

**COMMISSION OF INQUIRY INTO THE CONSTRUCTION WORKS
AT AND NEAR THE HUNG HOM STATION EXTENSION UNDER
THE SHATIN TO CENTRAL LINK PROJECT
CLOSING ADDRESS FOR WING & KWONG STEEL ENGINEERING
CO., LIMITED (“W&K”)**

A. Overview

1. In this Extended Inquiry, it is submitted that three main issues relate to the rebar fixers W&K:-
 - (1) The circumstances in which W&K’s “Ah Chun” (a man various witnesses described as a hard working and conscientious foreman) came about asking his own team to try to connect rebars into couplers knowing there was a mismatch of materials or when the couplers were wholly or partly unexposed (“**the First Point**”).
 - (2) Given the defective joints were visually obvious, whether there were any proper inspections at subject locations (the stitch joints and shunt neck joints) (“**the Second Point**”).
 - (3) The conduct of the various parties after the water leakage occurred, the investigation into its causation and whether any party tried to conceal the matter (“**the Third Point**”).

2. For the purpose of this Extended Inquiry, the Commission is concerned with 3 primary issues as stated in the letters of Messrs Lo & Lo dated 29 March 2019 [EE1/1-37]. The abbreviations stated therein are adopted.
3. Although it is not the Commission's main function to lay blame on any party regarding the construction works at the NAT, SAT or HHS. However, as one of its Terms of Reference is "*to inquire into the facts and circumstances surrounding any problem relating to the steel reinforcement fixing or concreting works, including but not limited to any lack of proper inspection, supervision or documentation of such works undertaken...*"). It is respectfully submitted that an examination of these points will be of relevance.
4. W&K was not involved with SAT. In relation to the suggested "deviations" of HHS works, as is demonstrated by the evidence they were instructed by Leighton and approved by MTRCL (see, for example Jeff Lii's witness statement at §§27-38 [CC6/2816] and Chris Chan's supplemental witness statement at §§7-8 and 10-11 [BB8/5238-5239]). Therefore these submissions will focus on the rebar works at the NAT Stitch Joints and Shunt Neck Joint.

B. The First Point

5. As to the First Point, the Commission is invited to consider:-
 - (1) the relative rights, obligations and positions of the parties;
 - (2) the interface meetings – Leighton knew of the Lenton couplers;
 - (3) the undisputed fact: Leighton provided the wrong materials;

- (4) the defects in this case: they would have been visually obvious;
- (5) the contrasting evidence of Ah Chun and Henry Lai, their credibility, whether there was a motive to lie.

B1. The Relative rights, obligations and positions of the parties

6. A good starting point to understanding the relative rights, obligations and positions of the parties is an examination of the Leighton/W&K Subcontract. Put bluntly, W&K (i) has to work with whatever materials they are given; (ii) has to follow instructions from Leighton; (iii) cannot communicate with MTRCL directly unilaterally; (iv) can be replaced for any part of their work at any time without reason or compensation.
7. Firstly, the subcontract is one provided by Leighton and it is a “labour-only” subcontract in which W&K is contracted only to provide *labour*: see Clause 2.5 [CC11/6559].
8. All the materials (both rebars and couplers) are to be provided by Leighton without W&K having any right in specifying the type or type of thread: see “General Notes” of Appendix 1 [CC11/6623], item 12 (f) of Fourth Schedule [CC11/6598], meaning that the provision of the rebars and couplers is “100% responsibility of the Contractor” [CC11/6594], and the costs of which shall also be 100% borne by Leighton.

9. Importantly, the General Notes mandates W&K “*shall complete reinforcement fixing works using an approved method and follow the instructions of the Contractors site team in respect of speed, extent, timing, sequencing and staging*” [CC11/6623]. Clearly this includes the instructions coming from Leighton engineers.
10. W&K was not allowed to unilaterally communicate with MTRCL concerning any matters: Clause 7.4 [CC11/6563].
11. Leighton had absolute right/discretion to withdraw any work from W&K (and to replace W&K in any part of the subcontract works) and in doing so is not required to give reasons or compensation whatsoever. Indeed, if any such work is withdrawn or omitted from W&K’s contract, the contract price payable to W&K would be reduced accordingly: see Clause 10.3 [CC11/6565].
12. There was a clear hierarchy and a significant difference in terms of rights and bargaining power between Leighton and W&K.

B2. What Leighton knew from the “Interface Meetings” – which were not attended by W&K

13. There were at least 22 interface meetings attended by representatives of Leighton, GKJV and MTRCL for the purpose of coordinating the works at the interface locations between Contract 1111 and Contract 1112

[BB3/1678-1795 and CC2/739-865]. W&K (like other rebar-fixing subcontractors) was never invited to attend.

14. Lenton couplers being used on Contract 1111 side of the interface was made clear in at least 14 of these interface meetings: §12 of Chris Chan's witness statement [BB1/109-111]. Leighton was reminded time and again to "*check with their supplier regarding compatibility*". At the 19th Interface Meeting (held on 18 January 2016) GKJV specified that at the Interface, "*T40 coupler is BOSA; others are Lenton*" [BB3/1774] and Leighton would "*check with their supplier regarding compatibility in later stage*" [BB3/1774].
15. Despite these repeated reminders, Leighton clearly did not properly conduct such compatibility checks. Indeed it adopted an indifferent and "could-not-care-less" attitude towards the intended compatibility check as seen from Jim Wong's evidence as set out below.
16. Jim Wong (Leighton's senior site agent) who attended various interface meetings, claimed that he gave no thought as to who would be responsible to carry out the compatibility check [T9/117:1-118:8] and there was no need to plan ahead at all. Then he tried to (falsely) suggest that the *subcontractor* (i.e. the only party who did *not* attend the interface meetings) was responsible for the inspection to ensure compatibility [T9/124:16-25], notwithstanding that the Interfacing Requirements Specification" Item 1.7 [BB1/425] specified that *Leighton* (and GKJV) were to "*carry out joint inspection of the waterproofing system, couplers and protection measures to couplers provided at the*

interface work". It is of note that Henry Lai was in fact Jim Wong's subordinate – although Jim Wong was evasive about it even when asked by the Commission [T9/133:19-134:1].

