

H P Construction & Engineering Pte Ltd v Chin Ivan
[2014] SGHC 137

Case Number : Suit No 180 of 2014(Registrar's Appeal No 124 of 2014)
Decision Date : 10 July 2014
Tribunal/Court : High Court
Coram : Edmund Leow JC
Counsel Name(s) : John Chung and Priscylia Wu (Kelvin Chia Partnership) for the plaintiff/appellant;
Joseph Lee, Tan Yee Siong and Ross Tan (Rodyk & Davidson LLP)
defendant/respondent.
Parties : H P Construction & Engineering Pte Ltd — Chin Ivan

Arbitration – stay of court proceedings

10 July 2014

Judgment reserved.

Edmund Leow JC:

1 This is an appeal against the decision of the Assistant Registrar to grant a stay of proceedings pursuant to s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed).

2 The plaintiff/appellant, H P Construction & Engineering Pte Ltd (“the Plaintiff”), was the main contractor for the construction of two detached houses on two lots of land located at Sentosa Cove, Singapore. The defendant/respondent, Ivan Chin (“the Defendant”), had employed the Plaintiff under a building contract dated 5 May 2009 (“the Contract”) for a sum of \$8,000,000.

3 The Contract incorporated the Singapore Institute of Architects Articles and Conditions of Building Contract (Lump Sum Contract) 7th Edition, April 2005 (“the SIA Conditions”). Under the SIA Conditions, the Plaintiff was entitled to progress payments by way of periodic valuation of works carried out which were certified by the architect appointed for the project. [\[note: 1\]](#) The architect appointed for the project was Philip Lee Pang Kee (“the Architect”), and the quantity surveyor was Turner & Townsend Pte Ltd (“the Quantity Surveyor”). [\[note: 2\]](#)

4 On 11 July 2012, the Architect issued two Architect’s Instructions (AI/131/HP/019 and AI/132/HP/019) (“the AIs”), one for each parcel of land. The AIs approved a number of items on the Plaintiff’s list of proposed variation works, including the items numbered 173, 174, 280 and 281 (“the Disputed Items”). These Disputed Items related to claims for: [\[note: 3\]](#)

(a) Preliminaries for an alleged extension of time granted to the Plaintiff to complete the project (“the Extended Preliminaries”); and

(b) An alleged extension of the Defects Liability Period.

5 Subsequently, the Plaintiff raised Payment Claim No 32 claiming for a sum of \$1,171,646.37 pertaining to work done on the project up to 28 September 2012. [\[note: 4\]](#) Of that sum, the amount of \$614,375 related to the Disputed Items. [\[note: 5\]](#) The Quantity Surveyor provided an interim valuation

of \$120,000 for the Extended Preliminaries claims . [\[note: 6\]](#) The Quantity Surveyor did not provide an interim valuation for the extension of the Defects Liability Period claims. [\[note: 7\]](#) The Architect then certified the Quantity Surveyor's interim valuation in Progress Certificate No 32 which amounted to the sum of \$321,383.94, [\[note: 8\]](#) for which the due date of payment was 10 December 2012. [\[note: 9\]](#)

6 Close to a year later, on 26 September 2013, the Plaintiff raised its final payment claim for the sum of \$720,417.29. This claim also contained the Disputed Items. [\[note: 10\]](#) The Quantity Surveyor valued the Disputed Items at \$334,000 (this time including the extension of Defects Liability Period claim). [\[note: 11\]](#) Subsequently, the Architect certified the Quantity Surveyor's valuation in Final Certificate No 33 dated 27 September 2013 for the sum of \$720,417.28, [\[note: 12\]](#) for which the due date of payment was 5 November 2013. [\[note: 13\]](#)

7 However, despite repeated requests, the Defendant did not pay the sum amounting to \$1,041,801.22 ("the Outstanding Certified Sum") which is the total sum that the Architect had certified as being due from the Defendant to the Plaintiff under Progress Certificate No 32 and Final Certificate No 33. [\[note: 14\]](#)

8 The Defendant refused to pay the said sums for various reasons, including the allegation that the works carried out by the Plaintiff were defective and should not have been certified by the Architect in the first place. The Defendant also alleged that he had a counterclaim for loss of rental, liquidated damages and rectification works that had to be carried out by third parties. [\[note: 15\]](#)

9 On 29 October 2013, the Plaintiff referred the dispute for adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOP Act") for the Outstanding Certified Sum, but the adjudicator dismissed the Plaintiff's claims for ignoring or failing to recognise the timelines for the Defendant's payment response as stipulated under the SIA Conditions. [\[note: 16\]](#) The Defendant alleged that it was only when the Plaintiff commenced adjudication proceedings against him that he was served a copy of the Plaintiff's final payment claim. [\[note: 17\]](#)

10 Subsequently, on 13 February 2014, the Plaintiff brought Suit No 180 of 2014 against the Defendant claiming for the Outstanding Certified Sum, as well as interest amounting to \$30,700.34. [\[note: 18\]](#)

11 In response, on 7 March 2014, the Defendant applied, *inter alia*, for a stay of proceedings under s 6 of the Arbitration Act. However, at the hearing before the Assistant Registrar on 28 March 2014, the Defendant's basis for the stay was premised on a fresh allegation that the Certificates had been procured by fraud. [\[note: 19\]](#)

12 The Defendant's allegation of fraud was primarily premised on a letter dated 21 March 2014 from the Architect replying to the Defendant's queries as to why he had to pay for the Disputed Items ("the Letter"). The Architect's response was, in substance, as follows: [\[note: 20\]](#)

(a) It was the Plaintiff who represented to the Architect in or about the middle of 2012 that the Defendant had agreed to various proposed variations for which no Architect's Instructions had been issued, and those included the Disputed Items.

