Hong Huat Development Co (Pte) Ltd v Hiap Hong & Company Pte Ltd
[2000] SGHC 131

Case Number : OM 12/1999, CA 85/1999

Decision Date : 06 July 2000

Tribunal/Court : High Court

Coram : Woo Bih Li JC

Counsel Name(s) : Lawrence Teh (Rodyk & Davidson) for the applicants/appellants; John Chung (Khattar Wong & Partners) and Sharon Tay (Donaldson & Burkinshaw) for the respondents

Parties : Hong Huat Development Co (Pte) Ltd — Hiap Hong & Company Pte Ltd

JUDGMENT:

Cur Adv Vult

1. This is an appeal by Hong Huat Development Co. (Pte) Ltd against part of an award by an arbitrator.

Background

2. The Appellants are the owners of a 6 storey shopping centre in Upper Serangoon Road. In 1979, they had entered into a written agreement with the Respondents Hiap Hong & Company Pte Ltd dated 27 January 1979 ('the Contract') for the Respondents to build the shopping centre. The Respondents were the main contractors. The Contract incorporated, inter alia, the 1979 Singapore Institute of Architects Standard Conditions. In the Contract, the Appellants are referred to as 'the Employer' as is frequently the case in building contract documents. However, the Appellants do not, strictly speaking, employ the Respondents. They engage the Respondents to build the shopping centre.

3. The firm of architects engaged by the Appellants was Chen & Associates Architects ('the Architect'). Counsel for each of the parties referred to the Appellants as 'the Employers' of the Architect and generally referred to owners who engage a firm of architects as 'the employers'. The same description is used in textbooks. While this may be a convenient description, it is, strictly speaking, not correct when the architects are in private practice.

4. Disputes arose between the parties and such disputes were referred to an arbitrator.

5. In the arbitration proceedings, the Appellants (before me) were the Respondents and the Respondents (before me) were the Claimants.

6. After a very long delay, the arbitrator eventually published his award on 24 December 1994.

7. The Appellants were dissatisfied with parts of the award and sought leave under s 28 of the Arbitration Act (Ch 10) to appeal to the High Court. On 21 March 2000, such leave was eventually granted by the Court of Appeal on a question of law.

8. In paragraph 55 of its Judgment, the Court of Appeal said that,

> 'The appeal will be on the question what is the nature or extent of the term to be implied as regards the duties of the appellants as employers in relation to the certifying functions of the architect under the SIA Conditions.'

9. It is not disputed that in the question framed, the reference to the architect means the Architect who is engaged (and not

employed) by the Appellants. The use of the description 'employers' arose probably because that was the label used by Counsel for each party.

10. Naturally, the question framed must be considered in the context of the claims for which the award was made in favour of the Respondents and which are the subject of the appeal before me. As it was, the award was in respect of six main claims but Mr Teh said that the appeal before me concerned five of them only. Furthermore, as regards one of the five claims, only part of it was the subject of the appeal before me.

11. The five relevant claims as set out in the Re-Amended Points of Claim, were:

> '5. In breach of clause 30(1) of the Schedule of Conditions, the Architects were repeatedly late in issuing their Interim Certificates of Payment, and in breach of the same provision, the Respondents were repeatedly late in honouring the Certificates that were issued. As a result of such delays the Claimants suffered financial loss amounting to ~~$163,819.51~~ $397,788.88. Full particulars will be given to the Respondents when they are ready. It is an implied term of the Schedule of Conditions that the Respondents as Employers will ensure the proper discharge by the Architects of their duties as prescribed under the Schedule of Conditions. The Architects having failed to discharge their duties in compliance with clause 30(1) as aforesaid, the Respondents are in breach of this implied term. [I will refer to this claim as "Item (a)".]
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> 6. In breach of clause 30(2) of the Schedule of Conditions, the Architects issued several Interim Certificates of Payment which allowed greater amounts to be deducted as retention money than as provided under clause 30(3) of the Schedule of Conditions. This wrongful withholding of such greater amounts than permitted caused the Claimants to suffer a financial loss, amounting to $1,799.70. Full particular will be given to the Respondents when they are ready. It is an implied term of the Schedule of Conditions that the Respondents as Employers will ensure the proper discharge by the Architects of their duties as prescribed under the Schedule of Conditions. The Architects having failed to discharge their duties in compliance with clauses 30(2) and (3) as aforesaid, the Respondents are in breach of this implied term. [I will refer to this claim as "Item (b)".]
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> 7. In breach of clause 30(4)(b) of the Schedule of Conditions, the Architects failed to issue to the Claimants a Certificate for one moiety of the total amounts retained by the Respondents on the issuance of the Certificate of Practical Completion. In breach of clause 30(4)(c) of the Schedule of Conditions, the Architects also failed to issue to the Claimants a Certificate for the residue of the amounts retained by the Respondents as prescribed in the said clause. The failure to issue the two Certificates as prescribed in the said clause 30(4)(b) and (c) caused the Claimants to suffer a financial loss amounting to $26,351.40. Full particulars will be given to the Respondents when they are ready. It is an implied term of the Schedule of Conditions that the Respondents as Employers will ensure the proper discharge by the Architects of their duties as prescribed under the Schedule of Conditions. The Architects having failed to discharge their duties in compliance with clause 30(4)(b) and (c) as aforesaid the Respondents are in breach of the implied term. [I will refer to this claim as "Item (c)".]
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> 8. In breach of clause 30(6) of the Schedule of Conditions, the Architects failed to issue the Final Certificate before the expiration of three (3) months from the end of the Defects Liability Period. This failure to issue the Final Certificate as aforesaid caused the Claimants to suffer a financial loss amounting ~~to $27,679.73~~ $176,210.50. Full particulars will be given to the Respondents when they are ready. It is an implied term of the Schedule of Conditions that the Respondents as Employers will ensure the proper discharge by the Architects of their duties as prescribed under the Schedule of Conditions. The Architects having failed to discharge their duties in compliance with clause 30(6) as aforesaid the Respondents are in breach of the implied term. [I will refer to this claim as "Item (d)".]

> 9. The Architects issued an Interim Certificate of Payment dated 21st June 1982 bearing reference No. S74/Con/26 certifying an amount of $392,467.69. The Respondents paid the same to the Claimants but subsequently demanded from the Claimants a refund of $12,982.94, which the Respondents alleged to be the amount of over certification in the Architects' Certificate No. S74/Con/26. The Claimants refunded the said sum of $12,982.94 but without prejudice to their rights to claim the same in the subsequent certificates. No adjustments were made to reflect the said refund in subsequent certificates. In the premises, the Claimants are entitled to a sum of $12,982.94 in addition to the sums of $711,661.45 and
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> $146,235.46 which are set out in paragraph 4 above. [I will refer to this claim as "Item (e)".] '

12. Although the Re-Amended Points of Claim refers to 'the Schedule of Conditions', it should refer to 'the Conditions of Building Contract'.

13. Item (a) was actually a claim in two parts. The first part was for $351,576.28 being interest for the alleged delay by the Architect in issuing Interim Certificates as the Respondents received the monies later than it should have. The second part was for $46,212.60 being interest for the Appellants' delay in honouring Interim Certificates. The appeal before me concerned the first part but not the second part.

14. Item (b) was apparently a claim for interest too but not for delay by the Architect in issuing certificates but for the over-certification of sums to be retained as retention money.

15. Items (c) and (d) were also claims for interest for the delay by the Architect in issuing other certificates which he apparently issued late.

16. It is more difficult to understand what Item (e) was about. The Re-Amended Points of Claim alleged that after the Appellants had paid a certain sum, the Appellants demanded the refund of $12,982.94 as over-certification on a certificate. The Respondents refunded the $12,982.94 but without prejudice to its right to claim it in subsequent certificates. No adjustments were made to reflect the refund in subsequent certificates. The Respondents then claimed to be entitled to this sum.

17. I asked both Counsel (a) whether the Architect was asked to amend the certificate in question for Item (e) i.e. Certificate No 754/Con/26 to reflect the refund and (b) whether this sum was in any event included in the Final Account and in the Final Certificate. Unfortunately neither Mr Teh nor Mr Chung were acting for their respective clients at the time when the arbitration hearing took place and neither could assist me further on Item (e).

18. Clause 30(1) to (4) and (6) of the Conditions of Building Contract states:

> '30(1) At the period of Interim Certificates named in the appendix to these Conditions the Architect shall issue a certificate stating the amount due to the Contractor from the Employer and the Contractor, shall, on presenting any such certificate to the Employer, be entitled to payment therefore within the Period for Honouring Certificates named in the appendix to these Conditions.
> Interim valuations shall be made whenever the Architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an Interim Certificate.
>
> (2) The amount stated as due in an Interim Certificate shall, subject to any agreement between the parties as to stage payments, be the total value of the work properly executed and 75% of the total value (unless otherwise agreed and stated in the appendix) of the materials and goods delivered to or adjacent to the Works for use thereon up to and including a date not more than seven days before the date of the said certificate less any amount which may be retained by the Employer (as provided in sub-clause (3) of this Condition) and less any instalments previously paid under Condition. Provided that such certificate shall only include the value of the said materials and goods as and from such time

as they are reasonably, properly and not prematurely brought to or placed adjacent to the Works and then only if adequately protected against weather or other casualties.

(3) The Employer may retain the percentage of the total value of the work, materials and goods referred to in sub-clause (2) of this Condition which is named in the appendix to these Conditions as Percentage of Certified Value Retained. Provided always that when the sum of the amounts so retained equals the amount named in said appendix as Limit of Retention Fund or that amount as reduced in pursuance of clause 16(f) and/or clause 27(e) of these Conditions, as the case may be, no further amounts shall be retained by virtue of this sub-clause.

