IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2015] SGCA 14

Civil Appeal No 125 of 2014

Between

IVAN CHIN

… *Appellant*

And

H P CONSTRUCTION & ENGINEERING PTE LTD

… *Respondent*

In the matter of Suit No 180 of 2014

Between

H P CONSTRUCTION & ENGINEERING PTE LTD

… *Plaintiff*

And

IVAN CHIN

… *Defendant*

GROUNDS OF DECISION

[Building and Construction Law] — [Architects, engineers and surveyors]
[Building and Construction Law] — [Standard form contracts] — [Singapore Institute of Architects standard form contracts]
[Building and Construction Law] — [Terms] — [Certificates and approvals]

Chin Ivan
v
H P Construction & Engineering Pte Ltd

[2015] SGCA 14

Court of Appeal — Civil Appeal No 125 of 2014
Sundaresh Menon CJ, Chao Hick Tin JA and Andrew Phang Boon Leong JA
30 January 2015

12 March 2015

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This appeal concerned issues relating to the validity and enforcement of Architect's certificates issued pursuant to a building and construction ("B&C") contract. The respondent, H P Construction & Engineering Pte Ltd (the plaintiff below), had mounted a claim founded on two Architect's certificates ("the Disputed Certificates") issued pursuant to a B&C contract between the parties which incorporated the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) (7th Ed, April 2005) ("the SIA Conditions"). Pursuant to cl 31(13) of the SIA Conditions, the respondent was entitled to seek payment, including by way of summary judgment, of the sums certified in any valid Architect's certificate. The appellant, Mr Ivan Chin (the defendant below), resisted the claim by alleging that the Disputed Certificates had been procured by fraud on the part of the

respondent. He consequently sought a stay of proceedings for the matter to be referred to arbitration pursuant to s 6(1) of the Arbitration Act (Cap 10, 2002 Rev Ed) as provided for in cl 37(1) of the SIA Conditions.

2 The judicial commissioner hearing the matter ("the Judge") found that a *prima facie* case of fraud had been made out. However, he concluded that the alleged fraud affected only specific parts of the Disputed Certificates. In light of this, the Judge ordered a partial stay of proceedings and allowed the respondent to proceed with that portion of its claim which the Judge considered was not affected by the alleged fraud. The appellant appealed against the Judge's decision to grant only a partial stay of proceedings. The Judge's *prima facie* finding of fraud was not disputed on appeal, and the only issue before us was whether the entire proceedings should have been stayed and referred to arbitration in light of this. The Judge's decision is reported as *H P Construction & Engineering Pte Ltd v Chin Ivan* [2014] 3 SLR 1318 ("the Judgment").

3 At the conclusion of the appeal, we were satisfied that irregularities affecting the Disputed Certificates rendered them invalid and, hence, unenforceable, such that they should not be afforded even temporary finality. Further, we were also satisfied that there was no basis under the B&C contract between the parties ("the parties' contract") for dissecting or severing the Disputed Certificates. We therefore allowed the appeal, and ordered that the proceedings be stayed in their entirety and the respondent's claim referred to arbitration. We now set out the grounds of our decision in full.

Background facts

4 The appellant employed the respondent as the main contractor for a building project in Sentosa Cove. As mentioned earlier, the parties' contract

incorporated the SIA Conditions. An Architect, Mr Philip Lee Pang Kee ("the Architect"), and a quantity surveyor, Turner & Townsend Pte Ltd ("the Quantity Surveyor"), were appointed for the purposes of the building project. The appellant also appointed a project manager to oversee the building project.

5 On 11 July 2012, the Architect issued two Architect's instructions ("the AIs") approving various items on the respondent's list of proposed variation works. These items included claims for: (a) preliminaries for an extension of the time for completion of the project granted to the respondent ("the Extended Preliminaries Claim"); and (b) an extension of the defects liability period ("the Defects Liability Period Claim"). We refer to these two items collectively as "the Disputed Items". As stated in each of the AIs, the variation works, including the Disputed Items, were approved on the basis that they were, "[a]s informed by [the respondent], … requested by [the appellant]/[the appellant's project manager]".[1] In other words, the AIs were issued by the Architect not on the basis of his professional judgment, but purely on the basis of the respondent's representation that the variation works in question had been "requested by" the appellant.