(b) As the Architect was no longer in regular contact with the Defendant, the Architect relied on the Plaintiff's representation of the Defendant's alleged consent. He also relied on the fact

that the Defendant's project manager did not give him any feedback on the matter, because project manager, as the Defendant's representative, would have informed the Architect if there was any discrepancy.

(c) He left the valuation of the claims to the Quantity Surveyor, as he had stated in the AIs, and simply certified as the Quantity Surveyor recommended. The AIs had the following footnote: [\[note: 21\]](#)

As informed by HP Construction & Engineering Pte Ltd, the above items covered are requested by Owner/ID Axis and to be verified by QS Towner and Turner.

(d) He was not aware that the Defendant had in fact not agreed to the Plaintiff's claim for Extended Preliminaries until the Defendant subsequently informed him of this.

13 In summary, the Defendant's case before the Assistant Registrar was that the Plaintiff had misrepresented to the Architect that the Defendant had agreed to, *inter alia*, the Disputed Items as variation works, when he had not given such consent ("the Alleged Misrepresentations"). He also alleged that the Architect had relied on the Alleged Misrepresentations when he issued the AIs, retrospectively approving the Disputed Items and other claims as variations to the Contract.

14 In his 3rd affidavit, the Plaintiff's managing director, Mr Seah Hwa Peng, denied making the Alleged Misrepresentations to the Architect. [\[note: 22\]](#) It was also confirmed at the hearing before the Assistant Registrar that there was no such agreement between the parties. [\[note: 23\]](#)

15 After hearing the parties, the Assistant Registrar granted the stay sought on the basis that there appeared to be a *bona fide* dispute as to whether any fraudulent misrepresentations were made to the Architect which resulted in the issuance of the Certificates. The Assistant Registrar also ordered that the Plaintiff pay the Defendant costs of \$1,500 plus reasonable disbursements. [\[note: 24\]](#)

16 The Plaintiff filed a Notice of Appeal on 10 April 2014.

Clauses of the Contract

17 In the present proceedings, it is clear that unless the Defendant is able to show that the validity of the Certificates is in dispute, no stay of proceedings can be granted in respect of the Plaintiff's claim, which is based on the Certificates. The reason for this is because Certificates issued by the Architect under the Contract enjoy "temporary finality" pursuant to cl 31(13) of the SIA Conditions, which states:

No certificate of the Architect under this Contract shall be final and binding in any dispute between the Employer and the Contractor, whether before an arbitrator or in the Courts, save only that, *in the absence of fraud or improper pressure or interference by either party*, full effect by way of Summary Judgment or Interim Award or otherwise shall, *in the absence of express provision*, be given to all decisions and certificates of the Architect (other than a Cost of Termination Certificate or a Termination Delay Certificate under clause 32(8) of these Conditions), whether for payment or otherwise, until final judgment or award, as the case may be, and until such final judgment or award such decision or certificates shall (*save as aforesaid* and subject to sub-clause (6) of this condition) be binding on the Employer and the Contractor in relation to any matter which, under the terms of the Contract, the Architect has a fact taken into account or allowed or disallowed, or any disputed matter upon which under the terms of the Contract he has

as a fact ruled, in his certificates or otherwise. *The Architect shall in all matters certify strictly in accordance with the terms of the Contract.* In any case of doubt the Architect shall, at the request of either party, state in writing within 28 days whether he has as a fact taken account of or allowed or disallowed or ruled upon any matter in his certificates, if so identifying any certificate and indicating the amount (if any) taken into account or allowed or disallowed, or the nature of any ruling made by him, as the case may be. [emphasis added]

18 In other words, under cl 31(13) of the SIA Conditions, no certificate of the architect shall bind the employer and contractor permanently. However, architect's certificates do have temporary effect, for they bind the parties in the interim period pending final determination of the dispute by arbitration or court proceedings. In the meantime, architect's certificates may be enforced by way of summary judgment or interim award—unless there is fraud, improper pressure or interference by either party, or an express provision stipulating otherwise. As explained by L P Thean J in *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 1 SLR(R) 591 ("*Lojan Properties (HC)*") at [15] (in reference to an equivalent provision under a previous edition of the SIA Conditions of Contract):

... In so far as interim certificates of payment are concerned, it seems to me that the intention of this clause is tolerably clear. It is intended that the contractor be paid the amounts expressed to be payable in the interim certificates, and if no payment is made by the employer it is intended to enable the contractor in the absence of fraud, improper pressure or interference or in the absence of express provisions, to obtain quick summary judgment for the amounts certified as due. In so far as any sum claimed by the employer is concerned, only the amounts expressly deductible under the contract may be set off against the amount due under the interim certificate.

19 An architect's certificate under the SIA Conditions is also invalid if it is not issued in strict compliance with the contract (see *Lojan Properties (HC)* at [13]; see also *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] 1 SLR(R) 622 ("*Lojan Properties (CA)*") at [9]).

