IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHCR 11

Suit No 276 of 2018 (Summons No. 1613 of 2018)

Between

Yau Lee Construction
(Singapore) Pte Ltd

… *Applicant*

And

Far East Square Pte Ltd

… *Respondent*

Suit No 276 of 2018 (Summons No. 1802 of 2018)

Between

Far East Square Pte Ltd

… *Applicant*

And

Yau Lee Construction
(Singapore) Pte Ltd

… *Respondent*

JUDGMENT

[Arbitration] — [Stay of court proceedings] — [Dispute to be referred to arbitration] – [Arbitration Act (Cap 10, 2002 Rev Ed)]

[Building and Construction Law] — [Standard form contracts] — [Singapore Institute of Architects standard form contracts] — [Validity of architect's certificates]

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v
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Elton Tan Xue Yang AR
1, 13 June 2018

17 July 2018 Judgment reserved.

Elton Tan Xue Yang AR:

Introduction

1 Writing in 1986, some six years after he authored the Articles of Agreement and Conditions of Contract of the Singapore Institute of Architects ("the SIA Conditions"), Mr Ian Duncan Wallace QC remarked that he had intended the instrument to serve as "an exemplar of a first attempt at the many reforms which [he] believe[d] to be long overdue in construction contracts": Ian Duncan Wallace, *Construction Contracts: Principles and Policies in Tort and Contract* (Sweet & Maxwell, 1986) ("*Construction Contracts*") at p539. The policy that guided the drafting of the SIA Conditions was, Mr Wallace explained, "to leave as little as possible for implication by the courts or arbitrators, in the hope that litigation or arbitration would be thereby kept to the absolute minimum, and that where it did become inevitable it would be limited,

as with any really well-drafted contract it ought to be, to issues of fact": *Construction Contracts* at p542.

2 Today, the SIA Conditions is the most widely used standard form of building contract in Singapore. By the time the 9th Edition was launched in September 2010, the instrument had "served a whole generation of architects, engineers, quantity surveyors and contractors in Singapore [and] attracted considerable interest from building owners and contractors abroad": foreword by Belinda Ang Saw Ean J in Chow Kok Fong, *The Singapore SIA Form of Building Contract: A commentary on the 9th Edition of the Singapore Institute of Architects Standard Form of Building Contract* (Sweet & Maxwell, 2013) ("*Chow Kok Fong*") at pvii. The present incarnation of the SIA Conditions can be found in the suite of six contracts constituting the Singapore Institute of Architects Building Contract 2016 (1st Ed). It is a testament to the cogency of Mr Wallace's work that fault in the SIA Conditions has only infrequently been detected, and where areas of improvement have been identified, the draftsmen who succeeded Mr Wallace have been able to make the necessary adjustments.

3 The dispute between the parties in this suit centres on the regime of architect's certificates in the SIA Conditions, known as the Delay Certificate, Termination of Delay Certificate, Further Delay Certificate and Final Certificate. Specifically, the parties differ on whether and if so, how, a contractor can seek extensions of time for delaying events that occur after the latest date for completion stipulated in a Delay Certificate but before the date of issuance of that Delay Certificate. The difficulty appears to have arisen out of certain amendments introduced in the 6th Edition of the SIA Conditions, such amendments having been intended to prevent architect's certificates from being invalidated due to lateness.

4 The parties applied for a stay of the claim and counterclaim respectively pursuant to an arbitration clause in the SIA Conditions. However, they disagree on the approach to be applied to determine whether there is a dispute to be referred to arbitration under s 6 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the AA"), in the context of an action commenced for the enforcement of architect's certificates. The issue in contention is whether the entitlement of an employer to seek summary judgment on architect's certificates under the SIA Conditions and the policy of facilitating cash flow in the construction industry ought to have an impact on how closely the court considers the quality of the claim and defence in determining the existence of a dispute to be referred to arbitration.

Facts

5 The plaintiff, Far East Square Pte Ltd ("the Plaintiff"), is in the business of property investment and development. It is a company within the Far East Organisation group.[1] The Plaintiff is the owner of a construction project described as the "Proposed Integrated Commercial and Residential Development Comprising of 7 Blocks of 5-Storey Residential (Condominium) Building (Total 319 Residential Units) With Provision of Basement Carparks, A Swimming Pool And Communal Facilities And 2-Storey Commercial Building with Shops (Total 34 Units) / Supermarket / Carparks on Lot No 17047L MK 18 at Yio Chu Kang / Seletar Road (Serangoon Planning Area), Singapore" ("the Project").[2]

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1 Affidavit of Belinda Abeyegoonasekara dated 17 April 2018 (SUM 1802/2018) at para 1.

2 Statement of Claim at paras 1 and 3.

6 The defendant, Yau Lee Construction (Singapore) Pte Ltd ("the Defendant"), is in the business of building construction.[3]

Letter of Award and Main Contract

7 On 29 November 2010, the Plaintiff issued a letter of award ("the Letter of Award") appointing the Defendant as the main contractor of the Project for a contract sum of $82m. The Letter of Award incorporated the Articles and Conditions of Building Contract (Measurement Contract) published by the Singapore Institute of Architects (7th Ed, April 2005) with certain amendments.[4] For convenience, I will likewise refer to this 7th Edition as "the SIA Conditions".

8 The parties subsequently executed a formal contract ("the Main Contract") on 23 April 2013. The Main Contract comprised, amongst other things, the Letter of Award and the SIA Conditions.[5] The SIA Conditions – in particular, cll 23 and 24 – are of central importance to the applications before me but in the interests of concision I will only set their terms out fully when discussing the parties' submissions below.

9 Two phases of works were envisaged under the Main Contract. Phase 1, which concerned the "Commercial Building, including 1st and 2nd Storey Shops and 1st and Basement Carparks" ("the Phase 1 Works"), was to commence on 22 November 2010 and be completed on 21 November 2011. The works for Phase 2, which involved construction of the "Residential Building, including 1st

3 Statement of Claim at para 2.

4 Statement of Claim at para 3; Defendant's Core Bundle of Documents dated 1 June 2018 at Tab 1.

5 Defence and Counterclaim at para 7.

Storey Swimming Pool, Common Facilities, Recreation Pools, Clubhouse and all Landscape" ("the Phase 2 Works"), were likewise to commence on 22 November 2010 but the contractual completion date was 21 April 2013.[6] The Main Contract also provided for liquidated damages for failure to complete the Phase 1 and Phase 2 Works at the rates of $2,000 and $7,000 respectively for every calendar day that the Defendant was in delay.[7]

10 The architect administering the Main Contract was Mr Lim Meng Hwa, a Partner of ADDP Architects LLP ("ADDP").[8] As the person issuing architect's certificates under the SIA Conditions, he is a key figure in the narrative of the dispute.

Delay Certificate

11 The Defendant was granted 14 days' extension of time to complete the Phase 1 Works and successfully did so by 5 December 2011.[9] The subject of the dispute only concerns the Phase 2 Works.

12 On 17 February 2014, Mr Lim issued a Delay Certificate ("the Delay Certificate"), purportedly in accordance with cl 24.(1) of the SIA Conditions.[10] In the Delay Certificate, Mr Lim stated that he had extended the time for completion by a total of 162 days from the contract completion date of 21 April

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6 Statement of Claim at para 5; Defence and Counterclaim at para 11.

7 Statement of Claim at para 5; Affidavit of Wong Ming Tak dated 6 April 2018 (SUM 1613/2018) ("Wong's 1st affidavit (SUM 1613)") at p78.

8 Statement of Claim at para 6; Affidavit of Lim Meng Hwa dated 20 April 2018 (SUM 1613/2018) ("Lim's 1st affidavit (SUM 1613)") at para 1.

9 Statement of Claim at paras 6 and 8; Defence and Counterclaim at paras 12 and 14.

10 Statement of Claim at para 10; Defence and Counterclaim at para 16.

2013 and that no grounds existed for any further extension of time. According to Mr Lim, the "latest date for completion of the Works pursuant to Clause 22(1) of the Conditions" was therefore 30 September 2013. He further certified that the Defendant was in default in not having completed the works by that date.[11]

13 On 3 March 2014, the Defendant wrote to Mr Lim, complaining that certain delays were not accounted for in the Delay Certificate. It claimed in particular that the Delay Certificate was "invalidated by the issue of further instructions by [Mr Lim] to carry out additional variation works after 30 September 2013". It attached a list of those instructions to its letter.[12] According to the Defendant, 94 of those instructions ("the 94 Instructions") were issued before 17 February 2014, *ie*, the date of issuance of the Delay Certificate.[13]

14 Mr Lim replied to the Defendant on 5 May 2014, requesting for "more information/reasons with supporting documents/particulars and evidences [*sic*] to enable us to determine and assess [the Defendant's] requisition of Extension of Time", relying on cl 23.(4) of the SIA Conditions. Mr Lim referred to a list of 33 architect's instructions which were annexed to his letter.[14] According to the Defendant, 29 of those 33 architect's instructions ("the 29 Instructions") were issued prior to 17 February 2014.[15]

15 The Defendant responded on 27 May 2014, attaching a detailed programme of works done in relation to the 33 architect's instructions that Mr

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11 Wong's 1st affidavit (SUM 1613) at p100.

12 Wong's 1st affidavit (SUM 1613) at pp105–109.

13 Defence and Counterclaim at para 19.

14 Wong's 1st affidavit (SUM 1613) at pp110–112.

15 Defence and Counterclaim at para 20.2; Wong's 1st affidavit (SUM 1613) at p6.

Lim had referred to in his letter of 5 May 2014. In its letter, the Defendant also sought the issuance of a Termination of Delay Certificate under cl 24.(3) of the SIA Conditions.[16] Both parties refer to the Defendant's claim for extensions of time arising from its letter of 3 March 2014 and the 33 architect's instructions as "EOT-5".

Termination of Delay Certificate

16 According to the Defendant, there was a meeting at Mr Lim's office on 5 March 2015. At the meeting, Mr Lim issued a "partial assessment" to the Defendant regarding further extensions of time arising from the delaying events that occurred prior to 17 February 2014.[17] The Defendant then wrote to Mr Lim on 20 March 2015, referring again to its receipt of Mr Lim's "partial assessment" and attaching that in an appendix to its letter. The Defendant sought "final approval of [its] EOT Claim No. 5".[18]

17 On 25 March 2015, Mr Anthony Tan, a Senior Principal Associate at ADDP, wrote to the Defendant. Mr Tan referred to the Defendant's "claim for Extension of Time in [the Defendant's] letter … dated 20 March 2015" and stated as follows:[19]

> Further to the many meetings and discussion in our office, we have in principal no objection to grant you further extension of time as per the following subject to further review:
>
> - EOT-4 1 Oct 2013 to 30 Nov 2013
>
> - EOT-5 7 Jan 2014 to 31 Mar 2014

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16 Wong's 1st affidavit (SUM 1613) at pp113–127.

17 Defence and Counterclaim at para 20.4.

18 Wong's 1st affidavit (SUM 1613) at p128.

19 Wong's 1st affidavit (SUM 1613) at p130.

> We will reply you on the actual grant on the number of days after our final evaluation.

18 This was followed by a letter from Mr Lim sent almost nine months later on 19 December 2016. Mr Lim referred to the Defendant's "letter … dated 3 March 2014 with regards to the Delay Certificate dated 17 February 2014" and stated as follows:[20]

> Based on the submitted information and substantiations, we have since reviewed and assessed a further extension of time totalling 51 days in respect of instructions given or matters occurring since the issuance of the Delay Certificate dated 17 February 2014.
>
> Enclosed copy of the Termination of Delay Certificate dated 19 February 2014 for your information and record.
>
> [underline in original]

19 In the enclosed Termination of Delay Certificate ("the Termination of Delay Certificate"), Mr Lim certified that he had granted the Defendant a further extension of time totalling 51 days "in respect of instructions given or matters occurring since the issuance of [Mr Lim's] Delay Certificate dated 17 February 2014" [underline in original]. Accordingly, no liquidated damages would accrue against the Defendant during the period of further extension, which was from 19 February 2014 to 10 April 2014, both dates inclusive. The Termination of Delay Certificate was backdated to 19 February 2014.[21]

Further Delay Certificate

20 On 7 February 2017, Mr Lim issued a Further Delay Certificate ("the Further Delay Certificate"), certifying that the Defendant had failed to complete

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20 Wong's 1st affidavit (SUM 1613) at p131.

21 Wong's 1st affidavit (SUM 1613) at p101.

the works "within the period of further extension of time granted under [Mr Lim's] Termination of Delay Certificate dated 19 Feb 2014" and was "again in default in not completing the Works by 10 April 2014". Therefore liquidated damages would again accrue against the Defendant from 11 April 2014, which was "the date of further delay".[22] For convenience, I will refer to the Delay Certificate, the Termination of Delay Certificate and the Further Delay Certificate collectively as "the Architect's Certificates".

