HCA 146/2015

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

HIGH COURT ACTION NO 146 OF 2015

BETWEEN

WING BO BUILDING CONSTRUCTION COMPANY LIMITED	Plaintiff
and	
DISCREET LIMITED	Defendant

Before : Deputy High Court Judge Marlene Ng in Chambers

Date of Hearing : 1 December 2015

Date of Handing Down Decision : 14 January 2016

D E C I S I O N

I. INTRODUCTION

1. The plaintiff is a building contractor. The defendant was the registered owner of the property known as Lot 496 in Demarcation District 399 (formerly known as Lot 414 RP and 415 of DD399), Ting Kau, Tsuen Wan, New Territories ("Property").

2. In/about 2005, the defendant was desirous of developing the Property by building 13 houses for residential use ("Project"). In/about 2006, the defendant engaged a contractor to complete the foundation and sub-structure of these 13 houses.

3. By a Main Contract dated 1 September 2007 ("Contract") made between the defendant as employer and the plaintiff as the main contractor, the defendant agreed to pay a lump sum price of $62,996,847.63 and the plaintiff agreed to undertake the construction of 13 houses at the Property for the Project. The defendant initially appointed CHIH Design Ltd as architect under the Contract ("CHIH Design"), but later replaced CHIH Design with K&W Architects Ltd ("K&W").

4. The Contract included *inter alia* 2 letters of intent both dated 19 July 1997 issued by CHIH Design for the defendant to the plaintiff, acknowledged by the plaintiff, and countersigned by the defendant ("Letters"). In the Letters, the defendant confirmed the acceptance of the plaintiff's tender for 10 houses and the remaining 3 houses at the price of $48,381,579 (rounded up figure) and $14,615,268 (rounded up figure) respectively. The Letters showed the total contract sum for the 13 houses was a lump sum price of $62,996,847.63.

5. The Letters provided *inter alia* that:

> "4. The above contract sum is subject to final measurement but in no case shall the re-measured contract sum be larger than the said figure unless the works were varied by instruction causing additional cost to [the plaintiff]. ……
>
> 5. The total contract sum (for 13 nos of houses) of **HK$62,996,847.63** mentioned above is calculated [based] on [the plaintiff's] previously submitted prices, quotations from sub-contractors and allowance for profit taking etc. **This sum is a lump sum price [based] on drawings and specification**. …… The rate and quantity of works registered herein below will be used for ascertaining the value of interim payment as well as the final contract sum of this contract [based] on actual measurement or fair and reasonable adjustment / proportioning ……"

6. Appendix B to the Letters set out the Conditions of Contract that formed part of the Contract. Such Conditions of Contract consisted of *inter alia* the articles of agreement and general conditions of contract in the "Agreement & Schedule of Conditions of Building Contract for use in Hong Kong, Private Edition (Without Quantities)" issued by the Hong Kong Institute of Architects, Second Edition 1976 (April 1998 revision) ("GCC").

7. Clause 35 of the GCC ("Clause 35") was an arbitration clause that provided for submission of any dispute/difference to arbitration as follows:

> "35. Arbitration
>
> (1) Provided always that in case *any dispute or difference shall arise between the Employer* or the Architect on his behalf *and the Main Contractor*, either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or *as to any matter or thing of whatsoever nature arising thereunder or in connection therewith* (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any certificate to which the Main Contractor may claim to be entitled or *the measurement and valuation mentioned in Clause 30(5)(g) of these Conditions or the rights and liabilities of the parties under clauses 25, 26, 32 or 33 of these Conditions*), then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or, failing agreement within fourteen days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party by the President or Vice-President for the time being of the Hong Kong Institute of Architects co-jointly with the President or Vice-President for the time being of the Hong Kong Institute of Surveyors.
>
> (2) Such reference, except on Article 3 or Article 4 of the Articles of Agreement, or on the questions whether or not the issue of an instruction is empowered by these Conditions, whether or not a certificate has been improperly withheld or is not in accordance with these Conditions, or on any dispute or difference under clauses 32 and 33 of these Conditions, shall not be opened until after Practical Completion or alleged Practical Completion of the Works or termination or alleged termination of the Main Contractor's employment under this Contract, or abandonment of the Works, unless with written consent of the Employer or the Architect on his behalf and the Main Contractor.
>
> (3) Subject to the provisions of clauses 2(2) and 30(7) of these Conditions the Architect shall, without prejudice to the generality of his powers, have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to him in the same manner as if no such certificate, opinion, decision, requirement or notice had been given.
>
> (4) The award of such Arbitrator shall be final and binding on the parties.
>
> ……"

Clause 35, which governed the dispute resolution mechanism between the parties on any matter arising under or in connection with the Contract, had not been amended or varied by the Special Conditions of Contract.

8. From 13 November 2007 to 7 January 2013, the plaintiff made a total of 29 applications for interim payment for its work done under the Contract.[1] Pursuant to such applications for interim payment, the defendant paid a total sum of $70,377,001.08 to the plaintiff. The plaintiff practically completed the Works under the Main Contract. On 28 January 2013, K&W certified that practical completion of the whole Works under the Agreement was achieved on 15 January 2013.

9. Under cover of its letter dated 23 April 2013, the plaintiff submitted for the defendant's comments a "Draft Update Final Account" ("23/4/10 Draft Account") for the remaining/outstanding balance payable by the defendant to the plaintiff under the Contract in the sum of $5,234,329.93 ("Outstanding Sum"). According to the 23/4/10 Draft Account, the final contract sum for the Works done should be $78,064,019.65 (after addition for compensation and ex-gratia payment of $11,590,675.99 and deduction for previous payments and direct payment made by the defendant to the plaintiff's sub-contractors), and the plaintiff claimed against the defendant for a net sum being the Outstanding Sum.

10. Later, by its email dated 13 June 2013, the plaintiff informed the defendant the final contract sum would be revised to $77,808,589.27 and after taking into account deduction for previous payments and direct payment made by the defendant to the plaintiff's sub-contractors, the plaintiff claimed a net sum of $4,517,407.55 ("Revised Sum") payable by the defendant.

11. After assessing the plaintiff's submitted draft final account, the defendant informed the plaintiff *via* email dated 25 June 2013 that the final contract sum of $77,808,589.27 as stated by the plaintiff should be adjusted by 14 deduction items totalling $5,435,630.34 ("Contra-charges"), and upon taking into account such adjustment the final contract sum should be $72,372,958.93.

12. By its letter dated 15 July 2013, the plaintiff did not agree to this final account and maintained the final account sum should be $77,808,589.27 instead of $72,372,958.93. Since then there had been discussions between the parties, but they could not agree on the final contract sum.

13. The plaintiff complained that despite the issuance of the draft final account and repeated requests/demands, the defendant failed/refused to settle the Revised Sum.

14. Discussions at a meeting held on/about 20 January 2014 among the plaintiff's director Mr Wilson Wong (also known as Wong Wing Yiu, "Wong"), the defendant's director Mr Daniel Kwan (who incidentally was an architect/engineer, "Kwan") and a quantity surveyor and consultant of The Contracts Group Limited ("CGL") Mr Raymond Szeto ("Szeto") led to a written agreement dated 23 January 2014 signed by Kwan for the defendant (Party A), Wong for the plaintiff (Party B) and Szeto (Party C) ("Agreement").

15. Pursuant to the Agreement, the parties agreed to appoint Szeto to provide quantity surveying services as specified therein. Szeto's fees in the sum of $95,000 were to be jointly and severally borne by the plaintiff and the defendant. The Agreement provided *inter alia* that:

> "**(B) Scope of Services**
>
> (1) *The scope of the Services shall include preparation and assessment of new rates for items of the final measurement on internal and external finishes*, including blockwork, waterproofing, plastering, tiling, granite, marble works, wooden floor tiles and painting. The items of final measurement are related to those identified and measured by [Szeto] and agreed by [the defendant and the plaintiff] under the previous services agreement with Contract Groups Limited and dated 23 March 2012 for the villas and external areas of the above-mentioned Project. For the sake of clarification, the new rates necessary to be assessed under the Services will be for those items not contained in the original Bills of Quantities.
>
> (2) Examine and review the formwork quantities for the project and reconcile the differences in formwork quantities between those measured and provided by [the defendant and the plaintiff].

(3) *Prepare and present the overall final account statement for the whole project incorporating final account values for all items of works*. For the purposes of the Services under this item and with the exception of the measurement and valuation tasks to be responsible by [Szeto] as set out in B(1) and B(2) above, *[the defendant and the plaintiff] shall provide [Szeto] all necessary final account related information, contract documents, cost records and summaries for consolidation and preparation of the final account statement*. The said information, documents etc shall be made available to [Szeto] prior to the commencement of the Services.

(4) The Services with respect to the foregoing items only include works for the superstructures and shall exclude all works for piling foundation and sub-structures.