20 Nevertheless, it seems clear (and is not disputed) that the question of whether the Certificates *themselves* should enjoy temporary finality in the first place is itself an issue that fell within the arbitration clause in the Contract, *ie*, cl 37(1) of the SIA Conditions, which provides as follows [\[note: 251\]](#):

*Any dispute between the Employer and the Contractor as to any matter arising under or out of or in connection with this Contract or under or out of or in connection with the carrying out of the Works and whether in contract or tort, or as to any direction or instruction or **certificate of the architect** or as to the contents of or granting or refusal of or reasons for any such direction instruction or certificate **shall be referred to arbitration** and final decision of a person to be agreed by the parties or, failing agreement within 28 days of either party giving written notice requiring arbitration to the other, a person to be appointed on the written request of either party by or on behalf of the President or Vice-President for the time being of the SIA or, failing such appointment within 28 days of receipt of such written request, together with such information or particulars of the dispute as may be requested in writing by the President or Vice-President for the time being of the SIA, such persons as may be appointed by the Courts.* [emphasis added in italics and bold italics]

The parties' positions

21 The Defendant argued that the Certificates were improperly issued and therefore do not enjoy temporary finality. In brief, its contentions were that:

(a) The Certificates were procured through the fraudulent representation by the Plaintiff to the Architect that the Defendant had agreed to certain variation orders when in fact there was no such agreement; [\[note: 26\]](#)

(b) When approving these variation orders, the architect did not objectively evaluate these orders, relying entirely instead on the Alleged Misrepresentations; [\[note: 27\]](#) and

(c) The Certificates were based on the AIs which were not issued strictly in accordance with the terms of the Contract and therefore the Certificates are similarly infected. [\[note: 28\]](#)

22 Further, the Defendant submitted that the standard of proof in a stay application under the SIA Conditions is that the party applying for a stay only needs to establish on a *prima facie* basis that there is a *bona fide* dispute. The court does not need to be satisfied on a balance of probabilities that fraud has been proved and/or that the Architect has abdicated his responsibilities. [\[note: 29\]](#)

23 The Plaintiff, on the other hand, argued that under s 6 of the Arbitration Act, the court does not automatically grant a stay once a semblance of a dispute arises. With regard to the exception of fraud, the court should consider if the Defendant has made out an *arguable case* that the Certificates were procured by fraud in deciding if it should grant a stay. [\[note: 30\]](#)

24 As for the Defendant's allegations that the Architect had not acted properly, the Plaintiff submitted that the Defendant's allegations are groundless [\[note: 31\]](#) because the Architect had acted within his certifying powers [\[note: 32\]](#) and had clearly applied his mind when evaluating the amounts to be accorded to each and every claim for the Extended Preliminaries. [\[note: 33\]](#)

25 Finally, in the event that the court was minded to grant a stay, the Plaintiff submitted in the alternative that only a partial stay should be granted as only part of the claim was actually disputed. [\[note: 34\]](#)

Standard of proof required to obtain a stay of proceedings in favour of arbitration on the basis that the Certificates were obtained by fraud

26 The first issue before me is whether the party applying for a stay of proceedings in favour of arbitration on the basis that a certificate issued by the Architect under the SIA Conditions is affected by fraud has to establish that there was a *bona fide* dispute on a *prima facie* basis, or whether a higher standard of proof is required. As it appears that there have been no decided cases in the Singapore High Court where an allegation of fraud has been raised as a ground for such a stay, it behoves me to examine the issue in greater detail.

27 First of all, I recognise that "temporary finality" under the SIA Conditions serves an important purpose in ensuring that contractors are paid on time. Contractors faced the problem of being kept out of their monies for extended periods of time by unscrupulous employers invoking technical grounds to avoid payment. The concept of temporary finality was introduced to deal with this (see Chow Kok Fong, *The Law and Practice of Construction Contracts* vol 2 (Sweet & Maxwell Asia, 4th Ed, 2012) ("Chow") at para 21.14).

28 As explained by Warren L H Khoo J in *Aoki Corp v Lippoland (Singapore) Pte Ltd* [1995] 1 SLR(R) 314 ("*Aoki Corporation*") at [36]:

... Progress payments are the lifeline of a building contractor's business. The object of giving interim payment certificates temporary finality is to enable the contractor to be paid during the progress of the works so as to minimise cash flow problems. ...

29 The importance of progress payments to contractors cannot be understated in an industry beset by cashflow problems. More recently in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380, the Court of Appeal considered the purpose underlying temporary finality in the context of the statutory adjudication regime for progress payments under the SOP Act. Sundaresh Menon CJ, in delivering the decision of the Court of Appeal, said at [18] and [20]:

18 ... It has often been said that cash flow is the life blood of those in the building and construction industry. If contractors and sub-contractors are not paid timeously for work done or materials supplied, the progress of construction work will almost inevitably be disrupted. Moreover, there is a not insignificant risk of financial distress and insolvency arising as a result. ...

...

20 ... The appeal of this philosophy is apparent: payments, and therefore cash flow, should not be held up by counterclaims and claims for set-offs that may prove to be specious at the end of lengthy and expensive proceedings that have to be undertaken in order to disentangle the knot of disputed claims and cross-claims. ...

30 In other words, temporary finality embodies the concept of “pay first, argue later”, and as the Plaintiff had rightly pointed out, the underlying objective of minimising cash flow problems should not be easily defeated by “bare assertions” of fraud. [\[note: 35\]](#) I would however also note that, although temporary finality is intended to protect the cash position of contractors, both contractor and employer may rely on it under the SIA Conditions. One example is where an employer is seeking to recover sums from the contractor pursuant to a certificate to enable the employer to recover a sum which represents any over-certification by the architect (see Chow at 21.423).