(4) The amount retained by virtue of sub-clause (3) of this Condition shall be subject to the following rules:-

> (a) The Employer's interest in any amount so retained shall be fiduciary as trustee for the Contractor (but without obligation to invest), the Contractor's beneficial interest therein shall be subject only to the right of the Employer to have recourse thereto from time to time for payment of any amount which he is entitled under the provisions of this Contract to deduct from any sum due or to become due to the Contractor.
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> (b) On the issue of the Certificate of Practical Completion the Architect shall issue a certificate for one moiety of the total amounts then so retained and the Contractor shall, on presenting any such certificate to the Employer, be entitled to payment of the said moiety within the Period for Honouring Certificates named in the appendix to these Conditions.
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> (c) On the expiration of the Defects Liability Period named in the appendix to these Conditions, or on the issue of the Certificate of Completion of Making Good Defects, whichever is the later, the Architect shall issue a Certificate for the residue of the amounts then so retained and the Contractor shall, on presenting any such certification to the Employer, be entitled to payment of the said residue within the Period for Honouring Certificates named in the appendix to these Conditions.

(5) ….

(6) So soon as is practicable but before the expiration of 3 months from the end of the Defects Liability Period stated in the appendix to these Conditions or from completion of making good defects under clause 15 of these Conditions or from receipt by the Architect of the documents referred to in paragraph (b) of sub-clause (5) of this Condition, whichever is the latest, the Architect shall issue the Final Certificate.

The Final Certificate shall state:-

> (a) The sum of the amount paid to the Contractor under Interim Certificates and the amount named in the said appendix as Limit of Retention Fund, and
>
> (b) The Contract Sum adjusted as necessary in accordance with the terms of these Conditions and the different (if any) between the two sums shall be expressed in the said certificate as a balance due to the Contractor from the

> Employer or the Employer from the Contractor as the case may be. Subject to any deductions authorised by these Conditions, the said balance as from the fourteenth day after presentation of the Final Certificate by the Contractor to the Employer shall be a debt payable by the Employer to the Contractor or as the case may be from the fourteenth day after issue of the Final Certificate shall be a debt payable by the Contractor to the Employer.'

19. The arbitrator's reasons for holding the Appellants liable were as follows.

20. In respect of Item (a), he said,

> '… there is an implied term between the Employer and the architect (*sic*) that the architect will exercise his certification functions according to the terms of the contract; and he would do all things necessary to enable the contractor to carry out the works, and the Employer is thus liable for any breach of this duty on the part of the architect. Where the contract provides that an architect has power to certify as to such matters as interim payments, he must be neutral in that he must act fairly and impartially as between the Employer and the contractor.'
> [Emphasis added.]

21. In respect of Item (b), he said,

> 'By reason that the terms in Clause 30(2) are clearly stipulated under the contract for which the architect is obliged to act, I therefore find on the fact and hold that the Claimants are entitled to their claim for damages amounting to $1,799.70 for the Respondents' breach of Clauses 30(2) and 30(3) of the Conditions of Building Contract.'

22. In respect of Item (c), he said,

> 'On the plain reading of the terms in Clause 30 of the Conditions of Building Contract, it is obvious that this clause lays down procedures on how to regulate payment under the contract. It also sets out the way in which the contract sum, as adjusted by the various provisions in the contract, is to be paid over to the contractor. I have no doubt at all in my mind that given the fact that a Condition is a major term of the contract, the breach of which would give rise to a right to treat the contract as repudiated.
>
> Thus, the fact that Clause 30(4)(b) provides that one moiety, ie., half of the retention percentage is payable on the issue of the Practical Completion Certificate under Clause 15, a term would thus be implied into a building contract binding the Employer to ensure that the architect, as certifier, shall perform his duty as Certifier under the contract.
>
> This payment is against the architect's certificate and is on the same terms as for interim certificates under Clause 30(1). Similarly, Clause 30(4)(c) deals with the release of the second half of Retention Percentage. Once the Contractor's liability to remedy defects under Clause 15 has been discharged, the second half of Retention percentage shall be released to the contractor.
>
> This ought to occur either upon the Defects Liability Period expires (either six months or twelve months from the date of Practical Completion, whichever is the case as specified in the Appendix) or when the architect issues his Certificate of Completion of Making Good Defects, whichever is the later.

> The architect shall then issue a certificate releasing the residue, and the contractor is entitled to payment on the same conditions as for interim certificates under Clause 30(1). By the fact that Clauses 30(4)(b), and 30(4)(c) are explicit in their terms under the contract for which the architect is bound to act, I therefore find on the fact and hold that the Claimants are entitled to their claim for damages amounting to $26,351.40 for the Respondents' breach of Clauses 30(4)(b), and 30(4)(c) of the Conditions of Building Contract.'
> [Emphasis added.]

23. In respect of Item (d), he said,

> 'I find as a fact that it is mandatory that the architect is required to issue the Final Certificate, and failure to issue such Final Certificate within the time and in a manner specified is a breach of contract for which the employer is liable. In the event, I find and hold that I would allow the Claimants' claim of having suffered a final loss amounting to $176,210.50.'
> [Emphasis added.]

24. In respect of Item (e), he said,

> 'I therefore find on the fact for the Claimants and accept that the Respondents indeed made no effort to ensure the inclusion in the Final Project Accounts this sum of $12,982.94 which the Claimants already refunded to the Respondents, but which the Respondents alleged the architect over-certified the said sum to the extent of $12,982.94 in his Certificate No. S74/Con/26.
>
> However, in giving equal consideration to the arguments of the Parties, I hold that allegation made by the Respondents about the architect's over-certification of the said sum to the extent of $12,982.94 in his Certificate No. S74/Con/26 is not consonant with the general principle of equity and good conscience since the architect is de facto acting as agent for the Respondents. In this context, I find and direct that this refunded sum of $12,982.94 should rightly be required to pay back to the Claimants.'
> [Emphasis added.]

25. In summary, the arbitrator had concluded that although the Architect as a certifier must be neutral and must act fairly and impartially as between the Appellants and the Respondents, the Architect was nevertheless still the agent of the Appellants. Accordingly, in the arbitrator's view, the Appellants were obliged to ensure that the Architect discharged its duties properly failing which the Appellants were liable for breach of contract.

26. The claims for Items (a) to (d) were on the basis that the Architect had defaulted in its function as certifier and the Appellants were liable for such default.

27. The claim for Item (e) was not on that basis. There is no suggestion in the Re-Amended Points of Claim that the Architect was in default as certifier in respect of Item (e).

28. The question I am to determine relates to the certifying function of the Architect.

29. The burden is on the Appellants to ensure that Item (e) is within the scope of the question I am to determine. I am of the view that the Appellants have failed to discharge this burden. Therefore my determination of the question will not affect the award of Item (e) to the Respondents.

30. I should also mention that when the arbitrator found in favour of the Respondents for Items (a) to (d), he also allowed interest at 8% per annum on each Item from the date of commencement of the arbitration proceedings till payment by the Appellants.

31. In the course of the hearing before me, I ascertained that the 'principal' sum claimed under Item (a) was for interest at the rate of 12% per annum. It seems that the 'principal' sums claimed under Items (b) to (d) were actually also for interest at the same rate. I do not know if the arbitrator realised this and if he did, it is not clear to me why he was prepared to grant the 'principal' sums based on 12% per annum and then further interest thereon at 8% per annum.

Functions and roles of an architect

32. It is important to bear in mind the functions and roles of an architect.

33. Mr Chung suggested that whatever the functions of an architect, he was always the agent of the owner. He referred to Keating on Building Contracts, 6th Edition 1995 at p.121 for the proposition that the architect is the employee's agent for the purpose of administering the building contract and 'performs the traditional duties of agent for the employer of supervision and certification'.

34. The actual passage reads:

> '**Professional independence**. An architect is not an arbitrator but he has "two different types of function to perform. In many matters be is bound to act on his client's instructions, whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion".[48] This was said with reference to the architect's position under the Standard Form of Building Contract but it may be taken as applicable to most forms of building contract where the architect performs the traditional duties of agent for the employer of supervision and of certification.'

35. The quotation in the passage was from a judgment of Lord Reid in *Sutcliffe v Thackrah* [1974] AC 727 at p.737. However, the clause quoted by Mr Chung is in the next sentence which is not a quotation from Lord Reid's judgment but is a comment in the textbook. Lord Reid did not say that the architect is the agent of the owner or performs the duties of an agent when the architect is certifying.

36. Indeed in footnote 48, there is also the following comment:

> 'There are many old cases (excerpts from which are set out in earlier editions of this book) referring to the dual function or dual capacity as it was sometimes called of the architect. Their basis is not, it is submitted, essentially different from the exposition by the House of Lords in *Sutcliffe v. Thackrah* but they frequently use words which speak in terms of the architect as an adjudicator or quasi-arbitrator and these terms should no longer be used. It is suggested that it is still, however, correct and useful when referring to those functions where the architect must act fairly to say that he must act "independently".'

37. The concept of dual functions recognises that when the architect is a certifier he is to act fairly and independently. In my view he cannot act fairly and independently if in that capacity he is also acting as agent of the owner.

38. Halsbury's Laws of England, Fourth Edition, Reissue, Volume 4(2) at paras 522 and 523 states:

> '**522. Dual function of architect or engineer.** The architect or engineer may often act in two capacities in respect of the same matter. For example, he may first be acting as the agent of the building owner, and in that capacity have to decide whether work or materials are acceptable to his client, the employer, and then as certifier have to decide whether the work or materials do or do not comply with the contractual standards, whether payment should be made, or the value of the relevant work or materials, and when acting in this quasi-judicial capacity he must act fairly and impartially

between the parties. …

523. Duties as a certifier.

In most building contracts the architect has to perform a number of duties as a certifier as well as acting on behalf of the employer. His duties as certifier are different from his duties as agent or arbitrator although sometimes it is not easy to distinguish them. ….'
[Emphasis added.]

