

Boonchai Sompolpong v Low Tuck Kwong
[2010] SGHC 266

Case Number : Suit No 499 of 2009
Decision Date : 06 September 2010
Tribunal/Court : High Court
Coram : Philip Pillai J
Counsel Name(s) : Mr Sankaran Karthikeyan and Mr George John (Toh Tan LLP) for the plaintiff; Mr Siraj Omar (Premier Law LLC) for the defendant.
Parties : Boonchai Sompolpong — Low Tuck Kwong

Building and Construction Law

Contract

6 September 2010

Judgment reserved.

Philip Pillai J:

1 The plaintiff, an architect practising in Singapore under the name and style of TAG Architects, following an introduction by a mutual friend Mr Yap Han Hoe ("Yap"), agreed to provide the defendant, a Malaysian client, with professional architectural services in two sequentially separate projects, viz, first a residential house in Perth, Australia (the "Joondalup Project"); and subsequently a second condominium complex in Balikpapan, Indonesia (the "Balikpapan Project"). Both projects did not proceed to construction.

2 It is not disputed that there were oral and written agreements between the plaintiff and the defendant relating to the appointment of the plaintiff to provide professional architectural services for both projects, and that the plaintiff did provide the defendant with various designs for each project. [\[note: 1\]](#) The dispute is instead over the precise terms of the agreement, relating to the agreed payment terms, whether the plaintiff's designs had been accepted by the defendant and if so, how the Singapore Institute of Architect's Conditions of Appointment and Architect's Services And Mode of Payment Terms (the "SIA Terms") would operate with respect to payments claimed by the plaintiff.

Facts

3 For clarity, I will set out the facts surrounding the Joondalup and Balikpapan Projects separately.

Joondalup Project

4 The plaintiff, anxious to receive professional assignments for his Singapore practice, was introduced by Yap to the defendant, a Malaysian businessman engaged in building projects in Southeast Asia and Australia. Through correspondence with Yap via a letter dated 4 March 2003, the plaintiff offered his professional services to the defendant for the Joondalup Project, as follows:

I am to come up with a proposal and if this is not accepted by him, a lump sum fee will be paid for work done. My scope of services is to complete the design work and liaise with his local

architects to do submission to building authorities in Perth.

Normally, I need to see the site and discuss terms and conditions of my professional service before embarking on design work. Since we know each other for sometime and with your assurance that [the defendant] is your old school friend and that he is a fair and reasonable man with good credit, I will leave the matter of fees for the time being.

However when my initial design is accepted, a progress payment will be billed and thereafter as the project progresses. The terms and conditions of engagement will be based on the standard set be [*sic*] the Singapore Institute of Architects.

Please convey the matter mentioned in this letter to [the defendant].

5 The plaintiff met the defendant on 15 March 2003 and thereafter proceeded with the brief for a project budgeted at A\$10 million on a land area of 1.75 acres to build a 5-6 bedroom house with a 40,000 sq ft built in floor area.

6 There is, however, some dispute over whether the lump sum fee should his design not be accepted was specified as S\$50,000. [\[note: 2\]](#) It suffices here to note that in the letter dated 4 March 2003, there was no specification of the lump sum payable upon non-acceptance of the designs.

7 On 30 May 2003, the plaintiff issued the first invoice under the Joondalup Project for S\$30,000, labelling the payment as "Progress Payment #1". [\[note: 3\]](#) The defendant subsequently paid the plaintiff S\$20,000, in two separate payments of S\$10,000 each. [\[note: 4\]](#) No conditions were stated or attached to these payments.

8 On 31 December 2003, the plaintiff issued a receipt for the S\$20,000 received under the first progress payment, characterising the received monies as "Progress Payment #1 billed as payment for work done". [\[note: 5\]](#) The plaintiff also issued a further invoice for the cumulative sum of S\$60,000, reflecting the previous payment of S\$20,000, and stating the balance sum payable as S\$40,000. [\[note: 6\]](#) The defendant subsequently paid, on 12 July 2004, a further sum of S\$30,000 to the plaintiff. Again, no conditions were stated or attached to these payments. In all, therefore, the defendant made three payments (S\$10,000, S\$10,000 and S\$30,000), amounting to a total payment S\$50,000 (for convenience, hereinafter referred to as the "S\$50,000 payment").

9 On 10 March 2004, the defendant's representative one Mr Loo Woei Harng ("Loo") wrote to the plaintiff in respect of the plaintiff's "Design Scheme #5", stating that "the basic design and form are acceptable" and requesting the elimination of high retaining walls and conformity to the ground profile. [\[note: 7\]](#) On 20 June 2004, Yap informed the plaintiff through email that the defendant was likely to let the plaintiff and the plaintiff's appointed consultant engineer, one Mr Harry Lewis ("Lewis"), see through the Joondalup Project. Yap requested the plaintiff to have a "details discussion" with Lewis to see how they could derive "precise plans and costs". [\[note: 8\]](#) On 1 July 2004, Yap further informed the plaintiff that the defendant was open to both the plaintiff and Lewis providing "total and comprehensive services" for the project. [\[note: 9\]](#) The plaintiff undertook further work including the preparation of cost budgets for the defendant.

