

Introduction

One of the unique features of the Singapore Institute of Architects Articles and Conditions of Building Contract (“the SIA Contract”) is that the contractor is assured of periodic valuation of works carried out and amounts expressed to be payable in the interim certificates. In the event that the contractor receives no payment from the employer by the due date, the provisions of the contract expressly confer upon the contractor the right of a court action by way of a summary judgement, except in the case of fraud, improper pressure or interference.

Under the SIA Contract, the temporary finality principle of an architect’s certificate is derived from the following provisions :

Clause 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 Judgement or Interim Award or otherwise shall, in the absence of expression provision, be given to all decisions and certificates of the Architect (other than a Cost of Termination Certificate or a Termination of Delay Certificate under Clause 32.(8) of these Conditions), whether for payment or otherwise, until final judgement or award such decision or certificates shall (save as aforesaid and subject to Sub-Clause (6) hereof) 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 a fact ruled, in his certificates or otherwise. The Architect shall in all matters certify strictly in accordance with the terms of the Contract. In any case of doubt the Architect shall, at the request of either party, state in writing within 28 days whether he has as a fact taken account of or allowed or disallowed or ruled upon any matter in his certificates, if so identifying any certificate and indicating the amount (if any) taken into account or allowed or disallowed, or the nature of any ruling made by him, as the case may be.”

Clause 37(3)

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)...

EFFECT OF FRAUD IN ARCHITECT'S CERTIFICATES

The comments of the draftsman in the Guidance Notes issued together with the SIA Contract pertaining to the architect's powers are as follows :

"...The scheme of the present contract is to ensure that virtually all areas of possible financial controversy, except most cases of breach of contract by the Employer and all terminations of the Contract by either party, are to be regulated for the time being by the certificates of the Architect...In all cases...the contractual effect of these certificates is to bind both employer and contractor, but only until final judgement or final award in any dispute between them – both parties will therefore be able to use the summary procedures in the Courts (or interim awards by arbitrators) in order to enforce the certificates, at least for the time being.... .."

Clause 31(13) read together with Clause 37(3) mandate that the certificates bind parties temporarily until the certificates are opened up and resolved at the final determinative arbitral or court proceedings. It follows that an arbitrator or the court would have the power to draw its own inferences and make decisions based on evidences admitted at a hearing or trial and disregard any summary judgement which may have been granted at an earlier stage of the proceedings.

The provisions were drafted with the intention to ensure that the cash flow of the contractors is protected and not impeded by spurious set-offs and cross claims by conferring what is commonly known as "temporary finality" on the architect's interim certificates.

The concept of "temporary finality" entrenched under the SIA Contract therefore serves an important purpose during the early days where the building and construction industry was beleaguered with financial controversies and payment disputes. However, with the advent of the statutory adjudication regime for progress payments under the Building and Construction Industry Security of Payment Act ("the SOP Act") and a process which places great emphasis on speedy and low cost proceedings, there have been relatively few cases concerning the temporary finality status of interim certificates under the SIA Contract which had landed in courts.

Recently, the courts had the opportunity to revisit these issues in *Ser Kim Koi v GTMS Construction [2016] SGCA 7*. The Court of Appeal ("CA") was concerned with issues relating to the validity and enforcement of two of the Architect's interim certificates ("the Disputed Certificates"). The building contract incorporated the SIA Articles and Conditions of Building Contract (Lump Sum Contract)(9th Edition, September 2010)("the SIA Conditions").

Background Facts

Ser Kim Koi ("the Appellant") employed GTMS Construction ("the Respondent") to build three two-storey detached houses. Chan Sau Yan Associates ("the Architect") was engaged for the purposes of the building project.

Disputes arose between parties over completion of works, extensive defects and non-compliant works. The Appellant subsequently refused to make payment of the sums certified under the Disputed Certificates and alleged that the same were tainted by fraud, improper pressure or interference.