……

(D) <u>Binding Effect of Independent review/Assessment</u>

(1) *As the review and assessment of the final account to be conducted by [Szeto] under this Agreement is deemed to be independent and final, both [the defendant and the plaintiff] hereby agree that the result of the independent review and assessment of the final account to be produced and issued by [Szeto] shall become final and binding among all concerned parties under this Agreement.*" (my emphasis)

16. Pursuant to the Agreement, the defendant sent Szeto copy of the plaintiff's draft final account submitted to the defendant and the 14 items of Contra-charges that the defendant took particular issue on.

17. On 28 July 2014, Szeto sent his report to the parties that set out his "Final Account Assessment" ("<u>July 2014 Report</u>"). In the July 2014 Report, Szeto set out his methodology, assumption and basis for preparing such report:

"**Scope of Review and Assessment**

(1) The final account is prepared and updated mainly based on the scope/extent of works which are identified and included in [the Agreement] comprising the following work items:

(a) Preparation and assessment of new rates for items of the final measurement on blockwork, internal finishes and external finishes for the superstructure works of the project.

(b) Examine and review the formwork quantities for the project and reconcile the difference in formwork quantities between those measured and provided under a separate and previous assignment.

(c) Prepare and present the overall final account statement for the whole project incorporating final account values for all items of work including assessment on those items by others, not covered under [the Agreement]."

18. The July 2014 Report went to provide as follows:

"**Contents of Final Account Statement**

(2) This final account statement for the intended purpose of the Services is prepared and compiled with the following parts of the document:

(a) The Main Statement Summary listing all the essential work items and values assessed either under the scope of [the Agreement] (as highlighted) or by other parties not within the scope of [the Agreement].

(b) Appendix A – items of Blockworks

(c) Appendix B – items of Internal Finishes

(d) Appendix C – items of External Finishes

(e) Appendix D – items of Variation Works

(f) Appendix D1 – Assessment of Formwork Quantities

(g) Appendix E – Assessment on Levies

Contractor's Submitted Draft Final Account

(3) The final account is prepared basically based on [the plaintiff's] draft final account submitted to [the defendant] via letter dated 23 April 2013, a copy of which was provided for by Mr Thomson Chan ([the defendant's] QS) via email dated 4 March 2014. As agreed, this latest draft final account submitted by the Contractor was provided for preparing the Final Account Statement required under the [Agreement]. There are **39 items** in the said draft final account summary. Only the following 4 items have been reviewed and assessed, which are works related to the assessment required under [the Agreement]:

(a) item 8 – Blockworks (Appendix A contains details of valuations)

(b) item 9 – Internal Finishes (Appendix B contains details of valuation)

(c) item 10 – External Finishes (Appendix C contains details of valuation)

(d) item 36 – Variation items VI to V2 (Appendix Defendant contains details of valuation)

(4) The remaining **35 items** have not been reviewed or re-assessed and the related values or amounts as indicated remain unchanged as they are outside the scope of the Services. An additional item 40 is added to this final account to cover the additional payment on "Levies" due to increase in contract sum.

……

Confirmation of Agreement to Final Account

(8) The net balance of **$3,689,994.10** as mathematically determined and shown at the end of the Final Account Statement (page 5 or 5) does not necessarily represent the final agreed amount between [the defendant and the plaintiff] owing to the fact that the scope of final account assessment under [the Agreement] is limited to those items as mentioned in (1) above. The values or amounts for all remaining items, which are beyond the extent of assessment defined in [the Agreement], are subject to confirmation of agreement between [the defendant and the plaintiff]."

19. Subsequently, upon the parties' request for clarification, Szeto published another report dated 5 September 2014 on "Final Account Assessment" ("September 2014 Report"). Compared with the July 2014 Report, Szeto clarified why he did not assess the 14 items of Contra-charges submitted to him by the defendant, ie the assessment of those items was outside the Agreement:

> "**Deduction Adjustment to [the plaintiff's] Draft Final Account**
>
> (9) A list of 14 items of deduction adjustment for various reasons were provided via [the defendant's] email dated 15 August 2014. This list of deduction has been reviewed. The proposed deductions are related to various aspects comprising, for example, payments for levies, adjustment for PC rates, backing plywood for wooden floor, movement joints, backfilling work, profit/attendance, flooding to lift shaft etc. The assessment on the deductions for these items of work is outside the scope of [the Agreement] (Item 1 above refers). Further, the independent consultant is not fully aware of the rationale, basis, responsibility and liability for such items of deduction. In view of the foregoing reasons, the assessed final account under [the Agreement] has not taken into account any deduction items on the list provided on 15 August 2014."

Paragraph 10 of the September 2014 Report repeated what was stated in paragraph 8 of the July 2014 Report.

20. Szeto derived the sum of $3,689,994.10 ("Sum") from the plaintiff's 23/4/10 Draft Account and Szeto's review of 4 items of works as follows:

	Item	Amount (HK$)
1	Total Contract Sum, before adjustment (A)	64,929,007.83
2	Less previous payment (B)	(70,377,001.08)
3	Less direct payment to sub-contractors (C)	(2,452,688.64)
4	Compensation and ex-gratia payment (D)	11,590,675.99

5	Net after adjustment (A+B+C+D)	3,689,994.10

21. As evident from the July and September 2014 Reports, Szeto qualified his assessment results by stating that the overall final account statement in such reports only took into account a few categories of work items covered in the Agreement,[2] which meant out of the 39 items shown in the plaintiff's 23/4/10 Draft Account submitted to the defendant he only reviewed 4 items[3] with an additional item 40 included in the overall final account statement to cover additional payment on "levies" due to increase in contract sum. Szeto did not assess or include in his reports the Contra-charges as they were considered by him to be outside the Agreement.

22. Kwan for the defendant indicated to both Wong for the plaintiff and Szeto by email dated 6 September 2014 that the defendant did not agree with the overall final account statement in the September 2014 Report which did not take into account all cost information provided by the defendant (including the Contra-charges). The defendant was of the view that Szeto did not produce any binding final account in relation to the Works carried out by the plaintiff under the Contract, so there existed a dispute between the parties on the final account, which dispute should be referred to a sole arbitrator for his determination pursuant to Clause 35.

23. On 31 October 2014, the plaintiff issued an invoice to the defendant in respect of the Sum. By its letter of the same date to the defendant, the plaintiff indicated the levies and marble unit rates in the September 2014 Report were underestimated, but it was prepared to agree to Szeto's assessment of its final account on the following conditions:

(a) the plaintiff would have no liabilities of payment including retention money to all the nominated sub-contractors; and

(b) the Sum assessed by Szeto would be paid by the defendant within 7 days after issuing of invoices by the plaintiff.

24. Despite the plaintiff's requests, including a letter dated 7 November 2014 issued by the plaintiff (and sent by registered post) to the defendant, the defendant did not pay the Sum to the plaintiff.

25. On 16 January 2015, the plaintiff commenced the present action to claim against the defendant for the Sum as the outstanding value of the Works under the Contract with interest and costs.

26. By a letter dated 27 February 2015 to the plaintiff's solicitors, the defendant's solicitors requested the plaintiff's consent to jointly apply to court to stay the present action in favour of arbitration. The defendant contended Clause 35 was an arbitration agreement that was operative as between the parties, and there was a real dispute or difference between the parties in respect of the final account to be ascertained under the Contract which fell within the ambit of the arbitration agreement and was fit and proper to be referred to arbitration. The defendant argued that the present action should be stayed in favour of arbitration with costs to the defendant on indemnity basis.

27. On 3 March 2015, the plaintiff's solicitors replied to say the plaintiff was unwilling to accede to such request. On 23 March 2015, the defendant filed a summons ("Summons") for an order that all further proceedings in the present action be stayed pursuant to section 20 of the Arbitration Ordinance Cap 609 ("Ordinance") on the basis that the parties having entered into a written contract that contained an arbitration clause shall refer to arbitration the matters in respect of which the present action was brought, and for an order that the plaintiff do pay the defendant its costs of and occasioned by the present action including the Summons on an indemnity basis to be taxed if not agreed.

28. On 31 March 2015, Master M Wong gave directions for the filing of affirmations, and ordered that the Summons be adjourned to a date to be fixed for argument before a master in chambers with 3 hours reserved. The defendant filed Kwan's 1st and 2nd affirmations on 25 March and 8 May 2015 in support of the Summons, and the plaintiff filed Wong's affirmation in opposition on 17 April 2015.

29. The substantive hearing for argument in respect of the Summons came before Master Leong on 7 July 2015 ("Master Hearing"). The learned master dismissed the Summons and awarded costs of and occasioned by the Summons to the plaintiff with counsel's certificate ("Leong Order").

30. On 20 July 2015, the defendant filed Notice of Appeal against the Leong Order ("Appeal"). The hearing of the Appeal came before me on 1 December 2015 ("Appeal Hearing").

