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A RELOOK AT AN ARCHITECT'S CERTIFICATION DUTIES

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I. Introduction

1 It has often been lamented that an architect's role in a construction project is one of a conflict of interest. On the one hand, an architect is engaged by the employer and is required to take instructions from the employer to ensure the smooth running of a project. On the other hand, an architect is required to exercise his own independent judgment to reach a fair and unbiased certification on matters such as variations, extensions of time and valuations, *etc*.

2 Inherent in this conflict is the somewhat unresolvable conundrum of an architect's certification duties. This has continued to plague architects when a dispute over payment between a contractor and an employer arises.

3 This article aims to explore this age-old problem and to provide practice tips for architects on how to avoid being placed in the hot seat.

II. Architect's certification duties under the Singapore Institute of Architects Conditions of Contract

4 Under the Singapore Institute of Architects Conditions of Contract[1] (the "SIA Conditions"), an architect's certification duties extend to issuing interim certificates (cl 31(3)), final certificates (cl 31(12)(a)), certificate of partial re-occupation (cl 26(1)), certificate of partial re-entry (cl 26(3)), completion

1 9th Ed, 2010.

certificate (cl 24(4)), maintenance certificate (cl 27(5)), termination certificate (cl 32(2)) and delay certificate (cl 24(1)).

5 The architect's wide powers of certification are, however, contractually circumscribed by cl 31(6) where the architect's power to revise any earlier certificate is limited to only interim certificates and not any other certificates. The architect also has no power to certify on issues of breach of contract such as late provision of necessary information, failure to give undisturbed possession of the site by the employer, termination of contract by the contractor or termination of designated subcontract.[2]

6 Within these defined limits of an architect's certification role, the SIA Conditions confer temporary finality on these certificates save for situations of fraud, improper pressure or interference, or where the architect did not certify in strict accordance with the contract.[3]

III. Avoiding the hot seat and practice tips for architects

7 When payment disputes arise between an employer and a contractor in a construction project, an architect's certificate, which affects payments to the contractor or cross-claims to the employer, often comes under close scrutiny. In some situations, the contractor or the employer may even seek to make the architect personally liable for losses arising out of his certification.

A. When a party puts improper pressure on or interferes with an architect's certification duties

8 The genesis of a series of challenges to an architect's certificate finds roots in the case of *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd*[4] ("*Lojan Properties*"). In *Lojan Properties*, the dispute between the contractor and the employer arose out of 12 outstanding payment certificates for a condominium project at Gilstead Road. The contract was based on the

2 Singapore Institute of Architects Conditions of Contract (9th Ed, 2010) cl 31(14).
3 Singapore Institute of Architects Conditions of Contract (9th Ed, 2010) cl 31(13).
4 [1989] 1 SLR(R) 591.

SIA Conditions. In or around March 1985, two extensions of time were granted by the architect for two aspects of the project, namely main building works and external works. On 2 July 1985, practical completion was achieved and on 1 July 1986, the defects liability period ended. On 9 September 1986, the contractor commenced proceedings against the employer for outstanding payment on the project. On 24 November 1987, close to two years after practical completion, the employer queried the architect on whether conditions precedent were met by the contractor when all the extensions of time were granted by the architect. On 2 December 1987, the architect informed the contractor that except for one, all previous extensions of time granted were null and void due to non-compliance with conditions precedent. A delay certificate was also issued. On 15 December 1987, the architect issued replacement interim certificates. On 16 December 1987, the architect wrote a letter purporting to explain the basis of his revised certificates on the recommendation of a firm of contract consultants.

9 On the facts, the High Court found in favour of the contractor and held that the architect's certificates were tainted by undue interference and/or improper pressure by the employer. But for the employer's letter of 24 November 1987, the architect would not have revised his interim certificates. The High Court also found that the issuance of further interim payment certificates deducting liquidated damages was not in accordance with the terms of the contract. The revised certificates did not reflect the basis given in the architect's letter of 16 December 1987. The delay certificate, while issued as late as 2 December 1987, purported to deduct liquidated damages from an earlier period in time. Finally, the late revision of the certificates, which had earlier been agreed between the contractor and the employer, suggested bad faith.

10 There are a few valuable lessons one can distil from *Lojan Properties*. When either the contractor or the employer imposes its own views instead of seeking clarification on the architect's basis of certification, the architect must be prepared to set out and defend his own views on certification. When issuing certificates such as a delay certificate which cannot be revised under the SIA Conditions, an architect will have to issue them with care. Finally, where there are errors in prior certificates, an architect should seek to revise them earlier or it might raise suspicions about the recertification.

