Anwar Siraj and Another v Teo Hee Lai Building Construction Pte Ltd [2007] SGHC 29

Case Number : Suit 348/2006, RA 241/2006

Decision Date : 28 February 2007

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : G Raman (G R Law Corporation) for the plaintiffs; S Thulasidas (Ling Das & Partners) for the defendant

Parties : Anwar Siraj; Khoo Cheng Neo Norma — Teo Hee Lai Building Construction Pte Ltd

Arbitration – Stay of court proceedings – Whether court should grant stay of proceedings in favour of arbitration – Whether subsequent dispute may not be referred to arbitration on ground that arbitrator functus officio – Whether arbitrator concluding arbitration proceedings and publishing award on earlier disputes considered functus officio for purpose of hearing subsequent dispute

Contract – Contractual terms – Express terms – Dispute between owners of residential property and main contractor working on property over payments owing to main contractor and interim certificates issued by architect in connection therewith – Whether architect having power at any time to issue further interim certificate correcting any error in earlier interim certificate

28 February 2007

Andrew Ang J:

1 This was an appeal from a decision of the assistant registrar ordering that the action brought by the plaintiffs in Suit No 348 of 2006 be stayed and referred to arbitration and that the plaintiffs pay the defendant costs in the sum of $2,500. I upheld the decision of the assistant registrar and the plaintiffs decided to take the matter further on appeal.

Background

2 The plaintiffs are a husband and wife, the owners of the residential property at No 2 Siglap View, Singapore 455810, comprised in Lot 425-292, Mukim 26 (hereinafter referred to as "the Property"). The defendant is a building and construction company incorporated in Singapore with its registered office at 314A Joo Chiat Road, Singapore 427565.

3 By a letter of award dated 29 December 1999 issued by the project architect Mr Tan Hock Beng, the defendant was appointed by the plaintiffs as the main contractor for the erection of a two-storey detached dwelling house with an attic, basement and swimming pool on the Property (such development thereon being hereinafter referred to as "the Project").

4 The contract between the parties ("the Contract") incorporated the Articles and Conditions of Building Contract in the Singapore Institute of Architects Lump Sum Contract (6th Ed, August 1999) (hereinafter referred to as the "SIA Contract") and, accordingly, Conditions in the SIA Contract are hereinafter referred to by their number as clauses of the Contract.

5 Disputes and differences arose between the parties on various issues including alleged delay, claims of alleged defects and quantum of payments due to the defendant.

6 In regard to the dispute over the payments due to the defendant, Interim Certificate No 11 issued by the architect on 12 January 2001 valued the work done by the defendant at $726,000 but Interim Certificate No 12 issued on 6 February 2001 reduced the sum to $712,294. According to the defendant, this was done without the issuance of a revision certificate setting out the nature of the revision and providing a detailed breakdown.

7 The disputes and differences between the parties resulted in the defendant issuing letters to the plaintiffs on 25 July 2001, 6 August 2001 and 16 August 2001 giving notice of their intention to refer the matters to arbitration.

8 On 12 January 2001, Mr John Ting Kang Chung ("Mr Ting") was appointed the arbitrator by the President of the Singapore Institute of Architects.

9 Alleging incompetence and bias on the part of the arbitrator, the plaintiffs applied to the High Court in Originating Motion No 26 of 2002 for his removal and for the parties' dispute to be heard by the High Court instead. Tay Yong Kwang J dismissed the application. The plaintiffs' appeal to the Court of Appeal was also dismissed. The plaintiffs were therefore obliged to continue with the arbitration.

10 The arbitrator required each of the parties to pay a sum of $25,000 as further deposit to secure his fees and expenses. The defendant paid but the plaintiffs did not. On the application of the defendant, the arbitrator, by his directions of 21 November 2003, decided that he would not hear the claims or counterclaim of the plaintiffs as long as his direction to them to pay the $25,000 deposit went unheeded. It is pertinent to note that the plaintiffs failed to appear before the arbitrator for the hearing of the defendant's application despite twice having been given the opportunity to do so.

11 The arbitrator then proceeded with the arbitration in the absence of the plaintiffs who had insisted that a number of matters had to be set right before they would appear.