31. At the Appeal Hearing, I asked both Mr Houghton SC, counsel for the defendant, and Mr Barlow SC (and Mr Ho with him), counsel for the plaintiff, to explain why (a) the Summons was heard before Master Leong and (b) the Appeal was fixed to be heard before me rather than by a judge in the Construction and Arbitration List. I drew their attention to paragraphs 3(4) and 10 of Practice Direction 6.1 which provide that:

> "3. The classes of action within the List include (but are not limited to) cases concerning the following:
>
> ……
>
> (4) applications relating to arbitration whether arising under the Arbitration Ordinance (Cap 341), Rules of High Court ('RHC'), Order 73 or otherwise.
>
> ……
>
> 10. Any application (including applications in an action outside the List) relating to an arbitration should normally be listed to be heard by the Judge or a designated Judge."

32. I also referred senior counsel to *Rondabosh International Limited v China Ping An Insurance (Hong Kong) Company Limited*.[4] In that case, the defendant's application to stay the plaintiff's claim pursuant to an arbitration agreement in the insurance policy was scheduled to be heard before me sitting as a master. In keeping with paragraph 10 of Practice Direction 6.1, I transferred the application to be heard before Reyes J who reminded as follows:

> "23. Practitioners should note that all applications relating to arbitration ought to be listed for hearing before a judge in the Construction and Arbitration List in the first instance, not before the master. This practice is long-established. It ensures that applications concerning arbitration are dealt with expeditiously and in a uniform manner by specialist judges. It will only be in exceptional cases that applications relating to arbitration will be entertained by a master."

33. Neither Mr Houghton SC nor Mr Barlow SC (both of whom did not appear at the Master Hearing) could enlighten this court as to why the Summons was heard by Master Leong. I expressed concern that even the Appeal was not scheduled to be heard before a judge in the Construction and Arbitration List. However, both counsel urged me to hear the matter since (a) both sides had committed time and costs in bringing the Appeal before this court, and (b) the arguments adopted by both parties for the purpose of the Appeal were more refined and narrowed. With some misgivings, I acceded to senior counsel's request. But I must warn that in future the court is unlikely to smile kindly on any attempt to sidestep the requirements in Practice Direction 6.1, and those who do so without good reason may have to bear any wasted costs arising from a master/judge adjourning an application to a specialist judge.

II. LEGAL PRINCIPLES: APPEAL FROM MASTER's ORDER

34. It is trite that an appeal from the master to judge in chambers is dealt with by an actual rehearing of the application which led to the order under appeal, and the judge treats the matter as though it came before him for the first time. Although the judge is in no way bound by the previous decision of the master, he will give the weight it deserves to such previous decision.[5]

35. Although the transcript of the Master Hearing was included in the hearing bundle, neither senior counsel referred to it. As explained above, both senior counsel had refined their arguments for the purpose of the Appeal Hearing, and I do not propose to revisit the reasons/decision by the learned master.

III. LEGAL PRINCIPLES: STAY OF PROCEEDINGS

36. Section 20 of the Ordinance provides for a mandatory stay of proceedings in favour of arbitration where the action is the subject of an arbitration agreement unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

37. Where the parties have expressly agreed to refer disputes or differences to be determined by arbitration, it is generally safe to assume that it is their intention to have such disputes or differences to be resolved only by arbitration.[6] Mr Houghton SC submitted that the courts in Hong Kong have been rigorous in their application of the provision requiring a mandatory stay in all but exceptional circumstances.[7] This is borne out by the Reasons for Decision in *Chimbusco International Petroleum (Singapore) Pte Ltd v Fully Best Trading Limited* handed down by Mimmie Chan J 2 days after the Appeal Hearing:[8]

> "11.The modern trend of the courts is to uphold arbitration agreements, to facilitate arbitrations, and (save in circumstances necessary to safeguard due process and as allowed under the international Conventions) not to intervene in an arbitration, which is the parties' free choice as to the method of dispute resolution, and the substantive law and forum to govern and oversee the arbitration.
>
> 12. As a matter of public policy, Hong Kong as a party to the New York Convention has the duty to comply with its duties under Article II of the Convention: to recognize and enforce an arbitration agreement and to stay actions before the Court in breach of a valid and subsisting arbitration agreement. Under s 20 of the Arbitration Ordinance, a Court before which an action is brought in a matter which is the subject of an arbitration agreement 'shall' refer the parties to arbitration, unless the Court finds that the agreement is null and void, inoperative or incapable of being performed. The Court has the duty to stay an action in accordance with the arbitration agreement found to exist."

38. In *Tommy CP Sze & Co v Li & Fung (Trading) Ltd & ors*,[9] Ma J (as he then was) set out the approach of the court in dealing with an application for stay in favour of arbitration, saying there were 4 questions which a court must generally deal with in such application: (a) is there an arbitration agreement between the parties? (b) is the clause in question capable of being performed? (c) is there in reality a dispute or difference between the parties? (d) is the dispute or difference between the parties within the ambit of the arbitration agreement?

39. In deciding whether or not a dispute or difference comes within the ambit of an arbitration agreement (and therefore whether or not it should be referred to arbitration), the court adopts the following approach: (a) it must first construe the arbitration agreement itself, (b) next it must analyse the nature of the dispute or difference by reference to the claim which has been made to decide whether or not the dispute or difference is one that is covered by the arbitration agreement, and (c) the content of the defence is generally irrelevant to the question in (b) above but the defence is relevant where a true construction is made consisting of claims that do not come within the ambit of the arbitration agreement.[10]

40. The onus lies on the defendant to demonstrate, *prima facie*, that an arbitration agreement exists which covers the scope of the dispute and binds the parties,[11] and that in light of the above background there remains an unresolved *bona fide* arbitrable dispute. The court should look at the evidence in support of the contention that there is a *prima facie* or plainly arguable case that the parties are bound by an arbitration clause, and if the evidence is cogent and arguable, and not dubious or fanciful, then the test has been satisfied.[12] To put this in another way, unless the point is clear, the court should not attempt to resolve the issue and the matter should be stayed for arbitration[13] as it is for the arbitral tribunal to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.[14] Tang VP in *PCCW Global Ltd v Interactive Communications Service Ltd* reiterated the importance of the court not usurping the function of the arbitrator, and that unless the court is clear the matter should be stayed for arbitration.[15] In *Private Company 'Triple V' Inc v Star (Universal) Co Ltd & anor*, Litton VP cautioned against going into the matter more deeply than to take a *prima facie* view.[16]

41. In this application, I propose to adopt the approach set out above.

IV. BACKGROUND EVIDENCE

42. As explained above, Mr Houghton SC and Mr Barlow SC had refined and narrowed their arguments for the purpose of the Appeal, and in doing they have avoided some of the factual issues that had arisen from the affirmation evidence and that had exercised the court below. In the circumstances, I shall concentrate on the issues in dispute and will not refer to the other matters in any great detail. However, I hasten to add that I have considered the affirmation evidence in their entirety in coming to my conclusions.

43. Wong claimed Szeto had been previously appointed to resolve the parties' earlier disputes in relation to the Project. He claimed that at/about the beginning of 2012 when the plaintiff had practically completed the contracted Works in relation to the Project, disputes arose between the parties over the quantity of works done at the site. At that time the plaintiff had not yet produced its quantities for blockwork and internal/external finishes for checking by the defendant and the architect, but to reduce the scope of disagreement Wong and Kwan agreed to engage a quantity surveying expert to carry out independent measurement of these items of works and to leave the disputes over other re-measurement items[17] and variation works to be resolved at the final accounts stage. Wong claimed that Kwan suggested they should appoint his friend Szeto who was a consultant of CGL. On/about 7 March 2012, Wong attended Szeto's office in Wanchai with Kwan for a meeting during which Kwan briefed Szeto about the status of the Project and explained the nature of the dispute. Wong further claimed Kwan indicated to Szeto the parties agreed to appoint him as an "adjudicator" to resolve their dispute once and for all. They discussed Szeto's fees and agreed for such fees shall be borne equally by the parties. Wong said that on/about 22 March 2012 he and Kwan again attended Szeto's office to sign a Letter of Appointment dated 22 March 2012 ("Appointment Letter"). On such basis, Wong claimed the parties' joint appointment of Szeto as an "adjudicator" in 2012 (and later in 2014) to "determine their disputes" was inconsistent with Clause 35, and was in fact a clear indication that the defendant preferred to resolve disputes in such manner rather than by arbitration.

44. The Appointment Letter was made by Wong for the plaintiff, Kwan for the defendant and CGL, and CGL's scope of services was defined as follows:

> "**(B) <u>Scope of the Services</u>**
>
> (1) The scope of the Services shall include preparation of measurement for blockwork, internal and external finishes, including waterproofing, plastering, tiling, granite, marble works, wooden floor tiles and painting for the following houses and external areas:
>
> (i) While there are 13 nos. of houses in this project only 4 houses are selected for measurement purposes under the Agreement. The 4 houses selected shall comprise 2 nos. corner houses (Villas A and G) and 2 nos. non-corner houses (Villas D and H)
>
> (ii) Upper and Lower Car Parks with all associated rooms and stair
>
> (iii)All external areas including waterproofing and finishing works for 4 nos. swimming pool (one largest, one smallest and two medium size pools to selected upon commencement of the measurement work)
>
> (2) The Services excludes claddings, glazing, carpentry & joinery, drainage & plumbing works, earthworks, steelworks, concrete, formwork, reinforcement and all other elements of works not covered by the scope specifically set out in (1) above.
>
> ……"

45. On/about 26 October 2012, Szeto of CGL eventually issued a final version of the Bill of Quantities ("<u>B/Q</u>") by email to Kwan and Wong:

> "We attach the final version of Bill of Quantities (BQ) for this project. The quantities and other details in the BQ have been reviewed and agreed by the QS of [the plaintiff] following some final adjustments as per [the plaintiff's] letter dated 24 September 2012.
>
> Our scope of services (ie. measurement of blockwork, internal and external finishes) is complete. Accordingly, we have already separately forwarded our invoice or the balance of fee payment in accordance with our Agreement of 22 March 2012."

