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Ser Kim Koi
v
GTMS Construction Pte Ltd

[2016] SGCA 7

Court of Appeal — Civil Appeal No 163 of 2014
Chao Hick Tin JA, Andrew Phang Boon Leong JA and Quentin Loh J
26 May 2015

Building and construction contracts — Standard form contracts — Singapore Institute of Architects standard form contracts

4 March 2016 Judgment reserved.

Quentin Loh J (delivering the judgment of the court):

Introduction

1 This is an appeal against the entry of summary judgment of $620,816.32 together with interest and costs based on two interim payment certificates, Interim Certificates Nos 25 and 26 issued by the architect, Mr Chan Sau Yan, Sonny ("the Architect"), under a construction contract entered into on the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) (9th Ed, September 2010) ("the SIA Conditions").

2 The learned Judge ("the Judge") below upheld the summary judgment entered by the Assistant Registrar ("the AR") and this decision is reported in

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GTMS Construction Pte Ltd v Ser Kim Koi (Chan Sau Yan and Chan Sau Yan Associates, third parties) [2015] 1 SLR 671 ("Judgment"). Dissatisfied, the appellant, Mr Ser Kim Koi ("the Appellant") brings this appeal. We heard the appeal on 26 May 2015 and reserved judgment. We now give our decision.

Background facts

3 The Appellant decided to build three two-storey detached houses (Unit Nos 12, 12A, 12B), each with a basement carpark and a swimming pool, on the land he owned at 12 Leedon Park, Singapore ("the Buildings"). He engaged the Architect under a memorandum of agreement dated 16 June 2009.[1]

4 Tenders were called for the Buildings and the respondent, GTMS Construction Pte Ltd ("the Respondent") submitted its tender on 15 November 2010. Three rounds of tender evaluation exercises were carried out and the Architect made a recommendation on 4 May 2011 to accept the Respondent's tender. The Appellant agreed. The Architect issued the Letter of Acceptance on behalf of the Appellant on 13 May 2011.[2] The contract sum was $13.13m.[3] The period of construction was 20 months with a contract completion date of 21 February 2013.[4]

5 The Respondent duly commenced work. The Architect issued a total of 26 interim payment certificates. The Appellant made payment for the first 24. The completion date was subsequently extended by the Architect to 17 April

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1 ROA Vol III (Part A) at pp 137 –153.

2 ROA Vol III (Part A) at pp 154 –159.

3 ROA Vol III (Part B) at p 14.

4. ROA Vol III (Part B) at p 62.

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2013.[5] The Appellant takes issue with this extension of time granted by the Architect.

6 The Architect issued the Completion Certificate dated 15 May 2013 under cl 24 of the SIA Conditions which certified contract completion on 17 April 2013.[6] It should be noted that some two weeks *before* the issue of the Completion Certificate, the Buildings had failed the first inspection by the Building and Construction Authority ("the BCA") for the issue of the Temporary Occupation Permit ("the TOP").[7] This first inspection was carried out on 30 April 2013.[8]

7 Nonetheless, the Architect issued the Completion Certificate dated 15 May 2013 and it is important to note what it certified:[9]

> I hereby certify that *on* **17 April 2013,** *the* ***Works*** *appear to* ***have been completed*** *and to* ***comply with the Contract in all respects*** (*save* and except *for the minor outstanding works listed* in Part 1 of the Schedule to this Certificate).
>
> I further certify that since the Contractor has undertaken in writing to complete the minor outstanding works set out in Part 1 of the Schedule to this Certificate by the dates and in accordance with the arrangements set out in Part 2 of the Schedule, an agreed sum of (to be advised by the [Quantity Surveyor]) is to be retained by the Employer and subsequently released to the Contractor upon completion of these outstanding works.
>
> The Maintenance Period of the Works shall commence on 18 April 2013 and will end on 17 April 2014.

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5 ROA Vol III (Part B) at p 102.

6 ROA Vol III (Part B) at p 131.

7 ROA Vol III (Part C) at pp 201-202.

8 ROA Vol III (Part C) at pp 201-202.

9 ROA Vol III (Part B) at p 131

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[emphasis in bold and italics; underlined in original]

8 A second TOP inspection was carried out by the BCA on 18 June 2013[10] and the Buildings again failed the TOP inspection. TOP was eventually obtained on 16 September 2013.[11]

9 Interim Certificate No 25 ("IC 25") was dated 3 September 2013 and certified interim payment of $390,951.96, ($418,318.60 if GST is included) of which $328,250 comprised the release of the first moiety of the retention sum under cl 31(9) of the SIA Conditions.[12] Interim Certificate No 26 ("IC 26") was dated 6 November 2013 and was for the sum of $189,250.21, ($202,497.72 with GST) (collectively "IC 25 and 26" or "the Disputed Certificates").[13]

10 By then disputes had arisen between the parties over the completion of the works and the Appellant alleged extensive defects and non-compliant works. The Appellant employed a chartered building surveyor, Mr Chin Cheong ("Chin Cheong") from Building Appraisal Pte Ltd ("BAPL"), to document these alleged defects.[14]

11 The Respondent, relying on the Disputed Certificates, issued two invoices (bearing invoice nos LP-025 and LP No 26) dated 3 September 2013

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10 ROA Vol III (Part C) at pp 206 - 207

11 ROA Vol III (Part C) at p 210.

12 ACB Vol II at p 91.

13 ACB Vol II at p 92

14 BAPL 1st Report (ROA Vol III (Part D) at pp 30 – 132); BAPL 2nd Report (ROA Vol III (Part J) at pp 171 – 196.

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and 6 November 2013 for $418,318.60 and $202,497.72 (both inclusive of GST) respectively, claiming a total of $620,816.32: see [1] above.[15] When payment was not forthcoming, the Respondent commenced Suit 50 of 2014 ("S 50/2014") on 13 January 2014. The Appellant filed its defence and counterclaim against the Architect and the Respondent for the alleged numerous defects, delays and conspiracy. The Appellant also added the Architect and his firm, Chan Sau Yan Associates, as third parties.

Proceedings Below

Proceedings before the AR

12 The Respondent applied for summary judgment under O 14 of the Rules of Court (Cap 322, 2014 Rev Ed) ("ROC") on the basis of IC 25 and 26 in Summons No 1051 of 2014. The Appellant challenged the validity of the Disputed Certificates on the ground that they were tainted by fraud or improper pressure or interference under cl 31(13) of the SIA Conditions. The following arguments by the Appellant were recorded by the AR in his minute sheet in the course of oral submissions:

> (a) the Architect should not have issued the Completion Certificate because the conditions for its issuance as stated in the parties' contract were not satisfied. Furthermore, the Completion Certificate was issued even *before* the TOP was.
>
> (b) the Completion Certificate issued by the Architect raises doubts about his honesty because the schedule to that Completion Certificate (essentially a defects list) recorded only minor outstanding works

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[15] ROA Vol III (Part H) at p 111.

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whereas there were in fact "extensive defects" to the Buildings as reported by Chin Cheong.

(c) the Architect recklessly certified payment for landscaping works despite the wrong type of soil used (clayey sub-soil instead of loamy soil).

(d) the Architect was "reckless" in certifying payment in respect of the timber flooring because the timber strips used in the Buildings were 10 mm thick, and not 15 mm as specified by the Architect.

(e) the Architect granted unwarranted extensions of time for the Respondent to ensure that there was permanent electrical supply to the Buildings.

13 Notwithstanding the arguments made, the AR was not satisfied that there were triable issues as to whether the disputed certificates were tainted by fraud, improper pressure or interference. He was of the view that the court should not be concerned with "shoddy, poor or unsatisfactory workmanship" and that the evidence borne out at the very highest shows that the Architect was merely negligent. It therefore cannot be said that he was acting fraudulently and accordingly granted summary judgment.

Proceedings before the Judge

14 The Appellant appealed against the AR's decision but the appeal was dismissed with costs. The Judge first acknowledged that the Architect's evidence, which we will turn to later, played a "significant role in [his] deliberation" in finding that the Disputed Certificates were not tainted by fraud, improper pressure or interference (Judgment at [43]).

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15 The Judge's reasons for rejecting each of the grounds to set aside the Disputed Certificates are as follows:

(a) First, the evidence that the Respondent sought to rely on (set out in [12] above) were "circumstantial" and "insufficient to prove fraud" (Judgment at [56]). Furthermore, there was a qualitative difference between fraud and negligence. The Judge noted at [57]:

> If (and I am not suggesting that he was) the Architect was negligent in issuing the [Disputed] Certificates or issued the [Completion Certificate] prematurely, that was one thing. It is another to say that he was dishonest and in cahoots with the [Respondent]. In my view, the suspicion was specious and devoid of any cogent direct evidence. The reliance on circumstantial evidence and inferences was insufficient to meet the high standard required to prove fraud (see *Wu Yang* [*Construction Group Ltd v Zhejiang Jinyi Group Co Ltd* [2006] 4 SLR(R) 451] at [94]–[95]). In the circumstances, I dismissed the first ground of the … appeal.

(b) Secondly, there was insufficient evidence to establish that the Respondent (or his proxy) had exercised improper influence on the Architect (Judgment at [59]). The Judge then went on to hold at [59]:

> … I accepted the [Respondent's] evidence that the Architect's decision to grant the [Completion Certificate] had been based on his professional judgement that the [p]roject could be enjoyed and occupied – it was consistent with the Architect's evidence which was convincing and detailed … There was nothing to suggest otherwise. Therefore I also dismissed the … appeal on this ground.

(c) Thirdly, with regard to interference, the Judge said at [61]:

> There was no evidence to indicate that the [Respondent] had influenced the Architect. The [Appellant] insinuated that they [(the Respondent and the Architect)] had worked together on [a previous project, namely] the Mont Timah project and the Architect had approved the [c]ertificates despite the many alleged defects in the [p]roject. Thus they were in cahoots. However, I find that

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> it was highly improbable given the manner in which the tender had been conducted and the involvement of other third parties in the certification process. It would have taken a lot of effort for the Architect's independence to have been interfered with. Therefore, I was of the view that there was insufficient evidence to show that the Architect's independence had been interfered with.

16 The Judge concluded by emphasising the importance of according the Disputed Certificates "temporary finality" in ensuring cash flow in the building and construction industry (Judgment at [62]–[63]). In dismissing the Appellant's appeal, the Judge also ordered that the Appellant pay costs of $10,000 plus reasonable disbursements to the Respondent (Judgment at [63]).

17 Dissatisfied, the Appellant filed his Notice of Appeal to this Court.[16] Thereafter, the Appellant filed a summons for stay of execution of the Judgment and for costs of and incidental to this application to be reserved to this Court by way of Summons No 5454 of 2014 ("SUM 5454/2014").[17] The basis of this application was that there was a 'real risk and serious concern' that the appeal would be rendered 'nugatory' if a stay of the Judgment was not granted because of the 'weak financial position' of the Respondent such that the Appellant will not be able to recover against the Respondent in the event his appeal before this Court was successful.[18] In this regard, a concession was made by Mr Dennis Tan Chong Keat ("Mr Dennis Tan"), a director of the Respondent in separate proceedings involving the same parties (Originating Summons No 317 of 2014 ("OS 317/2014"), which was an application for an injunction by the Respondent

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16 Notice of Appeal filed on 2 October 2014.