6 The respondent, relying on the AIs, subsequently raised a payment claim for unpaid work done on the project up to 28 September 2012. The Disputed Items were included in this payment claim. The Architect duly instructed the Quantity Surveyor to provide a valuation of the Disputed Items as well as the other items listed in the payment claim. The Quantity Surveyor reverted with an interim valuation of $120,000 for the Extended Preliminaries Claim. No

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[1] Appellant's Core Bundle, Volume II, pp 25–26.

valuation was provided for the Defects Liability Period Claim. The Architect approved the Quantity Surveyor's interim valuations and subsequently issued a progress certificate certifying that a sum of $321,383.94 (including the sum of $120,000 valued in respect of the Extended Preliminaries Claim) was payable by the appellant to the respondent ("the Progress Certificate").

7 On 26 September 2013, the respondent raised its final payment claim, which again included the Disputed Items. On this occasion, the Quantity Surveyor valued the Disputed Items, including the Defects Liability Period Claim, at $334,000. The Architect subsequently approved the Quantity Surveyor's valuations and issued a final certificate certifying a total sum of $720,417.28 as being payable to the respondent ("the Final Certificate"). This certified sum included the value of those of the Disputed Items that had not been included in the Progress Certificate. The Progress Certificate and the Final Certificate collectively constitute the Disputed Certificates mentioned at [1] above.

The dispute

8 The appellant refused to make payment of the sums certified under the Disputed Certificates for various reasons. The respondent first referred the dispute for adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOPA"), but was unsuccessful as the adjudicator found that the respondent had failed to act in accordance with the procedural provisions of the SOPA. The respondent then commenced court proceedings against the appellant claiming the total sum of $1,041,801.22 certified under the Disputed Certificates and interest. Pursuant to cl 31(13) of the SIA Conditions, the respondent was, "in the absence of fraud or improper pressure or interference by either party", permitted to enforce, "by way of

Summary Judgment", its right to sums certified in certificates issued by the Architect in accordance with the parties' contract.

9 The appellant, in response, applied for a stay of proceedings under s 6(1) of the Arbitration Act on the basis that the respondent's claim was disputed and ought to be referred to arbitration pursuant to cl 37(1) of the SIA Conditions. At the hearing before the assistant registrar ("the AR"), the appellant argued that the Disputed Certificates had been procured by fraud on the part of the respondent. To establish a *prima facie* case of fraud, the appellant relied on a letter addressed to him by the Architect dated 21 March 2014 explaining why the Disputed Items had been included in the Disputed Certificates. The Architect said as follows in that letter:[2]

> 3. In or about … mid 2012, the [respondent] represented to me that [the appellant] had agreed to various proposed variations for which no Architect's Instructions have been issued. These variations pertained to items numbered 163, 165 to 175, 220, 236, 242, 244, 245, 247, 249 to 251, 255 and 262 to 285 of the [respondent's] list of proposed variations. The [respondent's] claim for extended preliminaries arising from the extended completion date of the Project is set out in items 173 and 280 of the list.
>
> 4. As I was no longer in regular contact with [the appellant], I acted solely in reliance on 2 premises in regularizing the proposed variations. One was the [respondent's] representation of [the appellant's] purported consent where I issued two Architect's Instructions nos. AI/131/HP/019 and AI/132/HP/019 on 11 July 2012 (AIs). Two was [the appellant's] project manager's monitoring of the project. Had there been any discrepancy, real or perceived in the AI[s], [the appellant's] project manager as [the appellant's] representative would duly notify me for further action. He would inform me or convey to me [the appellant's]

[2] Appellant's Core Bundle, Volume II, p 27.

> view when there was any issue that needed my attention. I did not receive any feedback since.