39. Mr Chung also submitted that as an architect is employed by the owner, only the owner has control over the architect. If the architect fails or refuses to carry out his functions under the building contract, only the owner can tell him to do so, not the contractor. Mr Chung relied on the following passage in para 6228 of Hudson's Building and Engineering Contracts 11th Edition 1995:

> 'The building owner is naturally entitled to have a high degree of control over the services of the A/E for which he is paying, consistent with his exact status as a salaried official or as a professional man in private practice, but where the contract with the builder requires the A/E to decide matters judicially, the owner of necessity ceases to be entitled to control his activities in relation to the matter he is called upon to decide, whether as certifier or arbitrator …..'

The reference to 'A/E' is to an architect/engineer.

40. In my view that passage from Hudson's does not assist Mr Chung. It acknowledges the dual functions of the architect and that in his capacity as certifier, the owner ceases to be entitled to control him.

41. In fact, the passage goes on to say:

> '… The building owner must then leave the A/E to decide impartially, so far as he can do so as the paid agent of one side with possibly previously expressed opinions on the matter in question. While proper and no doubt strong representations can be made to him, they must not seek to limit his authority to decide, or pass the borderline beyond which they interfere with the free exercise of his function.'
> [Emphasis added.]

42. I would say that there is no valid basis in principle, aside from case-law, to say that an owner must ensure the proper discharge by the architect/certifier of his duties such as to render an owner liable if the certifier fails to discharge his duty properly since the certifier is supposed to act independently.

43. Indeed Mr Chung must have recognised this because he then tried to draw a distinction between 2 aspects of the certification duties of an architect. Such a distinction would be unnecessary if the owner was entitled to control the architect throughout the building contract and was liable for the architect's defaults irrespective of the architect's functions.

44. Mr Chung submitted that as regards the duty to certify, an architect has 2 functions to perform: (a) the act of issuing the certificates ('function (a)') and (b) the certification of the actual amounts due to the contractor ('function (b)'). To support this distinction he cited paragraph 522 from Halsbury's Laws of England which I have already cited in paragraph 38 above.

45. According to Mr Chung's submission, an architect acts as agent of the owner in function (a). He described it as a mandatory function which the architect must do regardless of whether claims had been submitted by the contractor (unless the contractor was required to submit a claim as in the case for the Final Certificate).

46. Therefore, in so far as function (a) is concerned, he submitted that an owner must ensure that the architect carries out his

duty regardless of whether the owner knows that the architect has failed in his duty.

47. In so far as function (b) is concerned, he submitted that an owner must ensure that the architect carries out his duty if the owner knows that the architect has not carried out his duty. He relied on *Frederick Leyland & Co Ltd (J Russel & Co) v Compania Panamena Europea Navegacion, Limitada* (1943) Vol 76 No 4 Lloyds Law Reports 113 ('*Panamena*') and on *Perini Corporation v Commonwealth of* Australia 12 BLR 90 ('*Perini*') for the requirement of knowledge and said these cases applied to function (b) but not to function (a).

48. He argued that in *Panamena*, the surveyor was required to certify the quality of work and this was function (b), hence the requirement of knowledge by the owner for the certifier's default. As for *Perini*, he argued that the Director of Works was required to extend time for completion if he thought that there was sufficient cause to do so and this also came within function (b).

49. However, I note that in *Panamena*, it was not so much the wrong assessment of quality by the surveyor in his certificate that was in dispute but the absence of the surveyor's certificate. That would have been function (a).

50. Besides, neither in *Panamena* nor in *Perini* was a distinction drawn between function (a) and (b). Indeed, Mr Chung had to admit that there were no cases drawing such a distinction.

51. In my view such a distinction is untenable. Where the architect acts as a certifier, he must act independently. No distinction can or should be drawn between the question whether he has wrongly delayed issuing a certificate and the question whether he has certified the wrong amount. Both pertain to his certifying function.

52. Mr Chung had another difficulty. Even if he was right in drawing a distinction between function (a) and (b), it is pertinent to note that for Item (b) (which is for loss of use of the sum that was over-certified to be part of the retention sum) this came under function (b) and not function (a). By his own submission, the Respondents could not have succeeded in its claim for Item (b) unless the Appellants knew that the Architect had over-certified the amount to be retained. The Appellants' knowledge was not pleaded by the Respondents and Mr Chung believed that there was no evidence before the arbitrator regarding the Appellants' knowledge of the alleged breaches by the Architect.

53. Mr Chung sought to get around this difficulty by arguing that it was for the Appellants to plead that knowledge of the Architect's default (for function (b)) was required of them in order to render them liable for the default. He also argued that it was for the Appellants to prove that they did not know of the default.

54. I am of the view that this argument is also untenable. It is for the claimants i.e. the Respondents, to plead the implied term correctly and to prove their case. If the Appellants are liable for the Architect's wrongful acts or omissions regarding its certifying function provided the Appellants knew of the wrong, the Respondents must plead such knowledge and prove it.

Cases and Textbooks

55. Both Mr Teh and Mr Chung cited to me the cases of (a) *Panamena*, (b) *Perini*, (c) *Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council & another* (1986) 33 BLR 39 ('*Lubenham*') and (d) the judgment in Civil Appeal No 85 of 1999 ('C.A. No 85 of 1999').

56. Mr Teh's submission was that there is no implied obligation on an owner to marshall its architect. For this proposition, he relied on paragraph 50 of the judgment in C.A. No 85 of 1999.

57. Mr Teh's alternative submission, which appeared to be his main argument, was that if there is an implied obligation to marshall the architect, this was predicated on an owner first knowing that the architect is not discharging his functions properly.

For this proposition, he relied on Panamena and Perini. He also relied on Emden's Construction Law Issue 56/June 1999 at p.II 274 to 275 and Hudson's Building & Engineering Contracts, 1995, para 4.200.

58. Mr Teh also relied on paragraphs 43 and 44 of the judgment in C.A. No 85 of 1999 for his alternative submission.

59. Accordingly, Mr Teh was relying on different parts of the judgment in C.A. No 85 of 1999 to support both his submissions although they were in the alternative.

60. For his part, Mr Chung relied on Panamena and Perini for the proposition that there is an implied obligation on the part of the owner to ensure that a certifier is carrying out his duty properly.

61. Yet on the other hand, Mr Chung sought to draw a distinction between Panamena and Perini on the one hand and the appeal before me. As I have mentioned above, he submitted that in so far as Panamena and Perini mentioned the requirement of knowledge on the part of the owner to render the owner liable, this was relevant for function (b) but not for function (a).

62. He also argued that paragraph 43 of the judgment in C.A. No 85 of 1999 was applicable to function (b) only.

63. As for Lubenham, Mr Chung said it was authority for the proposition that if there was a wrongful deduction in a certificate from an architect, then the certification could be challenged in arbitration.

64. Mr Chung also cited various textbooks. I have mentioned a number of them above.

65. It is therefore necessary for me to analyse (a) Panamena, (b) Perini, (c) Lubenham, (d) the judgment in C.A. No 85 of 1999 and (e) the textbooks in so far as they have not already been dealt with above.

Panamena

66. In *Panamena*, the plaintiff repairers had entered into an agreement with the Ministry of War Transport and the defendants to repair a steamship.

67. Clause 7 of the agreement provided:

> '7. The owners shall pay for the repairs upon the ordinary commercial basis, i.e., labour plus twenty-five per cent thereof for establishment charges plus cost of material plus ten per centum profit on the total of these three items plus sub-contractors and cash disbursements (including dock dues) plus give per cent all old material except heavy parts of machinery to become repairers' property. Payment shall be effected as required by the repairers on the basis of cash against expenditure during the progress of the work and the ascertained balance on the completion of the repairs and every such payment shall be effected promptly by the owners after the issue of a certificate by the owners' surveyor that the work has been satisfactorily carried out and on receipt of a certificate of the amount due issued by the Costs Investigation Branch of the Ministry of War Transport and certifying that same has been checked and found correct (and the Minister agrees to procure that the said Costs Investigation Branch shall so certify and issue certificates). The repairers shall keep correct and full entries and accounts of all wages expended and of the cost of all materials and things used in the execution of the repairs and shall permit the accountants of the said Costs Investigation Branch to inspect and examine all such entries and accounts and shall produce to them all vouchers and documents necessary for showing the amount of such wages materials and things and for vouching the same and shall give to such accountants all such information facilities and assistance as shall be reasonably required by them to enable them fully to understand such entries and accounts and other

particulars and to determine the sums from time to time payable by the owners in respect of the further repairs and to issue the said certificates accordingly. Such last-mentioned certificates shall be accepted by the parties hereto as final and conclusive and shall not be questioned except as regards any error appearing on the face thereof and of which due notice shall forthwith be given to the said Costs Investigation Branch.'

68. The Costs Investigation Branch of the Ministry of War Transport did certify the charges due to the plaintiffs but the defendants denied that the money was due as the surveyor had not issued his certificate.

69. The surveyor wanted to check the amount claimed by the plaintiffs but the plaintiffs contended that his function was to consider only the quality of the work done and not the amount.

70. The Court of Appeal agreed that the surveyor's function was to consider only the quality of the work done and not the amount.