B. Architect's fraudulent certification

11 In more recent times, parties have sought to challenge, and have in fact successfully challenged, the effect of an architect's certificate under the more onerous limb of "*fraud*" under cl 31(13) of the SIA Conditions.

12 In the case of *Chin Ivan v HP Construction & Engineering Pte Ltd*,[5] a dispute arose over two architect's certificates that were based on two architect's instructions. The two architect's instructions stated there were variation works which were approved as they were "informed by [main contractor], … requested by [employer/employer's project manager]".[6] On 21 March 2014, the architect issued a letter explaining to the employer that the architect's instructions were issued on the basis that there was a representation from the main contractor that it had been requested by the employer's project manager. If in fact there was any issue with the representation, the employer's project manager monitoring the project would have protested. Shortly after, the contractor filed for adjudication but failed for reasons of procedural non-compliance. The contractor applied for summary judgment before the Singapore courts. The employer then applied for a stay of the proceedings for the matter to be heard in arbitration in accordance with cl 37(1) of the SIA Conditions.

13 The Court of Appeal decided in favour of the employer and held that there was fraud as the architect did not apply his mind when issuing the certificates. The architect's instructions were made at the request of the contractor. The contractor denied the employer agreed to the request and the employer did not in fact agree to the request.

14 The court examined the authorities on an architect's certification duties and held that the function of an architect's certificate is to promote cash flow, is a condition precedent to payment and is supported by the enforcement process of litigation and arbitration. With this importance being placed on an architect's certificate, the architect's certificate only has temporary finality on three conditions, *ie*, (a) there must be no fraud, improper pressure or interference by either party,

5 [2015] 3 SLR 124.
6 *Chin Ivan v HP Construction & Engineering Pte Ltd* [2015] 3 SLR 124 at [5].

(b) the certificate must be issued in strict compliance with the contract and (c) the architect must have applied his mind when issuing the certificate.

15 The interesting issue raised in this case was whether an architect's certificate which was tainted by fraud but which also contained items not tainted by fraud may be severed such that the latter could be summarily disposed of in summary judgment. The Court of Appeal disagreed with the High Court's earlier finding that severance could be effected. The Court of Appeal was of the view that the court has no power to sever fraudulent items from non-fraudulent items and any power to vary the sums in the certificates rests solely on an architect.

16 Following from this case, architects would have to take care in issuing certificates. Such certificates cannot be rescued even if only one item is tainted by fraud. One procedural point worth noting is that had the contractor succeeded in making its adjudication application, the issue of whether an architect's certificate has temporary finality would have been less relevant as s 17(4) of the Building and Construction Industry Security of Payment Act[7] provides that an adjudicator is not bound to consider the architect's certificate when coming to a decision.

17 In *Ser Kim Koi v GTMS Construction Pte Ltd*[8] ("*Ser Kim Koi*"), the Court of Appeal had the occasion to re-examine the issue of fraudulent certification. In that case, the contractor sued the employer for non-payment under two interim certificates Nos 25 ("IC 25") and 26 ("IC 26"). Item 72 of the preliminaries provided for a completion certificate to be issued only where (a) the works were in the architect's opinion ready for occupation and use and (b) when all works were tested, commissioned and operating satisfactorily and test certificates, operating instructions and warranties were handed over to the employer. The architect issued a completion certificate on 15 May 2013 certifying the project was complete as of 17 April 2013. Shortly after, two temporary occupation permit ("TOP") inspections occurred and failed for reasons of non-compliance with riser and tread requirements. A TOP was finally obtained only on 16 September 2013, some five months after certified

7 Cap 30B, 2006 Rev Ed.
8 [2016] 3 SLR 51.

completion. IC 25 and IC 26 were issued on 3 September 2013 and 6 November 2013, respectively.

18 On the facts, the court found that that the architect's completion certificate was fraudulent as it had been issued recklessly without caring as to its truth or falsity and it was clearly not issued in accordance with the contract. The completion certificate requirements were not met as the project premises had neither undergone TOP inspection nor obtained TOP as at the certified completion date and would therefore not have been fit for occupation under s 12 of the Building Control Act.[9] Further, the specific requirements as to testing, commissioning and operation of services had not been performed until after the certified completion date. Operating instructions were also only handed over after the certified completion date.