17. This corporate culture and attitude of Leighton of (i) blaming the subcontractor for *everything* no matter what; and (ii) protecting its employees even if they were clearly at fault (to the extent of even trying to conceal the truth by shutting out the subcontractor) – will be apparent by the highhanded, unfair and unjustified way Leighton treated W&K.
18. There is no evidence that Leighton *ever* carried out the requisite joint inspection to check compatibility. **This failure by Leighton was the cause** of the incompatibility / mismatch problem.

B3. Leighton ordered the wrong materials

19. It is not in dispute that Leighton was responsible for making the correct materials available for W&K's labour.
20. As can be seen from material request forms submitted by W&K to Leighton [EE1/386-389], W&K would only specify the diameter and quantity of the required rebars, and whether or not the relevant rebars needed couplers. W&K would not (nor were they qualified or required to) specify the type of thread of the couplers or the rebars – that was the responsibility of Leighton who was party to the interface meetings and responsible for ordering the materials for W&K and: see Ah Chun's

statement §15(4) [EE1/371.7]). This was *never* challenged by Leighton in this Inquiry.

21. The mismatch of materials in this case was caused by Leighton ordering BOSA rebars on the assumption that BOSA couplers were used at the 1111 side of the interface when in fact Lenton couplers were used.

B4. The Defects and the fact that they were visually obvious

22. The two main types of defective connections in this case between rebars and couplers at the Stitch Joints and the Shunt Neck Joint were:-
 - (1) the “square peg round hole” situation, i.e. the mismatch / incompatibility problem between Lenton couplers (with yellow caps) and BOSA parallel threaded rebars (“**Type 1 Defect**”); and
 - (2) the “no hole” situation, i.e. where Leighton and/or GKJV did not chip away the concrete covering the couplers and properly expose the cast-in couplers for connection, rendering it impossible for W&K to connect the rebars to the cast-in couplers embedded in the concrete (“**Type 2 Defect**”).

See the witness statements of Leung Chi Wah (a rebar fixing worker engaged by W&K through Loyal Ease) (at §§16-19) [EE1/57.3-57.5] and Ng Man Chun (the foreman/site supervisor engaged by W&K through Loyal Ease) (at §§42 and 68-70) [EE1/371.19 & 371.27-371.28].

Type 1 Defect – “square peg round hole”

23. Type 1 Defect was observed only on the Contract 1111 side of the interface stitch joints (i.e. Joints 1 and 3), and the Shunt Neck Joint [T3/70-90]. It is not disputed that BOSA rebars cannot be screwed into Lenton couplers.
24. Leighton accepts that its own records showed that it had failed to order and thus provide the correct type of rebars to W&K for connection to the cast-in couplers for the initial construction of the Stitch Joints and the Shunt Neck Joint at the NAT: see Karl Speed’s 5th statement at §30 [CC1/59].
25. It is also undisputed that various Leighton personnel involved in the initial construction of the NAT were made well aware that GKJV were using Lenton couplers on the Contract 1111 side of the Stitch Joints and the Shunt Neck Joint through various Interface Meetings which representatives from GKJV, Leighton and MTRCL attended.
26. Henry Lai claimed that at that time he had no personal knowledge of the fact that the types of couplers to be used on the Contract 1111 side of the interface were to be different from those used on the Contract 1112 side.
27. In this regard, Leighton appears to accept that there was an internal breakdown of communication and that the information was not passed to Henry Lai by Leighton (see §46 of Karl Speed’s 5th statement [CC1/62-63]), as confirmed in cross-examination [T8/53:8]. It is difficult to

understand how any competent organization can simply fail to pass on such fundamental information (to ensure compatibility) to frontline engineers who not only had a crucial inspection role in the project, but was personally responsible for the ordering of materials.

28. Notwithstanding this, the senior members of Leighton tried to lay blame on the rebar fixers: see John Kitching's evidence [T6/94:4-9] and Karl Speed's evidence [T8/14:7-23], by (falsely) claiming that it was a "workmanship" problem. It is difficult to understand how material mismatch could be categorized as a "workmanship" problem. If the materials do not match, they simply cannot be connected, no matter what the workmen do. It was impossible to connect the rebars properly to the couplers with the materials provided by Leighton, and there was no way in which W&K could have found out about the use of Lenton couplers in advance [T6/95:14-96:8].

29. The way in which Jonathan Kitching and Karl Speed claimed that W&K as the rebar fixing subcontractor should have known which type of rebars to be ordered (and by that they mean the thread type) is disingenuous. As Leighton themselves try to use as an excuse, the working drawings provided do not indicate what type of rebars / couplers are to be used. Therefore (as Leighton claims) Henry Lai would not have known. Yet they saw it fit to lay blame on W&K when they did not even know that W&K was not required to specify the thread type when ordering materials (with Karl Speed arrogating the fact he is the "General Manager" of a company therefore need not know how rebar fixers order materials) [T8/48:9-16]. It is submitted this is

reflective of Leighton's irresponsible attitude towards the matter, constantly seeking to downplay their own role and shifting blame onto the weak, less resourceful rebar fixers.

Type 2 Defect – The “no hole” situation: i.e. couplers not exposed

30. As was clarified in the 5th statement of Joe Tam, GKJV was responsible for exposing the couplers casted in the Contract 1111 side of the stitch joint interface, whereas Hills/Leighton was responsible for the Contract 1112 side [CC10/6537-6538]. Henry Lai of Leighton was able to directly liaise and communicate with GKJV as to when the relevant stitch joint interface would be ready for GKJV to expose the couplers on the Contract 1111 side of the interface [CC10/6537]. It is difficult to understand how, with this line of direct communication, Leighton front line engineers still failed to perform the compatibility check.

31. W&K had no control over the hacking off of concrete to expose the couplers on either side of the interface. The Commission heard evidence from Henry Lai that the nature of the concrete was **solid** concrete and that it was not at all easy to chip them away [T4/118:24-119:5]. It was certainly not a situation where one can just use a hammer to do so. W&K's rebar fixing workers were not equipped (nor qualified to use) with the requisite tools (i.e. a hand-held electric drill [T3/78:3-16]) needed to chip away the concrete [T3/28:19-21]. One must remember that chipping away of concrete, if not done properly, may damage the couplers (no doubt if that happened Leighton would also lay blame on W&K). Thus it is neither realistic nor fair to suggest that the rebar fixers

should have done it themselves (without the proper tools or training) if the main contractors failed to do their own job properly.