10 On 16 October 2004, the plaintiff, at the defendant's invitation, attended the 10th Anniversary celebration of the Joondalup Country Club (the "Joondalup Meeting"). The defendant offered a lump sum fee of A\$1 million to the plaintiff to complete the Joondalup Project. The plaintiff documented the

Joondalup Meeting in a letter dated 22 October 2004, but later opted against the proposed A\$1 million fee. On 1 December 2004, the plaintiff wrote to the defendant referring to the Joondalup Meeting, and gave a breakdown of the revised budget for the Joondalup Project. [\[note: 10\]](#) The defendant did not reply to this letter. On 27 January 2005, the plaintiff wrote to Yap, proposing to fix the fees for the Joondalup Project at a lump sum fee of S\$150,000. [\[note: 11\]](#) The defendant did not respond to this letter. The plaintiff repeated this request on 15 September 2005. [\[note: 12\]](#) In this letter, the figures were tabulated to reflect that the S\$50,000 paid by the defendant thus far was used as part of a "previous payment" for "design work". [\[note: 13\]](#) Again, the defendant did not respond to the letter. [\[note: 14\]](#)

11 On 28 July 2006, the plaintiff, by an AR Registered letter, informed the defendant *inter alia* that "[i]t had [*sic*] been over 18 months that my commission to design the above project had been completed satisfactorily with Scheme #9 dated 19 November 2004". [\[note: 15\]](#) There was no response to the letter.

12 In all, between April 2003 and November 2004, a total of nine schemes were provided by the plaintiff with regard to the Joondalup Project. As the plaintiff stated in his Affidavit of Evidence-in-Chief ("AEIC"), he often had to make substantial changes between designs to accommodate the feedback given and requests made by the defendant. [\[note: 16\]](#) By way of summary, the schemes were produced on the following dates:

- (a) Joondalup Scheme No. 1: 21 April 2003
- (b) Joondalup Scheme No. 2: 30 May 2003
- (c) Joondalup Scheme No. 3: 4 September 2003
- (d) Joondalup Scheme No. 4: 31 October 2003
- (e) Joondalup Scheme No. 5: 28 February 2004
- (f) Joondalup Scheme No. 6: 5 May 2004
- (g) Joondalup Scheme No. 7: 10 July 2004
- (h) Joondalup Scheme No. 8: 8 October 2004

(i) Joondalup Scheme No. 9: 19 November 2004

13 In the course of developing these designs and producing a cost budget, the plaintiff made several visits to Perth, the costs of which were reimbursed by the defendant. The plaintiff undertook work up to readiness for planning submission and also undertook pre-tender qualification work. When the defendant proposed to extend the scope of the plaintiff's brief to now include the completion of the project, the plaintiff considered relocating his family to Perth but later demurred. The plaintiff produced various lump sum fee proposals for this enlarged assignment, to which there was no response.

Balikpapan Project

14 By letter dated 1 June 2003, by the plaintiff to Yap, the plaintiff recounted their meeting with the defendant on 30 May 2003 and set out his second terms of engagement as being:

... to design the condominium and liaise with [the defendant's] local architects to do submission to building authorities in Balikpapan.

...

I also appreciate your comment that [the defendant] is looking for a good design for the project which is to house his professional staff as well as for sales to the public. And if I can deliver the design he wants, professional fee is not a problem.

In any case, the terms and conditions of engagement will be based on the standard set be [sic] the Singapore Institute of Architects. [\[note: 17\]](#)

15 The plaintiff commenced work and produced architectural design plans for the 5-storey condominium, incorporating further changes requested by the defendant, right up to Scheme No. 4, and provided computer diskettes of this scheme for presentation to the mayor for feedback. Scheme No. 6 was finally submitted to the local authorities for approval. The approval was received on 15 March 2005.

16 On 6 February 2004, the defendant's representative, one Mr Lim Chai Hock ("Lim"), wrote an email to Loo, stating that after submission of the Balikpapan designs for planning approval, "a principle approval will be granted" and that the Balikpapan Project will "proceed with the EIA and structural design". [\[note: 18\]](#) On 12 February 2004, the plaintiff was instructed by Loo to "proceed with the appointment of a local architect in Balikpapan and set-up a company there, if necessary, so as to make the submissions to the local authorities". [\[note: 19\]](#) On 26 July 2004, Loo sent an email to inform the plaintiff that he was "[s]till chasing planning authority in Balikpapan". [\[note: 20\]](#) On 28 July 2006, the plaintiff, by an AR Registered letter, informed the defendant that he had "completed the design Scheme #6 dated 8 October 2004 which had also received Planning and Building Plan Approvals". [\[note: 21\]](#)

17 On 7 August 2007, the plaintiff's Indonesian architect, one Mr Benny Dhanio, informed the plaintiff that the Balikpapan Project building plans were approved by the Indonesian authorities, and that the construction cost of the Balikpapan Project would be US\$20 million (S\$30 million). [\[note: 22\]](#)

18 In all, a total of six schemes were provided by the plaintiff with regard to the Balikpapan

Project. These schemes were produced on the following dates:

- (a) Balikpapan Scheme No. 1: 27 June 2003
- (b) Balikpapan Scheme No. 2: 2 July 2003
- (c) Balikpapan Scheme No. 3: 10 October 2003
- (d) Balikpapan Scheme No. 4: 1 December 2003
- (e) Balikpapan Scheme No. 5: 10 March 2004
- (f) Balikpapan Scheme No. 6: 8 October 2004

Final correspondence leading to the dispute

19 On 11 September 2007, the plaintiff sent two AR Registered letters to the defendant, addressing the Joondalup and Balikpapan Projects respectively. [\[note: 23\]](#) With regard to the Joondalup Project, the plaintiff informed the defendant that the Project design was "completed and ready for planning submission", and that "pre-tender qualification work [had been] done". [\[note: 24\]](#) With regard to the Balikpapan Project, the plaintiff informed the defendant that the Project "had been given both the planning and building plan approvals by the Indonesian authority. The fee will be based on the tendered construction cost of US\$ 20 Million". [\[note: 25\]](#) In both letters, the plaintiff also reminded the defendant that unless the defendant was willing to meet within 21 days to agree on the final amount of the plaintiff's fees, the plaintiff would proceed to have his invoicing based on the SIA Terms. [\[note: 26\]](#)

20 The defendant's secretary contacted the plaintiff on 17 September 2007, requesting the plaintiff to provide details of his proposed fee based on a percentage basis. The plaintiff responded via two letters dated 21 September 2007, each rendering details of the scope of work and amount to be billed for the Joondalup and Balikpapan Projects respectively. [\[note: 27\]](#) The fees were computed as percentage fees pursuant to the SIA Terms, and were stated to be the sums of S\$432,240 (Joondalup) and S\$546,750 (Balikpapan).