EFFECT OF FRAUD IN ARCHITECT'S CERTIFICATES

As payment was not forthcoming, the Respondent initiated proceedings for payment by way of summary judgement pursuant to Clause 31(13) of the SIA Conditions. The Appellant filed its defence and counterclaim against the Architect and the Respondent for the alleged numerous defects, delays and conspiracy. The Architect and his firm, Chan Sau Yan Associates, were brought in as third parties by the Appellant.

The Respondent succeeded in its application for summary judgement. The Assistant Registrar ("AR") hearing the application was not satisfied that the Appellant had made out a case premised on the grounds of fraud, improper pressure or interference.

Dissatisfied with the AR's decision, the Appellant appealed to the High Court. The learned judge upheld the AR's decision and in reaching his conclusion, he emphasised the importance of according the Disputed Certificates temporary finality as "cash flow is the lifeblood of the construction industry".

The Appellant appealed to the CA against the learned judge's decision and thereafter, also took out an application for stay of execution of the judgement on the basis that the Respondent was in a weak financial position and there would be concerns of recovery in the event that the Appellant's appeal before the CA was successful.

At the conclusion of the appeal, the CA was satisfied that the Disputed Certificates were affected by the serious irregularities and denied the certificates of their temporary finality status. Accordingly, the CA allowed the appeal.

Proceedings before the Court of Appeal**Key Issue**

The key issue to be considered by CA was whether the Disputed Certificates were procured fraudulently such that they lost their status of temporary finality under Clause 31(13).

At the appeal, the Appellant no longer relied on improper pressure and interference to resist summary judgement. Instead, the Appellant pivoted its arguments solely on fraud based on the reckless conduct of the architect in his certification.

1. The architect had issued the Completion Certificate prematurely ahead of the buildings' Temporary Occupation Permit ("TOP") and notwithstanding that the conditions for issuance of Completion Certificate had not been met.
2. There were issues of the architect's honesty in relation to the schedule attached to the Completion Certificates which recorded only minor outstanding defects when there were in fact extensive defects based on a report prepared separately by a building surveyor.
3. The architect had acted recklessly in certifying payment for non-compliant works and treating them as being completed in accordance with the Contract.

The CA accepted that whilst the concept of temporary finality can be misused as a shield for excesses or abuses of power, the exceptions of fraud, improper pressure or interference would act as a safeguard.

EFFECT OF FRAUD IN ARCHITECT'S CERTIFICATES

The Respondent contended that :

1. The Disputed Certificates should be discerned from the Completion Certificate, further they were issued apart from one another.
2. There was no cogent evidence that fraud had been committed.
3. The architect had a “genuine honest subjective belief” that the works were substantially completed and the defects were trivial and minor.

Importance of Proper Certification

The case builds upon the principles pronounced in *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] 1 SLR(R) 622 and to a larger extent, *Chin Ivan v HP Construction & Engineering Pte Ltd* [2015] 3 SLR 124 (“*Chin Ivan*”). These cases also shed light on the requisite level of proof required to establish if temporary finality is unravelled due to fraud or irregularity and the extent in which courts would scrutinize the integrity of the certification process leading up to the interim payment certificate and the importance of proper certification strictly in accordance with the terms of the contract.

The CA first approached the matter with respect to the compliances requirements in Clause 31(13) and made the following observations that were expressed by the court in *Chin Ivan* which dealt with the principle of temporary finality :

1. The certificate must be issued “in the absence of fraud or improper pressure or interference by either party”
2. It must be issued “strictly in accordance with the terms of the Contract”
3. The need for the Architect to clarify, upon either party’s request “in any case of doubt”, what was or was not taken into account in his certificate
4. A properly-issued architect’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)

The CA in the present case also expressed the view that :

“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 judgement.”

The CA agreed with the Appellant’s submission that recklessness in certification, ie carelessness whether it is true or false, can amount to fraud under clause 31(13) of the SIA Conditions. However, the validity of a certificate would not simply be undermined by a mere allegation of irregularity. Cogent evidence is required before a prima facie case of irregularity can be established.