These defects would have been visually obvious upon proper inspection

32. The defects were visually obvious and would have been seen upon proper inspection. This is a simple **fact**. Clearly:-
- (1) Where there was a *mismatch* – the rebar simply could not be screwed into the coupler at all or many threads would be exposed [EE1/400];
 - (2) Where the rebars were unconnected to the couplers because the couplers were still embedded in the concrete, the gap between the couplers and rebars would be apparent. In any event the unconnected rebar threads would be completely exposed and visually obvious to the naked eye.
33. The pictures attached to NCR 095 [CC3/1322-1334] and to NCR 096 [CC3/1373-1376] illustrates how visually obvious the defects are. The preponderance of evidence before this Commission is that such defects are visually obvious: see Jonathan Kitching [T6/133:18-24; 135:20-136:4]; William Holden [T8/76:17-23]; Michael Fu [T11/7:11-16]; Tony Tang [BB14/9495] [T12/104-105].
34. Jonathan Kitching’s attempt to downplay Leighton’s role or culpability and to shift the blame onto W&K does nothing to alter this simple fact. His claim that Henry Lai is “*extremely*” junior engineer and

“*may not have understood what needed to be done with couplers*” [T6/135:5-11] is not only disingenuous but indeed shocking coming from a senior member of Leighton. Whether a rebar is correctly connected to a coupler is nothing more than common sense. Henry Lai himself never claimed he did not know how to check the rebar connection properly. Mr. Kitching’s suggestion to the contrary is nothing more than an admission that Leighton thought it satisfactory to appoint a person who they now claim may not have been sufficiently qualified / experienced to conduct the important hold point inspections.

35. If it *were* true, that Leighton thought that junior engineers (such as Henry Lai) may not know how to check the rebar connections properly, but nonetheless appointed them to perform critical hold-point inspections without giving any training in that regard, then it was grossly irresponsible and reckless on the part of Leighton. One must bear in mind that Henry Lai was one of the main personnel responsible for carrying out all critical hold-point inspections not only for the Stitch Joints and Shunt Neck Joint, but also for other areas in the NAT where rebar connections were made.

B5. Contrasting evidence of Ah Chun and Henry Lai

36. W&K’s case in respect of the defects in the NAT area has been set out in great detail in the witness statement of Ng Man Chun (Ah Chun) [EE1/371.19-371.33]. Its case is clear, simple and straightforward throughout. As W&K was not given the chance to attend any of the interface meetings, the earliest opportunity at which W&K could have discovered the defects above was when Ah Chun, as a matter of his

normal practice, went on site to inspect the surrounding area around 1 day before the official commencement of the rebar fixing works.

37. On discovering the defects, Ah Chun (naturally) phoned Leighton's engineer, Henry Lai, to inform him about the problem and to ask for instructions as to how to proceed, because with both types of defects, it was simply impossible for the rebars and couplers to be properly connected. This is the normal course that any rebar fixer would follow when they encounter any problem with the materials such as rebars or couplers (as explained by Leighton's own engineer Sean Wong [T9/61:4-15]).
38. With regard to the Type 1 Defect, only 2-3 threads of rebar could be screwed in while a lot of the remaining threads would be completely exposed [EE1/371.19] (on cross-examination by W&K, Henry Lai agreed with this proposition [T5/65:1-5]). Similarly with Type 2 Defect where the couplers were not exposed for connection, it was not possible for the rebars to be connected to the couplers whilst still embedded in the concrete. Again, the rebar threads would be exposed.
39. Having been informed of these defects, Henry Lai of Leighton nevertheless *expressly instructed* W&K to do their rebar fixing work as far as they can and to simply "*screw them in as much as you could*". W&K therefore did as they were told, with the materials that had been

supplied to them by Leighton as they were contractually obliged to do so under the W&K Subcontract.

40. On proper analysis, Ah Chun's version of events must be the truth, one must also take into account the context in which these instructions were given. They were given at a time when there was significant time pressure in terms of site works [T3/140:3-143:6] and it would have taken up to 2 weeks to procure tapered-threaded rebars from Lenton [T7/135:1-14] as its yard was in Yuen Long and it did not have a rebar yard on site [T10/84:6-21].

41. While *after the event* it may be easy to lay blame on W&K that a professional rebar fixing subcontractor should not have proceeded with the works in these circumstances notwithstanding the express instructions given by Leighton. But one must be realistic about the situation and not lose sight of the fact that Leighton was in a significantly stronger position than W&K, both hierarchically, contractually and financially. Not only would W&K be in breach of contract if it refused to comply with express instructions given by Leighton or if it approached MTRCL to seek to explain the situation, W&K could be replaced at any time as Leighton pleases (without reason or compensation) as Leighton had the absolute discretion to withdraw works from W&K under the W&K Subcontract and then deduct the value of the works accordingly from the contract price to which W&K was entitled.

42. Faced with that situation, particularly when the livelihood of numerous rebar fixing workers (who were paid by the day) [EE1/401] were at stake, in reality Ah Chun (or anyone in his position) was left with no choice but to do as he was told. What else was he supposed to do? Was he supposed to refuse to follow Leighton's instructions and refuse to work unless W&K was given the correct rebars? That is unreal.
43. Ah Chun must have acted on the express instructions of Henry Lai. This was critical to Leighton's case (and to Henry Lai's version of events). Unsurprisingly this was a topic on which Ah Chun was heavily cross-examined, particularly on the lack of documentary evidence recording the conversations which took place between Ah Chun and Henry Lai.
44. In that respect, now thinking retrospectively, Ah Chun fairly accepted that he should have made a record of it, but as he explained, it did not occur to him *at that time* that the contents of those conversations might be critical or have to be documented. But one has to ask rhetorically, why would a foreman such as Ah Chun think that such simple instruction has to be recorded in writing? He was just a foreman following instructions. He never expected Henry Lai would be an adversary in legal proceedings, nor that he would be questioned by senior lawyers about the conversation. The matter involved a simple situation, the foreman discovered a problem on site, he reported it to an engineer, the engineer then told the foreman what to do. This is the normal course if any problem was discovered. Why would any foreman think that a written record ought to be made? There was never any

requirement (contractual or otherwise) said by Leighton that any instructions received by the rebar fixers had to be recorded. The suggestion that Henry Lai's instructions should have been recorded is absurd, particularly when on the very first occasion when such defect was discovered and instructions given by Henry Lai (i.e. at the Shunt Neck Joint [T3/65:4-15]), the works were all completed in a very short span of time (the rebar works and concreting each only took one day to complete).