Final Certificate

21 Subsequent to that, Mr Lim issued a Final Certificate dated 5 September 2017 ("the Final Certificate"), certifying that the Defendant was liable to pay the Plaintiff liquidated damages in the sum of $1.169m.[23]

22 The parties then participated in adjudication, out of which an adjudication determination was rendered on 14 February 2018. The adjudicator held that a sum of $2,276,284.68 ("the Adjudicated Amount") was due and payable from the Plaintiff to the Defendant, following the Plaintiff's failure to provide a payment response.[24] The Defendant successfully obtained leave to enforce the adjudication determination on 12 March 2018. About two weeks thereafter, the Plaintiff applied to set aside the adjudication determination by filing Originating Summons No. 258 of 2018.

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22 Wong's 1st affidavit (SUM 1613) at p102.

23 Statement of Claim at para 13; Defence and Counterclaim at para 29.

24 Statement of Claim at para 15; Defence and Counterclaim at para 31.

The proceedings

23 The Plaintiff commenced Suit 276 of 2018 ("the Suit") on 14 March 2018. On 6 April 2018, the Defendant filed Summons No. 1613 of 2018 ("the Defendant's Stay Application"), seeking a stay of the Plaintiff's claim in the Suit given the presence of an arbitration clause in the Main Contract. The Defendant premised its application on s 6 of the AA.

24 On the same day, the Defendant filed a Defence and Counterclaim. Notably, the Defence and Counterclaim contained a reservation of the Defendant's right to file an application to stay proceedings in the Suit on the basis that the parties had agreed to refer to arbitration all disputes arising between the parties.[25] According to the Defendant, it filed its Defence and Counterclaim because the Plaintiff had refused to agree to the deferment of the filing of a Defence pending the outcome of any stay application filed by the Defendant.[26] In any event, given the Defendant's reservation of rights, the Plaintiff has not contended that the Defendant has taken a step in the proceedings by filing its Defence and Counterclaim and is thereby barred from seeking a stay of the proceedings (see also *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR(R) 168 at [22] and *Chong Long Hak Kee Construction Trading Co v IEC Global Pte Ltd* [2003] 4 SLR(R) 499 at [13]).

25 On 17 April 2018, the Plaintiff filed Summons No. 1802 of 2018 ("the Plaintiff's Stay Application"), seeking a stay of the counterclaim on the basis that the counterclaim should be referred to arbitration, relying on an arbitration

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25 Defence and Counterclaim at paras 1 and 35.

26 Affidavit of Wong Ming Tak dated 4 May 2018 (SUM 1802/2018) at para 22.

clause in the Letter of Award. Similarly, the Plaintiff based its application on s 6 of the AA. In addition, on 7 May 2018, the Plaintiff filed an application for summary judgment (Summons No. 2113 of 2018) ("the Summary Judgment Application"), seeking the entry of final judgment for its claim for $1.169m in liquidated damages and a declaration that Mr Lim's certificates be "given full effect with a corresponding right to deduct and/or set-off the sum of $1,169,000.00 from the Adjudicated Amount adjudged as payable to the Defendant.

26 The Stay Applications came before me for hearing on 1 and 13 June 2018. At the close of arguments on 13 June 2018, I reserved judgment.

Issues for determination

27 The question before me is whether the claim and counterclaim ought to be stayed pursuant to s 6 of the AA. In that regard, the only issue in contention is whether there exists a dispute which can properly be referred to arbitration. As mentioned at [4] above, the parties disagree on the approach to be applied to determine the existence of such dispute. This divergence became clear during the course of the hearing on 1 June 2013 and I therefore directed the parties to file additional written submissions to explain their respective positions on this threshold issue before the further hearing on 13 June 2013. I will proceed to determine that threshold issue and identify the correct approach before applying it to the claim and counterclaim accordingly.

Arbitration of disputes in the enforcement of architect's certificates

28 Although the parties refer to different documents in support of their respective arguments that the claim and counterclaim should be referred to

arbitration (*ie,* the Defendant relying on the Main Contract and the Plaintiff on the Letter of Award), it is clear that both parties rest their cases on the same clause within the SIA Conditions, which form part of both the Main Contract and the Letter of Award. This is cl 37.(1), which states in material part as follows:

> **ARBITRATION**
>
> Any dispute between the Employer and the Contractor as to any matter arising under or out of or in connection with this Contract or under or out of or in connection with the carrying out of the Works and whether in contract or tort, or as to any direction or instruction or certificate of the Architect or as to the contents of or granting or refusal of or reasons for any such direction, instruction or certificate shall be referred to […] arbitration…

Parties' submissions

29 The Plaintiff submits that the burden lies on the Defendant to satisfy the court of the existence of such a dispute if it is to succeed in its stay application, and it must do so by establishing a "*prima facie* defence" and not merely the existence of a "*prima facie* dispute".[27] The Plaintiff emphasises that its purpose in commencing the Suit was to enable it to enforce the architect's certificates by way of summary judgment in accordance with cl 31.(13) of the SIA Conditions.[28] It relies on the Court of Appeal's decisions in *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] 3 SLR 124 ("*Chin Ivan*") and *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] 3 SLR 51 ("*Ser Kim Koi*") to support its position that "the applicable standard for determining whether a stay should be granted on the basis that the architect's certificate is irregular (i.e. not

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27 Plaintiff's further written submissions dated 8 June 2018 at para 4.

28 Plaintiff's further written submissions dated 8 June 2018 at para 3.

issued in accordance with the [SIA Conditions]) would be that of a *prima facie* defence or arguable defence and not a *prima facie* dispute".[29]

30 Crucially, the Plaintiff suggests that the temporary finality of architect's certificates, which provides the basis for enforcement of such certificates by way of summary judgment, should be factored into the determination of the standard to be met by the applicant for a stay. It argues that if the temporary finality of such a certificate could be "displaced easily by a mere assertion that there is a *prima facie* dispute as to whether there was fraud, improper pressure or interference or whether the certificate was issued in accordance with the [SIA Conditions], that would seriously undermine the contractual intention of according temporary finality to the architect's certificate in the first place". To give effect to such contractual intention, the Plaintiff reasons, the approach to determine whether to stay an action in which the enforcement of architect's certificates is sought by way of summary judgment should likewise be the test for summary judgment, *ie,* a "*prima facie* defence or triable issue".[30]

31 According to the Defendant, the applicable test is whether it is able to show the existence of a *prima facie* dispute. The Defendant relies heavily on the decision of the Court of Appeal in *Kwan Im Tong Chinese Temple and another v Fong Choon Hung Construction Pte Ltd* [1998] 1 SLR(R) 401 ("*Kwan Im Tong*") which, in the Defendant's view, stands for the proposition that "the relevant test for a stay application [is] the test of *prima facie* dispute".[31] The

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29 Plaintiff's further skeletal submissions dated 8 June 2018 at para 9.

30 Plaintiff's further skeletal submissions dated 8 June 2018 at para 16.

31 Defendant's skeletal submissions 3 dated 8 June 2018 at paras 5–12.

Defendant goes further to argue that the test of "*prima facie* defence" is of no relevance to an application for a stay in favour of arbitration.[32]

Analysis

32 In my judgment, the test advocated by the Plaintiff is not only plainly inconsistent with the case law but is also unsupported by the policy reason that it puts forward to justify the application of the summary judgment standard to determine if there is a dispute to be referred to arbitration. As mentioned earlier, that policy is the need to preserve cash flow in the construction industry and minimise disruptions for contractors. Apart from its patent incompatibility with the approach adopted in the cases – a substantial number of which concern disputes between employers and contractors – the Plaintiff's argument ultimately confuses a question of jurisdiction with a question of merits and ignores the fact that an employer's entitlement to enforce architect's certificates by way of summary judgment ultimately arises out of an agreement between the parties of which an arbitration clause is also part. I begin with a survey of the authorities.

Whether the claim is undisputed or indisputable

(1) A comparison of the regimes under the Arbitration Act and International Arbitration Act

33 It is important to observe at the outset that the approach one adopts to determine the existence of a dispute to be referred to arbitration depends crucially on whether one is considering a stay application under the AA or the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). The

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[32] Defendant's skeletal submissions 3 dated 8 June 2018 at para 16.

approaches that the courts have adopted under the two statutes are markedly different.

34 In the context of the IAA, the position was made clear by the Court of Appeal in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*") at [49]. V K Rajah JA, giving the judgment of the Court, held that it is "sufficient for a defendant to simply assert that he disputes or denies the claim in order to obtain a stay of proceedings in favour of arbitration". Endorsing the English Court of Appeal's decision in *Halki Shipping Corporation v Sopex Oils Ltd* [1998] 1 WLR 726 as well as Woo Bih Li J's reading of that case in *Dalian Hualiang Enterprise Group Co Ltd v Louis Dreyfus Asia Pte Ltd* [2005] 4 SLR(R) 646 ("*Dalian*"), Rajah JA further held that the court is "not to examine whether there is 'in fact' a dispute, or a genuine dispute", and that "[a] dispute that a claimant was always likely to succeed in remains, until adjudicated on, none the less a dispute".

35 This parallels the situation in the UK following the introduction of the Arbitration Act 1996 ("the 1996 English Act"). One of the important reforms introduced by the 1996 English Act was the removal of the words "that there is not in fact any dispute between the parties with regard to the matter agreed to be referred" in s 1(1) of the Arbitration Act 1975 ("the 1975 English Act"), which had been the prevailing regime. In other words, under the 1975 statutory regime, the court could not grant a stay if it found that there was "not in fact any dispute between the parties" in relation to the matter at issue. The pre-reform position had been the subject of a considerable amount of criticism (see, for example, Michael J. Mustill and Steward C. Boyd, *The Law and Practice of Commercial Arbitration in England* (Butterworths, 2nd Ed, 1989) ("*Mustill & Boyd*") at p123 where the authors remark that a dispute in relation to which the

plaintiff was always going to win is nonetheless a dispute). The requirement to consider whether there was "not in fact any dispute between the parties" was understood to confer a power on the court to refuse a stay where the defence was so weak that the claim was "indisputable" (meaning that it was not capable of serious dispute), and this created a situation where many claims that fell within the scope of an arbitration clause were instead dealt with by the courts on the basis that they were "indisputable": Michael J. Mustill and Steward C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition* (Butterworths, 2001) at p269. The difficulty was removed with the introduction of the modern formulation in s 9(1) of the 1996 English Act, which applies to both domestic as well as non-domestic arbitration and which deletes the troublesome phrase from the statutory test.

36 In *Dalian*, Woo J observed at [46] and [74] that the Singapore courts have followed the English pre-1996 position in relation to *domestic* arbitration under the AA. The pre-1996 position in the UK applicable to domestic arbitration was governed by s 4(1) of the UK's Arbitration Act 1950, which did not explicitly state that a stay should be refused if there was "not in fact any dispute between the parties" (in contrast to s 1(1) of the 1975 English Act as described above, which applied to non-domestic arbitration) but which the English courts had always implicitly assumed in their decisions to contain such a qualification: see *Mustill & Boyd* at p122. This approach continues to be relevant to stay applications brought under s 6 of the AA. Put another way, the reasoning that eschews any curial consideration of the quality of the claim and defence when determining whether proceedings should be stayed in favour of arbitration does not appear to have been extended to stay applications under the AA, as it has under the IAA.

37 This can be seen from the following illustrative cases which I will briefly describe before distilling the key principles.

(2) Stay applications under the Arbitration Act

38 In *Uni-Navigation Pte Ltd v Wei Loong Shipping Pte Ltd* [1992] 3 SLR(R) 595 ("*Uni-Navigation*"), G P Selvam JC (as he then was) held at [15] that s 7 of the Arbitration Act (Cap 10, 1985 Rev Ed) ("the AA (1985 Rev Ed)"), which is the predecessor of s 6 of the AA, required consideration of whether the claim is "undisputed or indisputable". Where the claim is undisputed or indisputable, "the courts and not the arbitrators have the jurisdiction to decide upon the claim even though the arbitration agreement stipulates for disputes to be referred to arbitration". Selvam JC went on to provide the following useful observations:

> 16 The common form arbitration agreement provides for disputes to be decided by arbitrators. In such a case the court should, save in obvious cases, adopt a ***holistic and commonsense approach to see if there is a dispute.*** The justification for this approach is that it is important to hold a party to his agreement and avoid double and split hearing of matters. The reasoning in support of this view is found in [*Mustill & Boyd*] at p 123:
>
> > Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a bona fide if unsubstantial defence ought to be ruled upon by the arbitrator, not the court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement *plainly extends to cases where the defence is unsound in fact or law.* A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a

> dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed.
>
> 17 If the defendant, therefore, makes out a *prima facie* case of disputes the courts ***should not embark on an examination of the validity of the dispute as though it were an application for summary judgment.***
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> [emphasis added in italics and bold italics]

39 In *Kwan Im Tong*, the respondent contractors commenced an action against the appellant employers for interim payment certified by an architect. The employers applied for a stay of proceedings pursuant to s 7 of the AA (1985 Rev Ed) on the basis that they had a cross-claim for damages for defective works and for liquidated damages for delay in completion. Warren Khoo J took the view that certain principles governing summary judgment were applicable, having "start[ed] with the premise that, the architect having duly certified the interim payment, the contractors are *prima facie* entitled to summary judgment for the sum certified": *Kwang In Tong Chinese Temple v Fong Choon Hung Construction Pte Ltd* [1997] 1 SLR(R) 907 ("*Kwan Im Tong (HC)*") at [13].