71. In the course of his judgment, Scott LJ said at p.124:

> 'Let us consider the position. The repairers were entitled to rely on the surveyor doing what the contract said he was to do, that is, keeping to matters of quality only. It seems to me plain that if the shipowners had known that he was departing from his proper function under the contractor, it would have been their duty to stop him and tell him what the function was for which the contract provided, just as much so as if he had had in his possession a draft of the contract which gave him a wider field than was given by the executed contract, and the owners had realised that he was going wrong because his draft was an incorrect version of the real contract. It obviously was not the contractual duty of the repairers to bring him to book. It is equally obvious that they would count on his carrying out his proper function. In those circumstances I think the Court ought to imply an undertaking by the owners that in the event of its becoming known to them that their surveyor was departing from the function which both parties had agreed he was to perform, they would call him to book, and tell him what his real function was.
>
> This seems to me an implication exactly on the lines of all the authorities on implied terms from the *Moorcock*, 14 P.D. 64, down to Luxor (Eastbourne), Ltd. V. Cooper, [1941] A.C. 108 …'
> [Emphasis added.]

72. It is the first paragraph above on which Mr Chung relies to find liability on the part of the Appellants for interest for loss of use of various sums of money. On the other hand, it is also this paragraph which Mr Teh relies on to argue that an owner must know of the default before the owner is liable for the certifier's default.

73. Goddard LJ seemed to have taken a similar position as Scott LJ. At p.127, he says:

> 'The appointment of the surveyor in this case was to be made by the defendants, and they could appoint whom they liked. If they failed to appoint anyone, obviously they could not rely on the absence of a certificate. Equally, it seems to me, they must appoint someone who is willing to perform the duty assigned to him by the contract. If he will not or cannot perform that duty they must appoint someone who will. Here it is clear that Dr. Telfer refused to perform the simple duty of certifying whether the work was properly done, from the point of view of quality, because he took the view, and I will assume honestly, that the contract enabled and indeed required him to do something else and to concern himself with cost, with which he was in no way concerned and which was the business of the Costs Investigation Branch. He, therefore, was unwilling to carry out the duty assigned by the contract to him. The defendants either were of the same opinion or adopted his view; for this purpose, it matters not which. Consequently they neither required him to certify in accordance with the

> contract nor did they appoint anyone else in his place. It is no answer for them to say that that was because they misinterpreted the contract. It is often the case that a person is guilty of a breach of contract because he has placed a wrong construction on it, but that affords him no defence.'

74. In the House of Lords, Lord Thankerton said, at p.436:

> '… If the appellants had taken the contrary view of their surveyor's function under cl. 7, it would have been their duty to appoint another surveyor to discharge that function, and if they had refused to appoint another surveyor, the respondents would clearly have been absolved from the necessity of obtaining the surveyor's certificate; the respondents are equally so absolved when the appellants' wrongful view of their surveyor's function under cl. 7 prevents the appellants from obtaining the certificate. I agree with the view expressed on this point by Goddard L.J.'

75. There are factors which differentiate Panamena from the appeal before me.

76. First, it is important to bear in mind that in *Panamena*, the plaintiffs were not claiming for interest for loss of use of a sum or sums of money. They were claiming to be entitled to be paid the principal sum or sums notwithstanding the absence of a certificate by the surveyor. In the particular circumstances of that case, they were successful.

77. Secondly, in *Panamena*, the surveyor, one Dr Telfar, was the president of the defendant company. There was also a close relationship between him and the defendant company. It was he who had advised Messrs J.D. Chandris and D.J. Chandris to buy the vessel and it was bought in Dr Telfar's name on their behalf when the defendant company was incorporated. Dr Telfar became president and director and his wife became the other director of the defendant company.

78. Thirdly, the court there agreed that the defendants had been influencing Dr Telfar with their views and Dr Telfar was not acting impartially.

79. In the appeal before me, none of the professionals in the firm of the Architect is employed or is an officer of the Appellants, although the Architect was appointed by the Appellants.

80. Secondly, there is no suggestion in the appeal before me that the Appellants were influencing the Architect. Indeed the claim of the Respondents was to the contrary i.e. that the Appellants were obliged to ensure that the Architect discharged its duties properly. The Appellants were supposed to ensure this by telling the Architect to issue the certificates in question.

81. In so far as the judgments in *Panamena* say that it was the duty of the defendants to tell the repairer what his function was and to call him to book, if the defendants had known that he was departing from his proper function under the contract, I would respectfully suggest that this proposition be confined to the particular facts of the *Panamena*.

82. In so far as Scott LJ implied such a duty from authorities like the *Moorcock* 14 PD 64 down to *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, these authorities only say that a term should be implied if business efficacy requires it.

83. I do not see why it is necessary for business efficacy to imply a duty on an owner to tell an architect what to do regarding his certifying function.

84. On the contrary, it would impede business efficacy if an owner was obliged and entitled to tell an architect what to do regarding his certifying function. It must not be forgotten that just as the architect may be wrong in discharging his certifying function, it may be that the owner is wrong in his assessment of whether the architect is or is not discharging his function properly.

85. Furthermore, as it is accepted that an architect, as certifier, must act fairly, impartially and independently, the owner is not entitled to tell him what to do. An architect cannot act independently if the owner is entitled to remove him and appoint

someone else just because the owner believes that the architect has failed to discharge his duty or has discharged his duty wrongly.

86. However, if the architect is no longer able to act as certifier because, for example, he has retired, then the owner may and should appoint someone else in his place, see *Croudace Ltd v London Borough of Lambeth* (1986) 33 BLR 25.

87. I find support for my view not only from basic principles but from cases as well.

88. In *Minster Trust Ltd v Traps Tractors Ltd* (1954) 1 WLR 963 ('*Minster Trust*'), Devlin J said at p.974:

> 'If two parties agree to appoint an arbitrator … it would be, I think, implied in the contract to give it business efficacy that neither side would seek to interfere with his independence.'

89. This statement was made in the context of the quasi-arbitral nature of the certifier's function.

90. In *Kempster v Bank of Montreal* [1871] 32 Up.Can Q.B. 87 ('*Kempster*'), the plaintiffs were engaged to carry out alterations and additions to the defendants' banking house. Under their contract, the defendants were to pay the plaintiffs the value of the works done to be fixed by the defendants' overseer.

91. The plaintiffs alleged that it was agreed that the defendants would procure the overseer to, and that he would, wherever the plaintiffs were entitled to any such certificates, give such certificates.

92. Chief Justice Draper pointed out that the contract differed widely from what was contended for by the plaintiffs. He said at p.94 and 95:

> 'This deed or agreement differs widely from that which is stated in the declaration…. It contains no covenant or agreement on the part of the defendants that they would cause or procure Hills to give the necessary certificates to entitle the plaintiffs to demand any payment, or would cause or procure Hills to estimate the value of extra work done; and therefore, so far as express covenant goes, the defendants have committed no breach in not procuring Hills to do either of these acts, the performing or withholding which were among the matters to be determined and adjusted by Hills without reference in any way to any other person. And the deed does not afford any pretext for implying such an agreement or duty on the part of the defendants, for there are express stipulations as to the giving of such certificates and making of such estimates, and no implication can arise where the contract is fully set out, for it would be at variance with what is fully set out. It is beyond doubt that both parties, as is said by Hannen, J., in *Jones v. St. John's College,* L.R. 6 Q.B., at p.127, intended "to rely on the fairness as well as the skill and judgment of" the surveyor, Hills; and, to borrow another phrase from the same judgment, "it seems to be impossible for the English language to supply words by which a man can bind himself, if this contract does not" bind the plaintiffs.'
> [Emphasis added.]

93. I refer next to *Hickman & Co v Roberts* [1913] AC 229. In that case, payment was to be made by the owners to the contractor on certificates to be issued by the architect. It was found as a fact that the architect had allowed his judgment to be influenced by the owners and the architect had improperly delayed issuing various interim certificates and the final certificate.

94. The contractor sued for the final balance but the final certificate was not issued until after the commencement of the action. The House of Lords held, inter alia, that the issue of the certificate was not a condition precedent to the bringing of the action.

95. I refer to the judgment of Lord Shaw of Dunfermline where, at p.239, he says the following about the architect in that case:

> '… and I find that it is established, conclusively as I think, that he did not act with sufficient firmness

> to enable him to decide questions according to his own opinion, those questions affecting the issue of certificates and the interim amounts thereof. Instead of doing so, my Lords, he accepted the instructions or orders of the owners and their solicitors upon that topic.'
> [Emphasis added.]

96. If an architect is to decide on the issue of certificates and the amounts thereof without following the instructions or orders of the owners, then the owners cannot be obliged or entitled to give such instructions or orders whether it be to withhold a certificate, or, for that matter, to issue a certificate. The withholding and the issue of a certificate are both sides of the same coin. Accordingly, an owner cannot be liable for not giving such instructions or orders.

97. Indeed, should an architect issue a certificate because he was told to do so by an owner, and not because he himself thought it was right to do so, he would have 'forfeited his independence' (to adopt the words of Lord Atkinson in *Hickman & Co v Roberts* at p.238).

98. In my view, these three cases are authorities against the implied term contended in the pleadings of the Respondents. The case of *Lubenham* which was decided after *Panamena* and *Perini* is also against such an implied term. I will refer to *Lubenham* later in greater detail.

99. Neither *Minster Trust* nor *Kempster* appear to have been cited in the judgments of *Panamena*. This may be because of the nature of the claim before the court there.

100. As for the case of *Hickman & Co v Roberts*, it was cited in the judgment of Scott LJ in *Panamena* but in different contexts. At p.124, it was cited in the context that one party had prevented the performance of a term in the contract in question. At p.126, it was cited in the context of collusion.