21 On 25 September 2007, Yap informed the plaintiff via fax that "[the defendant] did express to you that he was willing to pay you S\$50,000 for his two projects in Australia and Balikpapan". On 28 September 2007, the defendant responded to the plaintiff's proposed fee structure alleging that both the Joondalup and Balikpapan designs were not accepted and that the previous payments aggregating S\$50,000 were payments for the rejected designs. [\[note: 28\]](#)

22 Following from the defendant's refusal to pay the sums of S\$432,240 (Joondalup) and

S\$546,750 (Balikpapan), the plaintiff instituted proceedings in this court to claim the abovementioned sums. However, with regard to the Joondalup Project fees, the plaintiff amended his Statement of Claim on 19 November 2009 to reflect a reduced claim of S\$415,472. [\[note: 29\]](#) The plaintiff made the S\$16,768 deduction because he erroneously assumed that the Joondalup Project's professional engineer fees, which were reduced by S\$16,768, were not charged separately to the defendant. [\[note: 30\]](#) In any case, the plaintiff has opted to stand by the amended claim of S\$415,472 under the Joondalup Project.

The plaintiff's claims

23 The plaintiff argues that he is entitled to payment pursuant to the SIA Terms on either of two grounds:

- (a) That there was a contractual agreement between the parties pursuant to which the plaintiff is entitled to be paid in accordance with the SIA Terms (the "contractual claim"); or
- (b) In the alternative, should the court find that there is a contract but no clear contractual provision dealing with payment, that the plaintiff is entitled to be paid pursuant to the SIA Terms on a quantum meruit basis (the "quantum meruit claim").

24 With regard to the quantum of payment, the plaintiff claims

- (a) the sum of S\$415,472 under Invoice No. INV/6101/03 dated 1 October 2007 in respect of the Joondalup Project;
- (b) the sum of S\$546,750 under Invoice No. INV/6201/01 dated 1 October 2007 in respect of the Balikpapan Project;
- (c) interest payments on the sum of S\$962,222 (aggregate of S\$415,472 and S\$546,750) at the rate of 3% above the prevailing prime rate, commencing 14 days after rendering of the plaintiff's invoices dated 1 October 2007; and
- (d) interest payments on the sum of S\$10,000 in respect of the plaintiff's invoice dated 30 May 2003, for the period dated 15 June 2003 to 1 October 2007.

25 There is no need to address the *quantum meruit* claim in this judgment (see [\[65\]](#) *infra*). I will deal with the contractual claim only.

Issues

26 The issues which arise for determination are:

- (a) Whether pursuant to the contracts of engagement, the defendant had accepted the

plaintiff's designs for the Joondalup and Balikpapan Projects;

(b) Whether, and how, the SIA Terms operate with regard to the Joondalup and Balikpapan Projects; and

(c) Whether the plaintiff is entitled to the interest sums as claimed.

27 I will address the issues *in seriatim*.

Whether the defendant accepted the plaintiff's designs

28 The key issue on both parties' pleaded cases is whether the defendant had accepted the plaintiff's designs. [\[note: 31\]](#) It is mutually agreed by both parties in their pleadings [\[note: 32\]](#) that the implication of the defendant's acceptance of the plaintiff's designs is, that had there been an acceptance of the design, the defendant would be obliged to pay the plaintiff professional fees for the work done as provided in the SIA Terms. [\[note: 33\]](#) The determination of whether there was acceptance of the designs is a question of fact.

29 The defendant admits that he is experienced and has retained architects to work for him. On these occasions he states that he has signed formal contracts which would set out the scope of works as well as the fees involved. He avers that he had paid the plaintiff S\$50,000 and reimbursed all his travel expenses and that he had not accepted the designs for both projects. While it is standard industry practice for an architect to request and receive an express written acceptance of design, the absence of a letter of acceptance of design is not fatal provided evidence exists of the fact of such acceptance.

30 I now proceed to consider the evidence relating to the characterisation of the S\$50,000 payment and the defendant's conduct during the correspondence with the plaintiff.

Characterisation of the S\$50,000 payment

31 The plaintiff's characterisation of the defendant's three payments amounting to S\$50,000 is that these were made pursuant to invoices issued under the Joondalup Project, as a form of "progress payment". The defendant characterised the S\$50,000 payment as a rejection fee paid upon non-acceptance of the plaintiff's design. On the evidence before me, I accept the plaintiff's characterisation for the following reasons.

32 The plaintiff continuously referred to the S\$50,000 payment as "progress payment" in all the invoices. [\[note: 34\]](#) The defendant's characterisation that he was only obliged to pay a lump sum fee if he did not accept the design does not square with his receipt of the invoices and instalment payments thereon. As a businessman having experience with building projects and architects, if such had been his understanding, the usage of the expression "progress payment" should have evoked a contemporaneous response or clarification from him at any time he made instalment payments.

