to the concrete mix and thereby weakening the slab; or (ii) failing to provide proper curing after pouring leading to rapid shrinkage and the development of micro-cracks and shrinkage cracks; or (iii) permitting weak joints to form by pouring a second part of the slab after the first has begun to harden; all of which allow ways for water to seep through the slab to the basement ceiling below. However, they admit that these are assumptions and there is no evidence that any of this has been tested or investigated.

29 Mr. Lee in his report for the Defendant puts forward another explanation that the slabs forming the ceiling of the basement and the base of the driveway are of insufficient thickness at 150mm. He says that this size of slab is the average thickness of those used for the 1st floor of residential properties and at ground level would be supported by a similar thickness of crushed rock and stone, and is not strong enough when supported by beams to withstand the imposed load of traffic on the driveway which could cause it to flex and crack.

30 Assumptions and theories are not evidence. The only definite evidence I have is the fact of water leakage through the concrete slab. How it was caused is far from clear. None of the Plaintiff's experts are able to agree on a specific reason why these cracks have appeared, only listing possible causes. On what has been produced to me I find that I am unable to conclude what is the more likely reason and accordingly have to find that the liability of the Defendant for this has not been established.

“Multiple areas of the shop lots’ screed flooring has hairline cracks and hollow issues.”

31 The matter of hairline cracks and hollow issues was raised with the Defendant during the defects liability period and the Defendant claimed to have rectified the problem, but Mr. Yapp claims that the defect persisted and was unsightly. Apart from the Plaintiff and Mr. Yapp there was no other direct evidence of this alleged defect as, at the time experts were engaged to report on the matter, the units affected were tenanted or occupied by purchasers and all had floor coverings over the screed floor, as no doubt was originally intended. Indeed, the Plaintiff himself confirmed that there were now no empty units, but it had affected his reputation. Mr. Lee was of the opinion that such cracks and hollow issues cannot be considered defects as they are superficial only. This appears to be the case as it has not prevented the units affected being sold or let. Although it is claimed in the amended statement of claim that the Plaintiff had lost potential buyers, there has been no evidence presented as to this.

32 I am accordingly satisfied that this is, if anything, a minor defect which has not affected the use of the premises for the purpose they were intended and cannot now support a claim against the Defendant.

33 The next alleged defect listed in the amended statement of claim is the fading of paint on the outside walls of the blocks, but I understand that this is no longer an issue, having been rectified.

“Uneven drain pipes connected from the rooftop gutter of Block A are damaged which cause pipes to burst and leak.”

34 This relates to three drainpipes from the roof gutter of Block A which became deformed and cracked and consequently leaked. Each of the blocks had 8 such drainpipes and the evidence is that these were the only three that failed of a total of 16.

There is no consensus between the experts, and the consultants on the project, as to what caused the fault to develop, particularly as it affected only three of sixteen. Mr. Yapp considers that it was material quality or installation stress with the pipes being over-tightened, improperly supported with no allowance for thermal movement such as flexible joints. Mr. Rizal agreed as to flexible joints. Mr. Chin is of the view that the method of jointing the pipes did not allow for thermal stress and was therefore inappropriate and Mr. Chung gave possible causes as material quality, insufficient support brackets and workmanship during installation but admitted these were only assumptions. Mr. Lee in his report says that the design was at fault in not providing enough downpipes of sufficient size to cope with the water flow from the roof of Block A.

35 None of the experts could explain why, if their suggested explanations were correct, only three drainpipes were affected. Indeed, Mr. Yapp in cross-examination admitted that he did not actually know the cause of the fault, he could only have suspicions. This again is a situation where a fault has occurred in part of the work carried out by the Defendant and I am asked to assume that it must therefore be owing to defective workmanship by the Defendant. It is for the Plaintiff to satisfy me of that to a degree where I can consider that the more likely cause. However, all I have been given to go on are assumptions and suspicions. This is not enough. The evidence is far from sufficient to satisfy me of any likely cause leading to a finding of poor workmanship and I cannot therefore so find.

“Multiple cracks on the face and corner of the walls of the hotel room at Block A, 5th floor.”

36 This complaint also includes cracks on the walls of the stairwell on the 5th floor on the other side of the wall between the hotel room and the emergency stairwell lobby. These were brought to the attention of the Defendant during the defects liability period and rectification work was carried out but it continued to be a problem.