46. Wong claimed the quantity of works done by the plaintiff as *per* the final account was based on the B/Q as assessed/and determined by Szeto. Wong suggested Kwan accepted and did not challenge Szeto's findings/assessment on the issue of quantity ever since the issuance of his report back in October 2012. But Kwan disagreed, saying that although such email stated the B/Q for the Project was attached, the attachment showed only quantities for 3 items of works (ie blockwork and internal/external finishes) without (a) provision of rates or (b) information on other items of works (including quantities and rates), which (according to Kwan) was hardly surprising as CGL's services were merely to measure the quantities for the 3 items of works only.

47. Kwan claimed he only knew Szeto through Mr Wong Wai Yee who was then director of Furgo (HK) Ltd,[18] and he had never met or known Szeto prior to his work as defined in the Appointment Letter, so Kwan would not have introduced Szeto to anyone (including Wong) as his friend. It was Szeto who, upon discussion with Wong and Kwan, drafted the Appointment Letter that provided CGL would charge a lump sum fee of $108,000 for which the parties would be jointly and severally liable. The defendant promptly settled its half share of Szeto's fees.

48. Secondly, Kwan denied the plaintiff had practically completed the contract works for the Project at/about the beginning of 2012 since the Project Works were practically completed only on 15 January 2013 as evident from the practical completion certificate issued by the architect on 18 January 2013.

49. Thirdly, Kwan denied he had indicated to Szeto the parties agreed to appoint him as an "adjudicator" to "resolve their dispute once and for all". Kwan never thought of Szeto as an "adjudicator", and such role was not set out in the Appointment Letter or in the Agreement. Kwan said if the parties could not resolve their disputes by settlement, they would have to go for arbitration since this was what they had agreed (and the defendant would not have preferred to have disputes resolved by adjudication instead of arbitration).

50. Fourthly, Kwan said since Szeto only did half of his work (ie production of the quantities only without assessing the rates) under the Appointment Letter, he was not in a position to say at that stage whether Szeto's findings/assessment should be accepted or not.

V. PLAINTIFF's AFFIRMATION EVIDENCE

51. Wong said that in view of the defendant's failure/refusal to pay the sum due to the plaintiff under the final account, he telephoned Kwan in late 2013 or early January 2014 to press for payment. Kwan proposed to have the dispute over the final account determined by Szeto, but Wong disagreed as the plaintiff did not wish to incur the additional expenses for such exercise. To induce the plaintiff to agree, Kwan assured Wong the defendant would effect prompt payment once Szeto determined the final account. Wong was still reluctant because he was concerned as to the impartiality of Szeto (who was Kwan's friend) for the proposed task, so he made the excuse that the plaintiff was short of funds to pay Szeto's fees. But Kwan said he would convince Szeto to let the plaintiff pay its half share of Szeto's fees after the plaintiff obtained payment from the defendant, so Wong finally agreed. On/about 23 January 2014, Wong attended Szeto's office to sign the Agreement which incorporated a full and final settlement clause in respect of the present dispute. It was Kwan (not Wong) who specified the scope of service in the Agreement. Wong told Szeto (who agreed) the plaintiff would only pay its half share of his fees after receiving full payment from the defendant, and the plaintiff still had not yet paid its share of Szeto's fees under the Agreement.

52. Wong said that after the July and September 2014 Reports were issued, the defendant still failed/refused to pay the plaintiff the Sum that Szeto assessed as due by the defendant under the final account, but the defendant never disputed the final assessment by Szeto or brought up the issue of arbitration until the present action. Such failure/refusal to pay the Sum amounted to breach of the parties' agreement to be bound by Szeto's decision/determination. The Agreement was not subject to any arbitration clause or referable to the underlying Contract. Indeed, it would be startling to suggest that Szeto could only recover his fees from the plaintiff for services rendered under the Agreement through the arbitration clause in the underlying Contract which Szeto might not even be aware of. Wong claimed the defendant's purported jurisdictional defence was an unjustified excuse to delay the plaintiff's just entitlement under the Agreement (and in turn the settlement agreement).

VI. DEFENDANT's AFFIRMATION EVIDENCE

53. Kwan claimed the plaintiff commenced the present action in breach of Clause 35 by disguising its demand for the Sum under a so-called "settlement agreement" allegedly evidenced by the Agreement, but notwithstanding the Agreement was intended to provide a final and binding result on the assessment of the final account, there was a clear dispute between the parties on the final account of the Contract, and Szeto's assessment as evidenced by the July and September 2014 Reports did not cover all final account items or provide a conclusive final account which settled the differences between them. Kwan said the parties' genuine dispute over the final account on the value of works done under the Contract and what amount should be due and owing and from whom should be resolved by a sole arbitrator conversant with the building industry and practice pursuant to Clause 35. Significantly, the parties disputed over whether (a) there was a net balance in the amount of the Sum payable by the defendant as shown in the September 2014 Report or (b) there was a net sum payable by the defendant or the plaintiff as a result of the Contra-charges (or any assessed value thereof) that should be included/assessed in the final account.

54. Kwan said neither the Appointment Letter nor Agreement provided Szeto's role was that of an "adjudicator" or some similar role. Kwan claimed it was clear from the Agreement and July/September 2014 Reports that the services to be rendered and actually rendered by Szeto were in gist (i) preparation and assessment of new rates for items of final measurement on blockwork and internal/external finishes, (ii) examination and review of the formwork quantities, and (iii) preparation and presentation of the overall final account statement for the Project:

(a) The work in (i) was consequential to Szeto's work in October 2012 pursuant to the Appointment Letter when he only completed the measurement of quantities of blockwork and internal/external finishes without provision of rates against these items. In 2014, pursuant to the Agreement, Szeto completed the rates assessment such that the value of blockwork and internal/external finishes could then be assessed.

(b) The work in (ii) was for resolving the parties' difference on the quantities of formwork in erecting the superstructure of various houses, ie the plaintiff claimed 34,000m^2 for formwork whilst the defendant claimed 31,000m^2.

(c) The work in (iii) only required Szeto to compile/present figures for the overall final account statement, and he was not required/ authorised to assess the value of other items of works in the Project. Indeed, Szeto confirmed in his reports the remaining 35 items of the overall final account statement had not been reviewed or re-assessed as they were outside the scope of his services, and the figures he presented for the overall final account statement did not represent the final agreed amount between the parties. Kwan suggested what had been presented by Szeto on the final account figures clearly would not be binding on the parties.

55. Kwan denied the parties appointed Szeto as an "adjudicator" for resolution of the disputes "once and for all". Rather, he was appointed to provide calculation/assessment of quantities/rates for blockwork and internal/external finishes, which assessment would facilitate the parties to narrow their disputes over the final account, but it did not mean the parties therefore agreed to adopt Szeto's overall final account statement in place of arbitration in the event they were unable to agree on figures in relation to other items in the same. Kwan said had the parties reached such an agreement to substitute arbitration with adjudication (or independent expert assessment as the plaintiff alleged), it would have been expressly set out in the Appointment Letter or Agreement, and the silence in these 2 agreements in this respect showed the plaintiff's contention was ill-founded.

56. Kwan said the parties never agreed the figures Szeto included for the other 35 items of works[19] in the overall final account statement should be final and binding. At most, all it could be said was the final account as assessed by Szeto for blockwork and internal/external finishes was binding, but for the other items of works (for which the difference between the parties was not as great as those for the aforesaid 3 items of works) the parties had not come to an agreement yet on the figures. Kwan said it was inconceivable for the parties to have agreed those figures Szeto listed in the overall final account statement without his review and assessment would be binding, and this was pointed out by Szeto in his reports. Kwan noted the defendant had provided Szeto with details/breakdown of the Contra-charges that the defendant sought to recover against the plaintiff and considered should have been included in the overall final account statement, but Szeto did not assess them as they were said to be outside his services under the Agreement. Kwan said in the absence of a final account that contained all figures which the parties agreed to be binding, their rights and liabilities would be governed by the provisions in the Contract, in particular Clause 30 of GCC (Certificates and Payments) and Clause 35.

57. Kwan denied he induced the plaintiff to agree to appoint Szeto for determining the final account and/or he gave assurance that once Szeto determined the final account the defendant would effect prompt payment. He reminded that Szeto was only asked to complete his assessment on the value for blockwork and internal/external finishes, and to further compute the formwork quantities to facilitate the discussion between the parties.