45. Bearing in mind that this was a time when Ah Chun and Henry Lai have known each other for over a year, during which they have worked very closely together and have been meeting each other almost on a daily basis and would "*hang out*" and have drinks and meals together [T4/42:16-44:8]. Ah Chun reposed trust and confidence in Henry Lai as a friend [T4/4:13-16]. Ah Chun is not a man who is well educated (like Henry Lai was), he was a straightforward man but nonetheless was a hard working and conscientious foreman. Ah Chun never thought that one day, he would have to tell the truth about his friend Henry Lai. The criticism against Ah Chun *after the event* as to why he did not "record" Henry Lai's instructions is not only unfair but disregards the reality of the situation.
46. In contrast, the Commission may find that Henry Lai was neither a credible witness nor an honest one. His standard answer to various crucial questions was "I don't remember", as if it was a shield from any responsibility.

47. He was evasive. He was clearly not telling the truth. In his statement he claimed he “cannot recall” having had a conversation with Ah Chun instructing him to screw in the rebars as far as possible (see Henry Lai’s 3rd statement at §§8-10) [CC10/6507-6508]. Notwithstanding he “cannot remember” details of matters that occurred only last year in 2018, he nonetheless *insisted* that he did the rebar fixing checks with MTRCL’s Chris Chan (see Henry Lai’s 1st statement at §35) [CC1/95] when the latter said he did not. There is no RISC forms to support Henry Lai’s version.

48. He even tried to pretend he did not really know that BOSA rebars cannot be fitted into Lenton couplers until he saw it during the Inquiry [T5/64:17-25].

49. Henry Lai originally denied having attended a meeting with Jonathan Kitching and Ah Chun about the water leakage. That was nonsense, and directly contradicted by Kitching himself. Then Lai changed his story, and claimed he did in fact attend the meeting but did not pay attention to what was happening at the meeting [T5/7:23], notwithstanding that the meeting concerned water leakage that occurred at the very locations that he had supposed inspected. That too, we submit, was not truthful.

50. Henry Lai also denied having had a meeting with Jonathan Kitching about W&K’s letters which alleged that he (Lai) instructed W&K to do

the defective works [T5/40:6-11]. Upon questioning, he changed his story again, claiming that he *did* have such meeting but “cannot remember” what happened at the meeting [T5/71:3-10].

51. He admitted that he knew about the mismatch issue as early as when the NCR was issued [T5/73:18-25]. This is critical, because he couldn't have. The mismatch problem was not known until later that month [T6/89:15-22] weeks *after* the NCR was issued. The admission by Henry Lai that he knew about the mismatch issue *before* it was in fact discovered by others, exposes his lies. The only explanation how Henry Lai knew about it before others, is because Ah Chun's version of events is true.
52. Ah Chun, being a mere foreman for a rebar fixing company, has nothing to lose by telling the truth, as he has done. Henry Lai on the other hand, has everything to lose. If he *admitted* that he instructed Ah Chun to do the rebar works in a defective manner, not only his career at Leighton is over, his career as an *engineer* is over [T6/89:1-10]. And that presents a clear motive why Henry Lai has to conceal the truth and lie to the face of the Commission.
53. In stark contrast to the evasive attitude exhibited by some of the witnesses which have appeared before the Commission to give evidence, the relevant individuals of W&K not only *admit* that they knew at the time about the defects now discovered, but also confirm that these

defects existed because Leighton (knowing of the defects) nonetheless *expressly instructed* W&K to screw in as far as they can.

54. It is submitted that W&K's case represents a credible, consistent and coherent account of what actually happened for the following reasons:-

- (1) W&K knew full well that its works would ultimately need to be inspected by professionals;
- (2) W&K knew that threads of the rebars would be exposed as a result of the lack of connection and/or improper connection between the couplers and rebars and thus, any such defects would have been visually obvious to anyone inspecting the works;
- (3) The mismatch/incompatibility issue between BOSA threaded rebars and Lenton (tapered-threaded) couplers was not of its own doing in the first place.
- (4) W&K's version of events (that Ah Chun acted on the express instructions of Henry Lai) is corroborated by contemporaneous documentary evidence in the form of correspondences between Leighton and W&K since February 2018 when W&K was first accused (by Leighton) of being responsible for the defective works [EE1/277; 290-291; 301-302].
- (5) Ah Chun was regarded by all the Leighton witnesses who have personally worked with him (including Henry Lai) as a competent, serious, conscientious and hardworking person:-
 - (a) Henry Lai [T5/30:16-22]
 - (b) Jeff Lii [T7/8:23-9:5]
 - (c) Ronald Leung [T10/9:23-10:2]

(d) Alan Yeung [T10/39:1-3]

55. In the circumstances, no one in their right mind would, on a frolic of their own, just try to screw in as much as they could knowing the defects were there, and hope that those inspecting the works would simply blindly approve them (unless of course, the person who was to inspect the works, was also the very person who instructed Ah Chun to perform the work in that defective manner – and we submit this is what occurred here, and that person, was Henry Lai).
56. Without express instructions from Leighton, W&K would have to redo the works at its own expense again when the defects fail inspection. There was simply no motive for them to do so. On cross-examination by the Commission, **not even Henry Lai himself** (having denied giving those instructions to Ah Chun) can think of **any** reason why Ah Chun would run that sort of risks if it were not for his express instructions [T5/35:9-11]. Because there was none. As aptly observed by the Chairman: what's in it for Ah Chun [T5/34:23-35:4]? Nothing.
57. It is not in dispute that W&K engaged Loyal Ease Engineering Limited (“**Loyal Ease**”) as its sub-subcontractor for the carrying out of the Subcontract Works [CC11/6622].
58. During the Inquiry, there was originally an attempt by Leighton to ascribe a motive to W&K perform defective work by suggesting that

W&K paid Loyal Ease (as a sub-subcontractor) on the basis of weight of rebar works completed [T3/103:1-104:7] (thus, the argument runs, they would try to spend as little time as possible on the works to cut costs). That allegation is unsustainable (which appears to be conceded) given the fact that (i) the Loyal Ease subcontract was simply created to manage the workers (ii) Loyal Ease did **not** receive payments on the basis of weight of rebars works completed as stated in the subcontract and (iii) the workers were paid on a daily basis.