101. Likewise, the judgment of Goddard LJ in *Panamena* cited *Hickman & Co v Roberts* in the context of collusion.

102. Neither learned judges had considered *Hickman & Co v Roberts* in the context of whether an owner is liable for interest for loss of use of money which the contractor has eventually received, although it was received late.

103. Although Lord Thankerton in *Panamena* did refer to *Hickman & Co v Roberts* extensively, it was also not in the context I have mentioned.

Perini

104. In *Perini*, the plaintiff contractor was engaged to build the Redfern Mail Exchange. The defendant was the building owner. The 'General Conditions of Contract' applied. This was a document in a standard form used by the defendant for the erection of buildings.

105. The biggest part of the plaintiff's claim was in respect of applications for extension of time.

106. It was agreed by the parties there that the Supreme Court of New South Wales would only be asked to decide points of law involving the construction of the agreement.

107. Some of the applications for extensions of time were made for delays to and disruption of the work caused by rain. Some of the reasons given for refusing applications based upon rain were that the rain was normal rain and should have been allowed for by the plaintiff when it submitted its tender, that the policy of the Department of Works was not to grant extensions for normal rain but only for abnormal rain and that the rain in fact did not delay the work. Reasons of a similar character were given with respect to delays caused by industrial disputes.

108. Macfarlan J decided that the Director of Works was entitled to consider Departmental policy but was wrong if he considered himself controlled by it.

109. The learned judge then considered whether there were implied terms in the contract between the parties which were described as being negative and positive.

110. In the negative sense, it was alleged that the owner was bound not to interfere with the proper performance of the Director's duties.

111. In the positive sense, it was alleged that the owner was bound to ensure that the Director did his duty.

112. Macfarlan J decided that there was an implied term in the negative sense. However, in the appeal before me, the implied term in the negative sense was not disputed by Mr Teh. In any event, it was not the case of the Respondents in the arbitration in respect of Items (a) to (d) that the Appellants had been in breach of an implied term in the negative sense but in the positive sense.

113. As for the implied term in the positive sense, Macfarlan J said at p.111:

> 'I will now consider the affirmative aspect of the term which learned counsel for the plaintiff argued must be implied in this agreement. Fundamentally he argued it is essential to consider this aspect against the background that the Director of Works was at all times a servant of the Commonwealth; that the position he occupies as Certifier was part of the machinery set up by the agreement of the Commonwealth and the plaintiff for certifying applications for extension of time. As such a servant of the Commonwealth the Director of Works was obliged by law to obey all lawful orders of the Commonwealth: see Commonwealth Public Service Act 1922, s.55(1)(a). If, for example, the Commonwealth were to say to the Director: "You are ordered to act in a particular manner", and if that order constituted a breach of the Contractual mandate conferred on him by cl.35, the Director would none the less be still obliged to act in compliance with the Commonwealth order. Against this background I will assume that the certifier, with the knowledge of both parties to the agreement, acted in breach of his obligation. Could the Commonwealth in those circumstances say: "I will not do anything to insure that he carries out these duties"? In my opinion an application of the test stated in *The Moorcock* (1889), 14 PB 64; would require the answer that the Commonwealth was contractually bound to order him to carry out his duties. In my opinion the plaintiff and the defendant, being the parties bound by his agreement, are bound to do all co-operative acts necessary to bring about the contractual result. In the case of the defendant this is an obligation to require the Director to act in accordance with his mandate if the defendant is aware that he is proposing to act beyond it. In *Mackay v Dick*, [1881] 6 App Cas 251, at 263, Lord Blackburn said:
>
> > "I think I may safely say as a general rule that where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually by done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." (*Cf. Electronic Industries Ltd v David Jones Ltd* (1954), 91 CLR 288, at pp.297, 298.)'

[Emphasis added.]

114. The passages cited at p.106 by Macfarlan J from *The Moorcock* were as follows:

> 'Any consideration of this point must begin with the judgment of Bowen, LJ in *The Moorcock* (1889),

PD 64. At 14 PD 64 at p.68; Bowen, LJ, said:

> "and I believe if one were to take all the cases, and they are many, of implied warranties or convenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have."

At 14 PD 64 at p.70; the learned judge also said:

> "The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this kind of unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction." '

115. I note that these passages from *The Moorcock* do not state what the implied term should be.

116. In my view, it is a quantum leap to say that an obligation to do all co-operative acts necessary to bring about the contractual result would lead to the conclusion that an owner is bound to order a certifier to carry out his duties.

117. Furthermore, it is a contradiction to say that, on the one hand, an owner must not interfere with the performance of a certifier's duties and yet, on the other hand, an owner must ensure that the certifier performs his duties to the extent that the owner must tell the certifier what to do if the owner believes the certifier to have defaulted in his duties.

118. In my view, an owner has an implied duty in the positive sense only to the extent that the owner must provide the certifier with such information as the certifier requires. The owner may also make representations to the certifier short of telling the certifier what to do.

119. Thus, Hudson's at para 6121 states:

> 'However, it is clearly natural and to be expected that both parties, contractor as well as owner, may in practice make representations to and communicate with the architect or certifier on the subject-matter of his decision. Whether such representations or communications amount to improper interference will depend upon whether they are of a character which recognises the independence of the certifier and his ultimate responsibility for making an impartial decision.'

120. Even the judgment of Lord Blackburn in *Mackay v Dick* [1881] 6 App Cas 251 at 263, which was cited by Macfarlan J (see paragraph 113 above), does not lead to the conclusion that an owner is bound to order a certifier to carry out his duties.

121. An architect does not have to require both the owner and the contractor to concur before he issues his certificate.

122. Therefore, for example, when the time comes to issue a final certificate under the standard conditions, an architect need not seek the concurrence of the owner and the contractor thereto.

123. There may well be a practical reason why an architect would want to obtain such concurrence i.e. if both concur, then neither will complain that the architect had erred in his final certificate. However practicality must not be confused with legality. It is the architect's legal duty to issue certificates. It is not part of such a duty for him to seek concurrence from the owner and the contractor. He may seek their responses but not their instructions. Also, he is not to delay for an unduly long period the issuance of the certificate pending their responses. If an architect sits by and waits for the owner and contractor to respond or to concur, the architect would have failed to discharge his duty.

124. Consequently, if an architect does not want to make a decision on an intended certificate and hopes that an arbitrator will decide it for him, the architect would not be carrying out his duty.

125. Although Macfarlan J did cite *Minster Trust* (at p.105 to 106) and *Hickman & Co v Roberts* (at p.108 and 109), it was in the context of whether a term should be implied and not what the term should be. Furthermore, although Macfarlan J did cite various passages from Devlin J's judgment in *Minster Trust*, including the one that I cited in paragraph 88 above (see p.105 to 106 of the report on *Perini*), Marfarlan J did not seem to think that there was any inconsistency between the proposition, on the one hand, that neither the owner and the contractor is to seek to interfere with a certifier's independence and, on the other hand, imposing an obligation on the owner to tell the certifier what to do.

126. *Kempster* was not cited by Macfarlan J.

127. It seems that although Macfarlan J found that the Director was required to act independently, he was much influenced by the fact that the Director was the servant of the owner.

128. This fact was noted a numbers of times in his judgment. For example at p.98 to 99, he says:

> 'In considering the scope of the authority it is essential to pay regard to the position of the Director of Works as it is seen apart from any special authority conferred upon him by the agreement. As I have already described he is a Senior Commonwealth servant and is the Chief Executive Officer of the Department of Works for the State of New South Wales. His duties lie within the Department of Works and his subordinates are also within that Department. In exercising his administrative functions under the agreement he undoubtedly, as a servant of the Commonwealth, would need to have the interests of the Commonwealth to the fore and his actions as such servant would be to preserve or further those interests. He is also, of course, a public servant and as such subject to the duties and obligations of the provisions of the Commonwealth Public Service Act. If a Commonwealth public servant or a Minister of State having authority to do so were to give him an order with respect to his duties, or the manner of performing them, he would be obliged by law to obey that order and would be liable to punishment if he did not do so. The important relation of the Director of Works to the Department of Works is emphasized by the contract which defines this title as meaning, "the officer howsoever styled who is in charge for the time being of the branch of the Department of Works in the State or Territory in which the works are to be executed". (See cl. 1, General Conditions of Contract.) Clause 1 also emphasizes that the expression 'Director of Works' is to have this meaning wherever it appears in the contract and it is, I think, of significance that this meaning is to be given without the common modification that often appears in Statutes in the following words: "unless the context shall otherwise require".'
> [Emphasis added.]

and at p.107 (when he was dealing with the implied term in the negative sense):

> 'I have already held that the duty of the Director when acting as Certifier was to act independently and in the exercise of his own volition according to the exigencies of a particular application. In my opinion it is not possible to assume that the parties to this agreement could have contemplated that he would act in manners other than those upon which they have agreed and expressed in cl. 35 and that it is a consequence of this assumption that they shall have impliedly bound themselves one to the other that they would not do anything that would prevent him from a proper discharge of the mandate which contractually they have granted to him. It is not necessary for any purpose of this case to decide whether the plaintiff is so bound but I am of the opinion that the defendant is, and that the obligation of the defendant in this respect is more clearly seen because it was the employer of the Director who in his turn was bound to act as the defendant should direct.'
> [Emphasis added.]

129. I refer again to the passage at p.111 (which I cited in paragraph 113 above) where Macfarlan J referred again to the contractor's argument that the Director was a servant of the owner when he considered the positive aspect of the implied term.

130. Furthermore, after citing the judgment of Lord Blackurn in *Mackay v Dick* at p.111, Macfarlan J went on immediately to say at p.112:

> 'I am accordingly of the opinion that a term must be implied in the present agreement binding the defendant to insure that the Director of Works, its servant, performs his duties under cl. 35 in accordance with this mandate.'
> [Emphasis added.]