58. Kwan also denied he told Wong the plaintiff would only need to pay its half share of Szeto's fees after it obtained payment from the defendant. Kwan did not even know the defendant had not paid its half share of Szeto's fees until about August or early September 2014 (ie before Szeto issued the September 2014 Report). Kwan said when the Agreement was concluded there was no suggestion the plaintiff would defer payment of its share of Szeto's fees until its receipt of payment under the Contract. Indeed, Wong's contention was contradicted by the terms of the Agreement.

59. Kwan further disagreed the defendant never disputed Szeto's overall final account statement and/or never brought up the issue of arbitration until the present action. On 6 September 2014, ie shortly after receipt of the September 2014 Report, Kwan immediately complained to Szeto by email (copied to Wong) that Szeto's overall final account statement did not take into account all cost information provided by the defendant, and the defendant did not agree to it. In the enclosure to such email Kwan protested that Szeto only adopted the figures put forward by the plaintiff and ignored the figures (with supporting information) put forward by the defendant, and he found Szeto's explanation that it was outside his scope of work under the Agreement wholly unacceptable.

60. Kwan reminded that the plaintiff had submitted at least 2 draft final accounts on 23 April and 13 June 2013 respectively which showed the amount claimed by the plaintiff had changed from the Outstanding Sum (23 April 2013) to the Revised Sum (13 June 2013), so it was incorrect for Szeto to have his draft final account in the September 2014 Report based on the 23/4/10 Draft Account, and not on the one of 13 June 2013 (which should be more updated), which also reflected how unreliable Szeto's figures were on the other items of work.

61. Kwan did not understand the relevance of Wong's allegation that the Agreement did not contain any arbitration clause and it would be startling to suggest Szeto could only recover his fees through arbitration. Whether Szeto should/could recover his fees against the plaintiff by means of arbitration or otherwise had no impact on the disputes between the parties under the Contract.

62. Kwan therefore believed Szeto did not produce any final/binding final account in relation to the Works carried out by the plaintiff under the Contract, and there existed a dispute between the parties on the final account which should be referred to a sole arbitrator for his determination pursuant to Clause 35.

VII. DISCUSSION

63. Mr Houghton SC's essential argument was this: Clause 35 in the underlying Contract was an arbitration agreement, hence the arbitrable dispute between the parties over the plaintiff's final account which fell within the ambit of such arbitration agreement should be put to arbitration instead of litigation. But Mr Barlow SC submitted the defendant's application for a stay to arbitration when sued was disingenuous and had no merit since such application rested on a misreading of the Agreement which in truth contradicted the defendant's case. He argued that even though there once was a *bona fide* dispute between the parties, the parties had finally and conclusively resolved it through "final and binding" expert determination, and as a result the arbitration agreement was no longer capable of being performed. Mr Barlow SC and Mr Houghton SC agreed that ultimately it was a matter of construction of contract, ie the Contract and the Agreement, against the contextual background.

64. Mr Houghton SC submitted that Clause 35 being the arbitration agreement between the parties was in wide terms, and in the absence of any admission of liability by the defendant there was a *bona fide* dispute over the final account[20] that fell within the scope of such arbitration agreement. Mr Houghton SC suggested the summary way in which Szeto's appointment came about and the July/September 2014 Reports he produced demonstrated that the issues remaining between the parties clearly fell within the ambit of the arbitration agreement in Clause 35.

65. Since Mr Barlow SC accepted that previously (a) there was an arbitration agreement between the parties and (b) there was an arbitrable dispute between the parties over the final account, I need not dwell on the questions posed by Ma J (as he then was) in *Tommy CP Sze & Co* save and except the one on whether or not the arbitration agreement was capable of being performed. If there was a *prima facie* case it was capable of being performed, then the plaintiff's claim should be stayed for arbitration.

66. Mr Barlow SC submitted the plaintiff's case was straightforward: (a) the defendant hired the plaintiff under a written lump sum building Contract to construct the works for $62,996,847.63 subject to final measurement, (b) the architect certified the plaintiff achieved practical completion of the Works on 15 January 2013, (c) despite that the defendant failed to pay the plaintiff's final account for the Outstanding Sum, (d) following the emergence of such dispute in 2013 (which the parties could have referred to arbitration but did not), the parties entered into a written "settlement agreement" (as they were entitled to do at any time before any final arbitral award came into existence) in 2014 (ie the Agreement) whereby the parties compromised such dispute by agreeing (i) to be bound by the amount to be identified upon the independent determination of their jointly-engaged quantity-surveying expert Szeto, and (ii) that Szeto's final account figure would be conclusive, ie "deemed to be independent and final" and "final and binding among all parties concerned under [the Agreement]", and (f) the September 2014 Report identified the final account figure as the Sum, so the plaintiff invoiced the defendant for their jointly agreed final account sum, but the defendant still refused to pay.

67. Mr Barlow SC accepted that but for the "settlement agreement" between the parties as evidenced by the Agreement, the parties were in arbitrable dispute as to whether the true amount of the plaintiff's final account payable by the defendant to the plaintiff was the Outstanding Sum[21] or nil.[22] But as a result of such "settlement agreement", Clause 35 was abrogated and ceased to be operative (whilst other parts of the Contract remained effective and binding on the defendant), and as a result there was no longer any arbitrable dispute to arbitrate. Mr Barlow SC submitted the parties were free to vary the Contract by such further agreement in writing to contract out of arbitration, and to resolve their dispute by appointing Szeto as quantity surveying expert to make a conclusive determination in order to save time, effort, trouble and expense.

68. Mr Barlow SC submitted there was nothing unusual about the manner in which the parties "settled" their arbitrable dispute. Kaplan J recognised the usefulness of expert determination in *Edward Mayers v Brian Dlugash* as follows:[23]

> " …… Both parties have agreed that I should first decide the issue whether Mr Dickson was in fact appointed as arbitrator or as an expert. *If the latter, then it is common ground that the Arbitration Ordinance can have no relevance to this matter* ……
>
> Arbitration is a tried and tested method of dispute resolution where the parties do not wish to litigate their differences before state courts. Expert determination, although having been used for centuries, is perhaps not so widely known. The classic features of expert determination are:
>
> (a) The expert makes a final and binding decision,
>
> (b) The decision can only be challenged in the most exceptional circumstances such as where the expert answers the wrong question (see **Jones v. Sherwood Computer Services Inc.** [1992] 1 WLR 277; **Campbell v. Edwards** [1976] 1 WLR 403 and **Nikko Hotel (UK) Limited v. NEPC** (1991) 28 EG 86).
>
> (c) The expert can be sued for negligence in the absence of an agreed immunity (**Arenson v Casson Beckman Rutley** [1975] 3 WLR 815).
>
> (d) The expert's determination cannot be enforced as an arbitral award.
>
> .....
>
> In more cent times, in **Campbell v. Edwards** (*supra*), Lord Denning M.R. said:

> "It is simply the law of contract. If two persons agree that the price of the property should be fixed by a value on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake, they are still bound by it. The reason is that they have agreed to be bound by it. If there were fraud or collusion, if course, it would be very different, fraud or collusion unravels everything."

……

To decide whether Mr. Dickson was appointed as arbitrator or expert involves me construing the 2 agreements entered into between the parties and ascertaining the parties' intention therefrom. A classic expert determination clause may state:

> "In stating the fair price the auditors shall be considered to be acting as experts and not as arbitrator and their decisions shall be final and biding on the parties."

Unfortunately in the present case such explicit language was not used and hence this dispute." (my emphasis)

Similar remarks were made by Harris J in Re Skydon Development Ltd:[24]

"7. …… In the present case the parties have agreed to appoint a valuer to value shares. He does not have to provide reasons for his valuation and it has been expressly agreed that the valuation is binding unless it contains "manifest error". The general approach of the courts to valuation of the sort with which I am concerned is explained by Lord Denning MR in *Arenson v Arenson* [1973] Ch 346:

> On reading all the cases, it seems to me that there is one dominant theme running through them. It is this: Whenever two persons agree together to refer a matter to be final and binding upon them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it. They cannot reopen it for mistake or error on his part or for any reason other than for fraud or collusion.

8. Lord Denning MR repeated similar views in the latter case of *Campbell v Edwards* [1976] 1 WLR 403:

> In former times (when it was thought that the valuer was not liable for negligence) the courts used to look for some way of upsetting a valuation which was shown to be wholly erroneous. They used to say that it could be upset, not only for fraud or collusion, but also on the ground of mistake: see for instance what I said in *Dean v Prince* [1954] Ch 409, 427. But those cases have to be reconsidered now. I did reconsider them in the *Arenson* case in this court: [1973] Ch 346, 363. I stand by what I there said. It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he has made a mistake they are still bound by it. If there were fraud or collusion, of course, it would be very different. Fraud or collusion unravels everything.