37 Mr. Lee in his report gives his opinion that the cantilever structure of the emergency stairwell on this block places an excessive load on the structure of the block, particularly as changes were made to the original design, causing the cracks. This is denied by Mr. Loh whose report says that on inspection there were no cracks in the cantilever beam, or any deflection in any beam, column of slab and the structural elements remained fully intact. He goes on to say that the cantilever beams were

designed to accommodate all specified loads with appropriate safety factors. As to this I prefer the evidence of Mr. Loh and it is clear that this is not a structural matter, particularly as this is a localised crack and therefore unlikely to be the result of structural movement.

38 It follows that in this situation the only possible cause I can infer from the evidence is poor workmanship on the part of the Defendant and failure to adequately rectify the defect when asked to do so. Mr. Chin estimates the cost of repair here to be BND\$10,000.00 which, while it appears to be a large sum, is half that claimed in the amended statement of claim and is the sum I find the Plaintiff is entitled to.

“The waste pipes at Block B, 1st floor of the building were not installed properly. Pipes are protruding from the walls.”

39 According to Mr. Yapp, this alleged defect was first raised with the Defendant on 15th November 2019, some 17 months after the date of practical completion. There is no explanation why it had not been noticed or raised earlier. In any event it is argued by the defence that there was a conflict in floor layouts between the 1st and 2nd floor toilets making it difficult to route the waste pipes discreetly. The Defendant says that he installed the waste pipes in accordance with the drawings and specifications, and the only complaint here is that, if he had some difficulty with complying with the plans provided, he should have consulted with the project team. Even if that were the case, apart from the cosmetic effect of the appearance of the pipes, there is no evidence that the work was carried out in an unworkmanlike manner and I am not satisfied that this can be classified as a defect.

“Wrong installation of roofing fibre thick wool of 25mm when the agreed thickness is specified as 50mm.”

40 It is not in dispute that the Defendant installed insulation fibre material of 25mm thickness instead of the 50mm specified in the contract. However, this was dealt with by the project team by allowing a contractual credit in favour of the Plaintiff and a financial adjustment in the final account rather than requiring the Defendant to remedy the matter and the Plaintiff now accepts that this is no longer in issue.

“Poor workmanship or materials on the asphalt road which led to the deterioration of the road surface causing ponding and look (sic) unpresentable.”

41 The complaint here is of poor surface owing to substandard workmanship in laying the asphalt driveway round and between the two blocks of the development. This work was in addition to the scope of the main contract and was carried out between April and May 2018 by the Defendant's subcontractor Wellmix Industries Sdn Bhd. The correspondence shows a number of complaints being made to the Defendant of issues with the asphalt, which seems to have been acknowledged, as a number of attempts were made to rectify the defects. Indeed, on 26th April 2018 the site engineer wrote to the Defendant noting that they had observed that the concrete slab was not completely dry before the tack coat and asphalt were applied and said that "any separation of pavement from the slab surface shall be the full responsibility of your company". On 27th April 2018 the Defendant replied saying that more attention would be paid to the matter. There was also an issue concerning the vibratory roller causing damage to basement light fittings to which they also proposed a solution. There was also a site inspection by the parties the same day and the following day. The engineers wrote again on 30th April 2018 saying they had no adverse comments of the Defendant's proposals.

42 It is clear from this that the engineers were taking a close interest in the work of laying the asphalt although Mr. Loh said in evidence that the work was reviewed by them "occasionally", and they had no further complaints and no evidence of incorrect work. However, I am told that defects were apparent within the following months, complaints made and attempts at rectification made by the Defendant. A number of photographs have been produced of the asphalt surface showing clear evidence of wear with holes worn in the surface, some showing the concrete beneath and uneven areas causing ponding of water. It is not clear when all the photographs were taken, but the evidence on behalf of the Plaintiff is that the damage persists to the present except for one area which was repaired by a separate contractor employed by the Plaintiff in September 2025. No explanation has been offered as to why the whole of the defective area was not repaired earlier than this with the cost being claimed in these proceedings.

43 It is submitted on behalf of the Defendant that the damage, or some of it, could have been caused by the heavy machinery and cranes brought in by the Plaintiff's contractors to construct a third block on the island site between Block A and Block B in the course of 2018, work which was unconnected to that of the contract under consideration here. Mr. Yapp and Mr. Loh admitted in cross-examination that it was possible that heavy machinery could have damaged the road surface, and also the

scaffolding erected for this and other work on the site by other contractors without precautions such as footings, and Mr. Loh admitted that the photographs of the scaffolding showed no footings.