10 In essence, the Architect was saying that he had included the Disputed Items for valuation on the basis of: (a) the respondent's representations that the appellant had consented to these items' inclusion, even though no Architect's instructions authorising the variation works in question had been issued earlier by the Architect as a matter of his own professional judgment; and (b) the failure of the appellant's project manager to voice any objections to the inclusion of these items. The respondent denied making such representations. Indeed, the respondent accepted that the appellant had never consented to the inclusion of the Disputed Items for valuation purposes. The AR therefore found that there was a *bona fide* dispute as to whether fraudulent representations had been made and ordered that the proceedings be stayed entirely. The respondent appealed against the AR's decision.

11 As alluded to at [2] above, the Judge below upheld the AR's decision in so far as he agreed that there was a *prima facie* case of fraud. In this regard, the Judge acknowledged that the wording of cl 31(13) of the SIA Conditions seemed to suggest that an Architect's certificate would be rendered invalid and unenforceable in the event of fraud. However, the Judge then departed from the AR's decision and ordered only a partial stay of proceedings as he concluded that the alleged fraud only affected the Disputed Items, which had been quantified at $334,000 – an amount which he thought was "severable" from the full sum claimed by the respondent (see the Judgment at [66]). In reaching this decision, the Judge placed particular emphasis on the fact that the object and spirit of cl 31(13) was to promote expedient cash flow within the B&C industry by ensuring that contractors were paid on time.

Our decision

12 The appellant appealed against the Judge's partial stay order, but not against the finding that there was a *prima facie* case of fraud. The issue before us could therefore be framed as follows: could the court enforce *in part* an Architect's certificate that had been tainted by fraud and/or that had not been issued in accordance with the conditions stipulated under cl 31(13) of the SIA Conditions by granting summary judgment in respect of *only a part* of the sum certified in such a certificate?

The Architect and the Architect's certificate under the SIA Conditions

13 The roots of the SIA Conditions can be traced to a set of standard forms of contract and subcontract drafted by the late Mr Ian Duncan Wallace QC. These standard forms were first introduced in 1980 and made significant changes to the regime reflected in the then existing standard B&C contracts. The standard forms were intended to address a number of issues that had bedevilled the local B&C industry; in particular, the fact that contractors sometimes found themselves at the mercy of employers who might withhold payment of certified sums on account of alleged counterclaims and set-offs. An important feature of the SIA Conditions is the regulation, by way of Architect's certificates, of the payment of monies due to contractors and of the deductions that can be made by employers. The Architect's certificate serves as the basis for both the contractor's claim for payment of monies due and also the employer's right to make deductions against such claims. Under a B&C contract which incorporates the SIA Conditions (also referred to hereafter as a "standard form SIA contract" where appropriate to the context), the Architect, in essence, is the quasi-adjudicator of both the contractor's right to receive payment for work done as well as the employer's right to withhold payment on account of

any cross-claim(s). This fundamental role of the Architect and his certificates is clearly described in the Singapore Institute of Architects' *Guidance Notes on Articles and Conditions of Building Contract* (Singapore Institute of Architects, 3rd Ed, 2011) ("the *Guidance Notes*") as follows (at p 1):

> **2. Architect's powers**
>
> The scheme of the 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 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 judgment 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 – see Clauses 31.(13) and 37.(3)(h) …
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> [emphasis added]

14 This excerpt from the *Guidance Notes* introduces the concept of "temporary finality" that is to be accorded to valid Architect's certificates so that they will bind the parties unless and until they are opened up and reviewed in the course of proceedings typically brought at the end of the project when a final judgment or award as to the parties' substantive rights is rendered. The same broad scheme is mirrored in the role of Dispute Review Boards that assist in resolving disputes in large-scale engineering projects governed by the standard terms of the International Federation of Consulting Engineers, more commonly known as FIDIC. The B&C adjudication framework encapsulated within the SOPA is also reflective of this scheme.