12 Although under the Singapore Institute of Architects Arbitration Rules, the arbitrator is to make his award in writing within 60 days after close of the hearing, in this case it was not until 15 April 2005 that the arbitrator wrote to inform the parties that the award was ready for collection upon payment of his fees and expenses amounting to $199,178.40. Neither party collected the award. At least in the case of the defendant, it appeared that the award was not collected because of the quantum of the arbitrator's fees.

13 On 20 January 2006, the architect for the Project issued his 13th Interim Certificate reducing the value of the defendant's work substantially below what the architect had previously certified. On the basis of that Certificate, an amount of $348,000 would be payable to the plaintiffs, this being the amount by which the plaintiffs would have overpaid the defendant given the reduction in the value of the defendant's work.

14 The plaintiffs brought the action herein for recovery of the said sum of $348,000. This resulted in the defendant successfully applying to the assistant registrar in Summons No 2800 of 2006 for a stay of proceedings in favour of arbitration. The assistant registrar's decision led to the instant appeal which I heard and dismissed.

15 The plaintiffs' submissions may be summarised thus:

(a) Having concluded the arbitration and published the award, the arbitrator is *functus officio*. There is no arbitrator to whom any reference may be made on the present claim by the plaintiffs.

The plaintiffs are therefore justified in bringing this claim to the court.

(b) Under cl 31(4) of the Contract, the architect has power at any time, whether before or after completion, to issue a further Interim Certificate correcting any error in an earlier Interim Certificate (but not any Delay, Further Delay, or any other Certificate other than an Interim Certificate) or dealing with any matter of which he was not aware, or which should have been dealt with, at the time of the earlier Interim Certificate, or revising any decision or opinion on which the Interim Certificate was based. Clause 37(3)(i) of the Contract further provides as follows:

> The power of the Architect to issue a further certificate under clause 31(4) of the Conditions shall continue until his Final Certificate notwithstanding the prior commencement of proceedings by way of arbitration or in the Courts, to which further certificate full effect shall be given by the Courts or an arbitrator until final award or judgment.

(c) Clause 37(11) specifically provides that none of the provisions of cl 37 shall be construed so as to limit or prevent either party from requesting the court to exercise its discretion to refuse a stay of proceedings in any case where a third party (in this case, the architect) is also involved directly or indirectly in a dispute with or between the parties to the contract.

(d) Section 12(2) of the Arbitration Act (Cap 10, 1985 Rev Ed) provides:

> Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration and a dispute which so arises involves the question whether any such party has been guilty of fraud, the court shall, so far as may be necessary to enable that question to be determined by the court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

In view of the defendant accusing the architect of having issued Interim Certificate No 13 fraudulently, s 12(2) comes into play.

(e) Where the evidence is so clear-cut that the defendant does not have any valid defence, the court will not allow a stay.

(f) The defendant has not shown that it remains ready and willing to arbitrate.

16 On its part, the defendant submitted as follows:

(a) The architect's issue of Interim Certificate No 13, almost five years after Interim Certificates No 11 and No 12, was in breach of cl 31(1) (read with the Appendix thereto) which requires Interim Certificates to be issued monthly. It was also issued some 4½ years after the appointment of the arbitrator. As such, Interim Certificate No 13 was null and void. Besides, Interim Certificate No 13 ignored the manner and form in which such certificate was to be issued.

(b) Interim Certificate No 13 was also issued under improper pressure or interference by the plaintiffs. (The defendant's other allegation that the architect had issued Interim Certificate No 13 fraudulently in collusion with the plaintiffs was withdrawn by the defendant at the hearing before me.)

(c) Clause 37(1) sets out the parties' agreement to refer disputes between them to arbitration.

The dispute over Interim Certificate No 13 clearly falls within cl 37(1) and the plaintiffs' action in Suit No 348 of 2006 is a wrongful attempt to bypass cl 37(1) and should be stayed.

(d) The arbitration before the arbitrator has not been concluded. The arbitrator is not *functus officio*.

17 I shall deal with the questions in the following order:

(a) Whether the dispute between the parties over Interim Certificate No 13 falls within cl 37(1).

(b) Whether the plaintiffs' claim based on Interim Certificate No 13 is indisputable so that the court has the jurisdiction to decide the claim despite the parties' agreement in cl 37(1) for disputes to be referred to arbitration. In this connection, I shall consider whether the defendant's contention that the Interim Certificate No 13 was null and void for any of the reasons given *prima facie* discloses a *bona fide* defence.

