

Ho Guan Heng

Applicant/Defendant

AND

**Haji Abdullah bin Haji Metassim
(as administrator of the estate of the
late Haji Metassim Bin Abdul Rahman@Haji Metassim)**

Respondent/Plaintiff

**(Court of Appeal of Brunei Darussalam)
(Originating Motion No. 3 of 2025)**

Steven Chong, C.J., Lunn and Sir Peter Gross JJAs.

Date of Hearing: 29 October, 2025.

Date of Judgment: 29 October, 2025.

Date of Reasons for Judgment: 22 November, 2025.

Headnote: Civil. Renewed application for leave to appeal allowed: Judge's dismissal of Registrar's refusal to strike out Respondent's claim, O.18, r. (1), RSC on grounds what it disclosed no reasonable cause of action, was scandalous, frivolous or vexatious or otherwise an abuse of the process of the Court; and O.14 A, RSC as a matter of a question of law and/or construction of documents.

Respondent's claim for liquidated damages for delay in delivery of Units by Applicant on practical completion in Development Agreement. Issue arising of effect of Project Architect's unparticularised certification of an extension of time for practical completion of 125 days, on application of Applicant on several different grounds including a Stop-Work Order issued by Authorities because site was not safe, having regard to Clause 2.7 that such certification, "...shall be construed and relied upon as valid and any such certification shall be final, conclusive and binding on the parties hereto." No issue as to fraud or dishonesty in the issue of certificate. Narrowness of defence of "manifest error". Sara Hossein Assets Holdings Ltd. v Blacks Outdoor Retail Ltd. [2023] UKSC 2, at paragraphs 30-34.

Mr. Hj Mansur DP Dr Hj Abd Latif and Ms. Nojaain Mazyiah Binti Jaini (Messrs Pg Izad & Lee) for Applicant/Defendant.

Ms. Nuratikah Binti Awang Haji Omar (Messrs Omar & Khan Advocates & Solicitors) for Respondent/Plaintiff.

Cases cited:

Malaysia Land Properties Sdn Bhd v Tan Peng Foo [2014] 1 MLJ 718

Jones and Others v Sherwood Computer Services PLC [1992] 1 WLR 277

Sara Hossein Assets Holdings Ltd. v Blacks Outdoor Retail Ltd. [2023] UKSC 2

Malai Nuridah Sheikh Mohammad v Brunei Shell Petroleum Company Sdn Bhd & Anor. (Civil Suit 8 of 2015-unreported, 2 November 2015)

Lunn, J.A.

1. This is an application by the Applicant/Defendant for leave to appeal against the Judgment of Woolley JC, dated 4 June 2024, dismissing the Applicant's appeal from the Ruling of Registrar Mohammad Marzuqi Bin Sabtu, dated 15 January 2023, refusing the Applicant's application to strike out the Respondent/Plaintiff's claim on the grounds that it discloses no reasonable cause of action; it is scandalous, frivolous or vexatious or otherwise an abuse of the process of the Court, pursuant to Order 18, r. (1) of the Rules of the Supreme Court ("RSC"); or as a matter of a question of law and/or the construction of documents, pursuant to Order 14A of the RSC. The Applicant renews the application, an earlier application for leave having been dismissed by order of Haji Abdullah Soefri Bin POKSM DSP Haji Abidin, JC dated 12 August 2025.

2. At the conclusion of the hearing of the application on 29 October 2025, we granted leave to appeal and, at the invitation of Mr. Mansur Latif for the Applicant, we made an Order of costs in the cause.

Background

3. The Respondent's claim is for liquidated and ascertained damages of \$408,000 .00 arising as a consequence of delay in the construction of a commercial building on land in Kg. Kiulap, Mukim Gadong of which the Respondent, as the administrator of the estate of the late Hj. Abdullah bin Hj. Metassim, was owner and the Applicant the contractor.

Development Agreement

4. By a Development Agreement between the Respondent, as the Landowner, and the Applicant as the Developer, dated 28 October 2014, the Applicant agreed to carry out the construction of the building on the Respondent's land, at the conclusion of which the Respondent was to receive a number of Units, the Applicant retaining the remainder.