15 The purpose of according temporary finality to Architect's certificates is to minimise *undue* cash flow problems that may affect contractors, typically when claims by a contractor for progress payments are held back on account of

unverified counterclaims raised by an employer. In this regard, this court, in considering the provisions of the SOPA, noted the importance of ensuring healthy cash flow within the construction industry in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 (at [18]):

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

16 The temporary finality of an Architect's certificate is therefore crucial to prevent the entanglement of claims and counterclaims that can otherwise stifle cash flow in a liquidity-dependent industry. In the context of the SIA Conditions, this concept of temporary finality is enshrined in cl 31(13), which provides:

> No certificate of the Architect under this Contract shall be final and binding in any dispute between the Employer and the Contractor, whether before an arbitrator or in the Courts, save only that, in the absence of fraud or improper pressure or interference by either party, full effect by way of Summary Judgment or Interim Award or otherwise shall, in the absence of express provision, be given to all decisions and certificates of the Architect (other than a Cost of Termination Certificate or a Termination Delay Certificate under clause 32(8) of these Conditions), whether for payment or otherwise, until final judgment or award, as the case may be, and *until such final judgment or award such decision[s] or certificates shall (**save as aforesaid** and subject to sub-clause (6) of this condition) be **binding** on the Employer and the Contractor in relation to any matter which, under the terms of the Contract, the Architect has [as] a fact taken into account or allowed or disallowed, or any disputed matter upon which under the terms of the Contract he has as a fact ruled, in his certificates or otherwise.* The Architect shall in all matters certify strictly in accordance with the terms of the Contract. In any case of doubt the Architect shall, at the request of either party, state in writing within 28 days whether he has as a fact taken account of or allowed or disallowed or ruled upon any matter in his certificates, if so identifying any

> certificate and indicating the amount (if any) taken into account or allowed or disallowed, or the nature of any ruling made by him, as the case may be. [emphasis added in italics and bold italics]

17 As can be seen from cl 31(13), the temporary finality of an Architect's certificate is achieved through the stipulation of its "final and binding" nature prior to and until the making of a "final judgment or award", as well as through the enforcement mechanism "by way of Summary Judgment or Interim Award". This is further reinforced by cl 37(3)(h) of the SIA Conditions, which provides that "temporary effect shall be given to all certificates".

18 However, the granting of such temporary finality to an Architect'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 "*strictly* in accordance with the terms of the Contract" [emphasis added]. For example, it cannot be issued at a time when the contractor has yet to submit a payment claim. 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 have considered the matters which are said to have been dealt with in his certificate. This requirement that the Architect must exercise his own professional judgment when issuing a certificate was specifically noted by Warren L H Khoo J in *Aoki Corp v Lippoland (Singapore) Pte Ltd* [1995] 1 SLR(R) 314, where he observed as follows (at [36]):

> Needless to say, the Architect must exercise his function as the certifier in good faith and to the best of his uninfluenced professional judgment, even though he is usually appointed by the employer. Otherwise, the object of the provisions for temporary finality could be defeated.

19 The need for an Architect'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* [1991] 1 SLR(R) 622 ("*Lojan Properties*"). There, this court had to deal with cl 31(11) of a prior version of the SIA Conditions – the identically-worded predecessor of the present cl 31(13) that concerns us in this case. In recognising the temporary finality conferred on an Architect's certificate pursuant to cl 31(11), M Karthigesu J (as he then was), who delivered the judgment of this court, held (at [11]–[12]):

> 11 … The unique features of the [SIA] Conditions of Contract are that the contractor is assured of regular periodic payments during the period the contract works are in progress based on a retrospective revaluation of all work carried out under the contract (see cll 31(1) and 31(2)) and *subject to the exceptions mentioned in cl 31(11) the contractor is put in a position to enforce payment* if payment is not made on the due date by action in the courts. On the other hand the employer's rights are equally protected in that he is entitled legitimately to deduct his legitimate claims against the contractor during the progress of the works provided that the claims themselves and the amounts due are certified by the Architect. … The financial machinery under the conditions of contract is regulated by the certificates of the Architect, the effectiveness of which until determined otherwise by a court or an arbitrator is preserved by cl 37(3)(g). Most important of all the conditions of contract read as a whole and cll 31(11), 1(7), 24(2) and 30(4) make it particularly clear that the common law defence of set-off or counterclaim is no longer available to the employer in a claim for payment of an interim certificate of payment.
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> 12 The foregoing are but some of the unique features of the conditions of contract which the learned judge clearly appreciated as can be seen from the admirably precise manner in which he addressed himself at [15]. He said:
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> > … It is intended [referring to cl 31(11)] that the contractor be paid the amounts expressed to be payable in the interim certificates, and if no payment is made by the employer it is intended *to enable the contractor in the absence of fraud, improper pressure or interference or in the absence of express provisions, to obtain quick summary judgment for the amounts certified as due.* In