40 On appeal, the Court of Appeal raised doubts over that approach. M Karthigesu JA, giving the judgment of the Court, held at [10] that while Khoo J's "application of the law was not wrong, applying summary judgment principles should not be held to be an exhaustive means of weighing the claims". He reasoned that "while O 14 summary judgment principles aid the court with determining whether a claim should be immediately allowed in very obvious cases, applications for a stay such as the present one relate to a larger issue of jurisdiction". Therefore it did "not appear entirely safe to determine whether parties should be bound by their agreement to arbitrate according to principles established to deal with very obvious claims to which there is no defence". Karthigesu JA cited with approval Parker LJ's decision in *Home and Overseas*

Insurance Company Ltd v Mentor Insurance Co (UK) Ltd (in liquidation) [1990] 1 WLR 153 ("*Home and Overseas Insurance*") at 158. Parker LJ's remarks are both insightful and pertinent and are therefore worth setting out at some length:

> The purpose of Ord 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment. If at first sight the point appears to be arguable but with a relatively short argument can be shown to be plainly unsustainable the plaintiff is also entitled to judgment. But Ord 14 proceedings should not in my view be allowed to become a means for obtaining, in effect, an immediate trial of an action, which will be the case if the court lends itself to determining on Ord 14 applications points of law which may take hours or even days and the citation of many authorities before the court is in a position to arrive at a final decision.
>
> *In cases where there is an arbitration clause it is in my judgment the more necessary that* ***full-scale argument should not be permitted.*** The parties have agreed on their chosen tribunal and a defendant is entitled prima facie to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the courts until it has been so decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals.
>
> In the case of a commercial arbitration the above remarks apply with even greater force, perhaps *especially when the dispute turns on construction, or the implication of terms or trade practice. Arbitrators and umpires in the same business or trade as the parties are certainly as well or better able than the court to judge what the parties must be taken to have meant or intended by the words or phrases they have used*, to judge what the parties would at once have replied if an innocent bystander had asked what was to happen in a certain event not dealt with by the contract and to know what are the practices in the trade. Not only is the defendant entitled to have the dispute decided in the first instance by such persons but ***the court should not in my view, save in the clearest of cases, decide the question without the benefit of their views.***
>
> ***In very clear cases a plaintiff is no doubt entitled to his summary judgment notwithstanding the clause***, but, when a plaintiff seeks immediate judgment in other than a clear case

> and resists the submission of the dispute to the tribunal on which he has agreed, one is bound to wonder whether the course which he has taken is prompted by the knowledge that the chosen tribunal with its more intimate knowledge of the trade may reach a conclusion adverse to him in respect of which he might either fail to obtain leave to appeal or if he did obtain leave fail to demonstrate any error.
>
> [emphasis added in italics and bold italics]

41 By way of background, *Home and Overseas Insurance* was heard at a time when the practice of the English courts was to bring on for hearing at the same time an application by the claimant for summary judgment and the cross-application by the defendant for a stay, "it being taken for granted that the success of one application determines the fate of the other": *Mustill & Boyd* at p124. Applications for summary judgment and for a stay of proceedings in favour of arbitration were seen as "the reverse sides of the same coin"; if the court found that there was no arguable defence to the claim then it would give judgment for the plaintiff and dismiss the stay, such that "[i]n the same breath, as it were, [the court would] then have decided that in reality there was not in fact any dispute between the parties": *SL Sethia Liners Ltd v State Trading Corp of India Ltd* [1986] 2 All ER 395 at 396–397. As I will subsequently explain, there used to be a similar practice in the Singapore courts but circumstances changed following amendments to the Rules of Court in 2002.

42 In *Kwan Im Tong*, Karthigesu JA went on to affirm two other pre-1996 English decisions. The first was that of Kerr J in *Tradax Internacional SA v Cerrahogullari TAS The M Eregli* [1981] 2 Lloyd's Rep 169 ("*The M Eregli*") at 175, where Kerr J held that if a claim is "indisputably due", the claimant can either obtain a final or interim award in the arbitration or summary judgment in an action, even though the action and the arbitration are concurrent, although in such a situation it would "obviously [be] far more sensible and convenient to

give judgment under O 14 than to refer the undisputed claim back to the arbitrator". The second was Lord Mustill's judgment in *Channel Tunnel Group Ltd and France Manche SA v Balfour Beatty Construction Ltd* [1993] 1 All ER 664 ("*Channel Tunnel*"), a decision of the House of Lords. Lord Mustill held at 681 as follows:

> In recent times, this exception to the mandatory stay has been regarded as the opposite side of the coin to the jurisdiction of the court under RSC Ord 14 to give summary judgment in favour of the plaintiff where the defendant has no arguable defence. ***If the plaintiff to an action which the defendant has applied to stay can show that there is no defence to the claim, the court is enabled at one and the same time to refuse the defendant a stay and to give final judgment for the plaintiff***. This jurisdiction, unique so far as I am aware to the law of England, has *proved to be very useful in practice, especially in times when interest rates are high, for protecting creditors with valid claims from being forced into an unfavourable settlement by the prospect that they will have to wait until the end of an arbitration in order to collect their money*. I believe however that ***care should be taken not to confuse a situation in which the defendant disputes the claim on grounds which the plaintiff is very likely indeed to overcome, with the situation in which the defendant is not really raising a dispute at all***. It is unnecessary for present purposes to explore the question in depth, since in my opinion the position on the facts of the present case is quite clear, but I would indorse the *powerful warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunals*, and on the international policy exemplified in the English legislation that this consent should be honoured by the courts, given by Parker LJ in *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (in liq)* [1989] 3 All ER 74 at 78, [1990] 1 WLR 153 at 158-159 and Saville J in *Hayter v Nelson and Home Insurance Co* [1990] 2 Lloyd's Rep 265. [emphasis added in italics and bold italics]

43 It is worth pointing out that both *The M Eregli* and *Channel Tunnel* concerned stay applications under the pre-1996 regime in England (and, at least in the context of *Channel Tunnel*, under the mandatory stay regime of the 1975 English Act which applies to non-domestic arbitration). Given the endorsement

of these authorities in *Kwan Im Tong* (which was decided in 1998), it appears that the reasoning and approach in these cases continues to hold sway in the context of stay applications brought under the AA. Summarising the cases, Karthigesu JA held at [15] that "it is *the party resisting the stay of proceedings … who ha[s] the burden of showing that the other party … ha[s] no defence to the claim*" [emphasis added]. He therefore found that Khoo J's approach of deeming the contractors to be *prima facie* entitled to summary judgment and that it was therefore for the employers to show that they had a *bona fide* defence was "not consonant with s 7 of the [Arbitration Act (1985 Rev Ed)]". He concluded by citing with approval a further remark from Lord Mustill in *Channel Tunnel* at 681 that on the facts of that case, "an English court could not properly conclude in the light of affidavit evidence alone that the appellants' claim [was] *so unanswerable that there [was] nothing to arbitrate*" [emphasis added].

44 About a year later, Tay Yong Kwang JC (as he then was) in *Fasi Paul Frank v Specialty Laboratories Asia Pte Ltd* [1999] 1 SLR(R) 1138 ("*Fasi Paul Frank*") turned his mind to the principles laid out in *Kwan Im Tong*. One of the principles Tay JC drew out from *Kwan Im Tong* was that "the court should adopt a holistic and common-sense approach to see if there is a dispute save in 'obvious' or 'very clear cases'", and "if the party applying for a stay makes out a *prima facie* case of a dispute, the court should not embark on an examination of the validity of the dispute as though it were an application for summary judgment": *Fasi Paul Frank* at [15]. On the facts, Tay JC found that there was in fact "a dispute or controversy which should be referred to the arbitrator", but he emphasised that in making such a finding, he was "not suggesting that the plaintiff [had] no chance of succeeding in his O 14 application". The circumstances in *Fasi Paul Frank* were somewhat unusual. Due to dilatoriness

on the defendant's part, the plaintiff's summary judgment application had been heard and conditional leave to defend granted by the time the defendant's appeal against the dismissal of its stay application was heard. Tay JC reasoned that since "*[s]howing no sustainable defence to a claim* is not the only way of *showing cause against an application for a stay*" [emphasis added], and because it did not make sense to order a stay of proceedings now that the action had proceeded past summary judgment, the proceedings should not be stayed.

45 The Court of Appeal next had occasion to consider the applicable approach in *Multiplex Construction Pty Ltd v Sintal Enterprise Pte Ltd* [2005] 2 SLR(R) 530 ("*Multiplex*"). The appellant entered into subcontracts with the respondent for supply, delivery and installation of marble. The architect for the project issued interim certificates for a total of $485,268.55 in respect of marble supplied by the respondent. The appellant did not pay those amounts and instead sought to set off certain losses that supposedly arose from the respondent's delay. The respondent commenced an action against the appellant for non-payment and the appellant applied for a stay under s 6 of the AA. The appellant succeeded in obtaining a stay of all of the respondent's claims save for the claim for $485,268.55. On appeal to the High Court, the appellant argued that there were disputes that should be referred to arbitration; namely, that it was unclear from the sub-contract whether the appellant was entitled to both general damages and liquidated damages or whether liquidated damages was the sole remedy for delay, and whether the set-off notices issued by the appellant were defective. The High Court judge dismissed the appeal and the appellant filed a further appeal to the Court of Appeal.

46 In my respectful opinion, the Court of Appeal's approach in *Multiplex* is instructive. Judith Prakash J (as she then was), giving the judgment of the

Court, began by reiterating the principles in *Kwan Im Tong* and *Uni-Navigation*. She identified the issues that arose in the appeal as whether it was "arguable" that the appellant had a right to claim general damages of delay and, if so, whether it was "also arguable" that its set-off notices complied with the subcontract: *Multiplex* at [16]. Both of these issues had to be answered in the affirmative if the appellant was to succeed; "if they are not, the refusal of the stay must be maintained". Prakash J referred to the Court of Appeal's decision in *JDC Corp and another v Lightweight Concrete Pte Ltd* [1999] 1 SLR(R) 96 ("*JDC*"), which concerned an application under s 7 of the AA (1985 Rev Ed), and distilled from [15] the "clear message [that] if there appears to be a conflict between two provisions of a contract and such conflict *cannot be settled without delving deeply into the contract*, then the resolution of the question of construction that is raised by the conflict is a dispute which should go to arbitration" [emphasis added].

47 On the issue of whether both liquidated damages as well as general damages were claimable, the Court of Appeal's reading of a clause within the Conditions of Sub-Contract for use in conjunction with the Main Contract (2nd Ed, 2000, published by the Singapore Institute of Architects) ("the Sub-Contract Conditions") differed from that advocated by the appellant: *Multiplex* at [23]. Prakash J held that the clause did not confer a right to claim general damages. She further identified a "possible tension" between that clause and another provision elsewhere in the parties' agreement, which she found at [25] to be susceptible to different interpretations. Accordingly, "the proper interpretation of the damages provisions of the sub-contract" was a dispute that must go to arbitration: *Multiplex* at [27]. In relation to the set-off notices issued by the appellant, the respondent had contended that the appellant had illegitimately sought to set off prospective losses in its first set-off notice, in breach of a clause

in the Sub-Contract Conditions. Prakash J found that the respondent's argument that the appellant could not set off prospective losses in its first set-off notice was "well founded in view of the phraseology of [the clause]" as well as the prohibition at common law against the set-off of prospective debts. Thus the appellant could only claim a set-off for expenses incurred prior to the date of issuance of the set-off notice. However, in relation to the remaining set-off notices, Prakash J was satisfied that there were indeed disputes to be referred to arbitration.

48 The result of the Court of Appeal's analysis in *Multiplex* was that the appeal was allowed in part. A stay was granted in respect of the remaining set-off notices but not in respect of the first set-off notice.