33 Next, although the parties agreed that a "lump sum" would be paid upon non-acceptance of the design, in none of the correspondence was the sum specified to be S\$50,000. [\[note: 35\]](#) In fact, the defendant's first and only characterisation of the S\$50,000 as a lump sum rejection fee arose on

28 September 2007, more than three years after the final instalment of the S\$50,000 was paid on 12 July 2004. If the S\$50,000 payment was indeed paid as a lump sum rejection fee, the defendant would surely have explicitly stated so at an earlier date, especially keeping in view that the defendant must have been aware that the plaintiff was conducting himself (eg travelling to Perth) in a manner that reflected the plaintiff's belief that his design had been accepted. Furthermore, the defendant was evasive when questioned about the S\$50,000 payment. The defendant stated, in his Affidavit of Evidence-In-Chief, that the terms of the agreement were evidenced in the letters dated 4 March 2003 and 1 June 2003. [\[note: 36\]](#) He could not explain why the letters made no reference to a lump sum rejection fee of S\$50,000, saying that "it may be a mistake". He also could not satisfactorily explain why he did not make any changes to his AEIC to reflect the mistake. He first contended that he did not know he was going to court, but when questioned on why he did not make the necessary corrections *after* he knew he was going to court, he suggested that it was due to his limited grasp of the English language. [\[note: 37\]](#)

34 Finally, the defendant at no time provided any explanation as to why the alleged lump sum rejection fee of S\$50,000 was paid in three separate instalments spread over a 12 month period. [\[note: 38\]](#) If the S\$50,000 payment was indeed paid as a lump sum rejection fee, it is unlikely that the defendant would have paid out by instalments without noting that such instalment payment signified non-acceptance or pending a decision as to acceptance.

Defendant's conduct during the course of correspondence with the plaintiff

35 Beyond characterisation of the S\$50,000 payment, I find that the defendant's conduct during the course of correspondence with the plaintiff suggests that the defendant had in fact accepted the plaintiff's designs for the reasons which follow.

36 The defendant and/or his representatives indicated on several occasions that the Joondalup design was accepted, in at least four written communications:

- (a) Lim's email on 6 February 2004 indicating that approval of the designs will be granted "in principle" after submission of the designs for planning approval;
- (b) Loo's letter dated 10 March 2004 stating that the "basic design and form [of Plaintiff's Design Scheme No. 5] was acceptable". This is express acceptance of the design and is further substantiated by a perusal of the details of Design Schemes No. 1–9. Starting with Design Scheme No. 5, there was a clear departure from previous overall conventional designs into a modern design with insubstantial refinements requested by the defendant thereafter; [\[note: 39\]](#)
- (c) The emails dated 20 June 2004 and 1 July 2004 indicating that the defendant was likely to let the plaintiff and Lewis see through the project; and
- (d) The Joondalup Meeting on 16 October 2004 and the subsequent letter dated 22 October 2004 detailing the Joondalup Meeting.

37 It is also likely that the Balikpapan design was accepted, because:

- (a) On 12 February 2004, Loo instructed the plaintiff to proceed with appointing a local architect and to set up a company to make planning submissions to the local authorities; [\[note: 40\]](#) and
- (b) The defendant allowed the Balikpapan design to be sent for planning approval and to be readied for planning submission. The memorandum dated 12 February 2004 reflected the defendant's intention for the plaintiff to "[appoint] a local architect in Balikpapan" and to "set-up a company [in Balikpapan], if necessary, so as to make the submissions to the local authorities". [\[note: 41\]](#) It is unlikely for the defendant to have allowed the designs to be sent for planning approval if he had not in fact accepted the design.

38 Finally, on at least five instances during cross-examination, the defendant did not unequivocally state that he had rejected the plaintiff's Joondalup and Balikpapan designs.

- (a) In the first instance, the defendant explicitly stated that he "accept[ed] the [Joondalup] concept design", and that "[he] maybe like[d] the design": [\[note: 42\]](#)

Q: ---not proceeding with the contract and not accepting the design are two different things, I put it to you. Do you agree or you disagree?

A: Anyhow it's no contract I consider---

Q: Mr Low.

A: Yes.

Q: Answer "yes" or "no", then you go and give your explanation.

A: Yes.

Q: You agree "yes", they are two different things?

A: Yes. Although I accept the concept design---

Q: Mr Low.

A: Yes.

Q: They are two different things?

A: Yes.

Q: So don't you agree then your defence and what you are stating in your AEIC, they are at odds, they are different?

A: For me---you consider different. But for me, the project is not go ahead, it's still the same, you see. I maybe like the design but due to other conditions, maybe I cannot perform the go ahead for the project, not enter into the contract; that means still the same, the project is not go ahead.

(b) In the second instance, with regard to the Joondalup designs, the defendant said that he "accept[ed]" the design but not the other "condition[s]", insisting that acceptance of the design was not sufficient if "the contract [was] not okay". [\[note: 43\]](#) He later confusingly said that he could not be "consider[ed to have] accept[ed]", and went on to assert that he did not accept any of the designs: [\[note: 44\]](#)

Q: Did you accept the design?

A: I accept that but I don't accept what kind of condition.

Q: No, no, no. Did you ever accept the design?

A: You mean which one? The Joondalup, myself is quite happy but is not considered accept, or not accept but im---now important is go until the contract. If the contract---

Q: No, no, no.

A: Design okay, the contract not okay, still no use.

Q: Oh that's now your case?

A: Yes. Of course if the design is good, the contract condition---

Q: My question, Mr Low---

A: Yes.

Q: ---did you at any point in time accept the design?

A: The design---I maybe can consider---can good.

Q: No, no, no, not---maybe can---

A: I'm not say consider accept.

Q: Did you accept the design at any point in time?

A: Finally I can say that not accept.

Q: Finally you never accepted?

A: Yes.

Q: What do you mean by finally you nev---

A: Because of the---because other condition is not---not enter into the contract yet and also I think that the cost is too high.