> so far as any sum claimed by the employer is concerned, only the amounts expressly deductible under the contract may be set off against the amount due under the interim certificate. I therefore come to the conclusion that subject to any deduction or set-off as provided expressly in the contract, the amounts certified in the interim certificates are due and payable to the plaintiffs.

[emphasis added]

The effect of an Architect's certificate not issued in accordance with cl 31(13) of the SIA Conditions

20 In addition to stating the need to observe the conditions laid down in the then equivalent of cl 31(13) of the SIA Conditions, the passage in *Lojan Properties* that we have reproduced at [19] above also stands for the proposition that 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 "financial machinery" of a standard form SIA contract is "regulated by the certificates of the Architect", which, if issued in accordance with cl 31(13), place the contractor or the employer (as the case may be) "in a position to enforce payment … [or] to deduct his legitimate claims" respectively. A contractor's right to receive payment and an employer's right to deduct claims would typically not even materialise if the particular Architect's certificate in question was not issued in accordance with the contract concerned. This much is also noted in Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 4th Ed, 2012) ("*Chow Kok Fong*") (at vol 1, paras 8.29–8.30):

> **8.29** Construction contracts frequently require that a contractor's entitlement to payment be conditioned on the issue of a certificate. In these situations, it has been suggested that the issue of the certificate thus operates as a condition precedent to payment. The general principle is that a contractor who fails to obtain the certificate has no basis to claim for payment in law or in equity. …

> **8.30** Effectively, the right to be paid for work done derives not from the actual execution of the work or supply of materials but from the issue of the payment certificate in respect of the work.
> …

21 For the avoidance of doubt, it should be noted that the requirement for the certification of an Architect, as described above, is generally concerned with the *mechanism and process* by which the contractor's work will be valued and paid for (or, as the case may be, the employer's right to make deductions quantified) during the course of the project. Such a mechanism may be supported by an enforcement process as is provided for under a standard form SIA contract, where the right to receive payment (or, as the case may be, the right to make deductions) pursuant to Architect's certificates may be enforced by litigation or arbitration proceedings brought *purely* to ensure that valid Architect's certificates are honoured and upheld in accordance with the terms of the contract. Such proceedings, which we shall term "'enforcement' proceedings" for ease of reference, are not concerned with the merits of Architect's certificates, in the sense of whether the certificates are ultimately correct as to the matters which they purport to deal with. The only question in this context will usually be whether the Architect's certificates concerned were validly issued in accordance with the terms of the contract. Because the certification process is concerned primarily with regulating the process and mechanism for payments (or, in the case of an employer, deductions) to be made, it will generally *not* affect either party's substantive rights, at the appropriate time and before the appropriate forum, to contend that the Architect's certificates concerned, even if validly issued in accordance with the terms of the contract, were not in fact correct as to the matters set out therein. This understanding of the true nature of Architect's certificates is also noted in *Chow Kok Fong* (at vol 1, paras 8.12–8.13):

> **8.12** … *These certifications are never intended to be a precise or final determination of the value of the works.* Thus, Hobhouse J in *Secretary of State for Transport v Birse-Farr Joint Venture* [(1993) 62 BLR 45] noted:
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> > At the interim stage, it cannot always be a wholly exact exercise. It must include an element of assessment and judgment. *Its purpose is not to produce a final determination of the remuneration to which the contractor is entitled but is to provide a fair-system of monthly progress payments to be made to the contractor.*
>
> **8.13** In the absence of any provision to the contrary, the sum certified in an interim certificate is thus taken to be an estimate of the value of the work done up to the date shown in the certificate. Thus, while the employer or owner is obliged to pay what is certified, *the amount certified is not binding on the parties and may be adjusted upon completion of the works. …* Since *the assessment does not represent a final and binding determination of the price for the work done* it could be corrected at a later date but the burden of proof falls on the party arguing for the amount assessed to be correct.
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> [emphasis added]