9. In summary the position is this: if parties have agreed to be bound by a valuation then, unless they have agreed otherwise, they cannot contest the valuation on the grounds simply that it contains a mistake. As long as the valuation has been prepared in good faith it is binding. This is even more so when the parties have expressly agreed that only "manifest error" will invalidate the valuation. The meaning of "manifest error" in the context of expert valuation was considered in *Dixons Group plc v Murray-Oboynski* [1997] All ER 34:

> The parties have agreed that the decision of Mr Jackson is final and binding on all the parties save in the case of manifest error. A 'manifest error' is an error 'that may be easily seen by the eye or perceived by the mind' (Chambers Twentieth Century Dictionary). There is no great difference between the defendants' arguments regarding failure to comply with obligations and their submissions regarding manifest error.
>
> As a matter of first impression, I find that on the true construction of the words of the agreement taken as a whole…, for an error on the part of Mr Jackson to be manifest it must be plain and obvious on the face of his written decision. The error must be manifest: the terms of the agreement do not contemplate an error which after a lengthy enquiry may be made manifest. No such manifest error appears and accordingly the decision of Mr Jackson is final and binding and cannot be reopened either directly or by the back door of a set-off.
>
> That approach is consistent with the approach of Potter J [in *Heald Foods v Hyde Dairies*, unreported, QB, 1 December 1994] in the words I have cited above:
>
> > 'By the use of the word "manifest", it is plain that [the parties] do not thereby intend to widen the area of the court's investigation beyond the ambit of the determination itself any reasoning within it or discernible on its face.' "

69. In short, Mr Barlow SC contended that where the parties have agreed that an expert determination was to be binding, it was settled law that the determination could not be challenged on the ground that mistakes had been made unless it could be shown that the expert had departed from the instructions given to him in a material respect, or if there was fraud or collusion, or if there was manifest error.[25]

70. Mr Barlow SC submitted that the parties' jointly-engaged expert (ie Szeto) did exactly as explained in the authorities. He suggested since arbitration is different from expert determination (as explained by Kaplan J in *Edward Mayars*), the parties could only choose one distinct species of dispute resolution (ie either arbitration or expert determination), and by the "settlement agreement" (ie the Agreement) they decided to walk away from arbitration and they were then bound by their *inter partes* decision to seek expert determination. Mr Barlow SC contended that Mr Houghton SC's suggestion that the arbitration agreement was not abrogated because the Contract still existed and provided the governing contractual basis for claiming and making payment for the Project Works was misconceived.

71. Mr Barlow SC argued that if the parties intended to keep Clause 35 operative, they would not have agreed to abrogate Clause 35 and appoint Szeto as expert to come up with a final and binding result. Although the language of the "settlement agreement" as home-made by non-lawyers was not explicit, its commercial purpose was clearly recognised by Kwan who said in the Kwan Aff that "…… the [Agreement] was intended to provide a final and binding result on the assessment of the final account ……" (ie Szeto as jointly-appointed quantity-surveying expert was to provide figures for the final account which would be final and binding), and there was no going back once the parties committed to such "settlement agreement" (ie the defendant was not entitled to resile therefrom nor was the plaintiff (whose final account sum was substantially reduced by Szeto as the parties' jointly-engaged expert) entitled to do so). Both parties were bound by it in the same way as parties to court litigation are bound by a contract of compromise or settlement.

72. Mr Barlow SC argued that the defendant's dissatisfaction/ rejection of an outcome that contractually was "final and binding" upon the parties (ie the Sum being the final account figure identified in the September 2014 Report) would not constitute a *bona fide* dispute. He submitted the defendant's real complaints merely spoke to its regret that (a) the Agreement was not drafted on broader terms than those upon which the parties contracted, and (b) Szeto as jointly appointed expert made mistakes in his determination. In respect of (a), by the pivotal clause (D)(1) of the Agreement,[26] the "result" of Szeto's review was "deemed to be independent and final", so the September 2014 Report had "become final and binding" upon the parties, and no actionable arbitrable dispute remained. In respect of (b), Mr Barlow SC noted Szeto himself considered he did the job that he was tasked under the Agreement (so there was no mistake). As regards Szeto's non-reference to the Contra-charges in the September 2014 Report, Mr Barlow SC reminded that an expert did not have to give reasons for his determination, and short of fraud, collusion or manifest error (and there was no suggestion of such in the present case), his methodology in arriving at his determination was irrelevant. But Mr Barlow SC agreed that apart from coming up with the final result (ie the Sum) in the September 2014 Report, Szeto in fact also discussed his methodology and gave his personal views as to its legal effect (including what matters were or were not final/binding). But Mr Barlow SC submitted that in the absence of fraud, collusion or manifest error, Szeto's views were neither here nor there. Further, Mr Barlow SC argued that whether Szeto's determination contained mistakes or perceived mistakes was neither here nor there when the parties chose to contract out of arbitration, and the defendant's recourse (if any) would be a claim against Szeto in negligence, but it was not open to the defendant to dispute Szeto's determination.

73. So Mr Barlow SC would answer the questions posed by Ma J (as he then was) in *Tommy Sze & Co* as follows:

	Question	Answer

1	Is the arbitration agreement capable of being performed?	No because it had already been performed (by the "final and binding" determination of the parties' jointly-engaged expert).
2	Is there in reality, a *bona fide* dispute between the parties?	There once was but the parties had finally and conclusively resolved it through the "final and binding" determination of their jointly engaged expert.
3	Is the dispute or difference between the parties within the ambit of the arbitration agreement?	This question does not arise – see 2 above.

Mr Barlow SC urged the court to hold the parties to the "settlement agreement" that superseded Clause 35, and submitted that the Leong Order was correct and there was no merit to the Appeal.

74. As I see it and as senior counsel rightly pointed out, the crux of the matter turned on the construction of the Agreement against its contextual background. I also agree with Mr Houghton SC that upon a plain or commercially purposive reading of the Agreement (in particular clauses (B)(1)-(4) and (D)(1)), it drew a clear distinction between (a) the review and assessment by Szeto in respect of the few items of works specified in the Agreement, and (b) the preparation and presentation of the overall final account statement for the whole Project.

75. Turning to the plain words of clause (B) of the Agreement which dealt with Szeto's "Scope of Services", he was tasked with the following pieces of work:

> (d) Szeto was tasked to carry out the "assessment" of "new rates" for 3 items of works being blockwork and internal/external finishes, which task was outstanding since Szeto previously completed the identification/measurement of such "items of final measurement" under the Appointment Letter. Quite plainly, this task required "independent" "assessment" by Szeto as a quantity-surveying expert.
>
> (e) Szeto was next tasked to "review" the formwork quantities for the Project to cover additional payment on "levies" due to increase in the contract sum, and to reconcile the different quantities as measured/provided by the plaintiff and the defendant. Quite plainly, this task required "independent" "review" by Szeto as a quantity-surveying expert.
>
> (f) Szeto was finally tasked to "present" the overall final account statement for the whole Project by "consolidation" of the final account values for all items of works, ie values/amounts drawn from (i) Szeto's "review and assessment" in respect of the works in (a)-(b) above and (ii) the other 35 items of works provided by the plaintiff and the defendant (outside Szeto's "review and assessment" services under the Agreement). Quite plainly, the overall final account statement "prepared" and "presented" by Szeto was a "consolidation", "presentation" and "mathematical" exercise by totting up such values/amounts and setting them out in an overall statement without any "independent" "review and assessment" by Szeto.

76. In what Mr Barlow SC described as the pivotal clause (D)(1) of the Agreement, it was provided that the "*review and assessment* of the final account to be *conducted by [Szeto]* under this Agreement is deemed to be *independent* and final", and that the "*result of the independent review and assessment* of the final account to be produced and issued by [Szeto] shall become final and binding among all concerned parties under this Agreement" (my emphasis). In my view, it is clear on the face of such provision that it was the "result" of Szeto's "independent" "review and assessment" "under this Agreement" that was final and binding, and the above analysis showed the only review and assessment to be done (and in fact actually done) by Szeto under the Agreement were in relation to "assessment of new rates" for the 3 items of final measurement works being blockwork and external/internal finishes, and "review" of the formwork quantities. As explained above, it was clear and obvious from the Agreement there would be no review or assessment by Szeto in preparing and presenting the overall final account statement, and most certainly such exercise would *not* be the "result" of "independent" review and assessment by Szeto.

77. In my view, the commercial purpose of the Agreement was to provide for expert assessment of the new rates for the 3 items of blockwork and internal/external finishes and for expert review of the formwork quantities, and the "result" in respect of such expert review and assessment "produced and issued by Szeto" that constituted the "final account" for these items of works would be final and binding. As for the "consolidation and presentation" of the overall final account statement, such work did not fall within the scope of clause (D)(1) of the Agreement since it was neither a "review" nor an "assessment" "conducted by [Szeto]". Indeed, the transfer of information collated by others into the overall final account statement could not be said to be an "independent review and assessment of the final account", and hence the overall final account statement could not be said to be final and binding. All Szeto was tasked to do was to consolidate information mathematically and to clerically prepare/present the overall final account statement to the parties for their use.