17 Summons for Stay of Execution of Judgment/Order (SUM 5454/2014) filed on 31 Oct 2014.

18 Defendant's written submissions for SUM 5454/2012 at [22] (see also AEIC of Ser Kim Koi dated 31 October 2014 at [13]).

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to restrain a call of a performance bond furnished by the Respondent in respect of the construction of the Buildings) to the effect that the Respondent was in a weak financial position,[19] and audited statements of the Respondent's account[20] were tendered to the Judge.

18 SUM 5454/2014 was heard by the Judge[21] and he granted the Appellant's application for stay. He also ordered the Appellant to pay into court a sum of $640,816.32, which represents the sum total of the monies claimed in respect of IC 25 and 26 and the fixed costs of $10,000 for each of the summary judgment application and the registrar's appeal.[22] The Judge also ordered costs to be in the cause.[23]

Arguments on appeal

Appellant's arguments

19 On appeal, the Appellant no longer relied on improper pressure and interference to resist payment of the sums due under the Disputed Certificates. Instead, he relied solely on fraud to resist summary judgment.

20 Before us, Mr Mohan Reviendran Pillay ("Mr Pillay"), counsel for the Appellant, submitted that leave to defend should be given because there was a

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19 Excerpt in AEIC of Ser Kim Koi dated 31 October 2014 at [17] (see Dennis Tan's AEIC dated 7 April 2014 in OS 317/2014 (SUM 1731/2014) at [33]).

20 Dennis Tan's AEIC dated 6 Nov 2014 at p 214 (OS 317/2014 (SUM 1731/2014).

21 Minute Sheet dated 12 Nov 2014.

22 Minute Sheet dated 19 Nov 2014.

23 Minute Sheet dated 19 Nov 2014; Order of Court (ORC 7665/2014) 3rd order.

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bona fide defence of fraud, as evinced by a clear pattern of reckless conduct on the Architect's part which the Judge failed to have proper regard to:

(a) First, the Architect should not have issued the Completion Certificate. This is because:

(i) The Buildings were not ready for occupation and use when the Completion Certificate was issued as the TOP was only issued months after the Completion Certificate was issued. Moreover, entering into occupation of and using a building which has not obtained TOP was an offence under s 12 of the Building Control Act (Cap 29, 1999 Rev Ed) ("the Act").

(ii) The conditions for its issuance under cl 24(4) of the SIA Conditions read with Item 72 of the Preliminaries ("Item 72") were not satisfied. The Architect therefore cannot say that the Buildings "appear to be completed and to comply with the [c]ontract in *all* respects", save for minor outstanding works, as he did in the Completion Certificate: see [6] and [7] above. The relevant portions of cl 24(4) and Item 72 read:

> 24.(4) Subject to the provisions of Sub-Clause (3) hereof as to the effect of Termination of Delay Certificates, the liability of the Contractor to pay further liquidated damages under Sub-Clause (3) hereof shall cease, and the Contract shall be deemed completed for this purpose, upon the issue by the Architect of his certificate under this Sub-Clause that the Works have been completed. Such certificate is referred to in this Contract as a "Completion Certificate", and shall be issued by the Architect when the Works *appear* to be complete and to comply with the Contract in all respects.
>
> 72 COMPLETION CERTIFICATE

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> Pursuant to the provisions of the Agreement and Conditions of Contract, a Completion Certificate will not be issued until:
>
> a) All parts of the Works are in the Architect's opinion *ready for occupation and for use*.
>
> b) *All services are tested, commissioned* and operating satisfactorily as specified in the Contract or the relevant Sub-Contract including handing over all test certificates, operating instructions and warranties.
>
> c) All works included in the Contract are performed including such rectification as may be required to bring the work to the completion and standards acceptable to the Architect.
>
> …
>
> [emphasis added]

(b) Secondly, the Completion Certificate issued by the Architect raises issues about his honesty because the schedule to that Completion Certificate (a defects list) recorded only minor outstanding works. The defects list to the Completion Certificate is "woefully deficient" because there were in fact "extensive defects" to the Buildings, as reported by BAPL. These defects, according to BAPL, are:[24]

(i) Leaking swimming pool, koi ponds and water features;

(ii) Cracked and leaking external walls; and

(iii) Poor installation of marble and timber flooring, which is described by Chin Cheong in his 1st report ("the BAPL 1st Report")[25] as follows:

> … In our view, the various timber decking with lower space needs to be re-designed to address

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[24] ROA Vol III (Part D) at p 131.

[25] ROA Vol III (Part D) at p 131.

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> the problem of continuous water streak marks flowing to the space below. Currently, rain brings dirt and other debris through the timber floor strips to stain the walls and vertical edges of the floor slab below. In addition, moisture from the rain is also likely to have caused efflorescence and rust stains from corroded fixtures.
>
> The marble finishes were observed to have many geological flaws and impurities. Though these impurities may be natural, they are defects nonetheless and should not have been selected for installation. Attempts to patch repair some of these marble tiles with coloured marble filler has left them appearing even worse with all kinds of unusual shapes and artificial looking marks on the tiles. Replacement of these defective marble tiles should not be done only on the affected tiles as it would likely cause a "chessboard" effect of light and dark tonality between the new and existing tiles. Unless the replacement tile can match existing tiles perfectly, the entire level or room (depending on the location) should have their similar marble finishes replaced.

The BAPL 1st Report contained photographs evidencing these defects.

(c) Thirdly, the Architect acted recklessly in certifying payment for landscaping works. This is because loamy soil was to be provided for the backfilling of the landscaping works under the contract, but in fact, the wrong type of soil (clayey sub-soil) was supplied and applied. Mr Pillay bases this assertion on a report from Mr Daniel Tay, a Senior Design Consultant with Landscape Konsortium Pte Ltd and R&D Landscape Consultant,[26] whom he says is an independent expert ("Daniel Tay's Report"), the material portions of which read:[27]

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[26] ROA Vol III (Part J) at pp 203–217.

[27] ROA Vol III (Part J) at pp 203–205.

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> We were instructed by [the Appellant] to determine if "loamy soil" had been used in the turfing works at Units 12, 12A & 12B at Leedon Park (the "Site")
>
> …
>
> **SOIL**
>
> …
>
> Based on photos and soil samples obtained from the Site, we can conclusively say that the soil delivered and filled is that of clayey sub-soil and not "loamy soil" as required …
>
> In this regard, "loamy soil" which is of finer consistency and darker tone is generally used and preferred over the clayey sub-soil in turfing works as it has a higher Humus content (higher fertility) and aeration quality which is critical to the growth and maintenance of the grass layer.
>
> On the other hand, clayey sub-soil, which is generally of a reddish hue, is not used in turfing works as top soil because the hard and compacted nature of the clayey sub-soil impedes the ability of the grass to flourish as the roots are prevented from growing deeply into the hard soil.
>
> In addition, clayey sub-soil has a tendency to form a consistency similar to that of 'cemented pavements' in hot weather and as such, is not conducive for landscaping works …
>
> Instead, clayey sub-soil, has excellent load-bearing qualities compared to "loamy soil".
>
> **LANDSCAPING WORKS IN MARCH 2014**
>
> During my site visit on 18 March 2014, I observed that the contractor was applying "loamy soil" as a top dressing on the grass at the Site. This is usually done as a method of rectification of sub-standard turfing works.
>
> However, it was observed that as of the time of my visit on 18 March 2014, not every section of the turfing works at the Site had been top dressed with "loamy soil".
>
> …

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It would be convenient for us to note at this juncture that the landscaping works were the subject of an earlier Architect's interim payment certificate, namely, No 22 ("IC 22") which had been paid by the Appellant. However this remains a disputed item as the Appellant strongly disagrees with the Architect's certification that the landscaping works were completed in accordance with the Contract.

(d) Fourthly, the Architect was "reckless" in certifying payment in the Disputed Certificates for the timber flooring in the Buildings. This is because the timber strips used in the Buildings were 10 mm thick, and not 15 mm as specified by the Architect in Architect's Instruction No 8 dated 10 July 2012, the material part of which reads:[28]

> **1. CHANGE OF FINISHES**
>
> We hereby confirm change of internal timber flooring from "150mm wide x 2mm thk White Oak wood strips" to "90mm wide x 15mm thk Indian Rosewood strips with plywood sub base".
>
> And staircase finishes from "25mm thk solid White Oak tread & 15mm thk Teak riser" to "90mm wide x 15mm thk Indian Rosewood with plywood sub-base", where applicable.
>
> …
>
> [another person's signature, signing on behalf of the Architect]
> CHAN SAU YAN, SONNY
> ARCHITECT

[underlined in original]

In this regard, the Appellant tendered photographs of the timber strips as measured by vernier callipers.

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[28] ROA Vol III (Part K) at p 151.

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21 The Appellant no longer relies on his point that the Architect granted unwarranted extensions of time for the Respondent to ensure that there was permanent electrical supply to the Buildings: see [12(e)] above. We therefore need say no more on this.

22 In respect of the points raised in [20], the Appellant submits that summary judgment should not be granted lightly unless the allegation of fraud is frivolous and "practically moonshine" (see *Brinks Ltd and another v Abu-Saleh and others* [1995] 1 WLR 1478 at 1482, quoting Lord Lindley in *Codd v Delap* (1905) 92 L T 510 at 511). Furthermore, while it is true that cash flow is important in the building and construction industry, that does not mean that the "concept of temporary finality can be misused as a shield for excesses or abuses of power" (per Leow JC in *H P Construction & Engineering Pte Ltd v Chin Ivan* [2014] 3 SLR 1318 ("*Chin Ivan (HC)*") at [31]). Indeed, there are exceptions to temporary finality, namely, fraud, improper pressure or interference, and they are intended to act as a safeguard against such possible misuses.

Respondent's arguments

23 Mr Thulasidas s/o Rengasamy Suppramaniam ("Mr Thulasidas"), counsel for the Respondent, argues that the Judge was right in upholding the decision of the AR in granting summary judgment for the sums due under the Disputed Certificates. Mr Thulasidas submits:

(a) First, the Appellant cannot argue that the Disputed Certificates were tainted by fraud simply by taking issue with the issuance of the Completion Certificate. This is because the Disputed Certificates and the Completion Certificate are completely different certificates issued apart from one another. The Disputed Certificates were issued some

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months after the Completion Certificate was issued (the Disputed Certificates were issued on 3 September and 6 November 2013, whereas the Completion Certificate was issued earlier on 15 May 2013). As such, the Disputed Certificates are "not directly attacked".

(b) Secondly, the Appellant merely raises a myriad of circumstantial evidence that is not sufficiently cogent to prove fraud. Indeed, the defects raised by the BCA with regard to the two failed TOP inspections were minor.

(c) Thirdly, the Architect had a "genuine honest subjective belief" that the works were substantially complete, and that the defects on the Buildings were trivial and minor when he issued the Completion Certificate. He therefore cannot be faulted for genuine mistakes he made.