131. In considering whether an owner is obliged to tell a certifier what to do, the test is not so much whether the certifier is an officer or servant of the owner but whether the certifier is expected to act independently. This depends on the terms of the contract.

132. In *A.C. Hatrick (N.Z.) Ltd v Nelson Carlton Construction Co. Ltd. (in liquidation) and others* (1964) NZLR 72, the role of an engineer/certifier was in issue. Richmond J cited (at p.78) the following passage from Devlin J's judgment in *Minster Trust* with approval:

> 'What has to be ascertained in each case is whether the agent is or is not intended to function independently of the principal. The mere use of the word "certificate" is not decisive.'

133. Richmond J went on to conclude on this point (at p.80) as follows:

> 'I think that the true test of the functions of a certifier must always be found in the intention of the parties. The question to be decided in each case must be whether, as a matter of construction and interpretation of the contract, it is apparent that the certifier was to act independently of his employer in arriving at his decision.'

134. North P. of the Court of Appeal in *Nelson Carlton Construction Co. (in liquidation) v A C Hatrick (N.Z.) Limited* (1965) NZLR 144 was of the same view (see p.150 at lines 15 to 21).

135. In addition, the fact that the certificate of the engineer or architect may be reviewed by an arbitrator and the fact that the engineer or architect was nominated by one party, does not make the engineer or architect, as certifier, an agent of the party engaging him (see North P's judgment at p.150 at lines 21 to 39).

136. In the appeal before me, it was not suggested that the Architect was not to act independently. Indeed its duty to act independently, like those of many other firms of architects under standard terms as certifier, is too well-established for any suggestion to the contrary to be attempted.

137. The close relationship between the certifier and the owner was common in *Panamena* and in *Perini*.

138. On the other hand, there was some difference between *Panamena* and *Perini*. As Macfarlan J observed, at p.110:

> 'In that sense *Panamena Europea Navigation Compania Limitada v Frederick Leyland & Co Ltd,* [1947] AC 428, is different from the present case where the plaintiff, having been paid its contract price claims other damages for breach of the implied term which all members of the Court of Appeal in *Panamena* held to have existed.'

139. In my view, the fact that a contractor may be entitled to claim damages from the owner over and above the contract price for wrongful denial of extension of time does not lead to the conclusion that the contractor can also claim damages against the

owner for interest for loss of use of money in the case of late issuance of certificates or for wrongful amounts certified.

140. To claim damages against the owner for wrongful denial of extension of time, a contractor need only establish that the architect's decision in refusing to extend time was wrong. To claim interest against the owner for receiving money late, a contractor must establish that not only was the architect wrong but that the owner was obliged to tell the architect what to do when the architect acts as certifier. For the reasons I have stated, there is no such obligation to tell.

Lubenham

141. In *Lubenham*, there was a building dispute arising out of three contracts between SPDC (the owners), Wigley Fox Partnership (the architects) and Lubenham Fidelities and Investments Co Ltd (a finance company) which sub-contracted the work to building contractors. The court was concerned only with 2 of the contracts.

142. The disputes arose out of interim certificates issued by the architects. The certificates set out first the total value of the work done up to date and then deducted 3% of the first figure as retention money provided for by the contracts. However each certificate then also deducted a sum in respect of alleged defective work up to date and a second sum in respect of liquidated damages up to 20 May 1977 in respect of alleged delay.

143. It was subsequently common ground that in making these deductions, the architects had erred and the certificates were not in accordance with the relevant contracts.

144. However, at the relevant time, the owners refused to pay any more than was certified. The architects insisted that their certificates were legitimate. The finance company insisted that the certificates were not legitimate and that it should be paid a proper figure calculated in accordance with the contract.

145. There were many issues but the relevant one for present purposes was Issue 2 which was:

> 'Were the Council in breach of the terms of the contracts in failing to pay any sum in respect of the Buttermilk Lane certificate and in failing to pay any sum in excess of 2,237 in respect of the Golden Hill certificate?'

146. Counsel for the finance company submitted (see p.56):

> '… that just as in the *Panamena* the repairers were held entitled to recover the full amount due to them under the repair contract, notwithstanding the absence of one of the stipulated certificates, so also in the instant case should the contractors be entitled to recover the full amount properly due to them under clause 30(2) of the building contracts. In the *Panamena* the shipowners were not entitled to rely on the absence of their surveyor's certificate: so also in this case should the employers not be entitled to rely not only upon the absence from their architect's certificate of material that ought to have been there but also upon the presence in that certificate of material which ought not to have been there.
>
> ….
>
> More specifically, by their amended notice of appeal, Lubenham claimed that the present case falls within *Panamena* on the grounds that "the Council were aware that the Architects regarded the decision as to whether or not to deduct liquidated damages as being a decision for Council, were aware of the Architects' intention to make such deductions, expected that they would do so and maintained the stand which they had taken on the certificates in the face of the direct challenge by Lubenhams to the validity of the deductions".'

147. However, May LJ said, at p.56 to 57:

> 'However, the true position was that on 26 May 1977 Mr Clive Jones, the job architect, had written to Mr Halpin saying that the liquidated damages had not been applied on the contracts and asking whether the council wished the architects to apply them when issuing their next interim certificates. The judge found as fact that liquidated damages were discussed at the meeting at the Council offices on 2 June 1977. He said, "I do not think that Mr Halpin or anyone else, said in terms 'deduct liquidated damages', but equally I do not think that anyone objected. Doubtless everyone was content to be guided by Wigley Fox as the experts".
>
> In all the circumstances, in our opinion none of these submissions can be made good in this case. In the first place, the facts of the *Panamena* were very different from those of the instant case, which makes it essential to discover the real *ratio* of the former. In the Court of Appeal Scott LJ based his decision first upon a term which he thought had to be implied in the contract between the shipowners and repairers that if and when it became known to the former that their surveyor was departing from his proper function under the contract, it then became their duty to stop him and tell him what his function was thereunder. In failing so to instruct their surveyor, the shipowners broke this implied undertaking and thus repudiated the contract. Upon this the repairers could have elected to rescind and claim damages, if they so chose; alternatively, on the principle *inter alia* of *Hickman Co v Roberts* [1913] AC 229, "The plaintiffs were entitled instead to treat the defendants as preventing the performance of the term in question, and also in waiving it as a condition precedent to the plaintiffs' right to sue on the [Ministry] certificate": per Scott LJ at p124. Goddard LJ also effectively based his decision on a breach of an implied term when he said at p 127:
>
> > "It is and must be conceded that if a party desires to rely on the non-performance of a condition precedent he must do nothing to prevent the condition being performed, and if there is anything that must be done by him to render possible the performance of the condition, a failure by him to do what is required disentitles him from insisting on performance of the condition."
>
> In the House of Lords, Lord Thankerton, with whose speech the rest of the House concurred, expressly agreed with this view of Goddard LJ, and, quoting from the judgment of Blackburn J in *Roberts v Bury Improvement Commissioners* (1870) LR 5 CP 310, said (at [1947] AC 436):
>
> > "It is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself."
>
> Whether or not the jurisprudential basis for this well established common law principle is, as we think it is, the presumed implication of a term in the relevant contract similar to that referred to by Scott LJ in his judgment in the Court of Appeal in the *Panamena*, on the facts of the instant case as we have outlined them, there was no question of the SPDC ever having hindered the architect from giving an interim certificate which properly complied with clause 30(1) and (2) of the building contract.'
> [Emphasis added.]

148. Therefore May LJ considered that it was the prevention principle that led to the decision in *Panamena*.

149. In *Lubenham*, the mere fact that the owners had remained silent in the face of the certificates was not sufficient to invoke the prevention principle. I have already referred to p.56 of May LJ's judgment where he cited the judge's conclusion that

everyone was content to be guided by the architects.

150. Then at p.58, May LJ said:

> 'The truth of the matter is that the certificates took precisely the form which the architects erroneously, but in the exercise of their independent judgment, thought they should take. And as the judge observed, doubtless the council were content to be guided by Wigley Fox as the experts. Such acquiescence on the part of the council did not, in our opinion, suffice to expose it to liability to pay the sums higher than those specified in the two interim certificates in accordance with *Panamena* principles.'

C.A. No 85 of 1999

151. As I have mentioned, it was Mr Teh's alternative argument that an owner is obliged to supervise the architect/certifier only if the owner knows that the architect/ certifier is not discharging his function properly. Mr Teh referred not only to *Panamena* and *Perini* for this proposition but also to paragraphs 43 and 44 of the judgment in C.A. No 85 of 1999 which state:

> '43. We entirely agree with the learned judge that the employer could be liable for the default of the architect in issuing the interim certificates but only if the employer was aware of such default. This proposition of law is amply supported by authorities: *Frederick Leyland & Co Ltd v Panamena Europea Navigacion* [1943] 76 Lloyd's Rep 113 and *Perini Corporation v Commonwealth of Australia* (1969) 12 BLR 82. The pre-requisite of knowledge is essential before an employer is required to act to ensure that his architect complies with the terms of the building agreement between the employer and the contractor. The standard works on the subject have also reiterated this principle, e.g. Hudson on Building & Engineering Contracts, Emden on Construction Law and Keating on Building Contracts.
>
> 44. The rationale for this rule is obviously to take into account the special position of the architect in a building contract, even though he is employed and paid by the employer. When an architect acts as a certifier under a building contract for interim payments, he is to act fairly and impartially between the parties, and the employer is not to interfere with the architect's exercise of this function. The arbitrator, in fact, recognised this point in his award. Such functions of the architect, among others, must be exercised by him independently as an expert. It would be unreasonable to expect a lay employer to warrant the performance of the architect in respect of such functions without establishing that the employer knew the architect had gone wrong: *Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council & Anor* (1986) 33 BLR 39 at 58.'