(c) In the third instance, the defendant seemed to suggest that he had accepted the Joondalup design: [\[note: 45\]](#)

Q: ---that you accepted Scheme 5. I put it to you that you accepted the basic design and form of Scheme 5.

A: If you say basic design, yes.

(d) In the fourth instance, the Defendant explicitly stated that he never rejected the Balikpapan design: [\[note: 46\]](#)

Q: So we'll move on. So we were just talking about the Joondalup, it was not a rejection fee. So would you also agree that for Balikpapan, you also never rejected any scheme?

A: The design-wise, yes, starting, yes, I didn't decide---I---I not say not---accept it or not accept it but what I know is the 50,000.

Q: You never rejected the Balikpapan design---

A: Yes.

(e) In the fifth instance, the defendant said that he had "not yet accept[ed] or reject[ed]" the design: [\[note: 47\]](#)

Q: Now, as at July 2004, had you accepted the projects or were there still work being done? Sorry, accepted the designs or were there still work being done.

A: He---I do not know the design whether finally or not. But I also not yet accept or reject. I thought this is why he need the money, submit in, I pay for him.

Q: Right. So if as you now say---

A: yah.

Q: ---you had not accepted or rejected---

A: Mm.

Q: ---why did you pay Mr Boonchai a total of \$50,000?

A: Because what---in my mind itself, 50,000 either soon or later. He need the money, I will pay up to 50,000.

39 As is evident from the transcripts of cross-examination reproduced above, the defendant provided inconsistent answers to the question of whether or not he had accepted the plaintiff's designs. The defendant on some occasions stated that he had accepted the designs, on other occasions said that he had "not yet" accepted the designs, and on further occasions said that he had accepted the designs but did not proceed with the project for reasons *other* than the non-acceptance of the designs (for instance, that the "cost [was] too high"). [\[note: 48\]](#) The defendant's constant shifting in position with regard to the crucial question of whether the designs were accepted weighs strongly in my finding that the designs were accepted.

The defendant's arguments

40 The defendant raised three arguments to support his defence that he did not accept any of the designs.

41 He contended that the plaintiff's failure to point to a firm date of acceptance suggests that there was in fact no acceptance of his designs. However, I do not find this a compelling factor. Loo's letter of 4 March 2004 would be sufficient evidence of an expressed acceptance of the Joondalup Project design and the 12 February 2004 communication by Loo instructed the plaintiff to proceed with appointing a local architect and to set up a company to make planning submissions to the local authorities; this would be sufficient evidence of an express acceptance of the Balikpapan Project design.

42 With regard to the Joondalup Project, the defendant pointed out that the plaintiff was "materially inconsistent" [\[note: 49\]](#) in his evidence because the plaintiff provided at least three different dates of acceptance, namely (1) an "in principle" acceptance of Scheme No. 1; (2) an acceptance of Scheme No. 3 "onwards"; and (3) "written acceptance" of Scheme No. 5. [\[note: 50\]](#) The defendant suggested that such inconsistency evinced that there was no acceptance of the designs. In my view, the fact that the plaintiff proffered three possible dates of acceptance *vis-à-vis* the Joondalup Project *does not* unequivocally demonstrate that there was *never*, at some point in time, any acceptance of the plaintiff's designs, especially in view of the weight of evidence pointing towards the defendant's acceptance of the designs. Indeed it suffices for the purposes of this action that I find that the defendant accepted the design as of 4 March 2004.

43 With regard to the Balikpapan Project, the defendant contended that the plaintiff's failure to "issue any interim invoice in relation to the Balikpapan Project" was indicative of non-acceptance of the designs. [\[note: 51\]](#) Further, the defendant suggested that Scheme No. 4, which the plaintiff allegedly submitted for approval from the Indonesian authorities, was *not* accepted: according to the defendant, as the plaintiff had already started working on Scheme No. 5 when Scheme No. 4 was submitted for approval, this indicated that Scheme No. 4 had not been accepted. I do not place much weight on these arguments. Both the failure to issue an interim invoice *vis-à-vis* the Balikpapan Project as well as the fact that the plaintiff worked on Scheme No. 5 whilst submitting Scheme No. 4 for planning approval are equivocal: they provide little evidence that the designs were not accepted. They are outweighed by the defendant's instructions thereafter to the plaintiff to submit the Balikpapan designs for approval from the authorities.

44 The defendant next argues that the plaintiff shifts his case from that stated in the plaintiff's pleadings. [\[note: 52\]](#) According to the defendant, the plaintiff's contention that the terms of the agreement were contained in two documents (*ie*, the letters dated 4 March 2003 and 1 June 2003) departs from his Statement of Claim (Amendment No. 1), in which the plaintiff stated that the terms of the agreement were contained in a series of thirteen documents (Joondalup Project) and five documents (Balikpapan Project). [\[note: 53\]](#) The alleged inconsistency is, however, more apparent than real: (1) it was the defendant's own contention, in his AEIC, that the terms of the agreement were contained in the two abovementioned documents; [\[note: 54\]](#) and (2) no evidence was adduced to demonstrate that the two documents were inconsistent with the remaining documents. In other words, the plaintiff's focus on the two documents does not amount to any inconsistency with the plaintiff's pleaded case.

45 Finally, the defendant argues that the plaintiff's making of substantial changes to the designs indicates that the designs were not accepted. [\[note: 55\]](#) However, while the making of further substantial changes could indicate non-acceptance of the designs, this factor is far outweighed by

my finding that as from Joondalup Scheme No. 5 further changes were no longer substantive to the design but were confined only to refinements.