59. As clarified by Ben Cheung during cross-examination by Leighton, Loyal Ease and W&K in fact shared a common management / control and Loyal Ease was simply a corporate vehicle used to insulate W&K from any trouble caused by employment disputes with its workers [T6/39:20-40:22].
60. In this connection, Leighton's contention that the engagement of Loyal Ease had never been raised with Leighton at any time prior the filing of W&K's witness statements (see §21 of the witness statement of Jonathan Kitching [CC10/6491]) is also unsustainable and untrue. Since the commencement of the Subcontract Works in or around 2015, W&K had sent to Leighton relevant payment records of its rebar fixing workers in order to apply for interim payments from Leighton. In all those payment records, it was clearly stated that the employer of those workers was Loyal Ease. The payment records produced by Ben Cheung during his oral evidence date back to as early as 2016 [EE1/429-491].

61. Both W&K and Leighton proceeded with the rebar fixing works at the HHS and the NAT *knowing* that the rebar fixing workers engaged by W&K were formally employed by Loyal Ease. As a further example, on 6 August 2016, a rebar fixing worker, Mr. So Ping Lau (蘇炳流) engaged by Loyal Ease sustained a fatal accident on site. In processing the application for compensation under the Life Insurance Policy provided under the MTR Workers' Life Insurance Scheme and to facilitate Leighton's reporting of the relevant accident to the Labour Department, W&K provided to Leighton a copy of the subcontract between W&K and Loyal Ease dated 1 September 2015 as well as the deceased's tax returns for the period between 1 April 2015 and 31 March 2016, on which the name of the deceased's employer was clearly stated to be Loyal Ease: see the chain of correspondences between W&K and Leighton regarding this incident [EE1/492-497].
62. No one from Leighton has ever raised any issue with W&K regarding its engagement of Loyal Ease.
63. We also note that there is no request by Leighton to recall Ben Cheung to challenge any of the documentary materials showing that Leighton knew of the engagement of Loyal Ease.

C. The Second Point

64. The next point following from the First Point, is the issue of whether there were any proper routine and hold points inspections at the subject locations (the Stitch and Shunt Neck Joints). It is submitted that:-

- (1) If Henry Lai was telling the truth that he did proper rebar fixing inspections, it was *impossible* for him to not notice the defects;
- (2) Henry Lai's claim that he did rebar-fixing checks with MTRCL's Chris Chan is *false*, and is directly contradicted by Chris Chan;
- (3) The woeful lack of RISC forms and a lack of proper system to enforce the use of RICS forms allowed individuals (such as Henry Lai) to abuse the system and to allow works to continue to the next stage without proper hold-point inspections being conducted.

C1. The routine and hold-point inspections

65. All rebar fixing works should have been subjected to a rigorous inspection process. According to Sean Wong, a Leighton engineer, during his routine site checks, he would specifically check the connections between rebar and couplers and would look "*to ensure that every rebar was fully screwed in or only a few threads were showing out of the coupler.*" [CC6/3801].
66. Upon completion of the rebar fixing works in a certain bay, there were to be two hold-point inspections, namely the rebar fixing inspection and the pre-pour check. According to Sean Wong, "*The subcontractors knew that their work would need to be inspected or rectified (if there were any defects) before they could proceed to the next phase*" [CC6/3802]. During the formal rebar fixing inspection, he would again check "*that the threads of the rebar were screwed into the couplers and*

not exposed (or that only a few threads were exposed at most)”
[CC6/3804].

67. That was the **proper** way to conduct inspections.
68. All of the other Leighton engineers gave the same evidence: Jeff Lii [CC6/3813], Saky Chan [CC6/3840 and 3843], Alan Yeung [CC6/3820 and 3822] and Ronald Leung [T10/10:4-24], **save and except Henry Lai**.
69. Henry Lai did not (nor could he) claim that he did the rebar fixing checks properly or in the same way as his colleagues did, because he **knows**, had he done the checks properly as described above, it was **impossible** for him not to notice the defects stated above at the stitch and shunt neck joints.
70. During Jeff Lii’s oral evidence, he confirmed that in carrying out both the formal and informal inspections, he would not only generally look at the connection, but would physically try to screw the rebars in to make sure that it had been screwed all the way in and was tight enough [T7/37:21-38:18]. If there were problems regarding coupler connections during inspection, e.g. loose connections, he would “*call Ah Chun, to tell him to get someone to come and screw it tightly*” [T7/45:17-22]. Unsurprising, Henry Lai did not do the same.
71. According to Henry Lai, he would spend 5-10 minutes on each location as part of his daily routine checks [T5/43:12-16] (cf it was Jeff Lii’s

evidence that a proper routine check or a rebar fixing check would take 15 minutes to half an hour on average and may even take longer if the location is structurally complicate [T7/44:6-18]), then 5-10 minutes for each rebar fixing check and another 5-10 minutes for each pre-pour check [T5/51-55]. This adds up to 1-2 hours in total spent by Henry Lai on the rebar fixing checks of the Stitch Joints and the Shunt Neck Joint and 4-15 hours in total spent on the routine inspections.

72. When asked why he failed to notice **any** defective connection during all those time spent on inspections, Henry Lai's incredible response was "I just did not see it" [T5/67:14-17 and 68:5-10].
73. The answer was neither honest nor truthful. Given how visually obvious the defects are and how much time was said by Henry Lai to have been spent on both routine inspections and formal hold-point inspections of the Stitch Joints and the Shunt Neck Joint, it was simply inconceivable that Henry Lai did not spot a single defective connection. No satisfactory explanation was ever proffered by Henry Lai as to why these deviations/defects were not discovered at the time of inspection. The only explanation, we submit, is that Henry Lai is not telling the truth, as **he** was the very person who instructed Ah Chun to do the defective work in the first place as stated above.

C2. Henry Lai's evidence directly contradicted by MTR's Chris Chan

74. In his 1st witness statement, Henry Lai was adamant about having carried out all the formal rebar fixing checks in relation to all the Stitch

Joints and the Shunt Neck Joint with Chris Chan of MTRCL [CC1/95].