Our decision

24 The central issue in this appeal against the entry of summary judgment is whether the Appellant has made out any of the grounds found in cl 31(13) of the SIA Conditions so as to deprive IC 25 and 26 of temporary finality.

Applicable principles

25 Clauses 31(13) and 37(3)(h) of the SIA Conditions provide as follows:

> 31.(13) *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

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> 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 … 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 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.
>
> 37.(3)(h) pursuant to Clause 31.(13) of these Conditions, *temporary effect shall be given to all certificates* (other than a Cost of Termination or Termination Delay Certificate under Clause 32.(8) of these Conditions), whether for payment or otherwise, granted (or refused) by the Architect …
>
> [emphasis added in italics and bold italics]

26 The ambit and extent of the temporary finality accorded to interim payment certificates under these clauses in the SIA Conditions has been the subject of a comprehensive and authoritative judgment by this Court in *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] 3 SLR 124 ("*Chin* Ivan") and to a lesser extent in *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] 1 SLR(R) 622 (*"Lojan Properties").*

27 In construing cl 31(13), this Court in *Chin Ivan* stated at [18]–[19]:

> 18 However, the granting of such temporary finality to an [a]rchitect's certificate is subject to certain conditions that are stipulated within cl 31(13). First, the certificate must be issued "in the absence of fraud or improper pressure or interference by either party". Secondly, it must be issued "s*trictly* in accordance with the terms of the Contract" [emphasis added]. … Thirdly, as can be seen from the need for the Architect to clarify, upon either party's request "[i]n any case of doubt", what was or was not taken into account in his certificate, the Architect must

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> have considered the matters which are said to have been dealt with in his certificate. …
>
> 19 The need for an [a]rchitect's certificate to cohere with the conditions laid down in cl 31(13) of the SIA Conditions was also recognised by this court in *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* …

This Court also pointed out at [20] that "a properly-issued [a]rchitect's certificate functions as a condition precedent to the contractor's right to receive payment and the employer's right to deduct claims (if any)."

28 These three paragraphs lie at the heart of the principle of temporary finality under the SIA Conditions. The role played by the architect in certifying payment is crucial because it is the integrity of his certification process and proper certification that confers temporary finality on his certificates and therefore enforceability by summary judgment. As this Court pointed out in *Chin Ivan*, the enforcement stage differs from the final and determinative arbitration or court proceedings brought to obtain a final and binding determination of the parties' disputes in the "project" where architects' certificates may be 'opened up' by the arbitral tribunal or the court, (referred to as "substantive proceedings" in *Chin Ivan* at [21] and [22] and citing Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 4th Ed, 2012) at vol 1, paras 8.12-8.13). At the enforcement stage of interim payment certificates, the court is not concerned with the merits of the architect's certificates (see *Chin Ivan* at [21]). Hence "a mere allegation of irregularity cannot suffice to undermine the validity of such a certificate" and "any allegation must be backed up by evidence, at the very least, so as to establish a *prima facie* case of irregularity" (*Chin Ivan* at [24]).

29 It would be instructive to examine *Lojan Properties* and *Chin Ivan* to illustrate how these principles were applied.

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30 In *Lojan Properties*, the architect had issued 28 interim payment certificates; the first 16 interim payment certificates were paid but the remaining 12, issued between September 1984 and January 1987, remained outstanding. In March 1985, the architect had given final extensions of time to 31 December 1984 for completion of the main building works and to 18 February 1985 for external works. Practical completion was certified on 1 July 1985, the owner entered into possession on 2 July 1985 and the defects liability period ended on 1 July 1986. On 9 September 1987, when settlement discussions failed, the contractor commenced proceedings and applied for summary judgment for $1,785,294.32 (excluding contractual interest) based on the interim certificates. The owner filed an application for a stay pending arbitration.

31 On 24 November 1987, whilst these applications were pending, the owner wrote to the architect querying whether all the certified work had been carried out and whether the condition precedent under cl 23(2), *ie*, written notification of entitlements to extensions of time, had been complied with before he issued his extensions of time. On 2 December 1987, the architect wrote to the contractor stating that save for one item, his previous extensions of time were null and void because the contractor had failed to comply with the condition precedent under cl 23(2) and separately certified that works ought to have been completed by 31 May 1984 and the contractor was in delay. On 15 December 1987, the architect issued 17 replacement interim certificates, which included the 12 unpaid interim certificates, and issued one further interim payment certificate. This resulted in cross-claims being available to the owner which exceeded the contractor's claim.

32 Both the trial judge and this court were unanimous that on these facts, (which included the architect's revocation of his previous extensions of time, his re-valuation of the interim payment certificates, his issuing of a further

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interim payment certificate which was not issued in compliance with cl 31(1) and (2) as it was issued long after completion of the works, "recording" in his certificate entitlement to liquidated damages more than two and a half years after practical completion and only after the owner had written to him), the court was entitled to draw the conclusion that there was undue interference and/or improper pressure by the owner thereby depriving these certificates of any temporary finality enforceable by summary process.

33 In *Chin Ivan*, the contractor commenced an action and applied for summary judgment on two interim payment certificates ("the disputed certificates"). The employer resisted the claim alleging that the disputed certificates were procured by fraud on the part of the contractor. The employer showed, and it was not disputed by the contractor, that the architect issued 'Instructions' under the SIA Conditions approving various items ("the disputed items") on the contractor's list of variation works on the basis that they were: "[a]s informed by [the contractor], … requested by [the employer]/[the employer's project manager]" (*Chin Ivan* at [5]). These architect's instructions were thus not issued by the architect based on his professional judgment, but were *purely* on the basis of the contractor's representation that the variation works in question had been "requested" by the employer.

34 The disputed certificates had certified various payments, which included the disputed items totalling $321,383.94 as well as other items. The judge below made three findings of fact, which were not challenged on appeal (at [24]). First, the architect stated he included the disputed items because the contractor informed him that the employer had consented to the inclusion of these items; secondly, the contractor denied making any such representation to the architect; and thirdly, it was not disputed that the employer had never consented to the inclusion of the disputed items for valuation. This court noted that on these three

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findings of fact, the trial judge below was correct in finding that a *prima facie* case of fraud was made out. But more than that, this court went on to state that in light of these facts, "it *could not have been disputed* that the [d]isputed [c]ertificates had not been issued in accordance with cl 31(13) of the SIA Conditions" [emphasis in original] and went on to note at [25] that:

> … If the [a]rchitect was telling the truth, then the inevitable conclusion would seem to be that the [contractor], in representing that the [employer] consented to the Disputed Items' inclusion for valuation purposes, had defrauded him. On the other hand, if the [contractor] was telling the truth, (*ie*, that he never made such representations to the [a]rchitect), then the [a]rchitect must have issued the Disputed Certificates improperly since, as noted … above, implicit in his statement in the [architect's instructions] and his letter of 21 March 2014 was the assertion that he did not include the Disputed Items as a matter of his professional assessment; and on this basis, his subsequent claim as to the representations allegedly made to him by the [contractor] would seem to suggest an ill-conceived attempt to cover up his error. In either scenario, the [a]rchitect would not have applied his mind to the Disputed Items when he included them in the Disputed Certificates. In these circumstances it could not possibly be said that these certificates had been issued in accordance with the parties' contract. It must follow from this that the entire basis of the [contractor's] claim fails since there was no certificate properly issued by the [a]rchitect which the [contractor] could rely on to sustain its claim. …

35 This court ruled that even if the irregularities only affected *part* of an interim payment certificate, there could be no severance and under the SIA Conditions that deprived the *whole* certificate of temporary finality. These certificates ceased to attract any temporary finality because they were in some material part not issued strictly in accordance with the contract and/or were tainted by fraud or improper pressure or interference (*Chin Ivan* at [26] and [27]).

36 These cases illustrate the nature and level of scrutiny of the integrity of the certification process leading up to the interim payment certificate as well as

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the importance of proper certification "strictly" in accordance with the terms of the contract. They also illustrate the requisite levels of proof to determine if the temporary finality is unravelled due to fraud or irregularity. These cases also emphasize that at the enforcement stage, the courts are not otherwise concerned with the merits of the architect's certificates, *viz*, whether the certificates are ultimately correct as to the matters they purport to deal with. The question at this enforcement stage is whether the architect's certificates were validly issued in accordance with the terms of the contract (*Chin Ivan* at [21]).

37 Before we turn to examine the facts of this case, it would be appropriate to address Mr Pillay's submissions on the Architect's certificates being affected by fraud under the first condition of cl 31(13). Mr Pillay does not rely on improper pressure or interference in the appeal but only on the reckless conduct of the architect in his certification amounting to fraud.

38 We agree with Mr Pillay's submission that recklessness in certification, *ie*, careless whether it is true or false, can amount to fraud under cl 31(13) of the SIA Conditions. In construing the word "fraud" in cl 31(13), we accept the classic exposition of fraud in Lord Herschell's speech in *Derry v Peek* (1889) 14 App Cas 337 ("*Derry v Peek*") at 374 (endorsed by the authors of *Hudson's Building and Engineering Contracts* (Nicholas Dennys QC, Mark Raeside QC and Robert Clay gen eds) (Sweet & Maxwell, 12th Ed, 2012) at para 4-046):

> … fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) *recklessly, careless whether it be true or false*. …
>
> [emphasis added]

39 The exposition in *Derry v Peek* is over 125 years old and the Singapore courts have endorsed it on many occasions (see *eg*, *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 at [13]; *Wishing*

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Star Ltd v Jurong Town Corp [2008] 2 SLR(R) 909 at [16]; *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 at [35]; *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co and others* [2007] 1 SLR(R) 196 at [38]; and *Chu Said Thong and another v Vision Law LLC* [2014] 4 SLR 375 at [114]).

40 The 'fraud' exception in cl 31(13), which unravels the temporary finality of certificates issued by the architect, read in the light of *Derry v Peek*, means temporary finality can be denied to certificates issued by the architect which are, to the knowledge of the architect false, or issued by the architect without any belief in its truth, or recklessly, without caring whether the certificate is true or false. *Chin Ivan* is authority for the proposition that 'fraud' within the meaning of cl 31(13) can also be made out on a *prima facie* basis when an architect, not acting on the initiative of either party, issues a certificate to cover up his own mistakes.

Application of principles to the facts

41 We now turn to the facts to determine if IC 25 and 26 have lost their temporary finality under cl 31(13).

Evaluation of the Architect's conduct and certification

42 We start with an examination of the Architect's conduct in his certification and the certificates he issued at the end stage of the contract. The Architect deposed that it was in order for him to issue the Completion

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Certificate.[29] He categorically denies any collusion or conspiracy between the Respondent and his firm or himself or any improper pressure or interference by the Respondent in relation to or connected with the issue of the Completion Certificate or extensions of time or any other matters in relation to the Buildings.[30] The Respondent says likewise.