EFFECT OF FRAUD IN ARCHITECT'S CERTIFICATES

Evaluation of Architect's Conduct and Certificates

The CA proceeded to examine the architect's conduct and certification process and concluded that the Completion Certificate was not properly issued under the terms and conditions of the Contract and is an invalid exercise of the Architect's powers and duties under the Contract:

1. the completion requirements for the proper issuance of the Completion Certificate were not satisfied, inter alia, the Completion Certificate was issued prior to the building achieving its Temporary Occupation Permit ("TOP") and not all services had been tested, commissioned and found to be operating satisfactorily;
2. there were apparent defects and non-compliant works as opposed to the Architect's classification of the same as minor outstanding works in the schedule to the Completion Certificate

The CA was also not impressed with the Respondent's argument that the Disputed Certificates are completely different certificates regardless of whatever had gone wrong with the Completion Certificate. Indeed, the Completion Certificate is an important milestone certificate under the SIA Conditions and its issue or non-issue has significant consequences on other certificates and/or related issues and milestones at the end phase of the construction contract, for example the release of retention monies, maintenance period, submission of final account documents, liquidated damages, etc.

As for matters relating to the Disputed Certificates, the CA found, inter alia, that :

1. the Architect had failed to release first half of the retention monies upon the issue of the Completion Certificate under clause 31(9). However, the full moiety of retention sum was released some 4.5 months after the works were in the opinion of the Architect to be complete and complied with the contract with all respects;
2. there was no evidence of a reasonable sum being withheld for cost of outstanding works as permitted under clause 31(9)

In this respect, the Architect had not complied with the stricture of clause 31(13) that the Architect "*shall in all matters certify strictly in accordance with the terms of the Contract*".

Notwithstanding that the Disputed Certificates were challenged on their serious irregularities and unexplained discrepancies, the CA observed that the architect made little effort to explain or clarify the basis of his certification.

It is of relevance to note that under clause 31(13), in the instance of any doubt, there is a duty on the part of the Architect to clarify upon either party's request what was or was not taken into account in his certificate. This clarification (although not strictly applicable to the filing of affidavits) forms the basis of the architect's independent professional judgement which is one of the requirements that confers temporary finality on the architect's certificates as held by the court of *Chin Ivan*.

EFFECT OF FRAUD IN ARCHITECT'S CERTIFICATES

Apart from the above, the CA also found that :

1. The maintenance period as stated in the Completion Certificate was incorrect.
2. The extended time for completion was 17 April 2013. Given that the TOP was only achieved on 16 September 2013 and there being no further applications for extension of time, liquidated damages should naturally follow from 18 April 2013.
3. Supply of gas was only tested close to 3 months after the issue of Completion Certificate and there was delayed handing over of the operating manuals, all of which were contractual requirements to be satisfied before completion can be certified.
4. The architect was partly at fault for failing the building's TOP inspections, some of which were due to design issues. Having said, the architect offered no explanation as to how the non-compliant items or errors were rectified.

On the evidence before the CA, the architect was clearly in breach of Clause 31(13). Not only were the Disputed Certificates not issued in strict accordance with the terms of the Contract, the CA found that the Architect could not have honestly believed in its truth or did so recklessly without caring whether they were true or false when the certificates were issued.

Accordingly, the CA held that the Disputed Certificates lost their temporary finality that would otherwise have been conferred on them by the SIA Conditions, and allowed the appeal.

Whether the Defects in the Buildings Removed Temporary Finality

For completeness, the CA also addressed the other arguments raised by the Appellant for the benefit of future cases.

The Appellant took issue with the Architect's issuance of Completion Certificate notwithstanding the presence of extensive defects as evidenced from the independent building surveyor's report. Not only so, the Architect went further to certify payment for these defects or non-compliant works. However, the CA was unable to accept that these constitute valid reasons to deprive the Disputed Certificates of their temporary finality.

At the enforcement stage, it is apposite to note that the courts are not otherwise concerned with the merits of the architect's certificates such as issues relating to certification for payment of works which were not carried out in accordance with the contract specifications. The question at enforcement stage is whether the architect's certificates were validly issued in accordance with the terms of the Contract. Hence, the opening up of the architect's certificates should be left to the final determinative proceedings before the arbitral tribunal or the court.