In his oral evidence however :-

- (1) During cross-examination by the Commission, he said he was unsure about which MTRCL engineer did the rebar fixing check alongside him in respect of the Shunt Neck Joint [T4/132:1-8]. It was only after he was referred to §35 of his 1st witness statement [CC1/95] that he said “*No, now I’m sure, yes.*” [T4/132:22].
- (2) The same happened during cross-examination by W&K on the inspection of Joint 3. When asked whether he remembered conducting the rebar fixing inspection for the East Wall of Joint 3 with Chris Chan, Henry Lai replied “*It was conducted but I do not remember who it was from MTR*” [T5/51:2-3]. It was only when he was reminded that that was part of the stitch joint and that his evidence the day before was that he conducted the rebar fixing checks in relation to all 3 of the Stitch Joints with Chris Chan that he changed his answer and said “*Sorry, my apologies. Yes, Chris Chan.*” [T5/51:6-10].

75. On the other hand, Chris Chan’s evidence was that he was *never* asked to inspect the Stitch Joints or the Shunt neck Joint [BB1/117]. Indeed, he was surprised that Henry Lai made such an allegation against him and that he found Henry Lai’s statement to be “utterly unacceptable” [T11/97:4-8]. On cross-examination, Chris Chan was sure that he did not do any of the rebar fixing check in respect of the Stitch Joints and the Shunt Neck Joint [T11/97:23-98:7]. He also expressed the view that it was more likely to have been Kappa Kang of MTRCL who carried out those rebar fixing checks [T/99:3-6].

76. Kappa Kang, however, gave evidence to the effect that she could not remember whether it was her who did the rebar fixing hold point inspections at the Stitch Joints and the Shunt Neck Joint, but contended that if she was the one who had done the relevant inspections, as a matter of practice, she should have sent out a Whatsapp message to confirm that the inspection was duly carried out. Nevertheless, having looked through various Whatsapp records, she was unable to find any message sent out by her **[BB14/9466-9467]**. She also broadened the scope of suspects and maintained that, apart from Chris Chan and herself, there are at least 6 other people who might have conducted the rebar fixing inspections in relation to the Stitch Joints and the Shunt Neck Joint, including Joe Tsang, Kenneth Kong, Victor Tung, Tony Tang, Wan Yiu Wing and Wong Wai Chung **[T12/55:4-12]**.
77. Tony Tang's evidence was that he only did the pre-pour checks in relation to the Stitch Joints and the Shunt Neck Joint, but did not carry out any rebar fixing inspections in the NAT area **[BB1/127-128 and BB14/9495]**. But he was able to point out from some of the photos he took for the pre-pour check at the time, some of the visible defective connections (see §§3-4 of Tony Tang's supplemental witness statement **[BB14/9495]**) even from the photos (see for example the photographs at **[BB14/9505 and 9511]** as identified by Tony Tang during the course of his evidence **[T12/104:18-105:23]**).
78. Victor Tung's evidence was that his involvement at the NAT was limited to monitoring site safety and general progress issues

[BB8/5249]. The remaining persons named by Kappa Kang did not appear before the Commission to give evidence, so it could not be verified.

79. It is submitted that Henry Lai's claim that he conducted hold-point inspections with Chris Chan is simply incredible and untruthful.
80. As rightly suggested by counsel for MTRCL to Henry Lai: "If it be found that you did instruct [Ah Chun] to carry out defective work...that would provide an explanation why you didn't contact Mr. Chan to inspect, because you didn't want him [Chan] to see the defective work" [T5/114:13-23]. Not only is that proposition entirely logical, it also explains why Henry Lai **could not** submit any RISC forms for Chris Chan to sign **at any time** during or after the **purported** inspection. It was not because of heavy "work load" as Henry Lai claims (as he accepts it would only take 5-10 minutes to fill out a RISC form [T5/56:20-22]), it was because Chris Chan *never* inspected the works with him.
81. As Chris Chan fairly accepted during cross-examination by the Government, whilst it is his assumption/belief that the rebar fixing hold-point inspection has been carried out by his team members from the construction engineering team or the Inspector of Works, he could not in fact rule out the possibility that no one from his team has in fact conducted the rebar fixing hold-point inspections in respect of the Stitch Joints and the Shunt Neck Joint [T11/107-108].

82. Insofar as Karl Speed [CC6/3754] tried to suggest that based on MTRCL's site diary records, joint inspections "must have been" done, because the item of work was recorded in the diary. That suggestion is simply false, and is directly contradicted by the incident of the HHS VRV Room. The fact that concrete was poured at a certain location or that the rebar works and concreting were both recorded in the site diary, does **not** mean that those works passed inspection at all. The HHS VRV room incident is a perfect illustration.
83. On 30 June 2017, MTRCL was invited to carry out a rebar fixing hold-point inspection at the HHS VRV Room. Jason Kwok, a construction engineer II of MTRCL, attended the relevant rebar fixing hold-point inspection and **rejected** the works on the basis that there was "*incomplete fixing of coupler*" (as recorded in RISC Form no. 12444) [BB8/5794].
84. Subsequently, it was discovered by Jason Kwok that the relevant location nonetheless proceeded to concrete casting notwithstanding (i) he had just rejected the rebar fixing hold-point inspection earlier and (ii) there was **no request at all** for a pre-pour check. As remarked in RISC Form no. 12445 (pre-pour check) [BB8/5796], there was "*No invitation for general condition inspection of formwork of footing (Rejected)*". There was further a note in asterisk which reads "*LCAL pls review your ITP system and brief to your front staff, it is totally unacceptable, and please tell me how to prevent the problem occur again*". It is notable from the two RISC forms that the rebar fixing hold-point inspection and the pre-pour check was handled by the same Leighton engineer, Lam

Wai Chung. It is also noted that from Leighton's records, the RISC form for the pre-pour check was a blank form and recorded as "issued not yet replied", when in fact MTRCL not only replied to it but also criticized Leighton on it [T13/53:21 onwards].

85. By an email dated the same day, i.e. 30 September 2017, Jason Kwok put on record his displeasure over Leighton's unacceptable behavior in arranging for concrete to be casted on a particular location despite knowing that it had failed rebar fixing check and that no pre-pour check had yet been done [BB8/5789].
86. This VRV room incident is a clear example where there was a "break down" of the ITP system [T13/59:13-22] down" and shows that there were loopholes in the system which can be exploited. In the case of the VRV room, the Leighton engineer who did the rebar fixing check with MTRCL knew that MTRCL had rejected the rebar fixing check and that no pre-pour check was ever conducted, yet that very same Leighton engineer ordered concrete to be poured. And it was only by "happenstance" that the MTRCL engineer (who rejected the check) returned to site for routine inspection that the concrete pouring was exposed [T13/45:25-46:4].
87. The problem with a woeful lack of RISC forms generated by Leighton [CC6/3786], is that there is simply no documentary evidence against which it can now be verified whether or not any hold-point inspections had indeed taken place insofar as the Stitch Joints and the Shunt Neck Joint are concerned.