22 Following from this, in the converse scenario where an Architect's certificate is invalid for some reason, the contractor would not thereby lose any and all right to be paid for the work done; and similarly, the employer would not thereby lose any and all right to make the appropriate deductions or counterclaims. In such circumstances, subject to any other contractual remedies which it may have, the contractor would be entitled to have its work valued and paid for (and, in the case of the employer, its claims against the contractor deducted) though not pursuant to "enforcement" proceedings (as defined at [21] above) brought for this purpose in accordance with the contract. Such proceedings are quite different in kind and scope from what may be termed "'substantive' proceedings" – *ie*, proceedings brought to obtain "a final and binding determination of the price for the work done" (see *Chow Kok Fong* at vol 1, para 8.13) – and the issues to be dealt with are correspondingly different.

23 The respondent's claim in this case plainly did not fall within the category of "substantive" proceedings. In its Statement of Claim, the respondent claimed payment of the "*certified* sum" [emphasis added] specifically. This was clearly not a general claim for monies due for work done. Instead, the respondent's claim fell within the category of "enforcement" proceedings. There was hence no doubt as to the fact that the respondent's claim was predicated entirely upon the existence of valid certificates having been issued by the Architect.

24 While the validity of an Architect's certificate is fundamental to a party's claim for payment or deduction, it goes without saying that a mere allegation of irregularity cannot suffice to undermine the validity of such a certificate. As the Judge correctly observed in the Judgment, any allegation must be backed up by evidence, at the very least, so as to establish a *prima facie* case of irregularity. In this regard, the Judge relied on three crucial facts to find that a *prima facie* case of fraud had been made out in the present case, namely:

(a) The Architect stated in the AIs and his letter to the appellant dated 21 March 2014 (see, respectively, [5] and [9] above) that he had included the Disputed Items in the Disputed Certificates only because he had been told by the respondent that the appellant had consented to the inclusion of these items. It is at least implicit in this statement that the Architect did not include these items as a result of his independent professional judgment and assessment.

(b) The respondent denied making any such representation that the appellant had consented to the inclusion of the Disputed Items for the purposes of valuation.

(c) There was no dispute between the parties that the appellant had in fact never consented to having the Disputed Items included for valuation.

25 On these facts, the Judge was correct in finding a *prima facie* case of fraud. Indeed, in our judgment, these rather exceptional facts went further than establishing a *prima facie* case of fraud, in that in light of these facts, it *could not have been disputed* that the Disputed Certificates had not been issued in accordance with cl 31(13) of the SIA Conditions. If the Architect was telling the truth, then the inevitable conclusion would seem to be that the respondent, in representing that the appellant had consented to the Disputed Items' inclusion for valuation purposes, had defrauded him. On the other hand, if the respondent was telling the truth (*ie*, that he never made such representations to the Architect), then the Architect must have issued the Disputed Certificates improperly since, as noted at [24(a)] above, implicit in his statement in the AIs 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 respondent would seem to suggest an ill-conceived attempt to cover up his error. In either scenario, the Architect 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 respondent's claim fails since there was no certificate properly issued by the Architect which the respondent could rely on to sustain its claim – as explained above (at [20]–[23]), the respondent's claim rested entirely on the Disputed Certificates as it was in the nature of "enforcement" proceedings.

26 The Judge proceeded on the basis that the aforesaid irregularities only affected the Disputed Items and that these items could be "severed", leaving the rest of the Disputed Certificates in place to be enforced. The respondent adopted this view, but in our judgment, this was plainly mistaken.