Conclusion

46 On the totality of the evidence adduced, I find that the weight of evidence is in the plaintiff's favour. First, on the balance of probabilities, the S\$50,000 payment was not a rejection fee. The defendant appears to have subsequently and unilaterally considered this to be reasonable payment in light of the fact that both projects were not proceeding further to construction. Second, the defendant's representatives' express communications and his conduct indicate that the designs were accepted. Crucially, the defendant failed to satisfactorily account for his failure to communicate his non-acceptance, and did not attempt to otherwise explain his expanding the Joondalup Project brief or for asking the plaintiff to submit the Balikpapan Project design for planning approval. Third, the arguments relied upon by the defendant to demonstrate that the designs were not accepted were largely equivocal, and do not swing the balance of probabilities in his favour.

The operation of the SIA Terms

47 Having found that the defendant accepted the plaintiff's designs, within the meaning of the engagement letters, the operation of the SIA Terms is brought into play as they have been incorporated into the terms of engagement by express reference.

48 The defendant first contends that the plaintiff's failure to institute arbitration proceedings indicates the non-applicability of the SIA Terms. This I find to have little merit. Whether or not the parties ought to have chosen to resolve their dispute in arbitration is now moot in light of the step in the proceedings evinced by this trial: see *Australian Timber Products Pte Ltd v Koh Brothers Building and Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR(R) 168. In any event, it is not determinative of the contractual question whether or not the SIA Terms apply to these contracts.

49 I find that the SIA Terms do apply. It was the defendant's own contention, in his AEIC, that the terms of the agreement were contained in the two letters dated 4 March 2003 and 1 June 2003. [\[note: 56\]](#) As both documents explicitly incorporate the SIA Terms into the agreement, the defendant cannot now be heard to say that the SIA Terms do not apply.

50 The defendant avers that if he accepted the plaintiff's design, the projects would move forward as governed by the SIA Terms with specific terms to be agreed. It is open to the parties to agree on the fee arrangements between them for each project. That these two projects were not Singapore located projects they were at liberty to conclude any fee arrangement as might be agreed between them. The plaintiff did propose an alternative lump sum fee for the Joondalup Project on 27 January 2005 after the Asian tsunami hit Phuket, where the plaintiff was based, and he urgently needed funds. However the defendant did not respond to any of these proposals. In the absence of any other agreement between the parties, the engagement letters provided for the SIA Terms to operate.

51 The SIA Terms Part 2 Architect's Services and Mode of Payment sets out in Part 2.1 the Basic Services of the architect to consist of five stages: schematic design, design development, tender documentation, contract construction and final completion. Part 2.2 then sets out the mandatory mode of payment for basic services in stages. The SIA Terms' sample Memorandum of Agreement between Client and Architect contemplates three alternative fee bases, viz, percentage, time charge or lump sum basis. SIA Terms (C) Recommended Scale of Professional Charges provides a default basis of fee calculation in the absence of other agreement between the architect and the client, and it reads as follows:

- 1 Unless otherwise agreed upon in writing between the Architect and the Client, the Architect's fees shall be according to the scale of fees herein for full Basic Services rendered based on a percentage of the total construction cost of the project according to the category hereinafter mentioned under which the building is classified ... [\[note: 57\]](#)

...

- 3.1 The Scale of fees may be varied by prior written agreement made between the Client and the Architect in respect of the following: -
- 3.1(1) The following rates for charging on a time basis shall apply to services for which a percentage or other scale has not been stipulated in these Conditions. Depending on various relevant factors including but not limited to the complexity of the work an appropriate increase in the rates with the prior agreement of the Client shall be applied.
- 3.1(2) Fees chargeable on the basis of time spent on services rendered and work done by Principal/Partners and technical staff shall be on the following basis: -
- (a) Hourly rates for principal/partners architects: S\$350.00 per hour
 - (b) Hourly rates for architectural and other technical staff:

Gross monthly salary, including all statutory contributions but excluding bonuses and leave pay divided by 156 and multiplied by a factor of three (3) to cover the Architect's overheads and profit.
 - (c) Costs of other staff:

Unless otherwise agreed the cost of staff other than the architect's technical staff shall not be charged.

The plaintiff's abandoned claim for payment of consultant's fees and disbursements

52 The plaintiff's pleaded claim is S\$415,472 for the Joondalup Project and S\$546,750 for the Balikpapan Project.

53 The Joondalup Project professional fees were calculated using the formula S\$17.6 million (project cost) x 6.85% (fee percentage) x 40% (work stage percentage) = S\$482,240 (professional fees). [\[note: 58\]](#) The pleaded claim of S\$415,472 is derived after subtracting the S\$50,000 payment and the plaintiff's further reduction of S\$16,768 on 19 November 2009.

54 The Balikpapan Project professional fees were calculated using the formula S\$30 million (project cost) x 5.40% (fee percentage) x 33.75% (work stage percentage) = S\$546,750 (professional fees). [\[note: 59\]](#)

55 Both the plaintiff and his expert, one Mr Peter Oscar Von Selkey ("Von Selkey"), have submitted that the SIA Terms entitle the plaintiff to charge the defendant separately for consultant's fees and disbursements. However, the plaintiff has, in his Statement of Claim (Amendment No. 1), opted not to claim consultant's fees and disbursements for both projects. Accordingly, the issue of whether the plaintiff may claim consultant's fees and disbursements *does not arise* in determining the quantum of

the claim under the contract.

The Plaintiff's claim based on SIA Terms

56 Three sub-issues are raised with regard to the plaintiff's claim under the SIA Terms.

(a) the use of a "percentage" basis in calculating his scale professional fees;

(b) the determination of the "project cost" for each project; and

(c) the "work stage percentage" used in his calculation of his professional fees.