(c) Whether cl 37(7) permits a party to apply to court for an order for repayment of sums allowed or overpaid instead of referring the dispute to arbitration as provided in cl 37(1).

(d) Whether the arbitrator is *functus officio* and, if so, whether for that reason the plaintiffs are entitled to bring their action in court.

(e) Whether the arbitration agreement should cease to have effect by reason of the defendant's allegation of fraud against the architect.

(f) Whether the court should refuse a stay of proceedings on the plaintiffs' contention that cl 37(11) applies.

(g) Whether the defendant was ready and willing to arbitrate.

(a) Whether the dispute falls within cl 37(1)

18 Clause 37(1) sets out the parties' agreement to refer disputes between them to arbitration in the following terms:

> Any dispute between the Employer and the Contractor as to any matter arising under or out of or in connection with this Contract or under or out of or in connection with the carrying out of the Works and whether in contract or tort, or as to any direction or instruction or certificate of the Architect … or as to the contents of or granting or refusal of or reasons for any such direction, instruction or certificate shall be referred to the arbitration and final decision of a person to be agreed by the parties or, failing agreement within 28 days of either party giving written notice requiring arbitration to the other, a person to be appointed on the written request of either party by or on behalf of the President or Vice-President for the time being of the S.I.A. or, failing such appointment within 28 days of receipt of such written request, together with such information or particulars of the dispute as may be requested in writing by the President or Vice-President for the time being of the S.I.A., such persons as may be appointed by the Courts.
>
> The arbitration proceedings shall be conducted in accordance with the Arbitration Rules of the S.I.A. for the time being in force which Rules are deemed to be incorporated by reference to this clause.

There is no gainsaying that the dispute between the parties over Interim Certificate No 13 falls squarely within cl 37(1). Nor have the plaintiffs suggested that the terms of cl 37(1) are not wide enough to cover the dispute (their contention rather being that *notwithstanding cl 37(1)* there ought to be a stay).

(b) Whether the plaintiffs' claim is indisputable so that the court has jurisdiction to decide the claim despite the arbitration agreement in cl 37(1)

19 The plaintiffs contended that where the evidence is so clear-cut that the defendant does not have any valid defence at all, the court will not allow a stay. For support, they drew on the dictum of GP Selvam JC (as he then was) in *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1993] 1 SLR 876 at 879, where he said:

> It therefore follows that where the claim is undisputed or indisputable the court and not the arbitrators have the jurisdiction to decide upon the claim even though the arbitration agreement stipulates for disputes to be referred to arbitration.

20 I do not find this statement to be in any way controversial. Nevertheless, for completeness and with a view to elucidation as to the context in which the learned judicial commissioner made the remark, I note the paragraph immediately following the dictum cited above which reads as follows:

> The common form arbitration agreement provides for disputes to be decided by arbitrators. In such a case the court should, save in obvious cases, adopt a holistic and commonsense approach to see if there is a dispute. The justification for this approach is that it is important to hold a party to his agreement and avoid double and split hearing of matters. The reasoning in support of this view is found in *Commercial Arbitration* by MJ Mustill and SC Boyd (2nd Ed) at p 123:
>
> > Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed.
>
> If the defendant, therefore, makes out a prima facie case of disputes the courts should not embark on an examination of the validity of the dispute as though it were an application for summary judgment.

21 In the case before me, there is a dispute as to whether the architect could properly issue Interim Certificate No 13 correcting Interim Certificates No 11 and No 12, given that 4½ years had passed since the appointment of the arbitrator and nearly 5 years had passed since the issue of the earlier two certificates. The defendant contended that once a dispute had been referred to arbitration, it was not open to the architect to issue further certificates. On that basis, it followed that the Interim Certificate No 13 was not binding and could be reviewed and revised by the arbitrator. Three cases were cited in support of the defendant's proposition.

