

Client Alert

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Ser Kim Koi v GTMS Construction Pte Ltd A Timely Reminder For Architects

The concept of according interim payment certificates “temporary finality” is vital in ensuring cash flow in the building and construction industry. However, under cl 31(13) of the Singapore Institute of Architects’ Articles and Conditions of Building Contract (Lump Sum Contract) (9th ed., September 2010) (the “**SIA Conditions**”), the granting of such temporary finality is subject to certain conditions.

In *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] SGCA 7, the Singapore Court of Appeal provided some further insight into the conditions that may withhold temporary finality from certain interim payment certificates.

1. Background

The appellant, Mr Ser Kim Koi, accepted a tender from the respondent, GTMS Construction Pte Ltd, to build three two-storey detached houses on the land he owned.

On 30 April 2013, the buildings failed the first inspection by the Building and Construction Authority (the “**BCA**”) for the issue of the Temporary Occupation Permit (“**TOP**”). However, two weeks later, the architect issued the Completion Certificate dated 15 May 2013. The buildings failed a second TOP inspection on 18 June 2013, and only obtained the TOP on 16 September 2013.

The appellant alleged extensive defects and non-compliant works, and employed a chartered building surveyor to document these defects. The respondent, on the other hand, commenced legal proceedings for unpaid invoices that were claimed against Interim Certificate 25 (“**IC 25**”) and Interim Certificate 26 (“**IC 26**”). The Assistant Registrar granted summary judgment in favour of the respondents, and the High Court Judge dismissed the appeal from the appellant.

The appellant appealed to the Court of Appeal, relying solely on fraud to resist summary judgment.

2. Issues before the Court of Appeal

The Court of Appeal reframed the central issue that arose in the appeal, being a question of whether the appellant had 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.

3. The Court of Appeal's Decision

The Court affirmed its previous decision in *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] 3 SLR 124 (“**Chin Ivan**”) on the ambit and extent of the temporary finality accorded to interim payment certificates under cl 31(13) of the SIA Conditions that the granting of temporary finality to an

architect's certificate is subject to certain conditions stipulated under cl 31(13) of the SIA Conditions:

- (a) The certificate must be issued in the absence of fraud or improper pressure or interference by either party;
- (b) It must be issued strictly in accordance with the terms of the contract; and
- (c) As can be seen from 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, the architect must have considered the matters which are said to have been dealt with in his certificate.

The court emphasised 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 judgment.

At the enforcement stage of interim payment certificates, the court reiterated that it is not concerned with the merits of the architect's certificates. 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]).

Evaluation of the architect's conduct and certification of the Completion Certificate

The court held that on the facts of the case and the evidence before the court at the enforcement stage, 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 the contract. The court also concluded that the architect issued the Completion Certificate at least without belief in its truth and/or recklessly without caring whether it was true or false.

Clause 24(4) of the SIA Conditions read with Item 72 of the Preliminaries specified that the architect is not allowed to issue the Completion Certificate until all parts of the work are in the architect's opinion ready for occupation and for use. The court found it difficult to accept how the architect could have issued the Completion Certificate two weeks after the buildings had failed the first inspection for the issue of the TOP. 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, the TOP has been obtained.

There were also "contradictory and shifting statements" by the architect which clearly showed that the architect cannot defend or explain his issue of the Completion Certificate (e.g. the architect had listed some significant outstanding works (i.e. items which would have caused the buildings to fail their TOP inspection) as minor outstanding works in the list of defects attached to the Completion Certificate issued by him).

Whether the Completion Certificate affected IC 25 and 26

The court stated that the Completion Certificate is an important milestone certificate under the SIA Conditions, and that its issue triggers other certificates and milestones at this end-phase of the construction contract (e.g. the release of one moiety of the retention monies less only a reasonable sum to cover the cost of outstanding works under cl 31(9)).

Considering the timing of the issuance of IC 25 and 26, the court found it 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 4.5 months and 6.5 months after contract completion. It also appeared uncharacteristic for a contractor with financial issues to wait so long after having completed his works to make his interim payment claims.

The respondent argued that the amount certified under IC 25 arose not due to work done after completion, but because of prime cost adjustments. The court was unconvinced by the respondent's argument. The Interim Valuation for the "Prime Cost & Provisional Sums" (the "**Interim Valuation**") for IC 25 was unchanged from IC 24; while the corresponding Interim Valuation for IC 26 increased only by a small amount of \$19.19 from IC 25. The court found the amounts certified under IC 25 and 26 to be questionable.

4. Conclusion

Whether there is temporary finality in the certificates issued by an architect will always depend on the facts of each case - but this case provides some useful pointers for architects:

- (a) There must be an absence of fraud or improper pressure or interference by either the employer or the contractor. The "fraud" exception, read in light of *Derry v Peek* (1889) 14 App Cas 337, means that 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* also states that "fraud" can 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.
- (b) The certificates will only be granted temporary finality if they are issued strictly in accordance with the terms of the contract - and in this regard, the court will take into account the circumstances surrounding the issuance of the certificates (for example, in this case, the court considered it relevant that the interim payment certificates were being issued some 4.5 months and 6.5 months after the purported contract completion).
- (c) In the usual case, the issuance of the Completion Certificate is generally not allowed until all parts of the work are, in the architect's opinion, ready for occupation and for use. Correspondingly, the issuance of the Completion Certificate is usually tied to the issuance of the TOP.