The "percentage" basis of scale fee calculation

57 Although the defendant argues that the plaintiff failed to demonstrate how he selected the percentage scale fee basis, [\[note: 60\]](#) I find that the plaintiff's use of the percentage scale fee basis is warranted pursuant to the SIA Terms (C) (1), which provides the percentage basis as the default basis of calculation in the absence of other agreement between the architect and the client (see [\[51\]](#) *supra*).

The "project cost" for each project

58 Having found that the plaintiff was warranted in adopting the percentage scale fee basis for his fees, the next issue is whether the plaintiff could use the estimated construction costs of S\$17.6 million (Joondalup) and S\$30 million (Balikpapan) as the bases for calculating his scale professional fees.

59 With regard to the Joondalup project, the plaintiff computed his fees based on the estimated construction cost of S\$17.6 million. [\[note: 61\]](#) The defendant argues that the sum was incorrect, because the sum of S\$17.6 million is "significantly" less than the A\$23,248,500 set out in the 30 September 2004 quotation. [\[note: 62\]](#) The defendant's contention is based on a misunderstanding of the 30 September 2004 quotation. As is evident from both the 30 September 2004 quotation and the letter to the defendant dated 1 December 2004, [\[note: 63\]](#) the project cost for the Joondalup Project has been fixed at A\$13.735 million, which is, upon conversion, S\$17.6 million.

60 With regard to the Balikpapan project, the plaintiff computed his fees based on an estimated construction cost of US\$20 million (S\$30 million), a figure provided for in an email dated 8 August 2007. [\[note: 64\]](#) The defendant argues that the sum was incorrect because the quotation, being provided more than 2 years after the plaintiff stopped working on the project, was possibly inaccurate. [\[note: 65\]](#) The defendant's argument has merit. I find that additional evidence is required with regard to the Balikpapan "project cost" figures. The Balikpapan project cost is to be quantified by the Registrar.

The "work stage percentage" for calculation

61 In calculating the quantum of professional fees due to the plaintiff, the plaintiff utilised "work

stage percentage” figures that differed from those provided by the expert Von Selkey.

62 With regard to the Joondalup Project, both the plaintiff and Von Selkey were consistent in using the project cost of S\$17.6 million and the fee percentage of 6.85%, but they differed with regard to the “work stage percentage” component: the plaintiff used 40%, whereas Von Selkey used 32.5%. A comparison table is produced here for clarity:

Conditions under SIA Terms	Von Selkey’s computation	Plaintiff’s computation
Condition 2.2(a)	5%	5%
Condition 2.2(b)	10%	10%
Condition 2.2(c)	4%	4%
Condition 2.2(d)	2.5%	2.5%
Condition 2.2(e)	2.5%	N/A
Condition 2.2(f)	N/A	10%
Condition 2.2(g)	7.5%	7.5%
Total	32.5%	40%

63 Similarly, with regard to the Balikpapan Project, both the plaintiff and Von Selkey were consistent in using the project cost of S\$30 million and the fee percentage of 5.4%, but they differed with regard to the work stage percentage component: the plaintiff used 33.75%, whereas Von Selkey used 21.5%. A comparison table is produced here for clarity:

Conditions under SIA Terms	Expert’s computation	Plaintiff’s computation
Condition 2.2(a)	5%	5%
Condition 2.2(b)	10%	10%
Condition 2.2(c)	4%	4%
Condition 2.2(d)	2.5%	2.5%
Condition 2.2(e)	N/A	1.25%
Condition 2.2(f)	N/A	5%
Condition 2.2(g)	N/A	2.5%
Condition 2.2(h)	N/A	2.5%
Total	21.5%	33.75%

64 The plaintiff stands by his own calculations, contending that Von Selkey’s interpretation of the SIA Terms was wrong. The plaintiff should have put his arguments to Von Selkey and have Von Selkey address them in Court. [\[note: 66\]](#) Because the plaintiff failed to do so, I am unable to come to a conclusion as to the correct “work stage percentage” figure to use. At this stage, I can only proceed on the basis of awarding the percentages that are agreed by both the plaintiff and Von Selkey,

namely Conditions 2.2(a), (b), (c) and (d) for both projects, ie a work stage percentage of 21.5%. The percentages for the remaining Conditions will be determined by the Registrar.

The plaintiff's alternative quantum meruit claim

65 Having found that there is a contract between the plaintiff and the defendant, with the terms of remuneration being based on the SIA Terms, it is not necessary for me to consider the plaintiff's *quantum meruit* claim.

The plaintiff's interest claim

66 The plaintiff seeks interest in accordance with Clause 1.3(6) of the SIA Terms. Clause 1.3(6) reads [\[note: 67\]](#):

Without relieving the Client of the obligation to pay the account, the Client shall pay interest on all fees due and not paid within the period stated in these conditions or if no period is stated, within 14 days of rendering account. The interest shall be 3% above the prevailing prime rate.

67 The plaintiff pleads two heads of interest claims: [\[note: 68\]](#)

(a) Interest on the sum of S\$962,222 (aggregate of S\$415,472 and S\$546,750) at the rate of 3% above the prevailing prime rate, commencing 14 days after rendering of the plaintiff's invoices dated 1 October 2007; and

(b) Interest on the sum of S\$10,000 in respect of the plaintiff's invoice dated 30 May 2003, for the period dated 15 June 2003 to 1 October 2007.

68 In view that the professional fees due to the plaintiff are to be ascertained by the Registrar, the first head of interest claims on the sum of S\$962,222 (under invoices for both projects) is accordingly also to be determined by the Registrar. The defendant's rigorous argument that no interest is claimable on consultant's fees and disbursements is not relevant, because the plaintiff is claiming interest only for his professional fees of S\$962,222.

69 In respect of the second head of interest claims, the plaintiff is to be awarded interest on the sum of S\$10,000 for the period dated 15 June 2003 to 1 October 2007.