22 In the first of them, *JA Milestone & Sons, Ltd (in liquidation) v Yates Castle Brewery, Ltd* [1938] 2 All ER 439 ("*Milestone v Yates*"), the facts (adopting the headnotes) were as follow:

> The plaintiffs contracted to build a hotel for the defendants, the contract being in the standard form recommended by the Royal Institute of British Architects (1909 edition). When the greater part of the work had been completed and paid for, the plaintiffs went into liquidation. The balance of the contract price outstanding at that time was £1,234 14*s* 6*d*. As to £643 0*s* 9*d*., part of that balance, the defendants contended that they were entitled by the terms of the contract to pay it direct to various subcontractors; who had been nominated by the defendants' architect. The architect had issued a certificate in favour of the contractors, including sums due to subcontractors, [but] later, in some cases on the day on which the writ in this action was issued, and in others at a later date, gave certificates in respect of the same matters in favour of the subcontractors. No contractual obligation to the subcontractors was placed, but reliance was placed upon a clause in the contract which said that such sums should be paid to the subcontractor by the contractor or by the employer as the architect should direct.

Singleton J held, *inter alia*, that a dispute had arisen between the parties, and, that on the decision of the Court of Appeal in *Lloyd Brothers v Milward* (1895), 2 Hudson's BC (4th ed) 262, it was not open to the architect to give further certificates in favour of the subcontractors. In the editorial note to the case report, it was observed:

> Where there is a power to issue certificates in favour of the contractors or of the subcontractors, it is a question of some importance whether the architect, having once issued a certificate, is then *functus officio*, or whether he can issue a further certificate, which would, of course, be in favour of the other type of contractor. What is decided here is that he cannot issue a further certificate after a dispute has arisen between the various parties, because it is then for an arbitrator or the court to say what are the rights of the parties in the circumstances then existing.

23 The second authority cited by the defendant was *Lloyd Brothers v Milward* ([22] *supra*). A brief digest of the case appears in *Hudson's Building and Engineering Contracts*, vol 1, (Sweet & Maxwell, 11th Ed, 1995) at 772 as follows:

> Clause 20 of a form of contract provided that the certificate of the architect *or* an award of the referee appointed under the contract showing the final balance due to the contractor *should be conclusive evidence* of due completion of the works and the contractor's entitlement to receive payment of the final balance. Clause 22 provided that disputes between the owner or the architect on his behalf and the contractor, (described in wide terms including disputes arising from the withholding by the architect of any certificate to which the contractor might be entitled) should be referred to a referee, whose award should be the equivalent of a certificate of the architect. Disputes arose between the owners and the contractor as to whether the works had been duly completed, and as to authorisation of and charges for certain extras. The architect subsequently issued his final certificate, upon which the builder brought an action to recover the sum certified. *Held*, by the Court of Appeal, that on the true construction of the two clauses the contract contemplated the issue of certificates by the architect only before disputes had arisen, and by the referee thereafter. Once a dispute arose, the architect's jurisdiction to certify disappeared and the award of the referee must be substituted for it. Since, however, the builder had not obtained an award of the referee his action must fail: *Lloyd Bros. v. Milward* (1895).

24 The final case cited as a relevant authority was *Loke Hong Kee (S) Pte Ltd v United Overseas Land Ltd* [1979] 1 MLJ 108. The decision was cited for only one holding, *viz*, following *Lloyd Brothers v Milward* ([22] *supra*), that once a dispute had arisen and been referred to arbitration, it was not open to the architect to give further certificates.[note: 1]

25 It is surprising that counsel for the defendant cited the foregoing cases without regard to the fact that each of them dealt with the construction of a contract quite different from the one between the parties to these proceedings.

26 In *Milestone v Yates* ([22] *supra*), the contract was in the standard form recommended by the Royal Institute of British Architects (1909 edition). In *Lloyd Brothers v Milward* ([22] *supra*), the agreement was based on the old form agreed to between the London Builder's Association and the Royal Institute of British Architects. *Loke Hong Kee* ([24] *supra*) dealt with the then current standard form of the Singapore Institute of Architects (prior to its revision in 1980) and a supplemental agreement made between the parties.

27 None of the contracts in these cases had anything similar to cl 37(3)(i) of the Contract. Clause 37(3) together with proviso (i) are set out below:

> Such arbitrator shall not in making his final award be bound by any certificate, refusal of certificate, ruling or decision of the Architect under any of the terms of this Contract, but may disregard the same and substitute his own decision on the basis of the evidence before and facts found by him in accordance with the true meaning and terms of the Contract, provided that:
>
> (i) The power of the Architect to issue a further certificate under clause 31(4) of the Conditions shall continue until his Final Certificate notwithstanding the prior commencement of proceedings by way of arbitration or in the Courts, to which further certificate full effect shall be given by the Courts or an arbitrator until final award or judgment.