78. In light of the unambiguous wording of the Agreement, I agree with Mr Houghton SC it would be important to keep a clear distinction between the two strands of argument that Mr Barlow SC had skilfully attempted to weave together in his submissions: (a) the "final and binding" nature of Szeto's "independent review and assessment" (ie the "final account") of the aforesaid 3 items of blockwork and external/internal finishes and the formwork quantities,[27] and (b) the plaintiff's suggestion that the underlying Contract had been varied by the Agreement which amounted to a "settlement agreement" that purported to abrogate Clause 35 being the arbitration agreement.

79. Focusing on (a) above, Mr Houghton SC submitted (and I agree) that on the basis of the construction of the Agreement as explained in paragraphs 74-77 above Clauses (B)(1)-(4) and (D)(1) therein at best provided a supplemental agreed valuation mechanism for a few items of the Works,[28] but it did not provide for any agreed dispute resolution mechanism for any other matter or thing of whatsoever nature arising under or in connection with the Contract (eg the measurements/values of the remaining 35 items of the works and/or the Contra-charges) in lieu of Clause 35. In my view, it could not be made out on the Agreement that the parties agreed to do away with Clause 35 in its entirety as the plaintiff suggested. In my view, at the very least, the defendant has established a *prima facie* case that the arbitration agreement in Clause 35 still binds the parties and is capable of being performed in respect of the unresolved *bona fide* arbitrable dispute between the parties in respect of the overall final account and whether any further payment was due by the defendant to the plaintiff.

80. Then focusing on (b) above, Mr Houghton SC submitted it would be fallacious/hopeless to read the Appointment Letter and Agreement to mean that the parties engaged Szeto to carry out a "final and binding" expert determination of the overall final account that abrogated the arbitration clause in the Contract such that either party might proceed to court by purporting to formulate its claim as being a claim under those agreements only. In light of the aforesaid analysis, I agree.

81. As regards Mr Barlow SC's reliance on *Edwards Mayars* and *Re Skydon Development Ltd* that distinguished between expert determination and arbitration, whilst these authorities dealt with (a) the question whether the person appointed was an arbitrator or an expert and (b) the distinguishing features of an expert determination, I agree with Mr Houghton SC that there was nothing in these authorities to say it was impossible for the parties to agree "on the hoof" when disputes arose between them to reserve certain matters (eg measurements/rates for certain disputed items) for expert review/assessment, but if such expert's limited measurement/valuation could not help the parties narrow the dispute and achieve overall resolution, the parties would resort to arbitration being their agreed dispute resolution mechanism under their primary agreement.

82. In coming to the aforesaid conclusion, I also bear in mind the following matters.

83. First, Mr Houghton SC reminded that in the Appointment Letter and Agreement there was no express reference to replacing the provision for arbitration in the Contract with expert determination. Indeed, Mr Barlow SC agreed there was no explicit language. Notwithstanding Wong's suggestion otherwise, I am unable to see how the parties' agreed choice to engage Szeto to carry out "preparation of measurement for blockwork, internal and external finishes" in the Appointment Letter which works was eventually carried to its logical conclusion by having Szeto carry out "preparation and assessment of new rates" for those 3 particular items of works as "identified and measured by [Szeto] and agreed by [the defendant and the plaintiff] under [the Appointment Letter]" could amount to a "settlement agreement" that did away with Clause 35 in its entirety for all disputes of whatsoever nature under or in connection with the Contract. I agree with Mr Houghton SC that set against the Appointment Letter and the factual matrix that were undisputed, the Agreement was plainly intended by both sides to provide no more than a mechanism whereby their differences in relation to the aforesaid 3 particular items of works and the formwork quantities might be resolved with saving of time, cost and antagonism, but this was just a first step towards resolution of the dispute over the final account between them. It was not in itself (and must not be confused with) the actual resolution or settlement of all disputes between the parties.

84. It must be remembered that there was already extant disputes between the parties even before the Agreement, eg both sides well knew that the defendant had raised the issue of deductions by way of the Contra-charges and that the plaintiff disagreed. There was no explicit language in the Agreement for replacing or substituting Clause 35. The fact that the parties asked Szeto to carry out "independent review and assessment" of some items of work and to put together in a overall final account statement that incorporated the values as reviewed and assessment by him and the values for other items of works made by others in order to "present" an overall picture to enable the parties to take the matter forward towards resolving their disputes did not mean there has been a full and final settlement of all differences.

85. Secondly, although the aforesaid construction of the Agreement was based on a plain and/or purposive reading of the terms of the agreement itself against its contextual background, I am comforted by the fact that it reflected the understanding of both the defendant and Szeto. As it transpired, Szeto only reviewed and assessed the 3 particular items of works (plus an additional Item 40 being formwork quantities), and he did not review and assess the remaining 35 items of works. Instead, Szeto merely included in the overall final account statement information given to him by the parties, but he declined to include the Contra-charges not because they were of nil value but because it was outside his scope of services. So the July and September 2014 Reports were at best an agreed valuation on the items that Szeto turned his mind to and actually reviewed/assessed, but it could not have been the final account under the Contract or final determination of the balance due as between the parties. Indeed, Szeto said he presented the overall final account statement as a mathematical exercise, and went further to explain (and indeed he was at pains to point out) the Sum was not the agreed/assessed balance due from one party to the other. In my view, as explained above, the final value of the balance due remained in dispute with the Contra-charges as yet undetermined, and Szeto's overall account statement was not final and binding.

86. Thirdly, Mr Houghton SC submitted there was no relevant cause of action that arose out of the Appointment Letter and Agreement which did not contain any payment provisions, ie contractual provisions on the right to payment and/or the obligation/time to make payment. Quite simply, the so-called "settlement agreement" did not provide for payment to be made by the defendant to the plaintiff in respect of any "final and binding" "result of the independent review and assessment" by Szeto. This was understandable because such "independent review and assessment" was limited to a few items of works and the parties had yet to resolve their differences in respect of the overall final account to be prepared and presented by Szeto.

87. Mr Barlow SC submitted that payment was to be made under the payment provisions in the underlying lump sum Contract and not under the arbitration clause in Clause 35.[29] That must be correct. Indeed, it was the very essence of Mr Houghton SC's argument (which I agree) that the parties would have to look to the provisions in the underlying Contract as to whether there was any payment due and payable from the defendant to the plaintiff under the final account, and dispute arising from, say, the defendant's refusal to make payment over the final account for whatever reason and/or the defendant's claim for deduction in respect of the Contra-charges, etcwould have to be resolved through arbitration pursuant to Clause 35. Even if the plaintiff had a strong case and the defendant's contentions were weak (which Mr Houghton SC denied), it would not have precluded the contractual requirement to refer to arbitration. In my view, there was no sufficient basis to say that the Appointment Letter and/or the Agreement abrogated the arbitration clause in Clause 35.

88. Fourthly, Mr Houghton SC argued that even if the plaintiff's claim in the present action was allowed to proceed in court, the response from the defendant would be to plead items of set-off and deduction, ie the very matters not considered by Szeto, and which matters the parties had contractually agreed to be decided in arbitration. In light of the construction of the Agreement as explained above, I accept there was *prima facie* basis to suggest that the plaintiff's claim was demurrable, ie the scope of services under the Appointment Letter and Agreement was limited, and any dispute as to the finalisation of the final account was within the ambit of the arbitration agreement under Clause 35. The plaintiff could not evade the agreement to arbitrate by purported reliance on the separateness of the Appointment Letter and Agreement nor on the fact that Szeto was a party to such agreements.

89. Mr Houghton SC cited *New Sound Industries Ltd v Meliga (HK) Ltd*[30] in support of his contentions. In that case, by a first written agreement the plaintiff appointed the defendant as sole distributor for various countries of watch components manufactured by the plaintiff at its factories in Mainland China. Clause 11 therein provided for the reference of disputes to arbitration and a collateral agreement of the same date made provision for the arbitration mechanism. Subsequently the parties entered into a second written agreement to suspend the first agreement, and it provided that the second agreement would not terminate until a specified date and would be automatically prolonged on terms as specified therein.

90. Disputes arose over non-payment of a large number of invoices for goods sold and delivered by the plaintiff under both agreements. After the plaintiff commenced legal proceedings, the parties entered into a tripartite agreement (partly oral and partly evidenced by correspondence) with a third party with the object of having the third party pay the plaintiff debts owed under the first and second agreements pursuant to instructions to pay issued by the defendant in circumstances stipulated in such agreement. Five invoices remained unpaid under the tripartite agreement. The plaintiff commenced a second legal action in respect of them, and the defendant applied to stay for arbitration. The plaintiff argued the first and second agreements were terminated as a result of non-performance and repudiation by the defendant which the plaintiff accepted and which led to the first legal action. It was suggested that even if the tripartite agreement intended to settle those proceedings, it was separate and distinct from those agreements, involved an additional party and contained no provision for arbitration.