Conclusion

70 I find that the defendant had accepted the plaintiff's designs for both the Joondalup and Balikpapan Projects. Accordingly, the plaintiff is entitled to professional fees for both projects, to be calculated based on the SIA Terms incorporated by expressed reference in the engagement letters. The overall damages are to be determined by the Registrar, based on the Registrar's determination of the professional fees due to the plaintiff (computed pursuant to determination of the "project cost" for the Balikpapan Project and the "work stage percentage" figures for both projects) as well as the consequent interest sums on both projects.

71 Costs to the plaintiff. Costs in the assessment of damages are reserved for determination by the Registrar.

[\[note: 1\]](#) Bundle of Pleadings ("BP"), at pp 27-29, 34, and 44.

[\[note: 2\]](#) BP, at p 43.

[\[note: 3\]](#) Agreed Bundle ("AB"), at p 4.

[\[note: 4\]](#) Notes of Evidence ("NE"), 19 May 2010, at p 32 line 27 and p 37 lines 3-7.

[\[note: 5\]](#) AB, at p 17.

[\[note: 6\]](#) AB, at p 16.

[\[note: 7\]](#) AB, at p 23.

[\[note: 8\]](#) AB, at p 31.

[\[note: 9\]](#) AB, at p 35.

[\[note: 10\]](#) AB, at p 95.

[\[note: 11\]](#) AB, at p 99.

[\[note: 12\]](#) AB, at p 151.

[\[note: 13\]](#) AB, at p 151.

[\[note: 14\]](#) NE, 19 May 2010, at p 75 line 25.

[\[note: 15\]](#) AB, at p 155.

[\[note: 16\]](#) Plaintiff's Bundle of Affidavits of Evidence-In-Chief ("PBAEIC"), at paras 10, 11, 13, 14, 16, 22, 26 and 32.

[\[note: 17\]](#) AB, at p 5.

[\[note: 18\]](#) AB, at p 21.

[\[note: 19\]](#) AB, at p 20.

[\[note: 20\]](#) AB, at p 39.

[\[note: 21\]](#) AB, at p 154.

[\[note: 22\]](#) AB, at p 156.

[\[note: 23\]](#) AB, at pp 157 and 158.

[\[note: 24\]](#) AB, at p 157.

[\[note: 25\]](#) AB, at p 158.

[\[note: 26\]](#) AB, at pp 157 and 158.

[\[note: 27\]](#) AB, at pp 159-162.

[\[note: 28\]](#) AB, at p 163.

[\[note: 29\]](#) BP, at p 28, para 4(a).

[\[note: 30\]](#) BP, at p 28, para 4(a).

[\[note: 31\]](#) Defendant's Reply Submission, at para 20.

[\[note: 32\]](#) Defendant's Pleadings (Amendment No. 1), BP at p 43, para 5(b).

[\[note: 33\]](#) AB, at p1.

[\[note: 34\]](#) See the invoices dated 30 May 2003 and 31 December 2003, the payment receipt dated 31 December 2003, and the letter dated 15 September 2005.

[\[note: 35\]](#) AB, at pp 1 and 5.

[\[note: 36\]](#) Defendant's Bundle of Affidavits of Evidence-In-Chief ("DBAEIC"), Tab 1, p 3, para 10.

[\[note: 37\]](#) NE, 19 May 2010, p 10 at line 5.

[\[note: 38\]](#) Plaintiff's Reply Submission, at para 17.

[\[note: 39\]](#) AB, at p 23.

[\[note: 40\]](#) AB, at p 20.

[\[note: 41\]](#) AB, at p 20.

[\[note: 42\]](#) NE, 19 May 2010, at p 44 line 27-32, and p 45 line 1-13.

[\[note: 43\]](#) NE, 19 May 2010, at p 46 line 1-15.

[\[note: 44\]](#) NE, 19 May 2010, at p 46 line 16-23.

[\[note: 45\]](#) NE, 19 May 2010, at p 48 line 13-15.

[\[note: 46\]](#) NE, 19 May 2010, at p 49 line 23-29.

[\[note: 47\]](#) NE, 19 May 2010, at p 98 line 12-22.

[\[note: 48\]](#) NE, 19 May 2010, at p 46 line 23.

[\[note: 49\]](#) Defendant's Closing Submissions, at para 21.

[\[note: 50\]](#) Defendant's Closing Submissions, at para 36.

[\[note: 51\]](#) Defendant's Closing Submissions, at para 45.

[\[note: 52\]](#) Defendant's Reply Submissions, at paras 6-8.

[\[note: 53\]](#) BP, at pp 29 and 35.

[\[note: 54\]](#) DBAEIC, Tab 1, p 3, para 10.

[\[note: 55\]](#) Defendant's Reply Submissions, at para 22.

[\[note: 56\]](#) DBAEIC, Tab 1, p 3, para 10.

[\[note: 57\]](#) AB, at p 626.

[\[note: 58\]](#) Plaintiff's Reply Submissions, at para 74.

[\[note: 59\]](#) Plaintiff's Reply Submission, at para 89. See the 1st October 2007 invoice.

[\[note: 60\]](#) Defendant's Reply Submissions, at paras 30-33.

[\[note: 61\]](#) AB, at pp 41-43.

[\[note: 62\]](#) Defendant's Reply Submissions, paras 45-46.

[\[note: 63\]](#) AB, at pp 43 and 95.

[\[note: 64\]](#) AB, at p 156.

[\[note: 65\]](#) Defendant's Reply Submissions, at paras 56-57.

[\[note: 66\]](#) Defendant's Reply Submissions, at para 50.

[\[note: 67\]](#) AB, at p 613.

[\[note: 68\]](#) BP, at p 40, para 37(c).