31 However, the concept of temporary finality can be misused as a shield for excesses or abuses of power. The exceptions of fraud, improper pressure or interference by either party therefore act as a safeguard against such possible misuses (see Eugenie Lip and Choy Chee Yean, *Contract Administration Guide To the SIA Conditions of Building Contract* (LexisNexis Singapore, 2nd Ed, 2009) at para 2.193).

32 With the above in mind, I now turn to the standard of proof that the Defendant is required to show in order to obtain a stay of proceedings. The key case relied on by the Defendant is *Anwar Siraj and another v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR(R) 500 (“*Anwar Siraj*”), where it was held that a stay of proceedings in favour of arbitration would be granted if the defendant could show that there was *prima facie* a *bona fide* dispute as to whether there was improper pressure or interference (these being the other exceptions under cl 31(13)).

33 In *Anwar Siraj*, the plaintiff landowner sued the defendant contractor for the recovery of a sum of money after the architect for the project in that case issued an interim certificate which reduced the value of the defendant’s work by that sum. The contract between the parties had incorporated the 6th Edition of the SIA Conditions. The question was whether the plaintiff landowner’s claim was indisputable so that the court had the jurisdiction to decide the claim despite the arbitration agreement. One of the issues the court had to decide was whether the interim certificate was issued under improper pressure or interference by the plaintiff. The defendant’s argument that such was the case was based on the fact that the certificate had been issued only after a long delay without any

reasonable explanation and that the certificate had drastically reduced the architect's valuation of the work done in a previous certificate without any explanation as to the nature and quantum of the revisions made. There was also no explanation why the architect in that case had not used the SIA model revision certificate. The architect had also ignored letters from the defendant asking for an explanation (see [34] and [35]). Andrew Ang J held at [36]:

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

34 Moreover, the learned judge also stated that it was inappropriate for him "in an appeal on a stay application to embark on an examination of the merits of the parties' respective positions as though it were an application for summary judgment" (at [42]).

35 The Plaintiff's counsel, Mr John Chung, sought to distinguish *Anwar Siraj* on the basis that when fraud is alleged *vis-à-vis* the architect's certificate, a party applying for a stay of proceedings would have to meet a higher threshold than that in cases involving improper pressure and interference. Instead, the applicable test was whether the Defendant had made out an *arguable case* that the Certificates were procured by fraud in deciding whether to grant a stay. In support of this contention, counsel cited the case of *Multiplex Construction Pty Ltd v Sintal Enterprise Pte Ltd* [2005] 2 SLR(R) 530 ("*Multiplex Construction*"). [\[note: 36\]](#)

36 His argument was as follows. Fraud has serious implications and cogent evidence is required before the court will be satisfied that an allegation of fraud is established (citing *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [161]). This means that the arbitral tribunal would not approach the Defendant's allegations of fraud lightly and it is likely that the Certificates will be upheld as valid. He drew an analogy with the high standard of proof required to obtain injunctions to restrain calls on performance bonds where it must be shown that it is seriously arguable that, on the material available, the only realistic inference is that the beneficiary could not honestly have believed in the validity of its demands on the performance bonds (*Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia and another* [2010] 2 SLR 329 at [36]-[37]). Based on this analogy, he submitted that the Defendant must show that, even if the Plaintiffs had knowingly made the Alleged Misrepresentations, he would also have to show that the alleged representations had tainted the certification process such that the Plaintiff could not honestly have believed in the validity of the Certificates. Mr Chung argued that such evidence of fraud must be clear, both as to the fact of fraud and as to the Plaintiff's knowledge. [\[note: 37\]](#)

37 With respect to the first argument that fraud is a serious allegation, I do not think that it necessarily requires that there should be a different standard of proof to obtain a stay in favour of arbitration.

38 As for the comparison between obtaining a stay of proceedings in favour of arbitration on architect's certificates and obtaining an interlocutory injunction to restrain calls on performance bonds on the ground of fraud, there are superficial similarities in that the effect of both is to delay the receipt of moneys to the respective beneficiaries of the documents until the substantial issues can be resolved. However, the analogy should not be taken too far. Architect's certificates are not intended to be security. Unlike a performance bond, an obligation to pay on an architect's certificate is not independent from the underlying contract. Finally, and most importantly, there are also crucial doctrinal differences between obtaining injunctive relief and obtaining a stay of proceedings in favour

of arbitration and the principles applicable to each should not be conflated.

39 I should however address an interesting argument raised by Mr Chung at the hearing before me. He said that it was only the *employer*, as the architect's paymaster, who would be able to exert improper pressure and interference on the latter, and in this sense the lower threshold is justifiable since it would be less offensive towards the concept of temporary finality. On the other hand, the employer should not so easily avoid having to pay first by simply raising the allegation of fraud against the contractor. I do not agree with this argument. Cl 31(13) of the SIA Conditions plainly states that the exceptions relate to fraud, improper pressure or interference *by either party*. Moreover, it is always possible for a contractor to allege fraud against the employer. It is conceptually difficult to justify why the threshold for obtaining a stay based on fraud should be substantially different from the other exceptions.

40 In my view, there is no reason why a different standard of proof should apply to the exceptions of fraud, improper pressure or interference in the context of cl 31(13).