I therefore do not find any of the three cases to be of any assistance to the defendant.

28 Likewise, I find *Steel Industries Pte Ltd v Deenn Engineering Pte Ltd* [2003] 3 SLR 377 ("the *Steel Industries* case") cited by the defendant to be of no help to the defendant's case. This was cited by the defendant in support of its contention that the architect had no power under the Contract to issue a certificate for payment once arbitration proceedings had begun as so to do would usurp the function of the arbitrator.

29 In that case, the defendants (the main contractors in a redevelopment project) nominated the plaintiffs as sub-contractors. Under the sub-contract, the plaintiffs agreed that they were entitled to seek payment from the defendants only for the sum certified by the architect provided the defendants themselves had been paid or were deemed to have been paid by the employers in the project. The plaintiffs subsequently applied for summary judgment against the defendants for payment under a certain Interim Certificate No 19 issued by the architect. The architect had also issued a certificate of payment ("Certificate of Payment") certifying that the defendants were deemed to have been paid by the employers in respect of the plaintiffs' works. The defendants sought a stay of proceedings pending a referral of the matter to arbitration. The assistant registrar ordered a stay of proceedings and dismissed the application for summary judgment.

30 The plaintiffs appealed, arguing that the parties had agreed that interim certificates for payment issued by the architect were to be binding between the parties until final judgment or award in any dispute. The defendants, on the other hand, contended that the plaintiffs could not sue on

Interim Certificate No 19 as the Certificate of Payment had subsequently been withdrawn by the architect. They further argued that even if the Certificate of Payment had not been withdrawn, it was made *ultra vires* since it usurped the function of the arbitrator in the proceedings then ongoing between the employers and the defendants. The particular holding we are concerned with is found in para 33 of the judgment ([28] *supra*) of Judith Prakash J where the learned judge said:

> Thirdly, there was the question of whether the architect had the power to issue a certificate of payment once arbitration proceedings between the employers and the defendants had commenced. The defendants submitted that he did not because cl 37(3)(i) of the Main Contract provided that once arbitration proceedings had commenced, the architect may only issue revision interim certificates under cl 31(4). By implication, this means that no other certificates may be issued after that point. This is logical because the issue of such a certificate [*ie*, a Certificate of Payment] would mean that the architect had determined that, notwithstanding the arbitration was ongoing and included an issue as to the liability of the plaintiffs for the delay in completion, the plaintiffs were not responsible at all for the delay in completion and had not contributed to the employers' claim for liquidated damages. That could not be right as the jurisdiction to decide the point had been conferred on the arbitrator before the architect took it upon himself to look into the same point.

31 It is clear that what the learned judge was saying was that cl 37(3)(i) permitted revision interim certificates under cl 31(4) to continue to be issued notwithstanding commencement of arbitration proceedings but not a Certificate of Payment. The decision certainly does not support the defendant's contention in the present case that the architect had no power under the Contract to issue an interim certificate for payment once arbitration proceedings had begun.

32 The position therefore appears to me to be as follows:

(a) The architect has power to issue a further Interim Certificate at any time whether before or after completion, correcting any error in an earlier Interim Certificate but not certain other certificates more particularly described in cl 31(4).

(b) This power to issue a further Interim Certificate under cl 31(4) continues until the architect's final certificate notwithstanding the prior commencement of proceedings by way of arbitration or in the courts: cl 37(3)(i).

(c) Temporary finality is to be given such certificate until final award or judgment: cl 37(3)(i).

(d) Apart from allowing temporary finality to a further Interim Certificate, the arbitrator in making his final award is not bound by such certificate but may disregard the same and substitute his own decision on the basis of the evidence before and facts found by him and in accordance with the true meaning and terms of the Contract: cl 37(3).