49 The next case of *Anwar Siraj and another v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR(R) 500 ("*Anwar Siraj*") likewise concerned a stay application under the AA. One of the disputed issues was whether the architect could properly issue an interim certificate correcting certain earlier interim certificates. Andrew Ang J rejected the respondent's argument that the architect could not issue the certificate following the commencement of arbitration, although he found that the long delay in the issuance of the certificate following appointment of the arbitrator and the earlier interim certificates gave "cause for disquiet". He also took the view that it was "not easy to dismiss out of hand" the respondent's allegation that the interim certificate was issued under improper pressure or interference by the appellants: *Anwar Siraj* at [33]–[36]. Ang J concluded at [42]–[43] that "*prima facie*, there [were] substantial disputes" concerning the certificate and it hence could not "be said to be undisputed or indisputable".

50 Finally, I come to the recent decision of the Court of Appeal in *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] 3 SLR 124 ("*Chin Ivan*"), which is the leading judgment on the validity of architect's certificates. The appellant employed the respondent as the main contractor for a building project. After the architect issued two instructions approving certain variation works, including a claim for preliminaries and for an extension of the defects liability period, the respondent raised a payment claim for unpaid work. The architect subsequently issued a progress certificate certifying that $321,383.94 was payable by the appellant to the respondent, and later a final certificate certifying that $720,417.28 was payable to the respondent. The appellant refused to make payment. The respondent then commenced an action in court and the appellant applied for a stay of proceedings under s 6 of the AA, arguing that the architect's certificates had been procured by fraud. An assistant registrar stayed the proceedings in their entirety and Edmund Leow JC allowed the appeal in part and ordered only a partial stay.

51 Sundaresh Menon CJ, giving the judgment of the Court of Appeal, endorsed Leow JC's reasoning that "a mere allegation of irregularity" would not suffice and that any such allegation must be "backed up by evidence": *Chin Ivan* at [24]. He further agreed at [25] with the finding that there was a *prima facie* case of fraud. Going beyond that, Menon CJ held that it in fact "could not have been disputed" that the architect's certificates had not been issued in accordance with the SIA Conditions. Thus the "entire basis of the respondent's claim fail[ed] since there was no certificate properly issued by the Architect which the respondent could rely on to sustain its claim". However, Leow JC erred in ordering only a partial stay because the entire certificate would cease to attract temporary finality if it was not issued in accordance with the contract or

tainted by fraud, improper pressure or interference. In my respectful view, the following remarks at [35] of Menon CJ's judgment are relevant and important:

> 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***. … [emphasis added in italics and bold italics]

52 Menon CJ concluded at [36] that in light of the exceptional facts of the case, the irregularities in the architect's certificates were "well established" and therefore the certificates could not "be enforced or accorded temporary or any finality". The result was that the appeal was allowed and the entire set of proceedings was to be stayed.

(2) Key principles and the applicable approach

53 I now draw from these authorities to summarise the approach that I should apply. In determining whether there is a dispute to be referred to arbitration in the context of a stay application under s 6 of the AA, the operative question is whether the claim can be said to be *undisputed or indisputable*. I will focus on whether a claim can be said to be "indisputable" since that is the issue before me.

54 I begin with the preliminary question of the burden of proof. As the applicant for a stay, the onus is on the defendant to demonstrate the existence of a "*prima facie* case of disputes": *Uni-Navigation* at [16], *Fasi Paul Frank* at [15] and *Anwar Siraj* at [42]. Where irregularities in the architect's certificates

are alleged by the defendant, the defendant cannot succeed in establishing a *prima facie* case of disputes merely by raising "mere allegations"; he must back this up by "credible evidence": *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR(R) 382 ("*Samsung*") at [25]; *H P Construction & Engineering Pte Ltd v Chin Ivan* [2014] 3 SLR 1318 at [42] ("*Chin Ivan (HC)*").

55 Once the defendant sets up a *prima facie* case of a dispute, the burden shifts to the plaintiff to satisfy the court that there is "sufficient reason why the matter should not be referred in accordance with the arbitration agreement" under s 6(2)(*a*) of the AA and the court should instead assume jurisdiction: *MAE Engineering Ltd v Dragages Singapore Pte Ltd (formerly known as Dragages et Travaux Publics (S) Pte Ltd)* [2002] 1 SLR(R) 853 ("*MAE Engineering*") at [9]; and *Maybank Kim Eng Securities Pte Ltd v Lim Keng Yong and another* [2016] 3 SLR 431 ("*Maybank Kim Eng*") at [23] (see also *Halsbury's Laws of Singapore*, vol 1(2) (LexisNexis, 2017 Reissue) at para 20.031; and Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 1999) at pp131–132). In this regard, Karthigesu JA's emphatic rejection of Khoo J's reasoning in *Kwan Im Tong (HC)* (*ie*, that the contractors were *prima facie* entitled to summary judgment and it was the employers who were required to show that they had a *bona fide* defence) underscores the importance of properly allocating the burden of proof in stay applications under the AA. By transplanting the approach applicable in summary judgment applications to the stay application, Khoo J had impermissibly reversed the burden of proof under s 6 of the AA.

56 I turn to the issue of "sufficient reason" under s 6(2)(*a*) of the AA; specifically, how the indisputability of the plaintiff's claim provides "sufficient reason" to refuse a stay. In this regard, it is necessary to disentangle two distinct

aspects of the analysis for clarity. The first is an issue of definition, and the second an issue of approach or methodology.

57 First, the point of definition. The term "indisputable" arguably speaks for itself, but its meaning has been variously described in the case law. An "indisputable" claim has been labelled as "the clearest of cases" (*Home and Overseas Insurance* at 158) or an "obvious case" (*Uni-Navigation* at [16]), a claim that is "indisputably due" (*The M Eregli* at 175) or to which there is "no defence" (*Channel Tunnel* at 681; and *Kwan Im Tong* at [15]) or "no sustainable defence" (*Fasi Paul Frank* at [18]), or that is "so unanswerable that there is nothing to arbitrate" (*Channel Tunnel* at 681), or "so indisputable that it does not warrant being referred to arbitration" (*Chin Ivan* at [35]). It is probably not helpful to add to this list of designations and I shall not venture to do so. The key point, however, is that an examination of whether a claim is "indisputable" necessarily involves some inquiry into the *merits* of the claim. This is especially evident from the analyses of the Court of Appeal in *Multiplex* and *Chin Ivan*. The former appeal involved the examination and interpretation of the Sub-Contract Conditions which led to Prakash J's rejection of the appellant's defence in relation to one set-off notice (see [47]–[48] above), and the latter a consideration of whether the disputed architect's certificates had been issued in accordance with the SIA Conditions (see [51]–[52] above). One gathers from the approach adopted in these cases that the *quality* of the parties' cases is inarguably and inescapably put in issue when one determines whether the claim is "indisputable".

58 This must be understood, however, in the light of the second point which concerns the manner in which the merits review is carried out – in particular, the *degree* to which the court will examine the quality of the claim. The cases

put it beyond doubt that the court will not "embark on an examination of the validity of the dispute as though it were an application for summary judgment": *Uni-Navigation* at [17]. It will not permit "full-scale argument" (*Home and Overseas Insurance* at 158) and will instead adopt a "holistic and commonsense approach to see if there is a dispute" (*Uni-Navigation* at [16]). In the context of allegedly conflicting contractual provisions, if the conflict "cannot be settled without delving deeply into the contract", the resolution of the question of construction is a "dispute which should go to arbitration": *JDC* at [15]; and *Multiplex* at [19].

59 In my view, the approach to determine the existence of a dispute which should be referred to arbitration under s 6 of the AA reflects two sets of competing policy aims. The first, as outlined by Lord Mustill in *Channel Tunnel* at 681 (see [42] above), is the goal of saving time and costs in the resolution of the dispute and, perhaps more importantly, the need to prevent potential abuse. As Lord Mustill observed, the jurisdiction to refuse the defendant a stay on the basis that there was "no defence" to the claim had been proven to be "very useful in practice, especially in times when interest rates are high, for protecting creditors with valid claims from being forced into an unfavourable settlement by the prospect that they will have to wait until the end of an arbitration in order to collect their money". In the quarter century since Lord Mustill's *dicta*, it may be doubtful if these views still represent the prevailing attitude regarding arbitration or whether they cohere with the approach adopted in the context of the IAA. But it is inarguable that the Singapore courts have, even in recent decisions, found the jurisdiction to refuse stay applications under the AA on this ground to be relevant and important (see, for instance, *Chin Ivan*).

60 The second imperative is the need to uphold and give effect to parties' choice of forum. Put shortly, this concerns the principle of party autonomy. As Parker LJ remarked in *Home and Overseas Insurance*, "[t]he parties have agreed on their chosen tribunal and a defendant is entitled *prima facie* to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the courts until it has been so decided". The principle has been endorsed multiple times in our jurisprudence (see, for instance, *Tjong Very Sumito* at [28] in the context of the IAA; and recognised by Steven Chong J (as he then was) in *Maybank Kim Eng* at [23] to apply equally to the AA). Lord Mustill affirmed the principle in *Channel Tunnel* itself. After explaining the rationale for staying proceedings in situations where there is "no defence", Lord Mustill immediately proceeded to "indorse the powerful warnings against encroachment on the parties' agreement to have their commercial differences decided by their chosen tribunals" (see [42] above).

61 The analysis therefore engages at least two of the three "higher-order concerns" described in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 at [188], such concerns having equal application in the context of the AA: *Maybank Kim Eng* at [23]. The two concerns are, namely, the court's desire to prevent a plaintiff from circumventing the operation of an arbitration clause; and the court's power to manage its processes to prevent an abuse of process and ensure the efficient and fair resolution of disputes, with the overriding aim that any balance to be struck must ultimately serve the ends of justice. The threshold of indisputability and the standard of review adopted by the courts in the context of stay applications under s 6 of the AA represent the ensuing balance between these competing imperatives. What is envisaged is a narrow but lively proviso that the courts have not been reluctant to apply in appropriate cases.

62 Given the above principles, I find that neither the Plaintiff's nor the Defendant's submission on the approach that I should apply to determine whether there is a dispute to be referred to arbitration can be said to be either correct or complete. In particular, the Plaintiff's position that the Defendant is to show a "*prima facie* defence" cannot be accepted because it impermissibly reverses the burden of proof, as was the case in *Kwan Im Tong (HC)*.

The cash flow argument

(1) The argument

63 As described at [30] above, the Plaintiff urged me to consider that if a "lower threshold" than that of a "*prima facie* defence" is applied to determine whether there is a dispute to be referred to arbitration, the "drafters' intention underlying the [SIA Conditions]" would be "unduly subvert[ed]" and the "temporary finality principle" would be left with "limited practical utility".[33]

64 According to the Plaintiff, the "temporary finality of an architect's certificate could be displaced easily by a mere assertion that there is a *prima facie* dispute as to whether there was fraud, improper pressure or interference or whether the certificate was issued in accordance with the [SIA Conditions]".[34] Therefore, "if the contractual intention is to give effect to the temporary finality of an architect's certificate by way of *inter alia* summary judgment, to displace temporary finality, the threshold for resisting summary judgment applications (i.e. whether there is a prima facie defence or triable issue that merits further investigation) should … correspondingly be adopted".[35]

33 Plaintiff's further skeletal submissions dated 8 June 2018 at para 16.

34 Plaintiff's further skeletal submissions dated 8 June 2018 at para 14.

35 Plaintiff's further skeletal submissions dated 8 June 2018 at para 15.

(2) My analysis

65 I reject this argument on two grounds. First, it is inconsistent with decisions of the Court of Appeal by which I am obviously bound, and second, it is undermined by two points of principle that I will shortly describe.

66 In *JDC*, the respondent subcontractors commenced an action against the appellant main contractors to recover sums certified in two interim payment certificates. The appellants applied for a stay of proceedings pursuant to s 7 of the AA (1985 Rev Ed). An assistant registrar stayed the action but the respondents' appeal was allowed by the High Court. Before the Court of Appeal, one of the respondents' arguments was that "the delay in referring the matter to arbitration would cause them considerable hardship in an industry where cash flow is vital": *JDC* at [20]. L P Thean JA, giving the judgment of the Court of Appeal, gave short shrift to this submission. His response at [20] was as follows:

> … In reply, we need only refer to the following passage of the judgment of Saville J in *Hayter v Nelson* [1990] 2 Lloyd's Rep 265 at 268:
>
> > [I]t must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the courts, their disputes should be resolved by a private tribunal. *Even assuming that this tribunal is likely to be slower or otherwise less efficient than the courts, that bargain remains* – and I know of no general principle of English law to suggest that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can be simply put on one side and ignored.
>
> [emphasis added]

67 In other words, Thean JA took the view that the need to preserve cash flow by facilitating enforcement of claims based on architect's certificates did not override the importance of upholding the bargain struck by the parties, even though the chosen tribunal might be less than expeditious in rendering a decision. The Court of Appeal, applying *Kwan Im Tong*, went on to find that this was "not a case where it could properly be said that the respondents' claim was 'undisputed or indisputable'" and that the appellants had made out "a *prima facie* case of disputes between the parties": *JDC* at [19].