43 Clause 31(13) requires that the Architect "shall in all matters *certify strictly* in accordance with the terms of the Contract" [emphasis added]. It is therefore apposite to see what this contract called for in relation to the Completion Certificate and its issuance. Clause 24(4), set out above at [20(a)(ii)], provides that the Architect shall issue the Completion Certificate "when the Works appear to be complete and to comply with the Contract in all respects" whereupon the Contract "shall be deemed to be completed". More importantly, Item 72 of the Preliminaries, also set out at [20(a)(ii)] above, sets out when works can be deemed completed in order for the Completion Certificate to be issued. Item 72 is worth repeating:

> Pursuant to the provisions of the Agreement and Conditions of Contract, *a Completion Certificate* ***will not be issued until***:
>
> a) ***All parts*** of the Works ***are*** in the Architect's opinion ***ready*** *for* ***occupation and for use***.
>
> b) ***All services are tested***, ***commissioned*** *and* ***operating satisfactorily*** as specified in the Contract or the relevant Sub-Contract *including handing over* all *test certificates, operating instructions and warranties*.
>
> c) *All works included* in the Contract *are performed including such rectification* as may be required to bring the work to the completion and standards acceptable to the Architect.
>
> [emphasis added in italics and bold italics]

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29 ROA Vol III (Part I) at p 17-22.

30 ROA Vol III (Part I) at p 29.

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44 The meaning of the phrase in Item 72 para (a): "All parts of the Works ***are*** … ***ready*** for ***occupation and for use*** ..." [emphasis added in bold italics] is clear. It means, in no uncertain terms, that the employer can go into occupation of and use the premises. It is difficult to understand how the Architect could have issued the Completion Certificate on 15 May 2013, certifying contract completion on 17 April 2013,[31] when just two weeks prior to his issue of that Completion Certificate, the Buildings had *failed* the first TOP inspection on 30 April 2013.[32]

45 Mr Pillay rightly points out that anyone in the building and construction industry knows that entering into occupation of and using a building which has not obtained TOP or its Certificate of Statutory Completion is an offence under s 12 of the Act, the relevant provisions of which read:

> **Occupation of buildings**
>
> **12.**–(1) Except as otherwise provided in this Act, no person shall occupy, or permit or cause to be occupied, any building where any building works have been carried out unless the Commissioner of Building Control has issued a certificate of statutory completion in respect of that building.
>
> **...**
>
> (2) Nothing in subsection (1) shall prohibit —
>
> …
>
> (*b*) the occupation by any person of any building in respect of which a temporary occupation permit has been granted.
>
> …
>
> (6) Any person who contravenes subsection (1) … shall be guilty of an offence and shall be liable on conviction –

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31 ROA Vol III (Part B) at p 131.

32 ROA Vol III (Part C) at pp 201-202.

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> (a) to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 6 months or to both; and
>
> (b) in respect of a continuing contravention or failure to comply, to an additional fine not exceeding $1,000 for each day or part thereof the contravention or failure to comply continues,
>
> and if the contravention or failure to comply continues after the conviction, the person shall be guilty of a further offence and shall be liable on conviction of this further offence to a further fine not exceeding $2,000 for every day or part thereof during which the contravention or failure to comply continues after conviction.

46 We therefore cannot comprehend how the Architect could overlook such a basic and fundamental rule. On the contrary, it is the Architect's duty to warn his clients *not* to enter into occupation or use a building unless, at the least, TOP has been obtained. In the present case, the Buildings *additionally* failed to pass a second BCA TOP inspection on 18 June 2013[33] and did not finally obtain TOP until some 5 months *after* the issue of the Completion Certificate.[34]

47 Item 72 para (b) is also unambiguous in its requirements, *viz*, that *all services* have been "tested, commissioned and operating satisfactorily". Yet in the Schedule of "minor" outstanding works attached to the Completion Certificate, the Architect had noted that some basic works and services had yet to be tested, commissioned or checked if they were operating satisfactorily:[35]

> Mechanical & Electrical
> 1. To conduct floor by floor testing and commissioning for the A/C equipment.
> 2. To flush the water pipes.
> 3. To conduct commission for the hot water system.

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33 ROA Vol III (Part C) at pp 206-207.

34 ROA Vol III (Part C) at p 210.

35 ROA Vol III (Part B) at p 132.

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Further, as noted below, on the Respondents own admission, the "operating instructions" or operating "manuals" were not handed over until at least 31 July 2013: see [90], [91(a)] and [91(b)] below.

48 The Architect was brought in as a Third Party by the Appellant and is aware of the allegations made against him and his certification by the Appellant. It is therefore important to examine the Architect's explanation. This can be mainly found at paras 37 to 39 of his affidavit. The Architect deposes at para 37 as follows:[36]

> Paragraphs 35 to 47 of the 1st Ser Affidavit are misconceived and denied. The issuance of the Completion Certificate pursuant to Clause 24(4) of the SIA Conditions is not dependent on whether the Temporary Occupation Permit has been issued. Completion is required before the Temporary Occupation can be issued.

49 This is an incorrect statement of the terms of the contract which the parties had entered into and which the Architect was administering. This paragraph *completely ignores* Item 72 which is unambiguous and governs when a completion certificate can be issued. There is a lack of any explanation as to why he thought Item 72 was inapplicable or that its requirements had been satisfied. Yet, as we shall see, in other paragraphs of his affidavit, he accepts that Item 72 has to be complied with before the Completion Certificate can be issued. In this paragraph, the Architect disingenuously states that "Completion" is required *before* the TOP can be issued.[37] This is either a reference to the practice under older versions of the SIA Conditions (where the contractor was obliged to bring the building to a stage where the architect could apply for TOP

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36 ROA Vol III (Part I) at p 17.

37 ROA Vol III (Part I) at p 17.

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inspection as it was the thinking then that applying for and obtaining TOP was the architect's duty), which are no longer in use, or a mere truism or statement of fact that all the works must have been properly carried out before it can pass the TOP inspection. But this was not the true issue, which the Architect side-steps, and not what this contract stipulated. Moreover, this explanation glosses over *his* errors that were pointed out by the BCA as one of the causes for the Buildings failing the first TOP inspection.

50 The Architect next goes on to depose at para 38 of his affidavit:[38]

> Further, with respect to the issue of non-compliance with statutory requirements pointed out at the TOP inspection, the Third Parties had ensured that the statutory requirements had been complied with, to the best of their knowledge.

51 This paragraph is quite remarkable. The Architect claims he had "ensured the statutory requirements had been complied with" but there is no explanation of what steps he had taken to "ensure" the same. There is no mention of when he carried out his pre-TOP inspections to check if the statutory requirements had been complied with and that he found the works were in order or in accordance with the contract. We pick one example. When the Architect issued the Completion Certificate, he had attached a list of defects to be rectified, which by industry practice are usually minor. Under the heading "MINOR OUTSTANDING WORKS", the Architect had surprisingly listed, amongst others, some significant items which would have obviously caused the buildings to fail their TOP inspection:[39]

> 1. To rectify unlevelled steps at all staircases.

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38 ROA Vol III (Part I) at p 18.

39 ROA Vol III (Part B) at p 132.

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> 2. To rectify un-equal risers at all staircases as per Architectural drawings.
>
> 3, To rectify all parapet walls to be at minimum 1m high as per Architectural drawings.

52 Either the Architect had failed to notice these important non-compliant defects, or, he only realised these defects when the Buildings failed the first TOP inspection and the BCA inspectors had pointed out and recorded these non-compliant items as the basis for refusing to grant the TOP.

53 If it was the latter, then we cannot understand how the Architect could label this as "minor outstanding works". It is anything but minor. Staircases are potentially dangerous structures because tripping and falling on staircases can have very dire consequences including serious physical injury or even death. The BCA's Approved Document: Acceptable Solutions (Version 4.0, July 2011) ("BCA Approved Document"), issued by the Commissioner pursuant to Regulation 27 of the Building Control Regulations 2003 has detailed provisions governing this aspect, especially at clauses E.3.4.1 and E.3.4.2 as to minimum sizes of the 'tread', *ie*, the horizontal part of a step on which a person's foot will rest (275 mm) and the maximum height of 'risers', *ie*, the vertical height of a step (175 mm) in staircases.

54 More importantly, at clause E.3.4.4 of the BCA Approved Document, risers have to be equal save for a 5mm construction tolerance between consecutive steps. Persons involved in the building and construction industry are aware of a known human behavioural trait. Most people only look at a staircase when they negotiate the first few steps. Thereafter their gaze goes elsewhere because they assume the steps are equal in rise or drop. Any non-uniform change in the rise or drop could potentially result in that person tripping or losing his balance and falling.

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55 When the Architect issued the Completion Certificate, he already knew from the TOP inspection that there was an important defect in unlevelled steps and unequal risers in all staircases. As noted above, the Architect acknowledged the existence of these defects in his attachment to the Completion Certificate as requiring rectification: see [51] above. These staircases were thus clearly not safe for use by occupants of the Buildings when the Architect issued his Completion Certificate. We cannot but help point out the rather slick drafting in the Architect's affidavit five paragraphs later. In para 43, the following is slipped in:

> … Other than the minor outstanding works, ***defects that were apparent*** *were also annexed* to the Schedule To Completion Certificate…
>
> [emphasis added in italics and bold italics]

It need hardly be said that if "these defects" (not minor in nature) "were apparent", then he does not say why he nonetheless issued his Completion Certificate on 15 May 2013, certifying completion on 17 April 2013.

56 Para 39 of the Architect's affidavit then inexplicably goes on to depose:[40]

> On 17 April 2013, the [Architect] were of the opinion that Clause 24(4) of the SIA Condition *and Item 72 … had been fulfilled.* The works appeared to be complete and in compliance with the Contract in all respects and all parts of the [Buildings] were in the Architect's opinion ready for occupation. The [Architect] then proceeded to issue the Completion Certificate.
>
> [emphasis added]

57 In this paragraph, the Architect acknowledges that Item 72 has to be fulfilled and states rather enigmatically, and baldly, that it has. As noted above,

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[40] ROA Vol III (Part I) at p 18.

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the requirements of paras (a) and (b) of Item 72 had clearly not been fulfilled. There is no explanation or reasons why he was of the opinion that they had been fulfilled. The Architect also states here that all parts of the works were, in his opinion, "ready for occupation." It will readily be seen that the Architect conveniently ignores Item 72 requiring the works to be "ready for occupation ***and for use***." [emphasis added]. Further, the Architect really has no answer to the fact that on his own attachment to the Completion Certificate, it clearly shows that not "all" services had been "tested, commissioned and operating satisfactorily": see [47] above. That was certainly not the case on 17 April 2013.

58 It can be seen that para 39 of the Architect's affidavit is even more inexplicable when we compare that to para 28, where he was dealing with the extension of time. At para 28, he accepted that: [41]

> Additionally or alternatively, Clause 23(1)(q) [extension of time provision] also applies *because* ***it is clear*** from the Contract Conditions ***at Preliminaries*** 71 and ***72*** Section 1 pg 32 … ***is clear*** *that* ***testing and commissioning*** *for M&E Services installation* ***is required before the works can be certified completed***. …
>
> [emphasis added in italics and bold italics]

This again is an incorrect statement. Item 72 is *not* limited to "M&E Services installation". It stipulates that "*all* services" must be tested, commissioned and operating satisfactorily. Finally, at para 42, in dealing with the late supply of gas, he deposes that the supply of gas is not a requirement for TOP inspection and then states, almost by-the-way, that "the premises were ready for occupation ***and use*** pursuant to Item No. 72(b) of the Preliminaries" [emphasis added]. These contradictory and shifting statements speak for themselves. It clearly

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41 ROA Vol III (Part I) at p 13.