152. Mr Teh suggested that the Court of Appeal had already determined the extent of the duty of the Appellants vis--vis the Architect as certifier. Mr Chung submitted likewise except that he argued that paragraph 43 of the judgment was applicable to function (b) but not to function (a).

153. In my view, the Court of Appeal did not determine the extent of the duty of the Appellants vis--vis the Architect as certifier. The appeal to the Court of Appeal was for leave to appeal to the High Court on certain questions which the Court of Appeal eventually summarised into one question. That question is set out in paragraph 55 of its judgment and reiterated in paragraph 8 above.

154. In deciding whether to grant such leave, the Court of Appeal had to assess the prospects of success of the appeal if leave to appeal was granted. This it did between paragraphs 39 to 50 of its judgment. Therefore, paragraphs 43 and 44 of its judgment must be read in this context.

155. As for paragraph 50 of the judgment of the Court of Appeal, this was cited by Mr Teh for his first argument that there is no implied obligation on an owner to marshall its architect. Paragraph 50 states:

> '…. In passing we should mention that in *Lubenham*, May LJ stated (at p 58) that where the building contract contained a very wide arbitration clause which expressly permitted arbitration upon interim certificates during the currency of the contract and before practical completion:-
>
> "…. We do not think that there is any need or scope for the implication of any further term in it, as there was in the *Panamena*. If, as is now common ground, the two challenged interim certificates in our case were not in accordance with the terms of the building contract, there was one simple remedy available to *Lubenham* needing no implied term, namely to go to arbitration upon them and have them corrected." '

156. This paragraph must also be read in the context that the Court of Appeal was making tentative observations only in assessing the prospects of success of the appeal.

157. Furthermore, the passage cited from May LJ's judgment pertained to his alternative reason for his decision. The entire paragraph in May LJ's judgment reads:

> 'Alternatively, in so far as the implication of any term into the contract in the instant case is concerned, there is in our opinion one fundamental difference between such contract and the one under consideration in the *Panamena*. This is the presence in the contract which we have to consider of the very wide arbitration clause 35 which expressly permitted arbitration upon interim certificates during the currency of the contract and before practical completion. There was no arbitration clause at all in the contract before the courts in the *Panamena*. In the light of the arbitration clause in the instant contract, we do not think that there is any need or scope for the implication of any further term in it, as there was in the *Panamena*. If, as is now common ground, the two challenged interim certificates in our case were not in accordance with the terms of the building contract, there was one simple remedy available to *Lubenham* needing no implied term, namely to go to arbitration upon them and have them corrected.'

158. One of the issues in *Lubenham*, as was in *Panamena*, was whether the contractor or repairer was entitled to recover the monies due to them in an action before the court, notwithstanding the absence of a certificate.

159. The absence or presence of an arbitration provision was therefore important in these two cases. In *Panamena* there was no arbitration provision whereas in *Lubenham* there was.

160. In *Lubenham*, the arbitration provision allowed arbitration on interim certificates during the currency of the contract. This therefore meant that the contractor could have proceeded to arbitration first to have the certificates corrected.

161. In the appeal before me, the issue is not whether the Respondents are entitled to recover in an action before the court the monies due to it in the absence of a certificate as apparently the certificates were eventually issued, although they were allegedly delayed. The claim was for interest for loss of use of the monies and was first made in the arbitration proceedings. Accordingly, the presence of an arbitration provision in the Conditions of Building Contract would not be material to the question before me.

Textbooks

162. Emden's Construction Law Issue 56/June 1999 at p.II 274 to 275 states:

'C *Liability of employer when his agent wrongly withholds approval*

[992]

1 Implied terms in contract

Whether an architect or other certifier owes a duty to the contractor if he negligently or indeed wilfully withholds an approval or certificate is discussed elsewhere. When the certifier is the agent or servant of the employer one might think vicarious liability would follow, but the position is complicated by the fact that the certifier is under a duty to act fairly, which in turn implies that the employer is not to interfere with the exercise of his functions. It can hardly be right to infer liability in the circumstances *simpliciter*, and this has been recognised. Instead the employer will be held liable if either:

> (i) he improperly interferes with the certificate; or
>
> (ii) If attracted to the fact that the certifier is not discharging his functions properly he fails to take steps to correct or replace him;
>
> (iii) when the certifier retires or ceases to act, he fails to replace him.

….

As to (ii) above, see the judgments of the Court of Appeal in *Frederick Leyland & Co Ltd v Panamena Europea Navigacion.* Scott LJ said:

> "I am of the opinion that they [the employers] were under a contractual duty to keep their surveyor straight on the scope of what I metaphorically called his "jurisdiction" by which I do not mean that he was in any sense an arbitrator, but only that as an expert entrusted with the duty of impartiality within a certain sphere he had to form his opinion with judicial independence within that sphere. It follows from my premises that in failing to inform Dr Telfer that he was going outside and away from the limits of his function, they broke their implied undertaking."

Similarly in *Perini Corpn v Commonwealth of Australia*, a term was implied, that the employer would ensure that the certifier performed his duties in accordance with the contract. In *Croudace v London Borough of Lambeth* the contractor submitted a claim for loss and expense, under JCT 1963, clause 24. The architect retired and no new one was appointed. The contractor was awarded damages representing the loss and expense that should have been ascertained, despite the absence of a certificate, on the basis that the employer had failed to take such steps as were necessary to enable the plaintiffs claim for loss and expense to be ascertained. In normal cases the contractor will use the remedy of a damages claim to circumvent the absence of a certificate and the amount claimed, though technically damages will in reality represent the amount for which a certificate should have been issued. This, of course, may not necessarily be the case. For example, if a certificate is wrongly withheld the contractor may suffer damage for which he would not be reimbursed at all under the contract. This will be recoverable if not too remote.'

163. These paragraphs refer to *Panamena* and *Perini* and to *Croudace* and suggest that there is an implied duty on the part of the owner to correct the architect if the architect defaults as certifier, but the owner must be aware of the default.

164. I have already expressed my views on *Panamena* and *Perini*. *Croudace* was a situation on different facts from those before me. There the architect had retired and there was no one to issue the certificate. Also, the question there was whether the contractor was entitled to be paid despite the absence of a certificate.

165. I find further support for my views in Emden's Construction Law Issue 56/June 1999 at p. II 275 (which comes soon after the part which I have cited in paragraph 162 above):

> '**2 The architect's duty of impartiality**
>
> When issuing certificates the architect or other certifier is not acting as the employer's agent but must form and act on his own opinion. That being so, he is bound to act independently; it is his duty to hear what both parties (ie employer and contractor) have to say and if he gives opportunity to one side he should give equal opportunity to the other. Moreover, he must act impartially. He will not be acting impartially if he allows the employer to interfere with his independent judgment when issuing certificates.'
> [Emphasis added.]

166. As for Hudson's, there are passages like paragraphs 4200 to 4201 and paragraph 6132 which refer to both *Panamena* and *Perini* for the suggestion that there is a positive duty on the owner to ensure that a certifier performs his functions correctly and to give instructions to a certifier who is not fulfilling his mandate correctly.

167. For example, I cite paragraph 4200:

> '4200 It has been seen that an owner give no warranty to the contractor as to the adequacy of the A/E's design. Nor does he warrant the A/E's competence in performing the A/E's certifying or discretionary functions during the supervisory stage of the contract. However, not only does the owner owe the contractor a negative duty not to interfere with the A/E in those cases where the latter is required by the contract to act fairly as between the parties and exercise his own judgment, but it has also been held that the owner owes the contractor an affirmative duty, in a case where, to the owner's knowledge, the architect is failing to perform his function at all, or is going outside his proper terms of reference or taking into account extraneous considerations not warranted by the contract, to use his best endeavours to see to it that the A/E does carry out the required functions properly.
> [Emphasis added.]

168. The passage from Scott LJ's judgment in *Panamena* was then referred to and *Perini* was also referred to.

169. Mr Chung relied on another passage from Hudson's at para 6145 which was supposed to say,

> 'the nature of the duty on the part of the employer is a positive duty to monitor the certification functions of the architect.'

170. However, upon inquiry by me, Mr Chung said that he had quoted Hudson's incorrectly. The actual passage reads:

> 'There may also be a positive duty to give instructions to the certifier to ensure his proper discharge of his function …'
> [Emphasis added.]

It goes on to say:

> 'Thus, in the *Panamena* case, where the certifier had, on his own initiative, taken a wrong view of his terms of reference and refused a certificate for that reason, the prevention principle was again in the

forefront of Lord Thankerton's speech in the House of Lords, and, indeed, implicit in Goddard L.J.'s judgment in the Court of Appeal, quoted in paragraph (f) *infra*, and expressly approved on this point by Lord Thankerton. Unconsidered application of the prevention principle to very different situations may serve to distract attention from a closer analysis of the certifier's own conduct as the reason for avoiding the certificate requirement. In the *Panamena* case there was as it happened, a close identity of interest between the surveyor and the owners.'

171. Furthermore, there are other passages in Hudson's which state that while there will be an implied term that the architect will be independent and impartial, there is no warranty as to his competence or that he will act reasonably, see paragraphs 6097, 6112 to 6113 of Hudson's.