68 In *Chin Ivan*, the Court of Appeal was likewise plainly aware of the rationale for the temporary finality accorded to valid architect's certificates. Menon CJ in fact went on to explain in considerable detail that 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" [emphasis in original removed]: *Chin Ivan* at [15]. Yet the Court affirmed the approach of the High Court judge, *ie,* that the inquiry was "whether *prima facie* there was a *bona fide* dispute as to whether there was fraud": *Chin Ivan (HC)* at [49]. The logical conclusion is that the Court did not find that the importance of preserving cash flow in the industry mandated any adjustment of the test for a stay. In my judgment, the reasoning in *JDC* and *Chin Ivan* alone provide sufficient grounds to reject the Plaintiff's argument.

69 Two points of principle provide additional grounds to reject the Plaintiff's argument that the approach should be akin to that in summary judgment applications.

70 First, that argument confuses a question of jurisdiction with a question of merits. In *Samsung* at [2]–[3], Chao Hick Tin JA offered an illuminating exposition of the interplay between summary judgment applications and stay applications prior to the amendment of the Rules of Court on 1 December 2002. At the time, it was permissible under O 14 r 1 for applications for summary judgment to be brought even though the defendant had applied for a stay of the proceedings. It was also the practice for both the stay and summary judgment applications to be heard at the same time in the interest of avoiding delay. Chao JA observed that because "in the building industry cash flow is vital", it was "understandable why under the previous O 14 r 1, the O 14 application was heard together with the stay application as the two applications were invariably inter-linked". There would "usually be considerable overlap in the arguments presented" in these applications, because in a situation where the plaintiff showed that its claim was indisputable, it was unlikely that the defendant could demonstrate an arguable defence that ought to be resolved at trial (see Leow JC's explanation of Chao JA's remarks in *Chin Ivan (HC)* at [45]). Critically, however, Chao JA highlighted at [3] that "*the tests that would be applied in determining the two applications were not the same*" [emphasis added]. He cited the Court of Appeal's ruling in *The Jarguh Sawit* [1997] 3 SLR(R) 829 at [30] that "*whether or not a court has jurisdiction is, of necessity, a question logically prior to the substantive dispute of the parties*. Unless and until a court is properly seized, it cannot adjudicate on the matter" [emphasis added]. For this and other reasons, Chao JA decided at [24] that no O 14 application should be made while a stay application is pending.

71 With the passage of the Rules of Court (Amendment No. 4) Rules 2002 (No. S 565), it is no longer permissible for a plaintiff to apply for summary judgment until a defence has been served. Given that a defendant who intends

to apply for a stay under s 6 of the AA would not file a defence lest he be deemed to have taken a step in the proceedings, the result of the amendment was an effective decoupling of the hearings of the two applications (see also *Lian Teck Construction Pte Ltd v Woh Hup (Pte) Ltd and others* [2006] 4 SLR(R) 1 at [13]–[14]; and *Chow Kok Fong* at paras 31.53–31.54). However, as Chao JA pointed out in *Samsung*, the tests that were applied in stay and summary judgment applications were never the same, even prior to the amendments. The former concerned an issue of jurisdiction and the latter the substantive dispute between the parties. Following the amendments, "the application for summary judgment can only be made after the Defence has been filed" and "while a stay application is pending, no O 14 application should be made": *Samsung* at [23]–[24]. Given the decoupling of the applications today, there is even less reason to assimilate the applicable tests. Accordingly, the Plaintiff's argument proves unpersuasive both as a matter of principle as well as practice.

72 Second, it must be remembered that the temporary finality of architect's certificates and the ability of a party to enforce such certificates by way of summary judgment arises *as an incident of the parties' agreement*. By adopting the SIA Conditions as part of their contract, the parties recognise, by way of cl 31.(13) of the SIA Conditions, 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". The contractual origin of the enforcement mechanism is also the reason why, if the architect's certificate is "impugned because it was, in some material part, not issued in accordance with the contract and/or was tainted by fraud, improper pressure, then that certificate *in its entirety* ceases to attract any finality" [emphasis in original]: *Chin Ivan* at [29]. Seen in this light, there is no obvious reason why the right to enforce

architect's certificates by way of summary judgment ought, as a matter of principle, to be given precedence over the right to refer the dispute concerning the architect's certificate to arbitration, which is accorded to the parties under another part of the *same agreement* between them. That other part of the agreement is cl 37.(1) of the SIA Conditions, which mandates – in expansive language and comprehensive terms – that any dispute concerning "any direction or instruction or *certificate of the Architect* or as to the contents of or granting or refusal of or reasons for any such direction, instruction or certificate shall be referred to the arbitration and final decision of a person to be agreed by the parties" [emphasis added]. In other words, the parties have, by their contract, identified a mode of enforcement and a means of dispute resolution. To give effect to contractual intention, save where the claim on the architect's certificate is "indisputable", any disputes including those concerning the validity of the architect's certificate should thus be referred to arbitration.

Validity of the architect's certificates

73 I now turn to apply the approach that I have outlined at [53]–[58] above to the parties' cases in the Suit. Notably, the dispute in relation to the Plaintiff's claim only concerns whether the Architect's Certificates were *validly issued*, rather than the *merits* of the Architect's Certificates "in the sense of whether the certificates are ultimately correct as to the matters which they purport to deal with" (see *Chin Ivan* at [21] on the nature of the distinction).

74 It is necessary to begin with a brief account of the parties' cases.

Parties' cases

75 The Plaintiff relies on the Final Certificate in which Mr Lim had certified that it was entitled to deduct $1.169m as liquidated damages from sums due to the Defendant. It seeks judgment for the sum of $1.169m and a declaration that the Architect's Certificates "be given full effect by way of summary judgment with a corresponding right to deduct and/or set-off the sum of $1,169,000 from the Adjudicated Amount".[36]

76 The Defendant avers that all three of the Architect's Certificates are invalid because they were not issued in accordance with the Main Contract and/or are tainted by fraud.[37] I begin with the Delay Certificate. The Defendant has two main grounds of complaint in this regard:

(a) First, Mr Lim failed to consider the 94 Instructions when issuing the Delay Certificate (see [13] above) or, at the very least, the 29 Instructions (out of the 33 instructions for which Mr Lim had sought more information and reasons together with supporting documents) (see [14] above).[38] It is important to note that all these instructions were issued between 1 October 2013 and 11 February 2014,[39] *ie*, after 30 September 2013 which Mr Lim had indicated as the "latest date for completion of the Works pursuant to Clause 22(1) of the Conditions", but before the date of issuance of the Delay Certificate (*ie*, 17 February 2014).

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36 Statement of Claim at paras 13 and 19.

37 Defence and Counterclaim at para 17.

38 Defence and Counterclaim at paras 18–20.

39 Defence and Counterclaim at pp23–32.

According to the Defendant, this was a breach of cl 24.(1) of the SIA Conditions which I set out in full at [83] below. I shall refer to this allegation as "the Clause 24.(1) Argument".

(b) Second, in relation to 11 of the 33 architect's instructions ("the 11 Instructions") for which Mr Lim had sought more information and reasons (see [14] above), Mr Lim failed to give the Defendant the full 28-day notice period that the Defendant was entitled to for the purposes of notifying Mr Lim of instructions which the Defendant considered entitled it to an extension of time. The 11 Instructions had been issued between 27 January 2014 and 10 February 2014, which meant that the 28-day notice period would expire at the very earliest on 24 February 2018 (*ie*, 28 days after 27 January 2014) and at the very latest on 10 March 2014 (*ie*, 28 days after 10 February 2014).[40] By issuing the Delay Certificate on 17 February 2014, Mr Lim did not offer the Defendant the full 28 days to give notice.

According to the Defendant, this omission constitutes a breach of cl 23.(2) of the SIA Conditions, which is set out fully at [105] below. I refer to this as "the Clause 23.(2) Argument".

77 As to the Termination of Delay Certificate, the Defendant contends that the certificate was not issued in accordance with cl 24.(3) of the SIA Conditions, which is reproduced at [100] below. According to the Defendant, under cl 24.(3), a Termination of Delay Certificate can only be issued in respect of delaying events occurring *subsequent* to the issuance of the Delay Certificate. Therefore, by granting extensions of time in respect of instructions given *before*

[40] Defence and Counterclaim at para 21.

the issuance of the Delay Certificate, Mr Lim "improperly utilised his powers of certification" in issuing the Termination of Delay Certificate.[41] I shall term this "the Clause 24.(3) Argument".

78 The Defendant's submission in relation to the Further Delay Certificate follows from the Clause 24.(3) Argument. Since the validity of a Further Delay Certificate is premised on the validity of the Termination of Delay Certificate, the former must be invalid given the non-conformity with cl 24.(3) of Mr Lim's Termination of Delay Certificate.

79 Finally, the Defendant alleges that the Architect's Certificates were issued fraudulently; specifically, that Mr Lim "knew that the Termination of Delay Certificate was false or issued the same without any belief in its truth or recklessly".[42] This allegation is premised on the Defendant's interpretation of cl 24.(3), described above, that cl 24.(3) only permits extensions of time in respect of instructions given before the issuance of the Delay Certificate. The Defendant avers that Mr Lim's issuance of the Termination of Delay Certificate was "an improper and belated attempt to rectify and cover up his failure to consider other matters entitling the Defendant to [extensions of time] when issuing the Delay Certificate".[43]

80 No Reply has yet been filed in the Suit. The Plaintiff's responses to the Defendant's arguments are, however, chiefly disagreements with the manner in which the Defendant has interpreted cll 24.(1), 23.(2) and 24.(3). These responses can be summarised as follows:

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41 Defence and Counterclaim at paras 22–23.

42 Defence and Counterclaim at para 25.

43 Defence and Counterclaim at para 26.

(a) Clause 24.(1) only requires the architect to consider whether there were matters entitling the contractor to an extension of time at the "latest Date for Completion", which in this case was 30 September 2013, and not the date of issuance of the Delay Certificate, which was 17 February 2014.[44]

(b) Clause 23.(2) does not require the architect to "wait out the 28-days for each and every single alleged delaying event to expire".[45] According to the Plaintiff, it was only on 3 March 2014, some two weeks after the issuance of the Delay Certificate, that the Defendant sought extensions of time for the 94 Instructions (see [13] above). By that time, the 28-day notice period under cl 23.(2) had already expired.[46] Because the Defendant did not notify Mr Lim of instructions which the Defendant considered entitled it to an extension of time pursuant to cl 23.(2), Mr Lim was entitled to issue the Delay Certificate after considering that there were no matters entitling the Defendant to extensions of time.[47]

(c) Clause 24.(3) does not prohibit the grant of extensions of time in respect of matters occurring before the issuance of the Delay Certificate, as long as these matters occur after the "latest Date for Completion".[48] In addition, the Termination of Delay Certificate was issued at the Defendant's request in its 27 May 2014 letter (see [15] above). Thus the

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44 Plaintiff's written submissions dated 25 May 2018 at paras 52 and 56.

45 Plaintiff's written submissions 3 dated 13 June 2018 at para 16.

46 Lim's 1st affidavit (SUM 1613) at para 30.

47 Plaintiff's written submissions 3 dated 13 June 2018 at para 17.

48 Plaintiff's written submissions 3 dated 13 June 2018 at paras 28–29.

Defendant should be estopped from asserting that the Termination of Delay Certificate was issued in breach of cl 24.(3).[49]

(d) Mr Lim did not issue the Architect's Certificates fraudulently. He explained his certification process in his affidavits, including the matters he took into consideration, the relevant cut-off dates that he relied on and the events and correspondence between the parties.[50]

Analysis

81 The SIA Conditions originated from the standard form contract administered by the Royal Institute of British Architects and the Joint Contracts Tribunal, and came under the auspices of the Singapore Institute of Architects in the 1950s. Following criticism of the form used by the Joint Contracts Tribunal in the 1970s, the Institute decided to appoint Mr Wallace to revise its own form: *Chow Kok Fong* at paras 1.3–1.6. The result was the first version of the SIA Conditions, published together with a set of guidance notes and a short form of sub-contract in 1980: *Construction Contracts* at p539.