44 It is apparent from the evidence before me that there are several areas of asphalt surface which have deteriorated badly, some from quite an early stage and before construction of the island block commenced. I also consider it likely that some of the damage to the surface was the result of poor workmanship making it wear badly from normal use. However, it is also likely that some was caused, or made worse, by the heavy machinery and scaffolding brought in by other contractors unconnected to the Defendant, and wear and tear over the last 8 years since it was laid. Clearly some blame must be apportioned to the Defendant, but the lack of detailed evidence of surface area affected, and whether the entire roadway surface has to be removed and replaced, makes such apportionment a difficult task. Doing the best I can with what is before me I consider that the Defendant should be responsible for 50% of the remedial work.

45 Mr. Chin has given an estimate of the cost of repair at BND\$199,971.00. Mr. Wong disputes this as the original contract price was BND\$35,000.00. However, this did not include the cost of removing the existing asphalt. Having said that, Mr. Chin's estimate of BND\$156,840.00 just for laying of the new asphalt layer seems excessive compared to the original cost even taking account of inflation since then. In the amended statement of claim the Plaintiff quotes four tenders from contractors for this work, the highest of which is BND\$90,000.00 and I will take that as the estimate to be adopted here. I accordingly find that the Defendant is liable for the defects here in the sum of BND\$45,000.00.

46 I would add as a general comment that it is now eight years since practical completion of the project and it is part of the plaintiff's case that these defects have remained unrectified. It was always within the power and ability of the Plaintiff to have used independent contractors to rectify them at any stage, charging those he claimed were caused by Defendant to the retention money he still kept, or by claiming the costs in these proceedings. The failure to do so has two obvious consequences: some will have become considerably worse due to the passage of time and wear and tear over the years and will require more work to rectify than might otherwise have been the case; and with inevitable inflation the costs will have increased considerably from those which would have been incurred had they been dealt with earlier. I have factored this

into my assessments of financial liability of the Defendant, where I have so found, and, where more than one estimate of the cost of rectification has been given either in the statement of claim or by the expert witnesses, I have chosen the lowest.

Other matters

47 The Plaintiff also claims the sum of BND\$3,000.00 a month for the cost of hiring a maintenance team to clean the basement when it rains and water collects. The evidence for this is a letter dated 9th January 2019 from a company called Serviclean Sdn Bhd giving a quote for this sum for this and other cleaning work. While the letter is signed as agreed and accepted by the Plaintiff, there is no other documentary evidence to show that it has ever been paid. If it had, as the Plaintiff claims in evidence, there would be invoices and payment vouchers and receipts, but none have been produced. I cannot therefore be satisfied that it was ever paid. In any event, the cleaning work being attributed to the defects, had the Plaintiff taken any steps to mitigate the damages by effecting rectification himself earlier, the maintenance claimed would not have been necessary, as it will not be following these proceedings when the financial aspects have been settled and defects rectified. For these reasons I find the claim for past and future maintenance unsubstantiated.

48 The Plaintiff also claims the defects have caused him to lose prospective purchasers and tenants. No evidence of this was put forward at all and no particulars were given. The only evidence as to occupancy was in relation to the floor cracks in the retail units which could not be examined as the units were fully let or sold. I accordingly find there is no merit to this claim.

Conclusion

49 For the reasons above I find that the Plaintiff succeeds to the extent of his claim for liquidated and ascertained damages in the sum of BND\$420,000.00 and is further entitled to recover the cost of rectification as follows:

- | | | |
|------|--------------------|-----------------|
| (i) | Under paragraph 26 | BND\$378,890.20 |
| (ii) | Under paragraph 37 | BND\$10,000.00 |

(iii) Under paragraph 44

BND\$45,000.00

BND\$433,890.20

I therefore find that the Plaintiff is successful in his claim to the extent of the sum of BND\$853,890.20. From that must be deducted the sum of BND\$736,133.54 being the retention money held by the Plaintiff, as it has never been in dispute that the Defendant is entitled to this, subject to the claims made herein. There will accordingly be judgment for the Plaintiff for the sum of BND\$117,756.66 with interest thereon at judgment rate from the date hereof. The Defendant's claims for return of the retention sum and for prolongation costs are dismissed

50 As the Plaintiff has been largely successful in these proceedings, there will also be an order nisi for costs for the Plaintiff to be taxed if not agreed.

A handwritten signature in black ink, appearing to read 'Edward T. Starbuck Woolley', is written over a light gray rectangular background.

EDWARD TIMOTHY STARBUCK WOOLLEY

Judicial Commissioner