41 Finally, the Defendant's counsel, Mr Joseph Lee, argued that there was actually no real difference between the test in *Multiplex Construction* and that in *Anwar Siraj*. I think this is correct. Both *Anwar Siraj* and *Multiplex Construction* had cited with approval the observation in *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1992] 3 SLR(R) 595 (at [17]) that when a defendant "makes out a *prima facie* case of disputes the courts should not embark on an examination of the validity of the dispute as though it were an application for summary judgment". (*Multiplex Construction* at [6]; *Anwar Siraj* at [20]). If a claim is plainly unarguable, I do not think it can be considered a *prima facie* case of *bona fide* dispute.

42 Therefore, I agree with the Defendant that he only had to establish a *prima facie* dispute. However, I would add that there should be some *credible evidence* of fraud, and mere allegations are insufficient (see *Samsung Corp v Chinese Chamber Realty Pte Ltd and others* [2004] 1 SLR(R) 382 ("*Samsung Corp*") at [25]).

43 In *Samsung Corp*, the Court of Appeal had noted that, in the past, applications for summary judgment under O 14 of the Rules of Court were often heard together with a stay application, as the issues were interlinked (at [22]). However, while the Court of Appeal recognised the policy importance of temporary finality, it nevertheless found that, after O 14 r 1 was amended such that an application for summary judgment could only be made after the filing of a defence, it was no longer possible for a stay application to be heard at the same time as a summary judgment application (at [21]–[23]). The Court of Appeal found that it "made absolute sense" that the question of stay should be determined before any further step is taken by either party in the action, especially in the context of s 6(1) of the Arbitration Act which expressly provides that either party must apply for a stay before delivering any pleading or taking any other step in the proceedings (at [7]).

44 However, the Court of Appeal also noted that, if a stay was not granted, the plaintiff would more likely than not be entitled to summary judgment. The interplay between the application for a stay and summary judgment was stated in *Samsung Corp* at [22] and [25]:

22 It is quite apparent that implicit in the provision of cl 31(11), that interim certificates be honoured notwithstanding any dispute, is the recognition that in the building industry cash flow is vital. It is thus understandable why under the previous O 14 r 1, the O 14 application was heard together with the stay application as the two applications were invariably inter-linked. **While the issues or tests may not be identical in the context of an SIA contract, if the defendant should fail in their stay application, the plaintiff would in all probability succeed in the O**

14 application.

...

25 In any case, in the context of cll 31(11) and 37(3) of the SIA contract, if the defendant should fail to show by credible evidence that there is fraud or undue pressure being brought to bear upon the Architect, and here we must add that mere assertion would not be good enough (see *RB Burden Ltd v Swansea Corporation* [1957] 3 All ER 243 and *Hickman & Co v Roberts* [1913] AC 229), then the stay application is likely to fail. **In that circumstance, it would be hard to imagine what further arguments could be raised by the defendant to resist an O 14 application for summary judgment.** A sensible defendant, upon failing to secure a stay, would have paid up and chosen to contest later before the arbitrator. He would not be likely to throw good money after bad. **While we recognise that not hearing the two applications together could conceivably give rise to inconsistent judgments, in the context of the SIA contract, that is more apparent than real.**

[emphasis added in bold]

45 After all, if the Plaintiff could show that its claim was indisputable, or that there was no genuine dispute, it was improbable that the Defendant could succeed in showing that he had an arguable defence that ought to be resolved at trial. However, it seemed to me that the converse was not necessarily true. Even if a stay of proceedings was granted, it may still be open for the Plaintiff to apply to the arbitral tribunal for an interim award.

Whether *prima facie* there was *bona fide* dispute whether there was fraud

46 The Plaintiff submitted that the Defendant's allegation of fraud is not *bona fide* but is in fact an afterthought. [\[note: 38\]](#) He noted that the Defendant could have queried the Architect or challenged the AIs and Certificates earlier. The Defendant could also have asked the Architect to revise the Certificates. The Letter was "obviously issued at the [Defendant's] insistence" by the Architect after these proceedings were commenced and that little or no weight should be placed on the Letter because it was procured solely for the purpose of raising questions as to whether the Certificates had allegedly been fraudulently procured. Moreover, the Certificates were issued in accordance with a rigorous certification process and any claims which were not in accordance with the Contract or not agreed to by the Defendant would have been caught either by the Quantity Surveyor or the Architect. Despite numerous opportunities to do so, fraud was only raised by the Defendant in the Defendant's 2nd Affidavit on 25 March 2014. [\[note: 39\]](#)

47 The Defendant pointed out that the Architect's assertion that the Plaintiff had made certain representations to him was corroborated by contemporaneous evidence, *ie*, the AIs. Moreover, the Letter was fair and did not toe the Defendant's line (indeed, I note the Defendant has made serious allegations against the Architect as well). As for why the Defendant did nothing earlier, it was because the Defendant did not know about the AIs at all. The reason why the Defendant had not alleged fraud earlier was because he only knew of the fraud after the Architect gave his reasons. [\[note: 40\]](#)

48 There was clearly a great deal of disagreement over the evidence. This was a situation where the Architect's evidence and the Plaintiff's Mr Seah's evidence were in direct contradiction. Something seemed to have gone wrong somewhere. The question, then, was whether the Architect was telling the truth or whether Mr Seah was telling the truth. Assuming that the Plaintiff had knowingly

misrepresented to the Architect that the Defendant had so agreed, and the Architect had subsequently issued the Certificates in reliance on those falsehoods, it was not unarguable that the Certificates were to that extent affected by fraud, *if* the Defendant's claims were true.