C3. RISC Forms and the abuse of the system

88. The lack of RISC forms and the lack of proper enforcement of the RISC form requirement allowed the system of inspection to be abused. Hence, the Commission now faces a situation where Henry Lai *claims* (without any records) that he did the hold-point inspection with Chris Chan, but Chris Chan on the other hand strongly denying it. There is nothing to support Henry Lai's version. And the Commission is left with no conclusive evidence as to who from MTRCL did the hold point inspection (if at all).
89. Henry Lai claimed that he did not submit retrospective RISC forms for Chris Chan to sign because he thought it was "inappropriate" to do so after a reasonable amount of time had elapsed [T5/57:7-12]. That is directly contradicted by the fact that his colleagues (e.g. Jeff Lii) were still able to file RISC forms to MTRCL **months** after the relevant hold-point inspection [T7:51:20-52:9]. As stated above, the true reason why Henry Lai did not (and could not) submit any RISC Forms to Chris Chan to sign is because Chris Chan did not conduct the rebar fixing checks with him as he claims.

D. The Third Point

90. Lastly, it is submitted that the conduct of the various parties after the water leakage occurred is of importance to ascertain where the truth lies.

D1. Conduct after-the-event

91. Leighton holds itself out as a responsible company. It is reasonable to expect that a large corporate entity such as Leighton, as the main contractor of a public utility and city infrastructure project, being accountable to the public at large, would be keen to undertake a thorough investigation as to what was the real cause to this saga, particularly when serious allegations have been made by W&K against Henry Lai. In Henry Lai's own words, these were matters which went to his professional integrity [CC10/6507]. Not only did Leighton fail to do so, it refused to do so.
92. Leighton's irresponsible approach in this regard is demonstrated by the events which occurred after the water leakage was discovered:-
- (1) Henry Lai was promoted to the rank of senior engineer in April 2018 (i.e. just 2 months after the defects in the Stitch Joints and the Shunt Neck Joint in the NAT came to light) [T5/42:2], notwithstanding that he was the very person responsible for the inspection of those locations.
 - (2) Apart from an internal appraisal which Henry Lai was taken through [CC10/6545.5] (and there no evidence as to what it actually achieved), no formal investigation was done into W&K's allegations or against Henry Lai. This was largely because Jonathan Kitching of Leighton (without any kind of investigation or inquiry) dismissed out of hand W&K's allegations as

“incredible” [CC10/6489] on the basis that it did not make sense to him that W&K would have acted on the instructions of a Leighton’s junior engineer to perform defective work [CC10/6489-6490].

- (3) This was so even though by February 2018, **it was in fact established** that at least in relation to the issue of mismatch/incompatibility between couplers and rebars, W&K’s complaints in its letters dated 23 February 2018 [EE1/277] and 26 February 2018 [EE1/290-291] were proven to be true.
- (4) Whilst apparently there were discussions between Jonathan Kitching and Henry Lai (unrecalled by Henry Lai) after the defects came to light in or around February 2018, Leighton simply accepted Henry Lai’s incredible claim that he had “no idea” why the defects had occurred and “did not remember anything” of note about the Stitch Joints and the Shunt Neck Joint - as a complete answer and did not even attempt to inquire further into the matter even though his responses were plainly unsatisfactory and inadequate [CC10/6488] [T6/104:3-8 and 137:1-7].
- (5) This was so even though W&K’s allegations went to the very core of Henry Lai’s professional integrity (or the lack thereof) and were very serious allegations that would not be lightly made by a subcontractor.

- (6) Not only did Leighton effectively condone Henry Lai's substandard performance, it is submitted that they also attempted to conceal the truth from MTRCL when by a letter dated 27 July 2018 [BB7/5073-5075], MTRCL enquired about, among other things, the "*Details of actions taken against responsible sub-contractor(s) in respect of the NAT issues*".
- (7) Leighton concealed the fact that W&K had made very serious allegations against Leighton and in particular Henry Lai in correspondence, and merely told MTRCL in reply that a meeting was held with the senior management of W&K, at which it was decided that W&K would not be carrying out any further work on the project. The series of correspondences between W&K and Leighton since February 2018 together with the allegations made against Henry Lai by W&K and the issue arising from the incompatibility between Lenton couplers and BOSA rebars [BB7/5081-5086] were all **undisclosed** by Leighton to MTRCL.
- (8) This was so even though, as aptly observed by Professor Hansford, given that Contract 1112 is a target cost contract, MTRCL had a legitimate interest to understand the transactions and commercial discussions between W&K and Leighton [T6/123:10-18].
- (9) In light of what actually occurred between W&K and Leighton, Leighton's response to MTRCL was disingenuous. When it was twice put to Jonathan Kitching that Leighton's response was

neither true nor accurate, he could not deny it but simply tried to evade the question by arrogating “this is what we responded at the time” and that MTRCL “surely” could investigate the matter themselves [T6/115:24-116:23] even though MTRCL was left in the dark about what was happening.

93. It is submitted that the conduct of Leighton personnel as stated above displays signs of arrogance, attempt to conceal the truth to avoid potential liability, attempts to shift blame to less-resourceful subcontractors, refusal to investigate one’s own employees in face of serious allegations. Therefore, when approaching their evidence, especially on matters where attempts are made to lay blame on W&K, they must be treated with caution.

D2. Inconclusive evidence on causation

94. It is noted that whilst this Extended Inquiry was at least in part prompted by the problems of water seepage and cracks in the concrete discovered at the NAT, and a significant proportion of time during the Extended Inquiry was spent on eliciting factual evidence on Issues 1 and 2 concerning the defective connections between couplers and rebars at the Stitch Joints and the Shunt Neck Joint, there is no conclusive evidence on the potential causal linkage between the two.
95. It was accepted by Mr. Jonathan Kitching, during his cross-examination by the Commission, that once the problem of water seepage and cracks was discovered, a relatively quick decision (a matter of merely about a

week or so) was made that the Stitch Joints just had to be demolished [T6/81:21-82:7].