33 Returning to the defendant's objections to Interim Certificate No 13, the mere fact that it was issued after arbitration had commenced is unobjectionable in view of cl 37(3)(i) although the long delay of some 4½ years after appointment of the arbitrator and almost 5 years after Interim Certificates No 11 and No 12 gives cause for disquiet in the absence of any reasonable explanation. Likewise, the defendant's contention that Interim Certificate No 13 was in breach of cl 31(1) (read with the Appendix thereto) is misconceived. Interim Certificate No 13 was a revision certificate issued under cl 31(4) purportedly correcting an error in Interim Certificates No 11 and No 12. Accordingly, it did not need to be issued until the occasion arose for correction. Such a certificate is unlike the normal Interim Certificate issued monthly under cl 31(1) as the construction progresses. The wording

in cl 31(4) itself makes clear that the certificate could be issued "at any time whether before or after completion, correcting any error in an earlier Interim Certificate".

34 The defendant's next contention was that Interim Certificate No 13 was issued under improper pressure or interference by the plaintiffs. If it was, it could not be conferred temporary finality under cl 31(11). This contention would appear more plausible than the ones referred to in the previous paragraph. Firstly, there was the long delay earlier referred to without any reasonable explanation. Secondly, Interim Certificate No 13 simply reduced the architect's assessment of the value of work from $726,000 in Interim Certificate No 11 (reduced to $712,294.68 in Interim Certificate No 12) to a mere $364,294.68 without any explanation therein as to the nature and quantum of the revisions made. Correspondingly, whereas Interim Certificate No 12 purported to certify an overpayment of $26,705.32, this sum escalated to $348,000 in Interim Certificate No 13. As pointed out by the defendant, this in effect meant that the plaintiffs would only have to pay a little over $320,000 for a building having a contract value of $1.2m.

35 It is not explained why the architect did not use the SIA model revision certificate which would have required the architect to set out the nature and effect of his decision requiring the revision as well as the nature of the revision and the calculation. It is also significant that the defendant's letters of 13 February 2006 and 3 May 2006 calling on the architect to explain and justify Interim Certificate No 13 went unanswered altogether.

36 In these circumstances, it is not easy to dismiss out of hand as being in bad faith the defendant's allegation that Interim Certificate No 13 was issued by the architect under improper pressure or interference by the plaintiffs. Nor do I have to make a finding on the merits that there was indeed improper pressure or interference by the plaintiffs. It suffices for me to say that *prima facie* there is a *bona fide* dispute whether there was improper pressure or interference.

37 Another dispute arising from the facts is whether Interim Certificate No 13 was null and void for ignoring the manner and form in which such certificate was to be issued. In this regard, it would be instructive to refer to *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] SLR 610 ("the *Tropicon* case"), the facts of which as set out below (following the headnotes to the report) bear some resemblance to our present case:

> The plaintiffs were building contractors and the defendants were building owners. They entered into a contract whereby the plaintiffs undertook the construction of a condominium development (the project). This contract (the contract) which was in writing, adopted the standard form of the Singapore Institute of Architects. Under the contract, the date of completion was 14 May 1984. (All future references to clauses are to clauses in the contract.) The contract was not completed by the completion date and the plaintiffs applied to the architects in charge of the project (the architects) for an extension of time, but this request was rejected. During the whole period, the architects had issued interim certificates to certify the work done (the certificates) which authorized the plaintiffs to be paid within 21 day of the receipt of the certificates by the defendants. Payment under 12 of the certificates had not been made. Following unsuccessful attempts to resolve the defendants' refusal to pay the certified payments, the plaintiffs instituted the present proceedings for the sum of $1,785,294.32 and interest thereon. After the writ had been served on the defendants, they took out an application for a stay of all further proceedings on the ground that the parties had agreed to refer the matter to arbitration. The plaintiffs had at the same time applied for summary judgment. These two applications were heard by a senior assistant registrar who dismissed the plaintiffs' application and allowed the defendants' application. The plaintiffs appealed against this decision. Before the senior assistant registrar had heard the applications, the architects had 'cancelled' the original interim certificates issued and

> purported to issue revised interim certificates which reduced the amounts payable to the plaintiffs by amounts equal to liquidated damages in respect of late completion of the contract by the plaintiffs. Also, a new interim certificate no 29 was issued. … On [the plaintiffs'] appeal, the defendants argued that the revised interim certificates were valid and that the defendants were entitled to the defences of set-off and counterclaim in respect of sums owed as liquidated damages for late completed, … [*inter alia*].