27 There was simply no basis under the parties' contract to warrant the conclusion that the Disputed Certificates were divisible or severable in this way. As we have noted above, one of the fundamental objectives of the scheme established by the SIA Conditions is to have matters relating to payment and deduction regulated by way of Architect's certificates only. Once an Architect's certificate is found in any material way to have been issued not in accordance with the contract and/or as a result of fraud or improper pressure or interference, then it loses its claim to temporary finality. There is nothing in a standard form SIA contract that would permit a court, in such circumstances, to substitute its assessment for that of the Architect and, in effect, to conjure up a new certificate.

28 It follows that any variation of the amount payable or deductible under an Architect's certificate must be done by the Architect and only by him. The respondent took a contrary view, citing the following portion of the decision in *Lojan Properties* (at [34]):

> A further criticism of counsel was that one of the contractors named in the list attached to "the certificate of non-payment" was not in fact a nominated subcontractor. There is no evidence of this except for counsel's statement from the Bar. Even if we accept this and we have no reason not to, that would not vitiate the whole document. It would be perfectly proper for the name entered in error to be deleted and the amount to be deducted, adjusted accordingly. We are fortified in saying this having particular regard to the wording of cl 30(4) and the reference to cl 31(10) which provides the machinery for dealing with outstanding balances due to nominated subcontractors in the event of there being a dispute.

The respondent relied on this passage to support its view that the court was able to go behind an Architect's certificate and make appropriate adjustments.

29 We do not agree with the respondent. We first note, as is evident from the passage itself, that the views expressed by the court in *Lojan Properties* as to its power to adjust the amounts certified by an Architect were *obiter dicta*. There was no need for the court to consider such a power in that case, given that it had already found that there was no evidence supporting the irregularity alleged. In any event, we respectfully disagree that the court has such a power. The point, simply, is this: under a standard form SIA contract, temporary finality, if it avails, is conferred on an Architect's certificate as a whole. If the certificate is impugned because it was, in some material part, not issued in accordance with the contract and/or was tainted by fraud or improper pressure or interference, then that certificate *in its entirety* ceases to attract any finality.

30 In this regard, we also note that a standard form SIA contract expressly confers the power on the *Architect* to vary the sums certified in his earlier certificates under cl 31(6) of the SIA Conditions, which states:

> The Architect shall have power to issue a further Interim Certificate at any time whether before or after completion, correcting any error in an earlier Interim Certificate (but not in any Delay, Termination of Delay, Further Delay or any certificate other than an Interim Certificate) or dealing with any matter of which he was not aware, or which should have been dealt with, at the time of an earlier Interim Certificate, or revising any decision or opinion on which that Certificate was based.

31 This power of an Architect to issue revised certificates is further buttressed by cl 37(3)(i) of the SIA Conditions, which provides that:

> The power of the Architect to issue a further certificate under clause 31(6) of the Conditions shall continue until his Final

> Certificate notwithstanding the prior commencement of proceedings by way of arbitration or in the Courts, to which further certificate full effect shall be given by the Courts or an arbitrator until final award or judgment.

32 It is therefore the case that even when proceedings have been commenced, the power to adjust the quantum payable or deductible resides in the Architect "until final award or judgment". In this regard, the elaboration provided by the *Guidance Notes* (at p 24) in relation to the nature of the power accorded to an Architect under cl 37(3)(i) is germane:

> Paragraph (i) is important, in that it will enable the Architect to revise an earlier certificate, even subsequently to the commencement of proceedings based upon that certificate. Evidence and contentions in those proceedings may well satisfy the Architect that he should have given consideration to some matter, or that he may have misinterpreted the contract in some way. Consistently with his right and duty to act independently, the Architect might even, in an extreme case, collaborate with an arbitrator or the Courts in issuing a certificate which might more justly regulate the situation for the time being until final resolution of the dispute. …