172. For example, I cite paragraphs 6112 to 6113:

'6112 Given the "quasi-arbitral" nature of the certifier's function, there must be an implied term that both parties will do nothing to prevent a true and unfettered exercise of his powers when certifying. Thus when discussing "the influencing of certifiers" Devlin J. said:

> "The main test appears to be whether the certificate is intended to embody a decision that is final and binding on the parties. If it is, it is in effect an award, and it has the attributes of its arbitral character. It cannot be attached on the ground that it is unreasonable, as the opinion of the party or the certificate of one who is merely an agent probably can. On the other hand, it must be made independently, for independence is the essence of the arbitral function. If two parties agree to appoint an arbitrator … it would be, I think, implied in the contract in order to give it business efficacy that neither side would seek to interfere with his independence. If a party to a contract is permitted to appoint his agent to act as arbitrator in respect of certain matters under the contract a similar term must be implied; but it is modified by the fact that a man who has to act as arbitrator in respect of some matter, and as servant or agent in respect of others, cannot remain as detached as a pure arbitrator should be."[27]

6113 It will be seen that the cases rightly distinguish between the functions and principal obligations of the owner, where the owner will warrant due performance of those obligations by the A/E acting as his agent or alter ego on the one hand, and the A/E's certifying or discretionary functions on the other where no such warranty is given:

> "To the extent that the architect performs these [principal] duties the building owner contracts with the contractor that the architect will perform them with reasonable diligence and with reasonable skill and care. The contract also confers on the architect discretionary powers which he must exercise with due regard to the interest of the contractor and the building owner. The building owner does not undertake that the architect will exercise his discretionary powers reasonably; *he undertakes that although the architect may be engaged or employed by him he will leave him free to exercise his discretions fairly and without improper interference by him.*"[28]

Similarly, in a case where a contract left a choice of working methods to an engineer, Diplock J. said:

> "His decision as to whether one method or another is satisfactory to him

must, of course, be an honest one, but it does not seem to me that the Corporation warrants competency or skill, or warrant that his decision shall be reasonable."[29] '

173. The authorities for footnotes 27 to 29 are:

'27

Minister Trust Ltd v. Traps Tractors Ltd. [1954] 1 W.L.R. 963, at p.974

28

London Borough of Merton v. Leach (1985) 32 BLR 51, at p.78 *per* Vinelott J.

29

Neodox Ltd v. Swinton & Pendlebury Borough Council (1958) 5 BLR 34, at p.47'

174. Mr Chung also cited two sentences from the textbook, The Malaysian Standard Form of Building Contract (1990) by Professor Vincent Powell Smith.

175. At p.144, it states,

'The architect's failure to issue interim certificates is a breach of contract for which the employer is liable.'

176. At p.151, it states,

'The issue of the final certificate is mandatory and failure to issue it within the time and the manner specified is a breach of contract for which the employer is liable.'

177. However no authority was cited to support these sentences which were in any event vague. If the sentences are meant to suggest that a contractor may be entitled to payment notwithstanding the absence of an interim or the final certificate, I am in agreement with them. However if the sentences are meant to suggest that an owner is obliged to tell the architect what to do and to ensure that the architect carries out his certifying function, I would disagree for the reasons I have mentioned.

Particular wording of Clause 30

178. Clause 30(1) of the Conditions of Building Contract states:

'30(1) At the period of Interim Certificates named in the appendix to these Conditions, the Architect shall issue a certificate ….'
[Emphasis added.]

179. Mr Chung further submitted that this meant that it was mandatory for the Architect to issue the certificates and that the Appellants had warranted to the Respondents that the Architect would issue the Interim Certificates on time. He argued that the Architect was the alter ego of the Appellants. Presumably Mr Chung intended this submission to apply to other certificates mentioned in Clause 30(4)(b) and (c) and 30(6) as well where similar words had been used.

180. I am of the view that Mr Chung's submission based on the words in these various provisions is not valid. The provisions may require the Architect to issue various certificates at various times but they do not render the Appellants liable for the

Architect's obligation. Although the Architect is not a party to the contract, the provisions make clear what is expected of him. Furthermore, for reasons which I have mentioned already, the Architect, as certifier, is not the agent nor is he the alter ego of the Appellants.

181. In addition, the Re-Amended Points of Claim does not rely on the particular words in the provisions but on an implied term.

Other points

182. I should mention some other points.

When the Interim Certificates should have been issued

183. Under the Conditions of Contract, the interim certificates were to be issued monthly. There is no provision stating when such issuance should start and whether the interim certificates should be issued at the beginning or at the end of each month.

184. What the Respondents did was to use 2 February 1979 as the date when the first interim certificate should have been issued and then it used the 2nd of every consecutive month thereafter as the due date when each interim certificate should have been issued. The date of 2 February 1979 was shortly after the date of the Contract which was 27 January 1979. Mr Chung was not able to explain why 2 February 1979 should be the correct starting date for the interim certificates to be issued.

185. Based on the approach I have mentioned, the Respondents had alleged that the Architect had been late in issuing many interim certificates whereas if a different starting date was used, the interim certificates issued might not have been late or might not be as late as alleged.

186. In addition, there was the question whether the duty of the Architect to issue the interim certificates was premised on an implied term that the Respondents must submit detailed progress claims for the Architect to make his decision. Mr Chung accepted that it was the practice in the industry for a contractor to submit progress claims for the architect to issue interim certificates but he submitted that there was no obligation on a contractor to do so. He submitted that an architect must issue an interim certificate on the same day every month even if an architect did not have sufficient information to issue the certificate or no work was done. In those events, he submitted that an architect could issue an interim certificate showing no amount payable to the contractor for the month but an interim certificate had to be issued nevertheless.

187. Mr Chung further submitted that if the issuance of the interim certificates was to be conditional upon the contractor submitting detailed progress claims then this must be specifically provided for in the contract as was the case in *China Construction (South Pacific) Development Co Pte Ltd v Leisure Park (Singapore) Pte Ltd* [2000] 1 SLR 622. However I note that that case does not decide the position when there is no specific term to that effect. I would have thought that it would be an implied term that the issuance of the interim certificates was to be conditional upon the contractor submitting detailed progress claims as an architect does not issue interim certificates in a vacuum.

Does an architect, as certifier, owe a duty of care to the contractor?

188. Mr Chung submitted that if an owner is not liable for the architect's default, where the architect acts as a certifier, then a contractor may have no recourse at all for the situation where certificates have been issued, but issued late. He cited the case of *Pacific Associates v Baxter* [1990] 1 QB 993 for the proposition that a certifier will not be liable in negligence to the contractor.

189. On the other hand, Mr Teh argued that that case should be confined to its particular facts.

190. Whether that case should be confined to its particular facts or not, I note that the English courts are less inclined to find a duty of care for pure economic loss. See also *D&F Estates Ltd & Ors v Church Commissions for England & Ors* (1989) AC 177 and *Murphy v Brentwood District Council* (1990) 2 All ER 908.

191. However, the position in Singapore is different. For example, in *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113, the Court of Appeal decided that a developer does owe a duty of care to a Management Corporation to avoid pure economic loss. The Court of Appeal found that there was a sufficient degree of proximity between the developer and the management corporation in view of various factors. One of the factors was that the developer knew or ought to have known that negligence in the construction of the common property would have to be made good by the management corporation.

192. In *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075 & Anor* [1999] 2 SLR 449, the Court of Appeal also decided that architects owe a duty of care to a Management Corporation to avoid pure economic loss. Here, the Court of Appeal found that the architects knew that the management corporation would depend on the architects' care and skill. The element of reliance by the management corporation on the architects was present.

193. I think that a strong argument can be made that an architect/certifier does owe a duty of care not only to the owner but also to the contractor to avoid pure economic loss. An architect must know that both intend to rely on his fairness as well as his skill and judgment as a certifier, as was mentioned in *Jones v St John's College* LR 6 QB and cited in *Kempster*, (see paragraph 92 above). See also the judgment of Bowen LJ in *Jackson v Barry Railway Co* (1893) 1 Ch 238 at p.247 which was cited with approval by the Court of Appeal in *Nelson Carlton Construction* at p.150 and 153. The architect must also know that if he is negligent in issuing certificates he might cause loss to one of these parties.

194. On the other hand, it may be argued that because an architect as certifier is often considered as exercising a quasi-arbitral or quasi-judicial function, he should owe no duty of care to the contractor when he exercises that function.

195. I need say no more on this point as it is not necessary for me to decide whether an architect, as certifier, owes a duty of care to the contractor.

Contractual interest

196. On another point, it is up to the industry to consider whether the standard conditions should provide for contractual interest to be paid by an owner for late issue of certificates by an architect not because the owner is entitled to tell the architect what to do but because the owner has had the benefit of paying later.

My Determination

197. The question posed by the Court of Appeal was regarding the duties of the Appellants in relation to the certifying functions of the Architect. I determine the question in the context of the claims as follows:

(a) The Appellants have an implied duty not to interfere with the discharge of the Architect's duty.

(b) The Appellants have an implied duty to do all things reasonably necessary to enable the Architect to discharge its duty properly. However, such an implied duty does not require the Appellants to order or tell the Architect what to do.

(c) Consequently, even if the Architect had failed to issue various certificates on time, or over-certified the retention sum, the Appellants are not liable for the Architect's default, if any, even if the Appellants were aware of such defaults. Should I be incorrect on this point, and the Appellants are liable provided they are aware of such defaults, it is for the Respondents to plead and prove such awareness which they did not do.

(d) Therefore, the Appellants are not liable for interest if the Respondents received various sums of monies late by reason of the Architect's default.

198. In the circumstances, I allow the Appeal to the extent that the Arbitrator's award in respect of the first part of Item (a) and in respect of Items (b) to (d) is set aside

199. I will hear the parties on the question of costs.

Woo Bih Li

Judicial Commissioner