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shows that the Architect cannot defend or explain his issue of the Completion Certificate.

59 It will be apposite to note what the BCA stated on the works failing the 1st TOP inspection. On 30 April 2013, some 15 days *before* the Architect issued his Completion Certificate, the Commissioner of Building Control, wrote to both the Respondent and the Architect stating that the Buildings failed the 1st TOP inspection ("30 April 2013 letter"). The material portion of that letter provides:[42]

> I refer to the site inspection conducted on 30.04.2013.
>
> 2 The following are the non-compliances found during the inspection.

S/No:	**Non-compliance in accordance with the Approved Document**
a)	Failure to comply with requirements at Clause E.3.4.1, E.3.4.2 and E.3.4.4 to i. Steps at all staircases. ii. Steps at landscapes. iii. Steps at swimming pools.
b)	Failure to comply with requirements at Clause H.2.1 at i. Landscape areas.
c)	Failure to comply with requirements at Clause H.3.2.1 to i. Parapet walls at roof. ii. Parapet walls at outdoor deck/pavilion.

[42] ROA Vol III (Part C) at pp 201 to 202.

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d)	Failure to comply with requirements at Clause H.3.4.3 to i. Opening at pavilion

3 The non-compliances listed above are non-exhaustive. Under Section 9 of Building Control Act, *you are required to ensure* that the building works *comply with the regulatory requirements. You should re-conduct a full inspection on the entire development and rectify all non-compliances.* When you have done so, please apply for a re-inspection …

[emphasis added]

60 We have already discussed the construction errors in respect of the steps in the staircases and the relevant clauses of the BCA Approved Document that were infringed in that respect: see [51]–[55] above. We therefore need say no more of them. The remaining clauses of the BCA Approved Document that were infringed are:

H SAFETY FROM FALLING

H.1 OBJECTIVE

H.1.1 The objective of paragraph H.2.1 … is to protect people from injury caused by falling.

H.2 PERFORMANCE REQUIREMENT

H.2.1 Where there is a vertical drop of 1.0 m or more, appropriate measures shall be taken to prevent people from falling from a height.

…

H.3.2 Height of barrier

H.3.2.1 The height of a barrier shall not be less than –

(a) 1.0 m at all locations except for locations indicated in (b);

(b) 900 mm at the lower edge of the window, stairs, ramps and gallery or balcony with fixed seating in areas such as theatres, cinemas and assembling halls.

…

H.3.4 Size of opening

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> …
>
> H.3.4.3 In all buildings, except for industrial buildings
>
> > (a) the size of any opening or gap in a barrier shall not be large enough as to permit the passage of a sphere of a diameter of 100mm; and
>
> …

61 Besides the problem with the height of the risers and the uniformity of the risers and treads on staircases, there were other errors that were made by the Architect *himself* which were picked up by the BCA. The first was in an area at or near the swimming pool of Unit No 12B, where there was a vertical drop of more than 1 metre; contrary to clause H.2.1 there was no barrier to prevent people from falling. This was noted by the BCA as "CYSA [the Architect] missed out the barriers at no.12B-swimming pool". The second also related to barriers where an item is noted as "CYSA missed out barriers at no.12A – pavilion." Further, within that item, it appears that where barriers were provided for, there were also construction errors in relation to the inadequate height of the barriers (see clause H.3.2.1 of the BCA Approved Document). The Architect does not explain these lapses, which he should have picked up when he carried out the pre-TOP inspections.

62 There was one more construction error that was noted: "Opening at pavilion" which contravened cl H.3.4.3 of the BCA Approved Document, *viz*, an opening or gap in a barrier which allowed passage of a sphere of a diameter of 100 mm. The Respondent was asked by the BCA to extend the parapet wall "to maintain the gap at 100mm."

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63 Having had errors in relation to the risers and treads pointed out by the BCA in the first TOP Inspection,[43] one would have expected the Architect to have carried out another careful pre-TOP inspection to ensure that all such errors were rectified. This was especially so as the BCA had stated that their list of non-compliant items was not exhaustive. The Architect clearly did not do so because, in the second BCA TOP inspection on 18 June 2013,[44] further failures to comply with the *same* requirements as to risers and treads were noted by the BCA in another area – the steps at the reinforced concrete flat roof for all units and the last step at the landscaped area of Unit No 12A.

64 Finally, we deal with Mr Thulasidas's contention that cl 24(4) overrides Item 72 of the Preliminaries. With respect, we cannot accept this submission at all. Article 6 of the Articles of Agreement set out the Contract documents. Article 7 provides that the Contract Documents should be read and construed as a whole "and no special priority other than that accorded by law shall apply to any one document or group of documents, nor shall the *contra proferentem* rule apply either to these Articles or to the Conditions of Building Contract." Moreover, the general rule at law in the construction of documents is that all other things being equal, a term specifically drafted for a particular contract takes precedence over a standard term (*Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 at [11] and *Fenice Investments Inc v Jerram Falkus Construction Ltd* [2009] EWHC 3272 at [26]). This rule has been cited with approval by the Singapore Court of Appeal in *Multiplex Construction Pty Ltd v Sintal Enterprise Pte Ltd* [2005] 2 SLR(R) 530 at [26].

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43 ROA Vol III (Part C) at pp 201-202.

44 ROA Vol III (Part C) at p 206-207

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65 Item 72 being a specially drafted term should therefore take precedence over the printed conditions. This can be compared to some other standard form contracts which contain a provision stating that that nothing contained in the contract bills or bills of quantities shall override, modify, or affect in any way whatsoever the application or interpretation of the conditions (see *eg*, HKIA Standard Form of Building Contract (With Quantities)) or have specific provisions setting out which document takes priority over another.

66 In any event, there is no discrepancy between cl 24(4) and Item 72 in the present case. Indeed cl 24(4) requires the Architect to issue the Completion Certificate when the works appear to be complete "and *to comply* with the Contract *in all respects*" [emphasis added]. It cannot be argued that Item 72 is not part of the Contract or that its requirements do not have to be met. In fact the parties do not dispute that Item 72 is contained within Section 1 of the Preliminaries and the Preliminaries in turn form an important part of the contract containing the bills or bills of quantities or schedules of rates or prices or the specifications of works which set out, *inter alia*, details of the works, the contractor's obligations, what equipment will be provided and what will not, requirements for the execution of the works, *etc*, all of which will enable the contractor to more accurately price his works and prolongation expenses. Item 72 can be seen to complement and describe in more detail what the contractor's obligations are, including those in relation to completion.

67 We therefore are driven to the conclusion that the Completion Certificate was very clearly not issued properly under the terms and conditions of the contract and is an invalid exercise of the Architect's powers and duties under this contract. On the facts of this case and the evidence before us at this enforcement stage, it is clear that the Architect issued the Completion Certificate at least without belief in its truth and/or recklessly without caring

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whether it was true or false. The Architect's affidavit and his contradictory and shifting statements only serve to underscore the serious irregularity in his certification and certification process.

Whether the Completion Certificate affected IC 25 and 26

68 Mr Thulasidas argues that whatever went wrong with the Completion Certificate, IC 25 and 26 are different certificates and were issued some time apart.

69 With respect, however, we cannot agree with this argument because first, it ignores the fact that the Completion Certificate is an important milestone certificate under the SIA Conditions and its issue triggers other certificates and milestones at this end-phase of the construction contract. For example, under cl 31(9), the Completion Certificate triggers the release of one moiety of the retention monies less only a reasonable sum to cover the cost of outstanding works. The Maintenance Period also starts to run under cl 27(1) as does the time for the contractor to submit its Final Accounts Documents under cl 31(11). The issue or non-issue of the Completion Certificate has significant consequences on other certificates and/or related issues, including liquidated damages for delay. Secondly, IC 25 and 26 are in themselves questionable. We deal with this in turn.

70 The Architect failed to certify the release of one moiety of the retention sum upon issuing his Completion Certificate, as he should have under cl 31(9) of the SIA Conditions. Clause 31(9) provides:

> Subject to Clauses 25 and 26 of these Conditions in regard to Phased or Stage Completion or Partial Occupation, *one-half of the Retention Monies not yet paid* ***shall be certified*** *as due to the Contractor* ***on the issue of the Completion Certificate under Clause 24.(4)*** *of these Conditions,* less only a reasonable

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> sum to cover the cost of outstanding work (if any) not yet completed pursuant to Clause 24.(5) of these Conditions at the date of the said Certificate. …
>
> [emphasis added in italics and bold italics]

Whilst cl 31(9) allows the Architect to withhold a reasonable sum to cover the cost of outstanding work not yet completed, if any, there is no evidence from the Architect that this was the case or that it was withheld for that reason. Instead, IC 25 was issued some 4½ months after the works were, in the opinion of the Architect, "complete" and complied in all respects with the contract and some 3 months and 19 days after he issued his Completion Certificate. The evidence shows the full moiety of the retention sum was released. In Interim Certificate 24 dated 1 July 2013 ("IC 24"), the retention sum was $644,195.65. In IC 25 (dated 3 September 2013) the retention sum was reduced to $315,945.65. The retention sum released to the Respondent was thus $328,250 or approximately 51% of the retention sum certified in IC 24. There is *no* explanation from the Architect whatsoever, despite his acknowledging in para 36 of his affidavit that 50% of the "retention sum … *had to be released* upon the issuance of the Completion Certificate" (emphasis added). IC 25 clearly did not comply with cl 31(13)'s stricture that the Architect "shall in all matters certify strictly in accordance with the terms of the Contract". The Interim Certificate is invalidly issued and therefore cannot have any temporary finality under the SIA Conditions.

71 We also find it strange that the Respondent did not appear to have made any complaint about the late release of the retention sum, especially since it appears that the Respondent was, on its own admission, in a weak financial

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position: see [17] above. Dennis Tan had this to say in an affidavit filed in related proceedings, *ie*, OS 317/2014:[45]

> The [Respondent], in consideration of EQ Insurance Company Limited issuing the Performance Bond, have in turn executed an Indemnity in respect of the Performance Bond together with myself and another of the [Respondent's] director, Ms Phua Poh Hua. If the Performance Bond is allowed to be called upon, EQ would proceed against us and we can ill afford to pay and will probably be wound up or the Directors bankrupted thus preventing us from continuing with Suit No. 50 of 2014 [ie, the suit commenced by the Respondent for recovery of the sums owed under IC 25 and 26].

72 Most contractors, *a fortiori*, a contractor with financial issues, would be eagerly waiting for this release of a moiety of the retention sum and one would not expect a contractor to remain silent when this not insignificant sum was not being certified for release upon issue of the Completion Certificate. Indeed, the Judge who heard SUM 5454/2014 granted the application for stay of execution of his Judgment precisely because there must have been concerns over the Respondent's financial position: see [18] above.