49 However, I am in no position to determine at this stage to say who was lying, if anyone in fact was, or what the Plaintiff's state of mind was when he allegedly made those representations. But I do not have to do so. All I have to do is decide whether *prima facie* there was a *bona fide* dispute as to whether there was fraud. It cannot be said that the Defendant's allegation of fraud is a mere assertion or that the Letter is not credible. I therefore find that it is not indisputable that the Certificates are not affected by fraud, and the Plaintiff has not provided me with a sufficient reason why the matter should not be referred to arbitration.

Whether a stay should be granted because the Architect had not acted properly and/or outside the scope of his authority

50 The Defendant submitted that the Certificates were not issued strictly in accordance with the terms of the Contract, because they included claims for the Extended Preliminaries. This is for two reasons:

(a) First, because it was held in the case of *Pitchmastic v Birse No 1* (unreported, 19 May 2000) ("*Pitchmastic*") that a claim for extended preliminaries is in the nature of a claim for loss and damage. Such a claim is outside the certifying power of the Architect because cl 31(14) of the SIA Conditions states that the Architect "shall, in the absence of express provision, have no power to decide or certify any claim for *breach of contract*" (emphasis added). [\[note: 41\]](#)

(b) Secondly, the Architect had no power to issue instructions to authorise payment for extended preliminaries, which is confirmed by cl 1(4) of the SIA Conditions which set out the matters on which the Architect may issue instructions. [\[note: 42\]](#) The Defendant argued that, therefore, the Certificates, which relied on the AIs, were "similarly infected". [\[note: 43\]](#)

51 The Defendant also contended that the Architect had failed to apply his mind to the issue as to whether he had the right to issue instructions for the items on the AIs, as it was the Architect's own explanation in the Letter that he had issued the AIs based on the Alleged Misrepresentations and on the fact that the project manager had remained silent. Therefore, by issuing the AIs, which in turn formed the basis of the Certificates, the Architect had acted in breach of his duties, which he claimed were the "minimum standards" that the court expects of an architect in order for temporary finality to be conferred on a certificate that he issues. These duties are: [\[note: 44\]](#)

(a) the duty to act in good faith and to the best of his uninfluenced professional judgment (*per* Warren L H Khoo J in *Aoki Corporation* at [36]); and

(b) the duty to perform his duty, or exercise his power with reasonable diligence and in accordance with the contract (*per* Warren L H Khoo J in *Lian Soon Construction Pte Ltd v Guan Qian Realty Pte Ltd* [1999] 3 SLR(R) 518 at [22]).

52 In response, the Plaintiff argued that the Architect was clearly empowered to certify extended preliminaries:

(a) *Pitchmastic* was distinguishable for the following reasons:

(i) The contract in that case incorporated the UK DOM/2 standard form subcontract and not the SIA Conditions; and

(ii) the subcontractor's claim was dismissed because the court found that it was not apt for the subcontractor to claim under cl 16.3.3.3 for extended preliminaries incurred by reasons of prolongation attributable to variation instructions of the contract in that case because such a claim is conventionally made as a claim for loss and expense (at [19]-[20]) and it did not involve an architect's certification of such claims. [\[note: 45\]](#)

(b) Under the SIA Conditions, the Architect had the power to issue instructions ordering variations to the works under cl 12(1), which included the valuation of preliminary items under cl 12(4). [\[note: 46\]](#) The Quantity Surveyor and Architect had clearly applied their minds to evaluating the amounts to be accorded to the Extended Preliminaries [\[note: 47\]](#) and it whether the Plaintiff did in fact make any representations to the Architect with respect to the Defendant's agreement to pay for the Extended Preliminaries is irrelevant. [\[note: 48\]](#)

53 I accept that if a Certificate is not issued in accordance with the contract, it *can* be regarded as a nullity. This seems to have been treated as an additional exception to the exceptions of fraud, improper pressure and interference. However, non-compliance is not always fatal, such as where there is evidence of waiver, in the absence of substantial vitiating factors. As succinctly stated by Warren L H Khoo J in *China Construction (South Pacific) Development Co Pte Ltd v Leisure Park (Singapore) Pte Ltd* [1999] 3 SLR(R) 583 at [29]:

... However, in the instant case, the architect concerned did not seem to be very scrupulous about adhering to the form called for by the provisions of the contract. The form he used for Interim Certificate No 21 is a good example. I do not think that the contractor should be penalised for such lapses on the part of the architect. *While strict compliance with the provisions of the contract in the matter of certifications should be the general norm, what happened in this case leads me to think that the rule should not be allowed to be applied in such a way as to enable the employer to rely on and take advantage of lapses on the part of the architect, particularly in respect of the form and timing of certifications of payments to the contractor, in the absence of **substantial vitiating factors*** . Delays in the issue of interim certificates and failure to cast such certificates (indeed other certificates as well) in proper form seem to be not uncommon occurrences. [emphasis added in italics and bold italics]

54 I do not see any grounds for the Defendant's argument that the Certificates should be wholly invalidated on the ground that the Architect is acting *ultra vires* his certifying power. With respect to the Defendant's contention that the Architect could not certify the Extended Preliminaries because it is usually a claim for loss and expense, the Plaintiff was correct to say that *Pitchmastic* is not relevant here, for the reasons it stated at [52(a)] above. I also fail to see how the fact that a claim is for loss and expense necessarily means that it is a claim for a *breach of contract*. Whether or not a claim is for a breach of contract must depend on the contract itself. Indeed, I note that in *Pitchmastic*, the contract was a *modified* form of the UK DOM/2 standard form subcontract and the judge had noted that the claim for extended preliminaries could have been made under cl 13 of the subcontract if not for the fact that cl 13.3.7 had been varied to exclude variation instructions from its ambit (at [20]). Cl 31(14) of the SIA Conditions is therefore not engaged.