82 Various amendments have been made to the SIA Conditions across its eight revisions. The Suit involves the 7th Edition of the SIA Conditions, but the relevant clauses have not received material amendments in the two more recent editions. I will examine cll 24.(1), 24.(3) and 23.(2) as well as the parties' interpretations of each of these clauses in turn, before setting out my findings on whether the Defendant has shown a *prima facie* case of disputes and, if so, whether the Plaintiff has satisfied me of the indisputability of its claim such that

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49 Plaintiff's written submissions 3 dated 13 June 2018 at para 37.

50 Plaintiff's written submissions 3 dated 13 June 2018 at para 44.

there is "sufficient reason" within the meaning of s 6(2)(*a*) of the AA to refuse a stay. I am not aware of any case law touching on the interpretation of these clauses, nor did the parties – who agreed that the matter had not been considered previously – bring any such cases to my attention.

Clause 24.(1): Delay Certificate

(1) Relevant clauses

83 Clause 24 of the SIA Conditions is titled "Delay in completion and liquidated damages". It begins with cl 24.(1) which states:

> ***After the latest Date for Completion of the Works pursuant to clause 22(1) of the Conditions has passed, then if at the said date there are no other matters entitling the Contractor to an extension of time*** *and the Works nevertheless remain incomplete, the Architect may at any time thereafter up to and including the issue of the Final Certificate* give a certificate setting out the Completion Date (if necessary modified or re-calculated under clause 10(1) of these Conditions); the total period of extension of time (if any); the consequential extended Contract Completion Date (if any); and certifying that the Contractor is in default in not having completed the Works by the stated Completion Date or Extended Completion Date (as the case may be). Such certificate shall be issued to the Employer with a copy to the Contractor, and is hereinafter called a "*Delay Certificate*". [emphasis added in italics and bold italics]

84 Clause 22, which is referenced at the beginning of cl 24.(1), is titled "Time for completion" and provides as follows:

> (1) The Contractor shall complete the Works on or before the Date of Completion stated in the Appendix thereto, or by such Date as modified and re-calculated pursuant to clause 10(1) of these Conditions, or by such Date or modified Date as further extended pursuant to the next following clause of these Conditions [*ie*, cl 23], whoever is the latest.
>
> (2) For the purpose of this clause "complete" and "completion" shall mean the completion certified by the Architect under clause 24(4) of these Conditions.

85 The "modifi[cation] and re-calculat[ion] pursuant to clause 10(1)" that is mentioned in cl 22.(1) above concerns revisions to the commencement date of the works in a situation where the contract does not state the commencement date or where that date becomes invalidated for any reason which is not the responsibility of the contractor.

86 Clause 23 of the SIA Conditions, which is likewise referenced in cl 22.(1), is titled "Extension of time". Clause 23.(1) provides for the extension and recalculation of the contract period and the date for completion in order to reflect delays in completion caused by any of a list of delaying events, which are described at cl.23(1)(a) to (q). Notably, one of the identified delaying events is the issuance of architect's instructions for, amongst other things, variation of permanent work where this is desired by the architect or the employer: cl 23(1)(f). Any extension under cl 23.(1) is "subject to compliance by the Contractor with the requirements of [cl 23.(2)]". I set out cl 23.(2) in full at [105] below, but for present purposes it suffices to describe cl 23.(2) as requiring the contractor to notify the architect of any event, direction or instruction which the contractor considers entitles it to an extension of time. The architect would then inform the contractor whether he considers that event, direction or instruction to entitle the contractor to an extension of time. The process for granting extensions of time is then completed under cl 23.(3), which requires the architect to determine the period of extension after the delaying factor has ceased to operate and it is possible to determine the length of the period of extension, and to notify the contractor of such period of extension.

(2) Procedure for issuing a Delay Certificate

87 In summary, the "latest Date for Completion of the Works pursuant to clause 22(1) of the Conditions" as mentioned in cl 24.(1) refers to one of three

possible dates: (a) the original completion date as stipulated in the Appendix to the contract; (b) the modified and recalculated completion date following revisions to the date of commencement of the works under cl 10.(1); or (c) the extended date of completion that reflects extensions of time that have been granted by the architect for delaying events, pursuant to cl 23.

88 From my reading of cl 24.(1), the procedure for the issuance of a Delay Certificate by the architect can be summarised as follows:

(a) First, the architect ensures that the "latest Date for Completion of the Works pursuant to clause 22(1) of the Conditions" – meaning the original completion date or the completion date that has been modified to reflect a revised date of commencement of the works or extensions of time granted for delaying events – has passed.

(b) Second, the architect considers whether, as at the "latest Date for Completion of the Works pursuant to clause 22(1) of the Conditions", there are any "other matters entitling the Contractor to an extension of time". If there are in fact such matters, the architect cannot proceed to issue a Delay Certificate. The mechanism for extensions of time under cl 23 would then take effect and the architect would, subject to the notice requirement in cl 23.(2), be required to determine the period of extension.

(c) Third, if there are no other matters entitling the contractor to an extension of time, the architect determines whether the works have been completed. If the works have in fact been completed, there will obviously be no basis for the architect to issue a Delay Certificate. If they have not, the architect may then, "at any time thereafter up to and

including the issue of the Final Certificate", issue the Delay Certificate which should contain (i) the contract completion date, modified if necessary to reflect any revised commencement date under cl 10.(1); (ii) the total period of extension of time, if any; (iii) the consequential extended contract completion date, assuming there were extensions of time; and (iv) a certification that the contractor is in default in not having completed the works by the contract completion date or the extended completion date, whichever is applicable.

(d) The architect is to issue the Delay Certificate to the employer, with a copy to the contractor.

89 The issuance of a Delay Certificate is a significant event because it triggers the employer's contractual entitlement to recover liquidated damages from the contractor from the date of default certified by the architect for the period in which the works remain incomplete, pursuant to cl 24.(2) of the SIA Conditions. Because the Delay Certificate is accorded temporary finality and can be enforced by way of summary judgment until final judgment or award under cl 31.(13), the issuance of the certificate also sets in motion an enforcement mechanism that can swiftly yield a judgment debt against the contractor.

(3) Relevant date for the architect's assessment

90 The disagreement between the parties in relation to cl 24.(1) essentially concerns the date ("the Relevant Date") that the architect uses as his reference when determining whether there are matters entitling the contractor to an extension of time (see [76(a)] and [80(a)] above). The Plaintiff argues that the Relevant Date ought to be the "latest Date for Completion of the Works pursuant

to cl 22(1) of the Conditions"[51] which in this case is 30 September 2013, *ie*, the date that Mr Lim arrived at after adding to the contract completion date of 21 April 2013 the extension of 162 days previously granted.[52]

91 The Defendant argues that the Relevant Date is the date on which the architect issues the Delay Certificate. In other words, the architect is to consider whether there are matters entitling the contractor to an extension of time as at the date he issues a Delay Certificate. In the present case, the Relevant Date would be 17 February 2014. The Defendant's argument follows from its interpretation of the phrase "latest Date for Completion" found in cl 24.(1). In the Defendant's words:[53]

> [P]rior to issuing the Delay Certificate, the Architect must consider all events for which the Defendant is entitled to [extensions of time] as at the date of the said issuance. Any [extensions of time] that [are] in fact granted [are] then "added" on to the Contract Completion Date. The Contract Completion Date as extended by way of the [extensions of time] granted then becomes the "latest date for completion". Simply put, *the Architect would have taken into account all [extensions of time] in arriving at the "latest date for completion", such that there would be no further [extensions of time] to be "added" to (and no other matters entitling the Defendant to [extensions of time] as at) the "latest date for completion" under clause 24.(1) of the SIA Conditions.* [emphasis added]

92 The Defendant's argument is premised on defining the phrase "latest Date for Completion" in a certain way. In essence, the Defendant suggests that in determining the "latest Date for Completion", the architect would have considered "all events for which the [contractor] is entitled to [extensions of time]" and added the extensions of time to be given for those events to the

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51 Plaintiff's written submissions 3 dated 13 June 2018 at para 9.

52 Plaintiff's written submissions 3 dated 13 June 2018 at para 11.

53 Defendant's skeletal submissions 2 dated 31 May 2018 at para 13.

contract completion date. Put another way, as a matter of definition, the "latest Date for Completion" factors in all events that entitle the contractor to an extension of time as at the date the architect issues the Delay Certificate.

93 I find the Defendant's reasoning difficult to accept. This submission is not so much a meaningful argument as to why the Relevant Date should be taken to be the date of issuance of the Delay Certificate than it is a mere reassertion of that conclusion, packaged in a preferred definition of the phrase "latest Date for Completion". More crucially, the proposed definition does not cohere with the manner in which cl 24.(1) has been phrased and structured. I will briefly explain.

94 First, cl 24.(1) draws a clear distinction between the determination of the "latest Date for Completion" and the determination of whether "at the said date there are no other matters entitling the Contractor to an extension of time". In other words, they are *discrete stages* in the analysis. The architect first ascertains the "latest Date for Completion" and ensures that at the time of his consideration, that date has passed. Once so satisfied, he goes on to consider whether there are other matters that entitle the contractor to an extension of time. This is apparent both from the structure (*ie*, the location of these stages of the analysis in different dependent clauses of the sentence) as well as the language (*ie*, the use of the words "After …, then if…") of cl 24.(1).

95 Second, the Defendant's argument entirely ignores the latter half of the phrase "the latest Date for Completion of the Works *pursuant to clause 22(1) of the Conditions*" [emphasis added]. The "latest Date for Completion" is a term of art within the SIA Conditions. It is defined in cl 22.(1) which, as I have described (see [84]–[86] above), refers to the original completion date or the

modified completion date to reflect the revised date of commencement of the works or extensions of time granted for delaying events (see [87] and [88(a)] above). Nothing in cl 22.(1) suggests that the term also includes a date for which extensions of time for "other matters entitling the Contractor to an extension of time" under cl 24.(1) have been added to the original or modified completion date.

96 Third, if the Defendant's understanding of "the latest Date for Completion" were correct, then the phrase "there are no other matters entitling the Contractor to an extension of time" would essentially be otiose and could be removed without consequence, since the meaning of that phrase is, according to the Defendant, already encapsulated within the definition of "the latest Date for Completion". It is difficult to accept an interpretation that renders so many words within cl 24.(3) superfluous.

97 It is also worth noting that the commentaries also identify the determination of the "latest Date for Completion of the Works pursuant to clause 22(1) of the Conditions" and the consideration of whether, at that date, there are "no other matters entitling the Contractor to an extension of time" as discrete stages in the analysis. For instance, Eugenie Lip and Choy Chee Yean, *Contract Administration Guide to the SIA Conditions of Building Contract* (LexisNexis, 2nd Ed, 2009) ("*Eugenie Lip*") at para 2.136 structures the analysis under cl 24.(1) as follows:

> The Architect may issue a Delay Certificate at any time <u>after</u> the following three conditions are met: –
>
> (a) the latest Date for Completion has passed;
>
> (b) there are no other matters entitling the Contractor to an extension of time as at the latest Date for Completion; and
>
> (c) the Works remain incomplete.

[underline in original]

The description of cl 24.(1) in *Chow Kok Fong* at para 24.2 is much the same. Likewise, the language used by Khoo J in *Aoki Corp v Lippoland (Singapore) Pte Ltd* [1995] 1 SLR(R) 314 ("*Aoki*") at [26] strongly suggests that these are different requirements under cl 24.(1): "Clause 24.1 requires the architect to issue the delay certificate when the latest date for completion has passed *only if there are no further matters then entitling the contractors to an exten[sion] of time*" [emphasis added].

98 I find that as a matter of principle, it is entirely persuasive that the latest date for completion determined in accordance with cl 22.(1) should be the reference point for the architect's consideration of whether there are matters entitling the contractor to extensions of time. If an event entitling the contractor to an extension of time occurs only after the latest date for completion, that must mean, as a matter of logical inference, that the contractor is in culpable delay in the period between the latest date for completion and the occurrence of that delaying event. The employer is therefore entitled to recover liquidated damages for the whole of that period of culpable delay and it is proper that a Delay Certificate be issued to give effect to this. Thus the date of reference must be the latest date for completion, rather than some subsequent date (such as the date of issuance of the Delay Certificate).

99 In the present case, given that Mr Lim certified a total of 162 days' extension of time from the contractual date of completion of 21 April 2013 (see [12] above), the "latest Date for Completion of the Works pursuant to clause 22(1) of the Conditions" is 30 September 2013. That is the Relevant Date.