73 The foregoing would invalidate IC 25. However, the amount certified in IC 25 is also questionable. IC 25 is dated 3 September 2013 and as noted above, certified payment of $390,951.96, of which $328,250 comprised the release of the first moiety of the retention sum under cl 31(9) of the SIA Conditions. IC 26 dated 6 November 2013 certified payment of $189.250.21. If works were complete as of 17 April 2013 and the works complied with the contract in all respects and fulfilled all the requirements of Item 72, why are these sums for work done being certified for payment months after certified completion on the terms of this contract? In so asking, we should not be taken to rule that there can

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45 Excerpt in AEIC of Ser Kim Koi dated 31 October 2014 at [17] (see Dennis Tan's AEIC dated 7 April 2014 in OS 317/2014 (SUM 1731/2014) at [33]).

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never be interim payment certificates after completion. There are a number of valid reasons why such certificates may be issued, including correcting undervaluation of previous certificates (see cl 31(6)), items that were previously missed out by the parties, payment for variations (especially those that were issued late in the course of the project), or claims for work done in the month before completion. The Appellant makes this point in his affidavit:[46]

> … the Completion Certificate is indicative of the fact that the Contract has been completed and performed in all respects. The fact that S$917,228.26 was certified by the Architects in Interim Certificates No. 23 to 26 indicates that there was still a significant amount of work to be done as of the date of Completion as certified by the Architects and not just minor works as suggested by the Architects in their Completion Certificate.

74 It does seem incongruent that if the works were as complete as the contract required and as certified by the Architect, and given the scheme of interim claims and interim payments under the SIA Conditions, interim payment certificates were being issued some 4½ months and 6½ months after contract completion. It is also uncharacteristic for a contractor with financial issues to wait so long after having completed his works to make his interim payment claims. In this regard, it is noteworthy that the Architect offers no explanation in his affidavit. He merely deposes at paras 35 and 51:[47]

> 35. …. The value of works certified in Interim Certificates No. 23 to 26 of $917,228.26 were for works carried out prior to completion or for sums payable as a consequence of completion and are not as the Defendant claims indicative of an alleged "significant amount of work to be done" as at the date of completion".
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> …

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46 Ser Kim Koi's 1st AEIC at [33] (ROA Vol III (Part A) at p 98).

47 ROA Vol III (Part I) at p 22.

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> 51. Interim Certificates No. 25 and 26 were for works completed, and are unrelated to the defects.

75 In one sense, paragraph 51 is true. The certificates are unrelated to the defects. An examination of the "minor" defective items listed in Annexes 1.1 to 1.4 of the Completion Certificate (comprising some 109 pages of photographs with captioned "defects") in relation to Unit Nos 12, 12A, 12B and the external works show just that, *ie*, minor items for rectification, *eg*, ceiling painting patchy, hole at ceiling to patch, remove floor marble stain, timber floor surface damaged, edge of wall painting to touch-up, aluminium window lockset loosen, cabinet doors not flush, aluminium capping loosened, *etc.* These are not works for which payment under the contract is due.

76 It behoves the Architect, whose certificates are being challenged in these circumstances, to furnish an explanation for the payment certified under IC 25 and IC 26 when he filed his affidavit. Although not strictly applicable to the filling of affidavits, it is nonetheless of relevance to note that under cl 31(13) of the SIA Conditions, there is a duty on the part of the Architect to clarify upon either party's request "[i]n any case of doubt", what was or was not taken into account in his certificate. In *Chin Ivan* at [18], this Court stipulated this as one of the requirements that confers temporary finality on the architect's certificates in that his clarification, if requested, would set out the basis of *his* independent professional judgment. Here, in the light of these proceedings, to which he is a party, one would have expected the Architect to explain the basis of the disputed certificates. But, for reasons best known to himself, he has chosen not to do so.

77 We note a second strange feature of this case. Whilst the Architect has given fairly detailed explanations for his time extensions and the alleged defects, in stark contrast, he says very little substantively about the completion and even less about what items were comprised in IC 25 and IC 26: see [74]

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above. We note that instead, it is the Respondent's Dennis Tan who attempts to explain what was being certified for payment under IC 25 and IC 26. It is important for us to point out that where certificates are being impugned, it is not for the Respondent, who is a party to the dispute with the Appellant, to speak for the Architect. In enforcement proceedings, where the temporary finality of his certificates are in question, it is important for the courts to hear from the Architect himself about his certification process and on the certificates he issued; this is especially so where he has been made a party to the action and therefore has the opportunity to explain his position and certification.

78 Accordingly, what the Respondent, (or Appellant for that matter) has to say in these circumstances is of very little weight. Thus if there are serious and legitimate doubts about the Architect's certification, and if the Architect has chosen not to explain his certification, it will often be insufficient for an interested party to do so on his behalf. Nonetheless, without derogating from the foregoing, we shall put that to one side and examine Dennis Tan's explanations contained in his 3rd affidavit dated 30 April 2014. He attributed the amount certified under IC 25 to prime cost ("PC") adjustments. At para 17, he states:

> … The $337,892.94 worth of work was not done after completion. The amount certified was not because of the work being done after completion but because of the PC rate adjustments. The [Respondent] had completed all the PC rate items like marble, tiles, granite, timber parquet, timber decking by Mar 2012 (see under Main Building Works for Interim Valuation from No.22 to No.25 … wherein the amounts were capped at about 95% until PC rates are adjusted on a later date.

Dennis Tan's explanation is not only quite unconvincing, it is instead misleading by making reference across five payment certificates, IC 22 to IC 26, because they stretch from an Interim Valuation ("IV") as of 14 March 2013 (about one month before "completion") to 31 October 2013. We should point

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out that the Interim Certificates do not show the PC items. We have to look at the accompanying Interim Valuation for the "Prime Cost & Provisional Sums" ("the PC Items"). A perusal of the Interim Valuation by M/S Faithful & Gould, the quantity surveyors, shows there was indeed an increase in the PC Items, but that occurred between the Interim Valuation for IC 23 and IC 24. The PC Items increased from $596,015.15 to $788,126.90. However the PC Items in the Interim Valuations for IC 24 and IC 25 *remain unchanged* and in IC 26 there was only a very small increase of $19.19 compared to IC 25:[48]

Interim Certificate/ Interim Valuation	PC Items Valuation	Change
IC 22 (19 April 2013) IV 22 (14 March 2013)	$583,229.26	-
IC 23 (5 June 2013) IV 23 (30 April 2013)	$596,015.15	+$12,785.89
IC 24 (1 July 2013) IV 24 (30 May 2013)	$788,126.90	+$192,111.75
IC 25 (3 Sept 2013) IV 25 (31 July 2013)	$788,126.90	-
IC 26 (6 Nov 2013) IV 26 (31 Oct 2013)	$788,146.09	+$19.19

So there were clearly no PC rate adjustments in IC 25.

79 Dennis Tan's attempt to then suggest the PC rate adjustments were under the Main Building Works is also misleading. First, there is already an item for PC Items in the Interim Valuation and, as noted above, except for an increase between IC 23 and IC 24, the PC Items remains, in effect, constant from IC 24

[48] ROA Vol III (Part J) at p 154 and ROA Vol III (Part K) at p104.

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to IC 26. Secondly, the Main Building Works were 95.73%, 95.5% and 95.51% (for Unit No 12, 12A and 12B respectively) complete by value in Interim Valuation 22, on which IC 22 was based, and this figure remained constant from IC 22 to IC 25. It was only in IC 26 that the Main Building works increased to 100% by value:

(a) Interim Valuation No 22 (on which IC 22 dated 19 April 2013, was based) for Unit Nos 12, 12A and 12B were respectively:[49]

(i)	Contract sum:	$2,662,770.09
	Contractor's Claim:	$2,549,179.32
	Valuation:	95.73%
(ii)	Contract sum:	$2,563,744.00
	Contractor's Claim:	$2,448,269.62
	Valuation:	95.50%
(iii)	Contract sum:	$2,423,912.34
	Contractor's Claim:	$2,315,084.55
	Valuation:	95.51%

(b) Interim Valuation No. 23, 24[50] and 25 (on which IC 23, 24 and 25 respectively were based) all contain identical figures on completion by value as those in (a)(i), (ii) and (iii) above for the three units.[51]

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49 ROA Vol III (Part K) at p 70.

50 ROA Vol III (Part C) at p 106.

51 ACB Vol II at p 111.

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(c) Interim Valuation No 26 (on which IC 26 dated 3 November 2013 was based) for Unit Nos 12, 12A and 12B were all 100% completed by value: [52]

(i)	Contract sum:	$2,662,770.09
	Contractor's Claim:	$2,662,770.09
	Valuation:	100%
(ii)	Contract sum:	$2,563,744.00
	Contractor's Claim:	$2,563,744.00
	Valuation:	100%
(iii)	Contract sum:	$2,423,912.34
	Contractor's Claim:	$2,423,912.34
	Valuation:	100%

80 The significance of the above figures is first that the three units were only 95.73%, 95.5% and 95.51% complete respectively by value when IC 22 was issued on 19 April 2013 (with valuation as at 14 March 2013), which was 2 days after the works were completed on 17 April 2013, and remained at the same level of completion by value through to IC 25 which was issued on 3 September 2013, some 4½ months after the Architect certified the works were complete. Secondly, this fact, *ex facie*, shows that there were no further works done between the issue of IC 23 dated 30 April 2013 and IC 25 dated 3 September 2013 as valued by the quantity surveyor because the level of completion of these units by value did not change. On the evidence before us, IC 25's $62,701.96 (the remainder after deducting $328,250 of retention monies released) could not have been for any PC rate adjustments.

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[52] ACB Vol II at p 117.

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81 For the above reasons, it is very clear that IC 25 was not issued strictly in accordance with the terms of the contract, and accordingly cannot be accorded temporary finality.

82 We turn now to IC 26. Like IC 25, we find IC 26's certification to be questionable for the same reasons set out above. Moreover, if completion took place on 17 April 2013, then the maintenance period started to run from 18 April 2013 and would end on 17 April 2014. Under cl 31(11)(a), the Respondent had to submit his Final Account Documents to the Architect and quantity surveyor showing the final value of all works carried out by him, including variations, together with all supporting documents. If completion had truly taken place in accordance with the contract, then one can legitimately ask what was being certified for payment some 6½ months after completion. In the absence of any explanation, one would expect, especially for this Respondent, to be busy with his Final Account Documents. IC 26 dated 6 November 2013 certified payment of $189,250.21 for work carried out by the Respondent. As noted above at [74], except for the laconic assertion that this payment was for completed works, the Architect has chosen *not* to explain what was certified in IC 26. If the Disputed Certificates were indeed for work that was completed before or by 17 April 2013, then the earlier certificates must have been erroneous. There is no explanation why these sums were not included in the appropriate earlier interim payment certification.

83 Again, it is the Respondent, not the Architect, who tries to furnish the explanation. The Respondent maintains no new work was done but instead offers two reasons for the sum certified for payment in IC 26:

(a) First, the sum on IC 26 was due to completed works and "[t]he PC rate adjustments were made between the QS Consultants and the

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> [Respondent] when the project was nearing completion and has no bearing on the interim progress".[53]
>
> (b) Secondly, the certified sum for the M&E works contained an "omission of $205,605.41" and was due to the "submission of operation manual and drawings and the regularization of the contract sum arising from variation works."[54]

84 With respect to (a), for the same reasons set out at [77] to [80] above, except for $19.19, the sum certified in IC 26 cannot be due to PC rate adjustments. As noted above, whilst there was a large increase in PC Items between IC 23 and IC 24, and, in effect no increase in PC Items from IC 24 to IC 26, there was no increase in the percentage completion of the buildings from IC 22 to IC 25.