55 As for the contentions relating to the AIs, the Architect is only alleged to have been acting outside his powers when he issued the AIs *vis-à-vis* the Extended Preliminaries. There is no suggestion that the Architect is not empowered to issue instructions for the other items on the AIs. Even if the

Architect had acted outside his powers in issuing instructions for the Extended Preliminaries, that would not invalidate the entirety of the AIs. The Extended Preliminaries related to just *two items* out of a total of 46 items on the AIs. [\[note: 49\]](#) The alleged discrepancies in the AIs could not be regarded as substantial vitiating factors, and the AIs could not be invalidated because of that. The cases show that architect's certificates have only been invalidated as a result of much more serious breaches. I would not undermine the temporary finality of a certificate on such a minor point (see my discussion below at [61] regarding *Lojan Properties (CA)*).

56 Finally, the allegation that the Architect failed to consider whether or not he had the right to issue instructions for the Extended Preliminaries also does not raise any referable dispute. To the extent that he was acting within his powers, it is quite irrelevant; to the extent that he was acting without his powers, the fact that he should have checked whether or not he could have done so would not be in itself a substantial vitiating factor in the absence of fraud, improper pressure or interference.

57 Therefore, I find that the Plaintiff's claim against the Defendant cannot be disputed on these additional grounds.

Whether a partial stay should be granted

58 Having established that there is *prima facie* a *bona fide* dispute of fraud, I finally have to decide whether I should stay the whole of the Plaintiff's claim or whether the Defendant should only be granted a partial stay of proceedings. The Disputed Items are valued at \$334,000. Therefore, Mr Chung argued that there is an undisputed balance certified sum of \$704,801.22 (being \$1,041,801.22 less \$334,000) which is due and owing to the Plaintiff. [\[note: 50\]](#)

59 The Plaintiff submitted that in the case of *Lojan Properties (CA)*, the Court of Appeal had granted a stay on a sum which formed only part of a certificate (namely, a new interim certificate number 29) and therefore stood for the proposition that the court can grant a stay on a part of a certificate. [\[note: 51\]](#) I do not think that is the correct reading of the case. In *Lojan Properties (CA)*, the contractors had claimed for payment upon 12 interim certificates. The project architects later issued a number of revised interim certificates as well as the new interim certificate number 29. The employer sought to rely on, *inter alia*, the revised interim certificates to raise the defence of set-off and counter-claim and to stay the proceedings. At the High Court, it was found that the revised interim certificates and the new interim certificate number 29 were null and void. The judge gave judgment for the contractor except that a sum of \$519,284 was stayed. The \$519,284 included a sum of \$137,493 relating to a claim which the employer claimed it had paid directly to the nominated subcontractors.

60 On appeal, one of the issues that the Court of Appeal had to decide was, *inter alia*, whether the employer was entitled to deduct the said \$137,493 from the amounts certified by the architect as due and payable to the contractor under the interim certificates. While the deduction of \$137,493 was indeed recorded on interim certificate number 29, that sum was based on a list that was appended to a different certificate—a certificate of non-payment wherein the architect certified that the sum of \$137,493 was due to the contractor to the employer. Upon the issue of such a certificate of non-payment, the employer had a contractual right to deduct payments made directly to nominated subcontractors from payments due to the contractor (at [29]–[30]).

61 The Court of Appeal upheld the validity of the certificate of non-payment despite certain alleged discrepancies, such as the assertion that one of the contractors named on the list was

allegedly *not* a nominated subcontractor even though such a certificate applied to nominated subcontractors only. The Court of Appeal did not accept the assertion as it was merely evidence from the Bar, but stated that, even if they did, that would not vitiate the whole document and added that “[i]t would be perfectly proper for the name entered in error to be deleted and the amount to be deducted adjusted accordingly” (at [33]–[34]). Temporary finality was therefore conferred on the *whole* of the certificate of non-payment, notwithstanding the assertions (at [35]).

62 The Court of Appeal did not have to find that interim certificate number 29 was partially valid and did not do so. In conclusion, *Lojan Properties (CA)* is distinguishable from the present situation.

63 Notwithstanding the fact that there do not appear to be any cases in Singapore where only part of an architect’s certificate has been found to be valid, it is also true that the Defendant has also not provided any cases which concluded that it is not possible to accord temporary finality to part of an architect’s certificate. It is still open to me to decide.

64 The Defendant also raised an argument that the wording of cl 31(13) does not contemplate that only part of a certificate may be given temporary effect. [\[note: 52\]](#) Read literally, cl 31(13) states that a certificate should only be given full effect by way of summary judgment in the absence of fraud. Arguably, any fraud, even if it only relates to a part of the certificate, would mean that fraud is not absent, and full effect cannot be given to the certificate. Without temporary finality, the matters certified would not be indisputable, and a stay should therefore be granted for the whole claim.