96. As a matter of fact, demolition works of Joints 1 and 2 commenced as early as on 15 February 2018: see §39 of William Holden's 1st witness statement [CC1/78].
97. Curiously, although having accepted that he personally regarded the problem of water seepage and cracks in the concrete to be a serious matter, Mr. Jonathan Kitching for whatever reason did not think that it warranted a thorough, rigorous investigation into the precise cause of the problem [T6/80:22-81:11].
98. As Mr. Jonathan Kitching confirmed, there is simply no available in-depth, detailed investigation report on what was the real cause of the problem of water leakage and concrete cracking [T/6/81:11-17]. Upon cross-examination, he accepted that the cause of the cracking and water leakage had never been definitively determined and that it was nothing more than an assumption that the improper or lack of connection between couplers and rebars was the cause of the problem. [T6/79:12-21].
99. As has been set out in the witness statement of Leighton's witnesses and further canvassed during their cross-examination (including Mr. Jonathan Kitching), there are other potential causes which might have led to the problems of water seepage and/or concrete cracking being observed at the Stitch and Shunt Neck Joints:- For example-

- (1) Relative movement on the two structures at the stitch joint:-
 - (a) Jonathan Kitching agreed that the non-connection or improper connection of rebars and couplers itself would not have resulted in the formation of a gap of up to 10 mm unless the two structures have moved relative to each other since the stitch joint itself was only 2 metre wide **[T6/130:24-131:16]**.
 - (b) William Holden agreed that a gap in the magnitude of 5 to 10 millimetres demonstrates that the structures on the two sides of the stitch joint have moved relative to each other **[T8/113:17-21]** and thus, it is at least a possibility that the real cause of the concrete cracking and the water seepage was due to the excessive movement of the two structures **[T8/115:2-8]**.

- (2) Contrary to the contractual requirement provided under Note 2 of Drawing No. 1112/B/000/ATK/011/101A **[BB1/463]**, the stitch joint had not been constructed in accordance with the typical tunnel stitch joint details at the NAT Tunnels, which provides that, *“The stitch joint shall be cast as late as possible in the construction sequence, and preperrably (sic) after groundwater recharge, to minimise the amount of differential movement after casting. Casting of the stitch joint shall not be carried out until after completion of backfilling.”*: see William Holden **[T8/72:2-14]**, **[T8/72:16-18]**.

(3) Insofar as Joint 2 is concerned, failure and/or fault in the installation of permanent waterproofing measures: see Karl Speed 5th witness statement at §37) [CC1/60], William Holden 1st witness statement at §24) [CC1/75] and transcript (William Holden) [T8/80:21-81:12], [T8/118:21-24], [T8/118:25-119:7].

100. In the face of such inconclusive evidence and without an attempt to first carry out an in-depth, thorough investigation to ascertain the precise cause of the problem, it is submitted that it is neither just nor fair for Leighton (or any party) to try to assign blame solely on W&K.

101. In this connection, Leighton's attempt to lay blame on W&K is wholly unjustified. Indeed, Leighton's treatment of W&K (without investigating the matter properly) was high-handed, by:-

(1) Writing to W&K on 12 February 2018 and alleged that "*Investigations are currently underway to ascertain the exact cause of the leaks and cracking however preliminary evidence suggests that the cause is due to defective work [on the part of W&K]*" [EE1/271].

(2) Sending to W&K a backcharge notice (SBN0056) on 23 February 2018 in respect of the remedial works at the Stitch Joints [EE1/286].

(3) Alleging *conclusively* in its letter to W&K dated 26 February 2018 that it has purportedly been established that the defects

discovered at the Stitch and Shunt Neck Joint (the water seepage and cracking) were allegedly due to W&K's defective "workmanship" in failing to properly connect the rebars into the couplers and informed W&K that Leighton shall engage other subcontractors to complete the defect rectification works and all costs arising therefrom shall be recovered from W&K [EE1/293-294].

(4) Withholding balance payment from W&K in the sum of HK\$1.1 million (this sum of money remains to date outstanding) (see §63 of the witness statement of Cheung Yick Ming [EE1/80-81]).

(5) Threatening to recover rectification costs in excess of HK\$40 million from W&K by its letter dated 10 May 2018 [EE1/304].

102. This was so even though under Clause 17.1 of the subcontract entered into between Leighton and W&K for the rebar fixing works under Contract 1112 ("the **W&K Subcontract**") [CC11/6554-6745], W&K shall be entitled to additional payment for any rectification works "*caused by the act, neglect or default of the Employer [i.e. MTRCL], its servants or agents, or the Engineer or Architect under the Main Contract or of the Contractor [i.e. Leighton], its servants or agents*" [CC11/6569-6570].

103. The above approach was taken by Leighton against W&K notwithstanding W&K had throughout displayed a constructive and

cooperative attitude towards resolving the issue, not least by requesting for a joint inspection to ascertain the extent of the problem as well as the likely cause of it: see W&K's letter to Leighton dated 26 February 2018 [EE1/290-291].

104. The request for a joint inspection was simply ignored by Leighton. When cross-examined by the Commission as to why no joint inspection was ever convened as per W&K's request, Mr. Jonathan Kitching simply said, "... *I didn't really see what benefit it would be at the time ... It was a busy time, and without wanting to – at that time, without wanting to go into a witch hunt with everybody, the focus was to get the repairs done and finished at that time.*" [T6/93:12-25]. No proper justification was ever given.
105. In the circumstances, W&K was left in a position where it was being accused by Leighton of defective workmanship leading to serious problems (concrete cracking and water seepage) and facing serious potential liability for rectification costs in the astronomical sum of HK\$40 million (when the final sub-contract price for works undertaken by W&K for Leighton in HHS and NAT under its Sub-contract was merely HK\$62.5 million [EE1/296]), but was nonetheless *denied* any chance to undertake any kind of investigation in an attempt to verify whether or not it was indeed at fault as accused.
106. This, W&K submits, illustrates the high-handed manner in which Leighton had treated W&K and indeed, an irresponsible attitude displayed by Leighton towards uncovering the truth of the matter.

Concluding submissions

107. Lastly, W&K of course recognize that it is not part of the Commission's main function to "assign blame", but we nonetheless respectfully submit (as we did in the opening address) that, in the circumstances of this case and for the reasons stated above, W&K should **not** be made Leighton's scapegoat for following Leighton's instructions on the rebar works.
108. Respectfully submitted.

Dated this 19th July 2019

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