85 As noted above, the PC Items in Interim Valuation 25 and 26 only increased by $19.19. PC Items rate and adjustments therefore cannot account for the amount certified in IC 26. There was also no such claim or explanation by the Architect on these prime costs adjustments in his affidavit, which is again strange because cl 4.4 of Section B, Scope of Works, vol 1B of the contract provides that:[55]

> The PC Sum shall only be adjusted through a variation arising from the Architect's instructions.

Needless to say, no such Architect's instructions were in the documents before us.

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53 Dennis Tan's 3rd AEIC dated 30 April 2014 at [17(iii)] (ROA Vol III (Part K) at p 14).

54 Dennis Tan's 3rd AEIC dated 30 April 2014 at [18] (ROA Vol III (Part K) at p 15).

55 ROA Vol III (Part B) at p 70.

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86 On the face of these Interim Valuations, works were still being valued well after the purported 'completion' under cl 24(4) and Item 72. If so, then the works could not have been 'complete' under cl 24(4) and Item 72 as of 17 April 2013, or, if they were indeed 'complete' and complied in all respects with the contract, then the Architect has not explained why these sums for work done came to be certified so many months after contract 'completion'. The Respondent's explanation for these figures is inconsistent with the evidence presented. It should also be noted that of the documents exhibited by the Respondent, there are many missing documents, and some important documents that are exhibited are not complete.

87 The Respondent has attempted to support its explanation by annexing a table in Dennis Tan's 3rd affidavit, entitled "Leedon Park – Comparison Table of Interim Valuation No. 25 & 26". Here, the Respondent purports to provide some figures to account for the PC rate adjustments.[56] First and foremost, this table is that of the Respondent, not the Architect or the quantity surveyor. Secondly, these figures and remarks cannot be readily matched against the figures reflected in the "Prime Cost & Provisional Sums" column on Interim Valuation No 26.

88 A similar trend appears in the accounting of the M&E works:

(a) In Interim Valuation No 23 ("IV 23"),[57] on which IC 23 was based, as of 30 April 2013, the M&E works for the Buildings was

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56 ROA Vol III (Part K) at pp 77–78.

57 ROA Vol III (Part J) at p 148.

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claimed and valued at $1,980,795.78 and this comprised 86.35% of the contracted sum for M&E works.

(b) In Interim Valuation No 24 ("IV 24"),[58] on which IC 24 was based, as of 30 May 2013, the M&E works for the Buildings was valued at $2,002,712.59 which comprised 87.3% of the contracted sum, an increase of $21,916.81 or 0.95% of the contracted sum.

(c) In Interim Valuation No 25 ("IV 25") [59] on which IC 25 was based, as of 31 July 2013, the M&E works for Buildings was valued at, $2,031,200.59, which comprised 88.54% of the contract sum, an increase of $28,488 or 1.24% of the contracted sum.

(d) In Interim Valuation No 26 ("IV 26"),[60] on which IC 26 was based, as of 31 October 2013, the M&E works for the Buildings had suddenly increased to $2,267,956 or 98.86% by value of the contracted sum. This was an increase of $236,755.41 or 10.32% of the contracted sum.

89 These facts raise similar questions but with heightened significance because first, these are M&E items, and secondly they are explicit requirements stipulated in Item 72. The M&E works were only 86.35% complete by value as of 30 April 2013. They increased marginally by 2.19% through IC 24 to IC 25. Unless there were omissions or sums withheld over quality issues, of which no evidence at all has been proffered, it defies belief that at 86.35% completion by

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58 ROA Vol III (Part J) at p 154.

59 ROA Vol III (Part J) at p 160.

60 ROA Vol III (Part J) at p 166

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value, all services, including M&E services, could have been tested, commissioned and found to be operating satisfactorily. If at all so, then there is no explanation as to the sudden increase of M&E work by 10.32% in IC 26. Needless to say there is no explanation from the Architect or the M&E Consultant.

90 Although it is not for the Respondent to explain the Architect's certification, again the Respondent has attempted to explain the figures by stating that:[61]

> … the omission of $205,605.41 is separated under Interim Valuation No.26 whereas it was still under M&E Works in Interim Valuation No.25 … In fact, the amount certified for Interim Valuation No.26 was only $31,150.00 because the physical works were already completed before 17.4.13. This certified sum is for the submission of operation manual and drawings and the regularization of the contract sum arising from variation works …$236,755.41 worth of M&E work was not done after completion.

91 This explanation by the Respondent is difficult to understand or follow but the following points can be made:

(a) The first point to note is the admission by the Respondent that IC 26's payment for M&E items was for the submission of "operation manuals". This means Item 72(b) was not fully complied with until after IV 25 which valued works as at 31 July 2013.

(b) The next point of note is the Respondent's cryptic remarks referring to an omission of $205,605.41 which "was separated" in IC 26 whereas it was "still under M&E works in [IC 25]". The Respondent

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61 Dennis Tan's 3rd AEIC dated 30 April 2014 at [18] (ROA Vol III (Part K) at p 15).

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then states that the net certification for M&E works in IC 26 was only $31,150 which was for the submission of operation manuals, drawings and "the regularization of the contract sum arising from variation works". It is difficult to make much sense of these statements.

(c) On their face, the interim certificates (as is usual in the industry) do not have a sufficient level of breakdown to validate the first point made in Dennis Tan's statement above at (b), *eg*, it does not contain a separate M&E component, let alone the figure $205,605.41, as M&E works are within the item: "Work carried out by Contractor: $11,334,625.80" (for IC 25).

(d) When we turn to the immediate underlying document, the interim valuation by the quantity surveyors, IV No 25 only shows the M&E works as a one line item containing the M&E Contract Sum, the Contractor's Claim, the Valuation and Remarks. It is important to note that it *does not show* an omission of $205,605.41 since the M&E Contract sums remains at $2,294,002 and the Respondent's Claim and QS Valuation stands at $2,031,200.59 (and in IV 24, the same M&E Contract sum appears with a Contractor's Claim and QS Valuation of $2,002,712.59). There is no other notation showing an omission of that nature or sum on the rest of that document comprising IV 25.

(e) In IV 26, although the same one-line M&E Contract Sum of $2,294,002 is stated, as noted before, the Contractor's Claim and Valuation by the QS is now $2,267,956.00, an increase of $236,755.41 which is 98.86% of the ME Contract Value. However, we now find the $205,605.41 figure stated by Dennis Tan in IV 26. It appears as Item 7 variations at (b) where there is an omission of $205,605.41. No such

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omission appears in the earlier interim valuations. Half of Dennis Tan's first point is correct – we do find that omission in IV 26. However his point that the $205,605.41 omission in IV 25 was under M&E Works is not correct.

(f) We now move down a further level, since these are M&E Works, to examine the M&E consultants' valuation and payment recommendations ("M&E Valuation"); again some, but not all or complete copies, are exhibited in Dennis Tan's affidavit.

(g) As a preliminary point, the M&E Valuations are confusing because they carry the same progress claim number 26 but have different dates which seem to indicate that M&E Valuation No 26 dated 12 August 2013[62] should be No 25 and the M&E Valuation No 26 dated 30 September 2013[63] is properly numbered 26. We treat this accordingly and although someone has written in manuscript "25" for both documents, we ignore this manuscript notation.

(h) M&E Valuation No 25 shows:

(i) the M&E Original Contract/Sub-Contract Value at $2,294,002 which is, as expected, consistent with the figure set out in IV 25, and where, as noted above, as at 31 July 2013, the amount claimed and valued was $2,031,200.59 or 88.54% of the contract value.

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62 ROA Vol III (Part K) at p 105.

63 ROA Vol III (Part K) at p 103.

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(ii) it records, for the first time, Variations (Additions) EI 01 to EI 04 amounting to $218,106.59 and, as one would expect, an increased Present Contract/Sub-Contract value by that amount to $2,512,108.59.

(iii) the previous M&E Valuation, numbered 24 and dated 6 June 2013[64] states no variations orders issued "to date"; unless there is an explanation put forward, and there is none, the conclusion to be legitimately drawn is that EI 01 to EI 04 were issued after M&E Valuation 24; we note that EI 01 to EI 04 were not put in evidence although they could have shed some light on this.

(iv) This raises questions as to what M&E works were being ordered at this stage, at or more than 3½ months after works were certified "complete". No explanation has been given by any party.

(v) We should in fairness point out that there *may* be an answer at a document entitled Cost Report No 6 which carries the date 15 January 2013[65] (but which we note may not be the full document), where there are items with sums corresponding or approximately corresponding to those found in these EIs:

(A) EI 01 for $4,635 has a corresponding sum in this document against S/No 26, AI No 18, "Additional of Emergency Lights" with the remarks "Regularize

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64 ROA Vol III (Part C) at p 186.

65 ROA Vol III (Part H) at p 131.

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Engineer instruction; M & E 01, as advised by M&E Engineer";

(B) EI 02 for $194,800.59 has an approximate corresponding sum in this document at S/No 25, AI No 16 where the first line carries the words: "Omission of Provisional Sum ($400,000)" and the second line has "Supply and delivery of light fittings and accessories $196,748.60" and with similar remarks: "Regularize Engineer instruction; M & E 02, as advised by M&E Engineer";

(C) EI 03 for $2,640 has a corresponding sum in this document against S/No 27, AI No 23 with the words: "Supply and install water sub-meters for swimming pools" and with similar remarks: "Regularize Engineer instruction; M & E 03, as advised by M&E Engineer"; and

(D) EI 04 for $16,031 has a corresponding sum in this document at S/No 23, AI No 3 with the words: "Additional jacuzzi jet" and with similar remarks: "As advised by M&E Engineer".

(vi) This raises more questions than it provides possible answers. The obvious question arises from the discrepancy in the date of this document and the dates recorded in the M&E Valuations for the EIs. There is no explanation as to the nature of this document, what it represents or whether AI means Architect's Instructions under the SIA Conditions or just costings for consideration of these items and not necessarily

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items that were in fact ordered and installed. It also does not tell us whether the works comprised in these items were carried out or not and if so when. If these were variations ordered by January 2013, then at least IC 22 (19 April 2013) and the interim certificates after that, and probably a few interim certificates prior to that, were wrong and under-certified. This would include IC 23 and IC 24. Importantly, we do not know if this is a complete document and equally importantly, there were other items in this document which do not appear in the EIs set out in M&E Valuation No 25 as one would expect, *eg*, S/No 28, AI No 25 with the description: "Supply and delivery of light fittings and accessories", "21,453.421" and with the remarks: "As advised by M&E Engineer".