EFFECT OF FRAUD IN ARCHITECT'S CERTIFICATES

Commentary

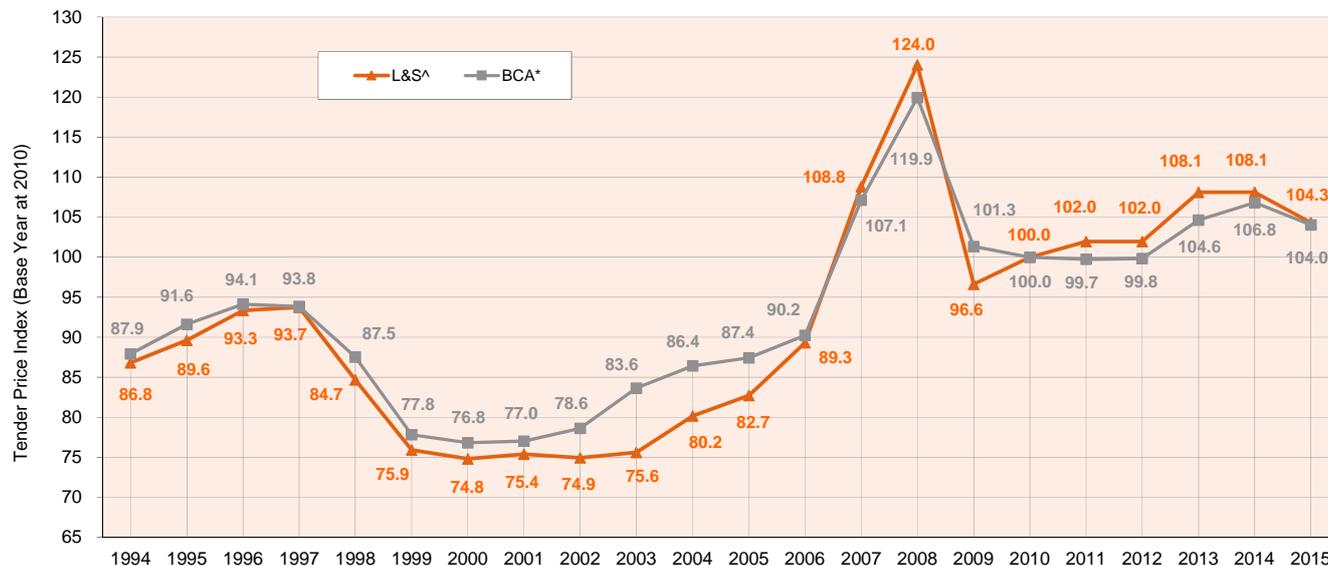
The finding of fraud or recklessness on the part of the Architect, at the enforcement stage, essentially turned on the facts of the case. Fraud is a serious offence and the CA must have duly considered the parties' arguments before coming to this conclusion.

Whilst the CA's decision underlines the importance of proper certification by the architect under the SIA Conditions, this is also a timely reminder to all construction professionals and particularly those sitting in the capacity of the PM or QS acting as Contract Administrators, must be competent not in terms of technical expertise but also a good understanding of the operation of the standard forms of building contract and the ability to apply the principles so as to properly administer the building contracts and manage the construction projects.

On a separate note, the Contractor for reasons unknown, chose to secure payment by way of summary judgement instead of statutory adjudication which was supposed to be low cost and speedy.

EFFECT OF FRAUD IN ARCHITECT'S CERTIFICATES

L&S TPI is a measure of the comparative tender price movements based on the projects handled by Langdon & Seah Singapore Pte Ltd, An Arcadis Company. The TPI reflects the tender price level of contracts let out over the years. Other than material and labour costs, it takes into account the elements of competition, risk and profits.



Source: * Building and Construction Authority as at 12 February 2016.

Note: With effect from the 1st Quarter of 2015, BCA has implemented the new TPI series with Base Year 2010 = 100. The TPI chart shown above has been amended accordingly to reflect the Base Year as Year 2010.

[^] From 2009 onwards, L&S TPI based on 4th Quarter index.

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