33 In light of cl 37(3)(i) read together with this explanatory passage, it is clear to us that the power to adjust the sums certified in a certificate falls solely within the purview of the Architect; and if it appears warranted, he may "collaborate" with the courts or an arbitrator to issue a revised certificate. Consistent with this, the only power to open up and revise a certificate that is vested in a court or an arbitrator is in the context of what we have termed "substantive" proceedings (see [22] above) – *ie*, litigation or arbitration proceedings brought to obtain a final judgment or award that is seized of the underlying merits of the Architect's certificates that have been issued, for the purposes of determining the actual sums due to or from the contractor (see the dichotomy between the two types of proceedings that has been explicated at [21]–[22] above). This is reflected in the same cl 31(13) of the SIA Conditions,

which provides that Architect's certificates shall only be "binding" on the parties "until final judgment or award". In such a setting, the relief sought in "substantive" proceedings will usually take the form of an attempt to open up and revise the certificate(s) in question with a view to the final resolution of the dispute. That is the very antithesis of "enforcement" proceedings such as the present, in which the respondent was seeking solely to enforce and uphold the Disputed Certificates without prejudice to their underlying merits or the correctness of the valuations reflected therein. There was simply nothing in the parties' contract that would enable the court to open up and revise the Disputed Certificates and then give the revised certificates temporary finality, presumably until another round of litigation that delved even further into the merits of the dispute between the parties.

34 In our judgment, the Judge, with respect, fell into error when he went behind the Disputed Certificates to assess what could be claimed and, in effect, to vary these certificates on his own accord. Once the Disputed Certificates were found to have been tainted by any material irregularity (be it fraud, impropriety and/or the Architect's failure to consider the Disputed Items at all), the entire foundation of the respondent's claim was demolished. There was then nothing left for the respondent to go on and the matter should have been stayed in its entirety.

35 We make one final observation concerning the Judge's order to grant a partial stay. By granting a partial stay, the Judge was effectively allowing summary judgment for part of the respondent's claim since this meant that the Judge had implicitly, if not explicitly, found that there was no real dispute apropos the remainder of the claim that should be referred to arbitration. This, in our judgment, was puzzling. In the context of the parties' contract at least,

the refusal to grant a stay on any part of a claim must be premised on an established and immediately enforceable contractual right to payment which is so indisputable that it does not warrant being referred to arbitration. As we have explained above (at [20]–[23]), the right to payment under the SIA Conditions is conditioned on the existence of a valid Architect's certificate issued in accordance with the conditions stipulated in cl 31(13). It is such a valid certificate that is enforced by way of summary judgment. There was no basis for the Judge in effect to allow summary judgment for a part of the respondent's claim after he found that there was no valid Architect's certificate that could be enforced. Significantly, the Judge had himself acknowledged in the Judgment (at [17]) that a stay would only be granted if the appellant could show that the validity of the Disputed Certificates was in issue. Having found that the validity of these certificates was very much in issue (indeed, as we have noted above (at [25]), these certificates were invalid), he unfortunately did not return to this point. Had he done so, he might have realised that he ought to have stayed the proceedings entirely.

Conclusion

36 In light of the exceptional facts of this case, we were satisfied that the irregularities in the Disputed Certificates were not merely in issue, but, in fact, had been well established. These were never corrected by the Architect and cannot now be corrected by the Architect or anyone else because the Final Certificate has been issued. In the circumstances, the Disputed Certificates cannot be enforced or accorded temporary or any finality. The respondent, of course, is not left without a remedy. The rights of the parties can and presumably will, in the absence of a settlement, be finally resolved at arbitration – but there was simply no basis for the partial stay that was ordered by the Judge.

37 For these reasons, we allowed the appeal with the usual consequential orders and ordered that the entire proceedings be stayed. We also awarded the appellant his costs of the appeal fixed at $40,000, inclusive of the costs of the proceedings before the Judge below, and all reasonable disbursements.

Sundaresh Menon	Chao Hick Tin	Andrew Phang Boon Leong
Chief Justice	Judge of Appeal	Judge of Appeal

Lok Vi Ming SC, Joseph Lee and Aw Jansen (Rodyk & Davidson LLP) for the appellant;
John Chung and Tan Yi Yin Amy (Kelvin Chia Partnership) for the respondent.