91. The Court of Appeal held that whether the plaintiff and the defendant remained bound by the arbitration agreements in the first and second agreements depended on the circumstances involving them. The fact that the third party was not bound by them was not a sufficient basis for relieving the plaintiff of its obligations under them. It was further held that the tripartite agreement was intended to enable the defendant to pay debts due under the first and second agreements. The amounts of those debts were disputed by the defendant and were doubtless matters in dispute under those agreements. Whether the defendant was obliged under the tripartite agreement to instruct the third party to pay the amounts in question was obviously a dispute under the first and second agreements and such a dispute was clearly subject to the arbitration agreements in those agreements. Woo VP agreed with the legal principles summarised by the first instance judge,[31] including that "[an] arbitration clause will bind the parties even if one of them asserts that circumstances have arisen which discharges one or both parties from subsequent liability under the contract, such as repudiation by one party accepted by the other: *Heyman & Anor v Darwins Ltd* [1942] AC 356 (HL) (E), at 373".[32]

92. Although *New Sound Industries Ltd* dealt with a different factual scenario, Mr Houghton SC drew a parallel in the present case in that the Appointment Letter and Agreement were to value works and not provide for any right/obligation to receive/make payment, and any dispute over whether or not there was any entitlement to payment arising under or in connection with the underlying Contract would be subject to the arbitration agreement under Clause 35. I agree. Mr Barlow SC submitted that *New Sound Industries Ltd* was not relevant or applicable to the present action. Although he did not elaborate further, I assume he made such submission on the premise that the Agreement was a "settlement agreement" that abrogated the arbitration clause in Clause 35. But I have dealt with such argument.

93. Fifthly, it followed from the above analysis that the overall final account was not settled or resolved by Szeto. Indeed, this was recognised by the plaintiff who wrote to the defendant on 31 October 2014 arguing that the levies and rates for marble in the September 2014 Report were undervalued, but nevertheless it would agree to Szeto's assessment of the final account on the following conditions: (a) the plaintiff would have no liabilities of payment including retention money to all the nominated sub-contractors; and (b) the assessed sum by Szeto would be paid by the defendant within 7 days after issue of invoices by the plaintiff. Clearly, the plaintiff's own view at that time was that it did not unconditionally accept, and was not bound by, Szeto's review and assessment, and it was left to the parties to determine how to implement, if at all, Szeto's conclusions. The defendant also informed the plaintiff and Szeto by email dated 6 September 2014 that the overall final account statement "prepared and presented" by Szeto had not taken into account all cost information provided by the defendant, and that the defendant did not agree to it. Thus, it seemed neither party unconditionally accepted the validity or binding nature of Szeto's overall final account statement.

94. Interestingly, Szeto mathematically derived the Sum in the overall final account statement by using the 23/4/10 Draft Account provided by the defendant. As *per* the 23/4/10 Draft Account, the remaining/ outstanding balance payable by the defendant to the plaintiff under the Contract was the Outstanding Sum. But by its email dated 13 June 2013, the plaintiff informed the defendant that upon revision of the contract sum from $78,064,019.65 to $77,808,589.27, the net sum due by the defendant to the plaintiff was the Revised Sum which was $255.430.38 less than the Outstanding Sum. Significantly, the plaintiff by letter dated 15 July 2013 demanded the defendant to pay the final account sum being the Revised Sum and not the Outstanding Sum. This, in my view, raised question over the reliability of the overall final account statement "prepared and presented" by Szeto, which was not final and binding, and naturally provided fodder for dispute over the overall final account in addition to the defendant's claim for deduction of the Contra-charges.

95. In the circumstances, I agree with Mr Houghton SC that the defendant has established a *prima facie* case that Clause 35 being the arbitration agreement between the parties was capable of being performed, and that despite the parties' attempt to resolve some matters by engaging Szeto to assist in dealing with measurement/valuation disputes for a few items of works, he did not address all issues and the Agreement did not abrogate or dispense with the arbitration agreement in the underlying Contract. I therefore agree with Mr Houghton SC's answers to the questions posed by Ma J (as he then was) in *Tommy Sze & Co* as follows:

	Question	Answer
1	Is there an arbitration agreement between the parties?	Yes, Clause 35.
2	Is the arbitration agreement capable of being performed?	Yes, there were provisions for the appointment of an arbitrator, and the scope of matters to be referred to arbitration was defined widely.
3	Is there in reality, a *bona fide* dispute between the parties?	Yes, issues in respect of the final account that should be resolved under Clause 35 remained in dispute.
4	Is the dispute or difference between the parties within the ambit of the arbitration agreement?	Yes, as the scope of the arbitration under Clause 35 was wide.

96. In my view, the defendant has established a *prima facie* case that disputes remained between the parties under the Contract, and the proper approach is to stay the proceedings for arbitration as the contractually agreed dispute resolution mechanism.

VIII. CONCLUSION

97. In the premises, I allow the Appeal, set aside the Leong Order and grant an order that all further proceedings in the present action be stayed pursuant to section 20 of the Ordinance for arbitration.

98. There is no reason why costs should not follow event. I grant a costs order *nisi* that the plaintiff do pay the defendant costs of and occasioned by the present action (including costs of the Summons (with certificate of counsel), costs of the Appeal and all costs reserved, if any) on an indemnity basis to be taxed if not agreed.[33]

(Marlene Ng)
Deputy High Court Judge

Mr Barrie Barlow SC and Mr Martin Ho, instructed by Dundons, for the plaintiff

Mr Anthony Houghton SC, instructed by Huen & Partners, for the defendant

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[1] (a) applications #1 to #25 for interim payment were all certified by CHIH Design and later K&W, and (b) applications #26 to #29 were all accepted by the defendant by reason of it making payments to the plaintiff thereunder without objection

[2] ie blockwork, internal finishes, external finishes, variation works and formwork quantities and levies

[3] ie item 8 (blockwork), item 9 (external finishes), item 10 (external finishes) and item 36 (variation items V1 and V2), and the remaining 35 items were not reviewed as they were considered to be outside the scope of the Agreement

[4] HCA581/2009, Reyes J (unreported, 29 December 2009)

[5] see *Hong Kong Civil Procedure 2016* Vol1 para58/1/2 at p1068

[6] see *Tommy CP Sze & Co v Li & Fung (Trading) Ltd & ors* [2003] 1 HKC 418, 419 and 430

[7] but none of those circumstances were said by either party to be relevant here

[8] HCA2416/2014, Mimmie Chan J (unreported, 3 December 2015)

[9] [2003] 1 HKC 418

[10] at pp 435-436

[11] see *Private Company 'Triple V' Inc v Star (Universal) Co Ltd & anor* [1995] 3 HKC 129 and *Pacific Crown Engineering Ltd v Hyundai Engineering & Construction Co Ltd* [2003] 3 HKC 659, 662-663

[12] see *Pacific Crown Engineering Ltd* at pp 663-664

[13] see *Pacific Crown Engineering Ltd* at pp 662-663 and *PCCW Global Ltd v Interactive Communications Service Ltd* [2007] 1 HKLRD 309, 320

[14] see *Private Company 'Triple V' Inc, Daily Win Engineering Limited v The Incorporated Owners of Greenwood Terrace* HCCT133/2000, Burrell J (unreported, 7 June 2001) and *Xu Yi Hong v Chen Ming Han & ors* HCA1109/2005, DHCJ To (as he then was) (unreported, 3 October 2006) para 16

[15] [2007] 1 HKLRD 309, 321-322

[16] [1995] 3 HKC 129, 132

[17] including the disputes on quantities of concrete and formwork

[18] engineering consultant retained by the defendant for the Project

[19] which had not been reviewed or assessed by Szeto at all as these were considered by him to be outside the scope of his services under the Agreement

[20] including the plaintiff's right to have a payment certificate issued and to receive payment under the Contract, and the defendant's right to make deductions

[21] or perhaps the Revised Sum

[22] if the Contra-charges were taken into account, there would be no payment to the plaintiff and instead there would be a small repayment to the defendant, but the position might change if the valuation would change

[23] [1994] 1 HKLR 442, 444

[24] [2013] 1 HKLRD 949, 953-954

[25] see also *Lau Yee Ching v Wong Tak Kwong & ors* CACV172/2006 (unreported, 26 January 2007) paras 15-17, *Re Ruby Art Jewellry Limited* HCCW1138/1999, DHCJ To (as he then was) (unreported, 30 June 2008) paras 21-24, and *Re Goldsfine Development Limited* HCCW211/2007, Ng J (unreported, 3 July 20130 para 22

[26] see paragraph 15 above

[27] in paragraph (8) of the July 2014 Report and paragraph (10) of the September 2014 Report, Szeto referred to the result of such "independent review and assessment" for the 3 items of works and formwork quantities as his limited "final account assessment" under the Agreement

[28] in which case at best it might be argued that the principles in *Edward Mayers* and *Re Skydon Development Ltd* concerning the limited scope for challenge to a binding expert determination might apply to these few items of works which were the subject of Szeto's "independent review and assessment"

[29] Mr Houghton SC submitted that the Statement of Claim did not cover the material facts that gave rise to a right to payment, but he preferred to take a practical rather than pleading point

[30] [2005] 1 HKC 41

[31] at p 49

[32] at pp 47-48

[33] see *Chimbusco International Petroleum (Singapore) Pte Ltd*