LP Thean J (as he then was) observed that most of the revised interim certificates were issued more than two years after the original certificates and that the basis for the revision or connection was not apparent on the face of the revised interim certificates (even though they were set out in the architect's subsequent letter). He further noted that despite the plain requirement of cl 31(2), in none of them were the valuation dates given, *ie*, the dates up to which the revaluations of all the works carried out under the contract were made.

38 Going on to interim certificate No 29, he again observed that it was not issued in compliance with cll 31(1) and (2) of the conditions of contract for the reasons, *inter alia*, that –

> (a) it was issued long after the works were done; and
>
> (b) it did not show any date at which the valuation of the works carried out under the contract was made.

The learned judge then concluded that all the revised interim certificates and the interim certificate No 29 were invalid. Upon appeal by *Lojan Properties*, the Court of Appeal upheld Thean J's decision although they allowed part of the appeal on grounds not relevant to the matter before me.

39 Similarly, in the *Steel Industries* case ([28] *supra*), Prakash J held a revision interim certificate to be invalid for non-compliance with the requirements set out in cl 31(4), agreeing with the respondent who had submitted that in order for an interim certificate to qualify as a revision certificate under cl 31(4) it had to:

> (a) identify the previous certification which it sought to correct;
>
> (b) state the reasons for the correction; and
>
> (c) set out the details of what was being corrected.

40 Unlike Thean J in the *Tropicon* case ([36] *supra*) and Prakash J in the *Steel Industries* case, each of whom was hearing an appeal, both against the assistant registrar's grant of a stay of proceedings as well as the assistant registrar's dismissal of the application for summary judgment, we are here concerned only with an appeal on an application for a stay of proceedings.[note: 2]

41 I therefore do not have to decide on the merits whether Interim Certificate No 13 is invalid. It suffices for me to say that Interim Certificate No 13 appears to suffer from the same defects mentioned above which were noted by Thean J in the *Tropicon* case and by Prakash J in the *Steel Industries* case.

42 Therefore, *prima facie*, there are substantial disputes between the parties in regard to Interim Certificate No 13. Beyond that, it is inappropriate for me in an appeal on a stay application to embark on an examination of the merits of the parties' respective positions as though it were an application for summary judgment.

43 I therefore rule that the plaintiffs' claim under Interim Certificate No 13 cannot be said to be undisputed or indisputable.

(c) Whether cl 37(7) permits a party to apply to court for an order for repayment of sums overpaid bypassing arbitration provided for under cl 37(1)

44 In my view, cl 37(7) cannot be read as allowing a party the option of suing in court or referring a dispute to arbitration. It merely states what power the arbitrator or the courts (if they are seised of the dispute) have. Contrast the language in cl 37(7) with that in cl 37(11) where it is clearly stated that none of the provisions of cl 37 shall be construed so as to limit or prevent either party from requesting the courts to exercise their discretion to refuse a stay of proceedings in the circumstances therein described. To read cl 37(7) in the manner suggested by the plaintiffs would be to disregard cl 37(1) without clear sanction.

(d) Whether the arbitrator is *functus officio* and, if so, whether for that reason the plaintiffs are entitled to bring their action in court

45 In law, once the arbitrator has published his award, the arbitration proceedings are concluded. An award is made and published when the arbitrator gives notice to the parties that the award is ready for collection and not when they have notice of the actual contents of the award: *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609. Thereafter the arbitrator is *functus officio*. As the plaintiffs pointed out, the arbitrator stated as much in his letter of 28 April 2006 to the parties.

46 Although, owing to the plaintiffs' refusal to deposit $25,000 with the arbitrator to secure his fees and expenses the plaintiffs' counterclaim had not been heard, the arbitrator could not be said to be suspended or incomplete. It is quite clear to me that the plaintiffs did not intend to have their counterclaim heard by the arbitrator. However, whilst I would agree with the plaintiffs that the arbitrator for the earlier disputes is *functus officio*, it does not follow that the present dispute between the parties should bypass arbitration altogether. The agreed procedure in cl 37(1) for referring the dispute to arbitration should be followed with regard to this dispute. As the learned assistant registrar quite rightly pointed out, a new arbitrator can be appointed and fresh arbitration proceedings commenced.