Clause 24.(3): Termination of Delay Certificate

(1) The clause

100 Clause 24.(3) provides as follows:

> ***If while the Contractor is continuing work subsequent to the issue of a Delay Certificate, the Architect gives instructions or matters occur which would entitle the Contractor to an extension of time*** under clauses 23(1)(f)(g)(h)(i)(j)(k)(n)(o) and (p) of the Conditions, and if such matters would have entitled the Contractor to an extension of time regardless of the Contractor's own delay and were not caused by any breach of contract by the Contractor, *the Architect shall as soon as possible grant to the Contractor the appropriate further extension of time* in a certificate known as a "*Termination of Delay Certificate*".
>
> Such further extension of time granted shall have no immediate effect nor shall it prevent the deduction and recovery of liquidated damages by the Employer until the issuance of the Termination of Delay Certificate. The Termination of Delay Certificate shall be issued to the Employer with a copy to the Contractor and while not preventing the deduction or recovery of liquidated damages accrued up to its issuance shall prevent the accumulation of liquidated damages during the period of the further extension of time granted.
>
> Thereafter, *if the Contractor fails to proceed to complete the Works with due diligence within the period of the further extension of time granted under the Termination of Delay Certificate*, the Architect shall issue a further Delay Certificate certifying that the Works have remained incomplete and that he is again in default in not so completing. Such certificate shall be known as a "*Further Delay Certificate*" and shall be issued to the Employer with a copy to the Contractor. Liquidated damages shall re-commence accruing in favour of and be recoverable or deductible by the Employer from the issuance of the Further Delay Certificate.
>
> [emphasis added]

In the 9th Edition of the SIA Conditions, sub-paragraph references (a) to (c) were added to cl 24.(3). For convenience, I shall likewise use these references.

(2) Earliest date of relevant delaying events

101 The dispute between the parties in relation to cl 24.(3) concerns the earliest date of any "instructions or matters … which would entitle the Contractor to an extension of time" that can be considered by the architect in determining whether to grant such extensions of time through a Termination of Delay Certificate. Specifically, the parties disagree as to whether the architect can consider any instructions that were given or matters that occurred *before* the date that the Delay Certificate is issued.

102 The Plaintiff argues that the architect can do so for the following main reasons (see also [80(c)] above). First, there are "no words in Clause 24.(3) that limit the matters entitling the contractor to a further [extension of time] to matters occurring after the issuance of the Delay Certificate".[54] Second, a "more reasonable interpretation" of cl 24.(3) would be that "the phrase 'subsequent to the issue of a Delay Certificate' is intended to refer to the 'latest [Date for Completion' [in cl 24.(1)] as certified or encapsulated in the Delay Certificate".[55] Third, the phrase "If while the Contractor is continuing work subsequent to the issue of a Delay Certificate" should be "read disjunctively from the second phrase of Clause 24.(3) (i.e. that the 'Architect gives instructions or matters occur which would entitle the Contractor to an extension of time'".[56] Fourth, the Defendant is estopped from alleging that the Termination of Delay Certificate is invalid because it was issued in respect of architect's instructions given before the issuance of the Delay Certificate. The estoppel arises out of the fact that the Termination of Delay Certificate was issued by Mr

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54 Plaintiff's written submissions 3 dated 13 June 2018 at para 27(a).

55 Plaintiff's written submissions 3 dated 13 June 2018 at para 29.

56 Plaintiff's written submissions 3 dated 13 June 2018 at para 33.

Lim at the Defendant's own request in its letter of 27 May 2014 (see [15] above).[57] I focus on the issues of interpretation at present and will provide my view on this last-mentioned argument at [122] below.

103 I find that the Plaintiff's reading of cl 24.(3) is implausible. The plain language of cl 24.(3) indicates that the architect can only consider instructions or matters entitling the Defendant to an extension of time that occur "while the Contractor is continuing work *subsequent to the issue of a Delay Certificate*" [emphasis added]. The Plaintiff's suggestion that there are "no words" in cl 24.(3) that limit the scope of the architect's consideration to instructions or matters occurring after the issuance of the Delay Certificate is therefore erroneous. Likewise, its argument that the phrase "subsequent to the issue of a Delay Certificate" refers to the "latest Date for Completion" mentioned in cl 24.(1) must be rejected. That is an undisguised attempt to replace one set of words with another. If the drafters intended to refer to the "latest Date for Completion" rather than the "issue of a Delay Certificate" as the starting point for the architect's consideration, they would undoubtedly have used those words.

104 I am also of the view that the commentaries on the SIA Conditions detract from rather than support the Plaintiff's submission. For instance, *Chow Kok Fong* (at para 24.10) describes cl 24.(3) as a "set of provisions dealing with delay events which arise during the period when the Contractor continues to work *following the issue of the Delay Certificate*" [emphasis added]. Likewise, *Eugenie Lip* at para 2.141 explains that cl 24.(3)(a) "deals with a case where the Contractor is still working after a Delay Certificate has been issued, and through

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[57] Plaintiff's written submissions 3 dated 13 June 2018 at para 37.

no fault of the Contractor, an event of delay for which the Architect or the Employer is responsible, occurs" [underline in original]. This is reiterated in Singapore Institute of Architects, *Guidance Notes on Articles and Conditions of Building Contract (Incorporating 9th Edition Main Contract and 4th Edition Sub-Contract Conditions)* (3rd Ed, 2011) ("*Guidance Notes*") at p16, which refers to the issuance of a Termination of Delay Certificate "in the event of any delay caused to the completion of the works *after the issue of the Delay Certificate*" [emphasis added]. It therefore appears to be common ground amongst independent observers that for the purposes of granting extensions of time through a Termination of Delay Certificate, the architect can only consider instructions or matters that occur *after* the issuance of the Delay Certificate.

Clause 23.(2): Notification of delaying events

(1) The clause

105 Clause 23.(2) provides as follows:

> It shall be a *condition precedent to an extension of time by the Architect* under any provision of this Contract including the present clause (unless the Architect has already informed the Contractor of his willingness to grant an extension of time) that ***the Contractor shall within 28 days notify the Architect in writing of any event or direction or instruction which he considers entitles him to an extension of time***, together with a sufficient explanation of the reasons why delay to completion will result. *Upon receipt of such notification the Architect, within one month of a request to do so by the Contractor specifically mentioning this sub-clause, shall inform the Contractor whether or not he considers the event or instruction or direction in principle entitles the Contractor to an extension of time.* [emphasis added in italics and bold italics]

For convenience, I will refer to the 28-day period in which the contractor is to notify the architect of any event, direction or instruction which the contractor considers entitles it to an extension of time as "the Notice Period".

(2) Issuance of Delay Certificate before expiry of Notice Period

106 The Defendant contends that because Mr Lim issued the Delay Certificate before the expiry of the Notice Period in respect of the 11 Instructions (see [76(b)] above), the Delay Certificate was not issued in compliance with cl 23.(2). The last of the 11 Instructions was given on 10 February 2014, which meant that Mr Lim could not issue the Delay Certificate before 10 March 2014.

107 Preliminarily, it should be highlighted that the Defendant's argument assumes that the Relevant Date is the date of issuance of the Delay Certificate, *ie*, that Mr Lim was required to consider whether there were any "other matters entitling the Contractor to an extension of time" as at the date he issued the Delay Certificate (rather than the latest date for completion certified). The reason is that the 94 Instructions that the Defendant alleges Mr Lim failed to consider were all given after the certified latest date of completion, which was 30 September 2013. Therefore if the Defendant's argument on the Relevant Date does not even raise a *prima facie* case of disputes, its further submission on the need to accord it the full Notice Period need not be considered.

108 I assume for present purposes that the Defendant is correct to take the Relevant Date to be the date of issuance of the Delay Certificate. For completeness, however, it should be noted that if the Relevant Date were taken to be the latest date for completion, then in a case where the delaying events took place *before* the latest date for completion but less than 28 days before such date, the question of whether the architect is required to "wait out" the Notice Period before issuing any Delay Certificate would likewise arise. Those are, of course, not the facts in the present case but that is a hypothetical worth flagging because a similar concern would arise in that scenario.

109 I agree with the Plaintiff that nothing in cl 24.(1) suggests that the architect should "wait out" the Notice Period before issuing a Delay Certificate. Clause 24.(1) requires the architect to consider (amongst the other requirements described at [88] above) whether there are "no other matters entitling the Contractor to an extension of time". Under cl 23.(2), if the contractor desires an extension of time on the basis that there is an event or instruction entitling it to such extension, the onus lies on the contractor to notify the architect of the event or instruction. Indeed, cl 23.(2) labels the contractor's act of giving notice as a "condition precedent to an extension of time by the Architect". In the circumstances, requiring the architect to "wait on" the contractor to issue a cl 23.(2) notice before the architect can issue a Delay Certificate appears to be contrary to the spirit and intent of the contractual regime. It appears that the architect is not required to consider "other matters entitling the Contractor to an extension of time" under cl 24.(1) unless he has been given due notice of such matters pursuant to cl 23.(2) (although if the architect has already informed the contractor of its willingness to grant an extension of time, then such notice will not be a condition precedent to the grant of an extension of time: *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] 1 SLR(R) 591 ("*Tropicon*") at [19]).

110 Perhaps more crucially, the architect might simply be unaware of the existence of a particular event that entitles the contractor to an extension of time. That necessarily entails a corresponding lack of knowledge that the Notice Period for that event has started running. Without such knowledge, it is difficult to see how the architect could avoid issuing a Delay Certificate before the Notice Period has elapsed. That is a result that seems impossible to countenance.

111 Counsel for the Defendant, Mr Raymond Chan, submitted that in the case of delays caused by architect's instructions, the architect should be taken to be aware of the delay such that he should refrain from issuing a Delay Certificate until the Notice Period has expired. This argument assumes, however, that every architect's instruction invariably results in a delay in completion of the works and that the architect takes the view that the instructions he has given will, or is likely to, result in such a delay. In *Aoki*, Khoo J observed at [14] that the reason for requiring a contractor to notify the architect of delaying events in a timely manner is "to enable the employer or architect to verify the claim for extension and to *monitor the event and its impact on the progress of the works*" [emphasis added]. It is only upon receipt of such notification that the architect decides whether to inform the contractor that the event, instruction or direction in principle entitles the contractor to an extension of time, pursuant to cl 23.(2). This makes it clear that not every architect's instruction causes a delay, nor is there any presumption to such effect.

Possible lacuna in the certification scheme

112 Ultimately, cll 24.(1) and (3) have to be read together in order to discern the contours of the overall certification scheme. The issuance of each architect's certificate triggers an important contractual consequence – the Delay Certificate the contractor's liability to pay liquidated damages, the Termination of Delay Certificate the cessation of such liability during the period of extension of time granted, and the Further Delay Certificate the recommencement of liquidated damages. The certificates are therefore the valves that effectively control the contractor's liability to pay liquidated damages to the employer. Accordingly, the contractual timelines that determine when the architect is to exercise such control assume considerable importance.

113 Taking (a) the Relevant Date to be the latest date for completion of the works pursuant to cl 22.(1); and (b) the date following the issuance of the Delay Certificate to be the earliest date of any instructions or matters that may entitle the contractor to extensions of time under a Termination of Delay Certificate, an important ambiguity arises in relation to delaying events that occur after the latest date for completion but before the issuance of the Delay Certificate. *Eugenie Lip* perceptively outlines the difficulty in the following terms (at pp161–162):

> Another limitation to Clause 24.(3)(a) is its provision that the Contractor is entitled to extensions of time only if the event of delay for which the Architect or the Employer is responsible occurs 'subsequent to the issue of a Delay Certificate'. Hence, *if the Delay Certificate was not issued till very late in the Works and post-completion delays occur that were caused by the Architect or the Employer, the Contractor will not be able to avail itself to Clause 24.(3)(a).*
>
> It should be noted that under the Fourth (1988) and Fifth (1997) Editions of the SIA Standard Form, the Delay Certificate had to be issued 'as soon as' the three grounds set out in Clause 24.(1) were met. However, from the Sixth Edition (1999) onwards, the Delay Certificate only needs to be issued at any time up to and including the Final Certificate. But *because Clause 24.(3) can only apply where 'the Contractor is continuing work subsequent to the issue of a Delay Certificate', the relief which Clause 24.(3)(a) is supposed to afford the Contractor may be illusory or severely compromised if the Architect decides to issue the Delay Certificate very late in the project.* This may not be as uncommon as one might expect seeing that the Architect is quite entitled to issue a Delay Certificate as late as when the Final Certificate is issued (by which time, the Completion Certificate would have been issued and there will be no possibility of Clause 24.(3)(a) having any application.
>
> It seems inherently unfair for the Contractor's entitlement to relief (from acts of delay for which the Architect or the Employer is responsible) to hinge on the Architect's ability or willingness to be expeditious in the issuance of the Delay Certificate.
>
> Unfortunately, it is submitted that the Architect's inefficiency or indecision when issuing certificates do not just impact on the Contractor. Evidently, the Employer also has every interest to ensure that the Architect moves reasonably efficiently and that