65 Further, the Defendant also submitted that the certification process contemplates that in issuing a certificate, the Architect will not be influenced in any way by fraud, improper pressure or interference of either party. Once the certification process is tainted, the certificate loses the authority which the parties had agreed to confer on it. [\[note: 53\]](#)

66 There is some force in the Defendant’s arguments. On the other hand, in interpreting cl 31(13), I do not think that I should disregard the objective and spirit of the clause itself. I have already discussed the importance of ensuring expedient cash flow within the construction industry. It must also be remembered that in the present case, all I have found is that there is *prima facie* a *bona fide* dispute as to fraud in relation to certain items on the Certificates. This is not a case where collusion was alleged and there is no indication that the Architect himself was privy to the fraud, if there was indeed fraud. There is no suggestion that the other items on the Certificates were in any way infected by fraud. They could just have easily been certified on a different certificate and thereby be conferred temporary finality. Indeed, *Lojan Contractors (CA)* illustrates such a scenario. In the present case, even though there is a dispute of fraud, such fraud, even if proven, only affects certain items on the Certificate, and those could be severable as the Disputed Items have been clearly quantified.

Conclusion

67 For the above reasons, I will allow the appeal in part. I will grant a stay of the part of the Plaintiff’s claim that relates to the Disputed Items (including the part of the interest claimed thereunder). There will be no stay in respect of the remaining claimed sums.

68 I will hear the parties on costs.

[\[note: 1\]](#) See SOC, para 5.

[\[note: 2\]](#) SOC, para 3.

[\[note: 3\]](#) Defendant's Submission, paras 21-23; Defendant's 2nd Affidavit, paras 7 and 8.

[\[note: 4\]](#) Defendant's 2nd Affidavit, p 12.

[\[note: 5\]](#) Defendant's 2nd Affidavit, para 7.

[\[note: 6\]](#) Defendant's 2nd Affidavit, pp 25 (items 173 and 174) and 35 (items 280 and 281).

[\[note: 7\]](#) *Ibid*; see also Plaintiff's Further Submission, para 14.

[\[note: 8\]](#) Defendant's 2nd Affidavit, para 10, and p 37.

[\[note: 9\]](#) SOC, para 11.

[\[note: 10\]](#) Defendant's 2nd Affidavit, para 11 and p 44.

[\[note: 11\]](#) Defendant's 2nd Affidavit, para 12; see Seah Hwa Peng's ("Seah") 2nd Affidavit p 64 (items 280 and 281) and p 86 (items 173 and 174).

[\[note: 12\]](#) Defendant's 2nd Affidavit, p 117.

[\[note: 13\]](#) SOC, para 11.

[\[note: 14\]](#) SOC, para 10.

[\[note: 15\]](#) Defendant's 1st Affidavit, para 10.

[\[note: 16\]](#) Defendant's 1st Affidavit, para 11; see also IC-3.

[\[note: 17\]](#) Defendant's 2nd Affidavit, para 13.

[\[note: 18\]](#) SOC, para 11.

[\[note: 19\]](#) AR's Certified Transcript, p 1.

[\[note: 20\]](#) Defendant's 2nd Affidavit, pp 9-10.

[\[note: 21\]](#) Defendant's 2nd Affidavit, pp 7-8.

[\[note: 22\]](#) Seah Hwa Peng's 3rd Affidavit, paras 4-5.

[\[note: 23\]](#) AR's Certified Transcript, p 4.

[\[note: 24\]](#) AR's Certified Transcript, p 4.

[\[note: 25\]](#) Defendant's Submission, para 7.

[\[note: 26\]](#) Defendant's Submission, para 9(a).

[\[note: 27\]](#) Defendant's Submission, para 9(b).

[\[note: 28\]](#) Defendant's Further Submission, para 6.

[\[note: 29\]](#) Defendant's Submission, para 40.

[\[note: 30\]](#) Plaintiff's Submission, paras 15-18.

[\[note: 31\]](#) Plaintiff's Further Submission, para 3.

[\[note: 32\]](#) Plaintiff's Further Submission, para 9.

[\[note: 33\]](#) Plaintiff's Further Submission, para 12.

[\[note: 34\]](#) Plaintiff's Submission, paras 53-64.

[\[note: 35\]](#) Plaintiff's Submission, para 64.

[\[note: 36\]](#) Plaintiff's Submission, paras 16-18.

[\[note: 37\]](#) Plaintiff's Submission, paras 40-46.

[\[note: 38\]](#) Plaintiff's Submission, para 39.

[\[note: 39\]](#) Plaintiff's Submission, paras 19-39.

[\[note: 40\]](#) Defendant's Submission, para 30; also oral arguments.

[\[note: 41\]](#) Defendant's Further Submission, paras 7-9; Defendant's Submission, para 36.

[\[note: 42\]](#) Defendant's Further Submission, para 10.

[\[note: 43\]](#) Defendant's Further Submission, para 6.

[\[note: 44\]](#) Defendant's Further Submission, paras 3-4.

[\[note: 45\]](#) Plaintiff's Further Submission, para 7.

[\[note: 46\]](#) Plaintiff's Further Submission, para 4.

[\[note: 47\]](#) Plaintiff's Further Submission, para 12.

[\[note: 48\]](#) Plaintiff's Further Submission, para 13.

[\[note: 49\]](#) Defendant's 2nd Affidavit, pp 7-8.

[\[note: 50\]](#) Plaintiff's Further Submission, para 34; Plaintiff's Submission, paras 53-64.

[\[note: 51\]](#) Plaintiff's Further Submission, paras 35-37.

[\[note: 52\]](#) Defendant's Further Submission, paras 14-15.

[\[note: 53\]](#) Defendant's Further Submission, para 18.

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