19 The court found IC 25 to be questionable. IC 25 purported to release half of the retention moneys. However, cl 31(9) of the SIA Conditions provided for the release of the retention moneys when the completion certificate was issued and not at a later time when IC 25 was issued. IC 25 also purported to pertain to prime cost rate adjustments, although such adjustments could not be supported when comparing these figures to earlier interim valuations. IC 25 was also questionable in that between IC 22 (which was issued some two days after certified completion) and IC 25, the value of the works hovered at 95%. This meant that the works were not complete as at the date of certified completion.

20 Further, the court also found IC 26 to be questionable. IC 26 purported to pertain to prime cost rate adjustments but again, the amounts did not match the earlier valuations. IC 26 also contained an omission for mechanical and engineering works ("M&E works") which could not be explained as the contract sum for M&E works was never reduced. The court also found that the M&E works hovered at 85% as at IC 26, which meant that the works could not have been complete as at the certified completion date.

21 The court found it unusual that the architect did not bother to explain the basis of his certification when he had a

9 Cap 29, 1999 Rev Ed.

duty to do so under cl 31(13) of the SIA Conditions. It took issue with the architect's conduct as he did not account for liquidated damages and did not issue variation instructions following the TOP failures post project completion.

22 The only reprieve granted to the architect was when the court held that it was not concerned with the numerous defects alleged by the employer as the court was not interested in going behind the certificates to determine its merits.

23 Following from *Ser Kim Koi*, completion certificates should probably only be issued (a) after architects have familiarised themselves with all the contractual requirements for completion; (b) all contract requirements for completion certificates are met; and (c) when the value of works is close to 100%. When it comes to issuing certificates, architects can expect the courts to scrutinise every item in the certificates. Where there are errors in earlier certificates, architects should issue revised certificates and not arbitrarily add to or subtract from later certificates. As a matter of good practice, architects should consider always explaining the basis of their certification.

C. Architect's duty of care in certification

24 In more serious situations, an architect could be made personally liable for negligent certification. In *Goodwill Building Resources Pte Ltd v Yue Cheong Kuan t/a Ben Design Architects*[10] ("*Goodwill Building Resources*"), the contractor brought legal proceedings against the architect for loss of profit and/or loss of interest from the delay in issuing the final payment certificate. The contractor claimed it had been kept out of funds, resulting in it being charged commercial interests for utilising the overdraft account. The contractor also asked for the delay certificates which were issued by the defendant to be set aside on grounds that they were invalid.

25 After extensive review of the relevant case law in Singapore, the court found that there was a duty of care on the part of the architect to ensure that he exercises his certification duty carefully. The relationship between the architect and the contractor is of such close proximity that the architect must

10 [2006] SGDC 240.

know that if he is negligent in his duty in issuing the relevant certificates, he is likely to cause loss to the contractor. Such losses are not recoverable against the owner since no fault can be attributed to the owner and if the contractor is not allowed to recover against the architect, he would be without redress.

26 On the facts, however, the court found that there was no breach of the duty of care owed by the architect. The contractor did not, beyond submitting that the project should have been certified complete on 23 September 2002 when it completed the project, tender any evidence that the architect, in issuing a completion certificate, took an inordinate amount of time and fell below the reasonable standard of skill and care when certifying. Accordingly, the court did not agree with the contractor that the period for calculating when the maintenance certificate should be issued should start from the earlier date of 23 September 2003. The final payment certificates which were to be issued within three months of receipt from the contractor of final claim documents or issuance of maintenance certificate, whichever is later, were accordingly to run only from the actual issuance of the maintenance certificate.

27 While *Goodwill Building Resources* is significant, as it has moved in the direction of allowing claims for economic loss to be extended beyond management corporation–developer relationships, this was circumscribed in the later case of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[11] ("*Spandeck*"). In *Spandeck*, the court found that the contractor could not claim for alleged under-certification from the DSTA superintending officer as there was no duty of care owed to Spandeck. Any dispute with the employer concerning certification or valuation was instead to be taken up by the contractor with the employer in arbitration as provided for in the contract.

IV. Conclusion

28 What all these cases signify is perhaps a trend towards cautioning architects that there is at the very least a contractual obligation on architects to certify carefully.

11 [2007] 4 SLR(R) 100.

29 This is aptly encapsulated in the Court of Appeal's judgment in *Ser Kim Koi*, where the court expressed its disapproval towards architects neglecting their certification duties:[12]

> 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*. [emphasis added]

12 *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 at [104].