(e) Whether the arbitration agreement should cease to have effect by reason of the defendant's allegation of fraud against the architect

47 Given that the arbitrator Mr Ting is *functus officio*, any arbitration proceedings commenced in regard to Interim Certificate No 13 (being proceedings commenced after 1 March 2002) would be governed by the Arbitration Act (Cap 10, 2002 Rev Ed) ("the new Act") rather than its predecessor in the 1985 Rev Ed ("the old Act"): see s 65(1) of the new Act.

48 The new Act does not have a provision corresponding to s 12(2) in the old Act which is as follows:

> Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration and a dispute which so arises involves the question whether any such party has been guilty of fraud, the court shall, so far as may be necessary to enable that question to be determined by the court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement. [emphasis added]

The power previously given to the court to order that the arbitration agreement shall cease to have effect, where there are allegations of fraud against one of the parties to the agreement, has been omitted from the new Act so that there is no limitation on the arbitrator deciding an issue of fraud. Accordingly, there is no longer any justification for a court to refuse a stay of proceedings brought in breach of an arbitration agreement even if an allegation of fraud was raised by the party applying for the stay. The plaintiffs' attempt to invoke s 12(2) of the old Act is therefore misconceived.

49 Moreover, even if the old Act were to apply, the plaintiffs' attempt to bypass arbitration would still fail because, in order to come within the statutory provision, the allegation of fraud must be against a party to the agreement. An allegation of fraud against the architect (even if it was not withdrawn) would not qualify.

(f) Whether the court should refuse a stay of proceedings on the plaintiffs' contention that cl 37(11) applies

50 Clause 37(11) provides as follows:

> None of the provisions of this condition shall be construed so as to limit or prevent either party from requesting the Courts to exercise their discretion to revoke the appointment of any arbitrator or refuse a stay of proceedings in any case where third parties (including in particular a sub-contractor or supplier or the Architect or Quantity Surveyor or a Consultant) are also involved directly or indirectly in a dispute with or between the parties in this Contract.

As may be observed, the provisions of cl 37(11) relevant to this case merely permit either party to request the court to exercise its discretion to refuse a stay of proceedings where third parties are involved directly or indirectly in a dispute with or between the parties to the agreement.

51 Where, as in this case, the parties are in dispute over the architect's Interim Certificate, it might be said that the architect is "involved" in the dispute. Indeed (following the language in cl 37(1)), each time that there is a dispute between an employer and a contractor as to "any direction or instruction or certificate of the architect or as to the contents of or granting or refusal of or reasons for any such direction, instruction or certificate", the architect could be said to be involved in the dispute irrespective of whether he has a dispute with either of them.

52 Clause 37(11) merely gives liberty to the parties to apply to the court to exercise its discretion to refuse a stay. In the present case, I see no reason to exercise my discretion to set aside the assistant registrar's order staying proceedings in favour of arbitration. If the court were to allow the arbitration agreement to be bypassed each time this happens, cl 37(1) will be as good as "writ on water".

(g) Whether the defendant was ready and willing to arbitrate

53 In reply to the plaintiffs' allegation that the defendant was not able and willing to go to arbitration, the defendant explained that they had not referred the dispute to arbitration because in the defendant's mind, an arbitrator having earlier been appointed, there was no need for a further application for appointment of an arbitrator. This was consistent with the defendant's submission (albeit erroneous) that the arbitration had not been completed.

54 That the defendant was willing to go to arbitration can be seen in its solicitor's letter dated 13 June 2006 wherein they conveyed the defendant's view that the dispute had to be resolved by arbitration.

55 I am satisfied that the defendant was willing and able to go to arbitration.

Conclusion

56 For all the foregoing reasons, I dismissed the appeal with costs fixed at $4,500.

[note: 1]Several other holdings of the High Court were reversed by the Court of Appeal which reversal was upheld by the Privy Council.

[note: 2]Since the amendment of O 14, r 1 of the Rules of Court (Cap 322, R5, 2006 Rev Ed) allowing an application for summary judgment to be made only after a defence has been filed, it has not been possible for such application to be heard together with a stay application. It was held by the Court of Appeal in *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR 382 that the intention behind the amendment must have been that no O 14 application should be made while a stay application was pending.