> Clause 24.(3)(a) will apply. This is because ***if the Employer or the Architect commits acts of prevention during the period when the Contractor is in culpable delay (ie after the passing of the Completion Date), Clause 24.(3)(a) is the only provision allowing a grant of extension in that situation.***
>
> *As such, if Clause 24.(3)(a) fails to be triggered because the acts of prevention took place before the issuance of the Delay Certificate, there will not be any contractual mechanism to grant the Contractor an extension of time.*
>
> In such circumstances, time may be set at large and the Employer may find itself unable to utilise the liquidated damages provision.
>
> Finally, it should be obvious that the device of issuing a Termination of Delay Certificate and a Further Delay Certificate is intended to apply in the very limited circumstances outlined above. It is not a device for amending an erroneous Delay Certificate, for which as noted above, there is no provision.
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> [emphasis in original removed; emphasis added in italics and bold italics]

114 In summary, the contractual regime does not seem to account for delaying events that occur between the latest date for completion under cl 22.(1) and the date of issuance of the Delay Certificate, assuming there is a gap between these two dates. If the reading of cll 24.(1) and (3) that I have preferred is correct, the architect is not required to consider such delaying events under cl 24.(1) when deciding whether to issue a Delay Certificate, nor does cl 24.(3) permit extensions of time for these events under a Termination of Delay Certificate. As *Eugenie Lip* points out, the problem may be exacerbated in situations where the architect does not issue a Delay Certificate for a substantial period of time after the latest date for completion. In such a case, various delaying events may have occurred before the Delay Certificate is issued. The authors also astutely observe that it in fact accrues not merely to the contractor's but also the employer's advantage that there be clarity as to how extensions of time may be granted (see also Richard Wilmot-Smith QC, *Construction Contracts: Law and Practice* (Oxford University Press, 2nd Ed, 2010) at paras

11.04–11.05 on how extension of time clauses in construction contracts are generally for the benefit of the employer and not, as is often thought, for the benefit of the contractor). In these circumstances, it is unclear if the contractor will be able to obtain extensions of time for those events and, if so, how the regime under cl 24 of the SIA Conditions permits it to seek such extensions.

115 This unsatisfactory state of affairs appears to have arisen as a result of amendments made to the SIA Conditions between the 5th and 6th Editions, the latter of which replaced the word "After" at the beginning of cl 24.(1) with the phrase "As soon as", and inserted the phrase "at any time thereafter up to and including the issue of the Final Certificate": *Eugenie Lip* at para 2.136. As *Chow Kok Fong* observes at para 24.4, the amendments were catalysed by litigation over whether certain Delay Certificates were invalid because they were not issued "[a]s soon as" the latest date for completion had passed (see, for example, *Tropicon* where Thean J (as he then was) held at [22]–[23] that the fact that the Delay Certificate was issued more than two and a half years after the latest date for completion of the works rendered the certificate invalid). While the removal of the requirement for the architect to render a Delay Certificate expeditiously may have solved one problem, it appears to have unintentionally created another. It did so by widening the timeframe between the latest date for completion under cl 22.(1) and the issuance of the Delay Certificate, and hence the likelihood that delaying events might occur during this period.

116 Quite separately, *Chow Kok Fong* also remarks at para 24.4 that the pre-amendment wording of cl 24.(1) "had the effect of alerting the Contractor to the Architect's position on the issue of the Contractor's liability for the delay", thus "enabl[ing] the Contractor to consider whether it is necessary to take steps to mitigate the effects of any culpable delay" which might include "accelerating

the carrying out of the Works". That salutary effect no longer persists with the post-amendment wording of cl 24.(1).

Application to the facts

117 To briefly reiterate the relevant facts, the 94 Instructions were given after the latest date for completion of 30 September 2013 certified by Mr Lim, who granted an additional 36 days' extension of time from the previously extended completion date of 25 August 2013 for nine claimed delaying events.[58] This meant that the Defendant was certified to be in culpable delay after 30 September 2013. The first of the 94 Instructions that the Defendant alleges Mr Lim failed to consider was only issued on 1 October 2013, after the latest date for completion (albeit only one day after).[59] The last of those 94 Instructions was given on 11 February 2014.[60]

118 In my overall estimation, the Defendant has established a "*prima facie* case of disputes" as to whether Mr Lim was required to consider the 94 Instructions and, if so, when and how he was required to do so. I say this because the Defendant's arguments do not consist of "mere allegations" and while I do not consider all of its submissions equally plausible, I cannot say that they are so devoid of credibility that this basic threshold is not crossed (see [54] above). The burden therefore shifts to the Plaintiff to satisfy me that its claim is either undisputed or indisputable such that there is "sufficient reason" under s 6(2)(*a*) of the AA to warrant a refusal of a stay. Having carefully considered the various issues, I cannot conclude that this is a case that warrants the application of any

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58 Lim's 1st affidavit (SUM 1613) at para 21.

59 Defence and Counterclaim at p23.

60 Defence and Counterclaim at p32.

of the appellations set out at [57] above – it cannot be considered "the clearest of cases" nor is the Plaintiff's claim "so unanswerable that there is nothing to arbitrate".

119 While the amendments to cl 24.(1) in the 6th Edition of the SIA Conditions might have been introduced so as to expressly permit a gap of time between the latest date for completion pursuant to cl 22.(1) and the date of issuance of the Delay Certificate, it seems inconceivable that the drafters would have intended that there should be no extensions of time for delaying events occurring within that gap. Prior to the amendments, the architect was required to issue a Delay Certificate "[a]s soon as the latest date for completion of the Works pursuant to clause 22 of the Conditions has passed". The original formulation of cl 24.(1) may not have provided a conceptual solution to the problem, since delays in the issuance of Delay Certificates still occurred (see, for instance, *Aoki* at [29]–[30]), but it at least posed enough of a warning to architects such that they would presumably strive to issue Delay Certificates with all due haste. The practical effect was to minimise the gap as much as possible, resulting in a reduced likelihood of there being any instructions or matters entitling the contractor an extension of time during that period.

120 The notion that there should be no gap (or only a negligible gap) between the latest date for completion and the issuance of the Delay Certificate appears to be implicitly assumed in some of the commentaries on the Termination of Delay Certificate. These commentaries tend to focus on how delaying events entitling the contractor to an extension of time may occur during the period of "culpable delay" – which commences after the latest date of completion if the works have not been completed by then – rather than subsequent to the issuance of the Delay Certificate. When describing cl 24.(3) in the second edition of the

Guidance Notes, Mr Wallace remarked that "[s]ub-clause (3), for the first time in any standard form, lays down a procedure permitting further extensions of time *during the period of delay* should certain events for which the Employer is responsible occur, as they can easily do, during that period" [emphasis added]: *Construction Contracts* at p641. This may suggest that the original intent behind the Termination of Delay Certificate was to allow extensions of time for any delaying events occurring after the latest date for completion. One suspects that because Mr Wallace did not envisage any real gap between the latest date for completion and the date of issuance of the Delay Certificate, he simply referred in cl 24.(3) to the occurrence of delaying events "while the Contractor is continuing work subsequent to the issue of a Delay Certificate". However, given the explicit reference to "the issue of a Delay Certificate" in that sub-clause, it is not obvious how effect could be given to such intent where the delaying events occur in the gap between the latest date for completion and the issuance of the Delay Certificate. It is unlikely that Mr Wallace would have foreseen the widening of that gap in the 6th Edition of the SIA Conditions some two decades after he first drafted the instrument.

121 As a secondary argument to its proposed interpretation of cl 24.(3), the Plaintiff suggests that it is "an implied term of the Contract that the [Termination of Delay Certificate] can be issued in respect of delaying events occurring after the extended completion date but before the issuance of the [Delay Certificate] (the "Unaccounted Period")". Such term should be implied because "[p]arties did not contemplate the gap that arose as a result of the absence of a contractual mechanism to govern the assessment of [extensions of time] for events occurring during the Unaccounted Period and it would be necessary in the business or commercial sense to imply such a term in order to give the contract efficacy".[61] In my view, it is not appropriate for me to make any findings on a

submission of this nature. In order to determine whether such a term should be implied, one would have to apply the framework set out in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [93]–[101], which necessitates an investigation of matters such as whether the parties contemplated the gap and the exact nature of the term to be implied having regard to the officious bystander test. That is a mixed question of fact and law that is too intricate and multifaceted to be contemplated in the context of a stay application, and would sit uneasily with the "holistic and commonsense approach" that I am required to apply in respect of such applications (see [58] above).

122 I shall briefly deal with two further interlinked arguments raised by the parties, both of which should likewise be referred to the arbitrator. The first argument, made by the Plaintiff, is that the Defendant is estopped from impugning the validity of the Termination of Delay Certificate because it was the Defendant that had asked Mr Lim to issue the certificate in respect of 33 architect's instructions (see [15] above). In this regard, the Plaintiff claims that the estoppel has arisen by convention on the basis of a "course of dealing over a period of almost two years" involving various meetings, discussions and correspondence.[62] This is plainly an investigation that will require "full-scale argument" and examination of the facts in at least as much depth as a summary judgment application (see [58] above) and I decline to embark on such an exercise. The results of that inquiry will, in addition, have implications on the second argument, this time advanced by the Defendant, that Mr Lim had acted fraudulently by issuing a Termination of Delay Certificate purportedly "in

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61 Plaintiff's written submissions dated 25 May 2018 at para 66.

62 Plaintiff's written submissions dated 25 May 2018 at para 81.

respect of instructions given or matters occurring since the issuance of [the] Delay Certificate dated 17 February 2014",[63] since those instructions were actually given before the issuance of the Delay Certificate. It is therefore also appropriate that that issue be left to the arbitrator.

123 I agree with the Defendant that the validity of the Further Delay Certificate is premised on the validity of the Termination of Delay Certificate (see [78] above). Clause 24.(3)(c) provides that a Further Delay Certificate is issued "if the Contractor fails to proceed to complete the Works with due diligence within the period of the further extension of time granted under the Termination of Delay Certificate" (see [100] above). If the Termination of Delay Certificate is invalid, there is no proper grant of extension of time under it and accordingly no grounds to issue a Further Delay Certificate. Given that the validity of the Further Delay Certificate is therefore contingent on the validity of the Termination of Delay Certificate, and there exists a dispute to be referred to arbitration in respect of that latter issue, the former issue ought also to be referred to arbitration. I did not understand the Plaintiff to take issue with the Defendant's position in this regard.

124 For these reasons, I am satisfied that there is a dispute to be referred to arbitration in respect of the Plaintiff's claim, and I therefore grant the Defendant's Stay Application.

Stay of the counterclaim

125 The Defendant's counterclaim does not concern the validity of the Architect's Certificates. In summary, there are four main parts to the

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63 Wong's 1st affidavit (SUM 1613) at p101.

counterclaim. First, the Defendant alleges that Mr Lim had granted an extension of time of 213 days (that is, the 162 days' extension mentioned in the Delay Certificate added to the additional 51 days' extension granted in the Termination of Delay Certificate) without certifying that it was entitled to claim for preliminaries based on that extension of time. The Defendant claims $1,127,505.31 as preliminaries for the time extended.[64] Second, the Defendant seeks an extra 104 days' extension of time, for which it claims a further $550,519.02 in preliminaries.[65] Third, the Defendant seeks a declaration that the Plaintiff is not entitled to impose liquidated damages or any damages at all on the Defendant. Fourth, the Defendant demands recovery of costs incurred as a result of the adjudication (see [19] above) pursuant to s 30(4) of the Building and Construction Industry Security of Payments Act (Cap 30B, 2006 Rev Ed), such costs amounting to $105,370.58.

126 In response to the Plaintiff's Stay Application, the Defendant does not contend that there is no dispute to be referred to arbitration. Its position is that the entire set of proceedings – both claim and counterclaim – ought to be decided at arbitration.[66] Before me, Mr Chan confirmed that position and agreed that "[i]nsofar as the counterclaim is concerned, there is a dispute". There being no other matters in contention in relation to the Plaintiff's Stay Application, I am satisfied that that application should likewise be granted.

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64 Defence and Counterclaim at para 36.

65 Defence and Counterclaim at para 37.

66 Defendant's skeletal submissions dated 25 May 2018 at paras 85–86.

Conclusion

127 Having granted both the Defendant's and the Plaintiff's Stay Applications in respect of the claim and counterclaim respectively, the overall result is that the Suit is stayed and the entirety of the dispute between the parties is to be left to the arbitrator's decision.

128 I will hear the parties on costs.

Elton Tan Xue Yang
Assistant Registrar

Christopher Chuah, Lee Hwai Bin, Valerie Koh and Deborah Hoe (WongPartnership LLP) for the plaintiff;
Raymond Chan and Karen Oung (Chan Neo LLP) for the defendant.