(i) M&E Valuation No 26 shows the Original Contract/Sub-Contract Value at $2,294,002 as well as EI 01 to EI 04, but there is now an EI 05 which records an omission of $423,712 thereby bringing the revised M&E subcontract value down to $2,088,396.59. EI 05 has also not been put in evidence. This raises the following doubts:

(i) Why was such a large omission being effected by an EI at this late stage? There is no explanation as to what these *M&E omissions* comprised of. Importantly, if the contract works were completed as of 17 April 2013, that there can be an omission of this size and at this stage cries out for a compelling explanation. It is possible for works to be omitted for various reasons including reducing the amount of works for cost or aesthetic considerations or because they were no longer needed or because the contractor cannot supply or do the works or that parts of the

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M&E works were no longer necessary. Reasons like this should bring about an omission by an EI at a much earlier point in time and *before* completion. Unfortunately the Architect and M&E consultant have chosen to remain silent.

(ii) Although Dennis Tan seems to suggest a specific omission or omissions amounting to $205,605.41 that was within IC 25, which as we have said above cannot be the case, it seems that that figure comes from deducting $218,106.59 comprised in EI 01 to EI 04 (issued after 6 June 2013) from this omission of $423,712 by EI 05 in or around 30 September 2013.

(iii) Importantly, if an omission of this large sum occurred before completion on 17 April 2013, or at some earlier stage and was being accounted for only in M&E Valuation No 26 and/or IV 26, in the sense of reducing the M&E Contract Sum only at that stage, then the previous valuations of works done by the M&E Consultants and the Quantity Surveyors were erroneous and any Interim Certificate based on these valuations would be similarly erroneous and invalid and certainly could not be clothed with temporary finality under cl 31(13); $423,712 is an omission of 18.47% of the original M&E Sub-contract sum or 16.86% of the revised M&E Sub-contract value after adding EI 01 to EI 04.

92 It may well be the case that at the substantive or final determinative arbitral or court proceedings matters will be clearer with all the relevant and complete documents being produced and the parties are cross-examined. However, at this stage, based on what appears in IC 26 and its immediate

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underlying documents, there are serious irregularities and unexplained discrepancies that deprive IC 26 of any temporary finality.

93 Besides these serious irregularities, and the fact that the maintenance period as set out in the Completion Certificate was clearly wrong, there is another glaring omission. The Architect ignores delays and, as a consequence of delay, liquidated damages. Whilst the Architect has dealt in some detail with the extension of time in paras 17 to 34 of his affidavit,[66] he dismisses the concomitant issue of delay with great brevity in para 41 of his affidavit:

> … the [Architect] certainly did not collude with the [Respondent] to avoid any liability on the [Respondent's] part for liquidated damages or to defraud the [Appellant]. …

94 The Architect explains he disallowed any extension of time for alleged delay on marble confirmation, changes in marble selection and cutting sizes but explains that he allowed a total of 55 (40 + 15) days extension due to the delays in testing and commissioning of M&E services as a result of Singapore Power's delay in turning on the power supply.[67] There were no other pending applications for extension of time and the Architect certified that the extended time for completion was 17 April 2013.

95 If the works were not 'complete' under cl 24(4) and Item 72 as of 17 April 2013 under the terms of the contract, then the works have been delayed and the consequence would be that liquidated damages becomes due. This would be of significant financial consequence if completion in accordance with the contract, and in particular Clause 24(4) and Item 72, only occurred on 16

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66 ROA Vol III (Part I) at pp 9 - 17.

67 ROA Vol III (Part I) at pp 9 - 17.

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September 2013[68] when the buildings achieved the TOP. The period of delay would then be significant. If, (i) as is undeniable, TOP was finally obtained only on 16 September 2013, (ii) if, testing and commissioning for M&E installation is required before completion, as the Architect admits in para 28 of his affidavit, (iii) if there were M&E and other services that had yet to be tested, commissioned and found to be operating satisfactorily as at 17 April 2013, as noted in the Completion Certificate, and (iv) there were no outstanding applications for extension of time, then it must follow that liquidated damages must have started to run from 18 April 2013.

96 It should be noted that the supply of gas to the Buildings was not tested, commissioned and found to be satisfactory when the Completion Certificate was issued. Dennis Tan himself admitted that the gas supply was only tested on 6 August 2013, close to three months after the Completion Certificate was issued.[69] We have also referred to the evidence of delayed production of the operating manuals, a requirement for completion under Item 72(b). It goes without saying that duly certified liquidated damages would be available as a set-off against any sums certified due to a contractor.

97 Lastly, it is also clear that the Architect was partly responsible for the Buildings failing the TOP inspections: see [61] and [62] above. Both the Respondent and the Architect are silent as to what was done to remedy this. In a normal case, there would have been an instruction from the Architect to the Respondent to carry out these additional works. There would then have been an attendant extension of time and payment for variation work. These additional

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68 ROA Vol III (Part C) at p 211.

69 Dennis Tan Chong Keat's 2nd affidavit dated 7 April 2014 (ROA Vol III (Part I) at p 226.

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works must have been carried out otherwise TOP would not have been eventually obtained. No doubt all these issues will be explored at the substantive hearing stage.

98 In view of the foregoing, the Architect was clearly in breach of cl 31(13) when he issued IC 25 and 26 as they were not issued strictly in accordance with the terms of the contract. Moreover, in our judgment, when the Architect issued these certificates, he could not have had any belief in their truth or he did so recklessly without caring whether they were true or false. The Disputed Certificates have thereby lost the temporary finality that would otherwise have been conferred on them by the SIA Conditions.

Whether the other defects in the Buildings removed temporary finality

99 Our reasons and conclusions above are sufficient to dispose of this appeal. Nonetheless, for completeness, and for the avoidance of doubt in future cases, we will deal with the other arguments raised by the Appellant.

100 Mr Pillay submits that the Architect was guilty of reckless certification on the facts of the case and that this amounts to fraud under cl 31(13). First, Mr Pillay says the Architect issued the Completion Certificate despite there being extensive defects. These defects are all listed and photographed by an independent building surveyor to give substantiation to this allegation: see [20(b)] above. It is true that there are numerous defects listed in this report and equally numerous photographs allegedly evidencing this state of affairs. Mr Pillay also points to the evidence, including Daniel Tay's Report which states that the wrong type of soil, clayey sub-soil and not loamy soil as called for under the specifications, was provided. Yet the Architect went on to certify acceptance and payment for these works. Mr Pillay also points to wrong-sized timber

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decking being provided, *viz*, 10 mm thick instead of the 15 mm specified by the Architect, yet they were accepted and duly certified by the Architect. In response to these allegations, the Architect states in para 43 of his affidavit that "the alleged defects … are … minor and are not uncommon for newly completed projects." The Architect then goes on to set out his disagreement with the Appellant's allegations in paras 43 to 52 and 61 to 63 of his affidavit. The Respondent broadly maintained that the works were not defective and denied that they were at fault.[70] We note the Respondent failed to meet these allegations other than in generalised terms.

101 Notwithstanding this, on the evidence before us, we cannot accept any of these factors as being valid reasons in themselves to withhold temporary finality from IC 25 and 26. As we have noted at [28] above, at the enforcement stage, the court is not concerned with the merits of the certificates. The court will not go into whether, *for instance*, the soil was loamy soil or not or whether it complied with the specifications. Nor can the court go into whether the timber decking was 10 mm or 15 mm or whether the specification called for 10 mm or 15 mm thick pieces of timber. To do otherwise would be to drive unwarranted inroads into the principle of temporary finality that is embedded in cl 31(13). "Opening up" the Architect's certificates must be left to substantive final determinative arbitration or court action.

102 Payment certificates however, are of a different nature from the kind of certification under discussion here. On their face, payment certificates deal with resultant totals and sub-totals, the details of which do not appear on the payment certificate itself. For the supporting figures, breakdown or calculations, one has

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70 See *eg*, Plaintiff's Supplementary Submissions before the AR.

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to look to the immediate underlying or supporting document. This is invariably the interim valuation compiled by the project quantity surveyor. This finds support in practice because in all well run construction contracts, the interim valuation is attached to or issued with the payment certificate. This interim valuation will also contain remarks as to why a particular claim has been paid in part or not paid because, for example, it was rejected for non-compliance with the specifications. These remarks and explanations in the interim valuation often comprise the payment response for adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). In turn, for special components like the M&E works, one goes down further to the immediate underlying document, the M&E engineer or consultant's valuation. This does *not* amount to "opening up" the payment certificate. First, the figures in these sets of documents either add up or they do not. There is no grey area in arithmetic. Secondly, and importantly, the Architect has chosen not to explain or clarify his certification. Thirdly, the court looks at what is written on the face of these documents and does not examine, *eg*, the stated reason for an omission of an individual item, unless there is something so obviously wrong with that statement that it cannot, on any basis, be true or correct.

Conclusion

103 Every case must depend on its own special facts. Whilst we will not lay down a hard and fast rule to say there can never be a case where the evidence, as distinct from the process of certification and proper certification strictly in accordance with the terms of the contract, is so clear as to support a *prima facie* finding of fraud or recklessness or irregularity in relation to the merits or contents of an architect's certificate under the SIA Conditions, such a case must be rare and quite exceptional.

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104 This case is exceptional in our view and findings. It must be seen against what must be numerous construction projects contracted on the SIA Conditions which are completed without such serious irregularities and errors in certification. What this case does unfortunately illustrate is that some architects, like those in *Lojan Properties* and *Chin Ivan*, project their profession in a very poor light when they administer their contracts with such disregard for its terms and conditions and which are, after all, those of a standard form put forward by their own professional organisation. In the vast majority of cases of this nature, it is the architect, (albeit with assistance from the quantity surveyors), who compiles and puts forward the construction contract, to the owner and contractor, for execution. To then disregard, in a sense their own contract terms and conditions or to display ignorance of some of its terms or content seems to be very unfortunate and tarnishes the good name of their profession.

105 Needless to say, the defence based on fraud and serious irregularity is not, at this stage, a complete one, and this should not preclude the Appellant from having their defences tested at trial. Our findings at this enforcement stage, depriving IC 25 and IC 26 of temporary finality, will necessarily be *prima facie* and non-conclusive at the substantive and final determination of the disputes between the parties (see *The "Chem Orchid" and another matter* [2016] SGCA 04 (*The "Chem Orchid"*) at [47] and [48]; *The Bunga Melati 5* [2012] 4 SLR 546 at [127]-[129]).

106 For the reasons set out above, we allow the appeal. The judgment and orders for costs entered into below by the AR and the Judge are set aside and the Appellant is to have his costs here and below (including the costs of and incidental to the application in SUM 5454/2014 which were reserved to this Court: see [17] above), such costs to be agreed or taxed. There will be the usual consequential orders for the release of monies furnished by the Appellant as

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security for costs for this appeal and the sum of $640,816.32 ordered by the Judge to be paid into court by the Appellant are to be paid out to the Appellant.

Chao Hick Tin	Andrew Phang Boon Leong	Quentin Loh
Judge of Appeal	Judge of Appeal	Judge

Mohan Reviendran Pillay, Yeo Boon Tat and Danna Er (MPillay) for the appellant;
Thulasidas s/o Rengasamy Suppramaniam (Ling Das & Partners) for the respondent.

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