5. Clause 2.4 provided that the Applicant was to commence the Construction Works within six months of the date of obtaining the Required Approvals to commence and carry out the construction (Commencement of Construction Date). Clause 2.5 required that the Developer achieve Practical Completion of the Development Project within 36 months from the Commencement of Construction Date, "*or such further extended date as may be permitted to the Developer under the terms of this Development Agreement.*"

6. Further, the Development Agreement provided:

"2.6 Notwithstanding the above, the Developer shall be allowed, without penalty, a reasonable period of extension of time (to run consecutively or concurrently as may be fair and reasonable in the circumstances), to be decided by the Project Architect, if the delay in the Practical Completion of the Development Project is due to reasons which are beyond the control of the Developer or the Developer's Contractor such as:

2.6.1 by reason of force majeure, any exceptionally inclement weather, fire, landslides or acts of God; or

...

2.6.3 by reason of the Project Architect's instruction or certification; or

2.6.4 by reason of any delayed approval and/or inspection of any work by the relevant authorities beyond the control of the Developer; or

2.6.5 by reason of any provision or order of the competent government authorities.

2.7 Any certification for extension of time in respect of the Development Project given by the Project Architect directly or indirectly, shall be construed and relied upon as valid and any such certification shall be final, conclusive and binding on the parties hereto.

2.8 For the purposes of this Development Agreement, the Development Project shall be deemed to be complete upon Practical Completion.

2.9 Practical Completion shall be deemed to have been achieved on the date the Certificate of Practical Completion is issued.”

Practical Completion

7. Clause 1.1.9 provided that “*Practical Completion*” shall mean:

“...practical completion of the Construction Works subject to such amendments, changes or alterations thereto made under the provisions of this Development Agreement, as certified by the Project Architect, notwithstanding that there may exist defects of a minor nature which the Developer is liable to rectify... (it) shall not include the issuance of the occupation permit by the relevant authorities...”

8. Clause 1.1.10 provided that the Certificate of Practical Completion, “shall mean a certificate issued by the Project Architect certifying that Practical Completion of the Development Project has been achieved on the date stated therein.”

Liquidated Damages

9. Clause 13 provided that:

“...in the event that the Developer shall be unable to achieve Practical Completion of the Development Project within the period herein agreed, including such extension or extensions of time approved by the Project Architect, the Developer shall pay to the Landowner the sum of **B\$2,000 .00 per Unit per month** as liquidated and ascertained damages until the date that Practical Completion is achieved.”

Registrar’s Ruling

10. In his Ruling, dated 15 January 2023, Registrar Mohammad Marzuqi bin Sabtu noted that the Development Agreement required the construction to have been completed within 36 months after commencement, which commencement was to be no more than six months after the Applicant had obtained the required Approvals from the Authority. The Approvals had been obtained by the Defendant on 12 May 2016, so that commencement of the project was to commence on 12 November 2016. However, the Respondent claimed that the project was not completed until 9 May 2020.

Respondent's claim

11. In consequence of the delayed completion, the Respondent claimed liquidated damages of \$2,000 .00 per month per Unit of the Units which were required to be provided to the Respondent by the Defendant pursuant to the Development Agreement. That was a total of \$408,000.00, for a delay of six months.

Delayed completion

12. Of the main reason for the delay, the Registrar referred to two 'Stop Orders', issued by the Department of Labour, Ministry of Home Affairs to the Defendant, dated respectively 12 August 2017 and 7 September 2019, which required work on the construction to cease. It was the Respondent's case that the Stop Orders were issued because of the Applicant's failure to comply with safety requirements required by the Architect and/or the Authority.

STOP-WORK ORDER

13. The recipient of the 'Stop-Work Order', dated 12 August 2017, was Skydeck Construction Sdn. Bhd. ("*Skydeck*") The Order, made pursuant to the Workplace Safety and Health Order, 2009, stated that the Department of Labour had, "*...conducted investigations into the collapse of the building structure that has put construction workers at risk of danger*" and, "*having regard to the safety, health and welfare of workers and the dangerous conditions on the site*", advised Skydeck to take the steps required in the Attachment. Further, in ensuring that the construction site was safe and did not pose risks to the health of workers, Skydeck was notified that the company was, "*not permitted to operate at the construction site...until the workplace improvement measures meet the requirements and written permission was obtained from the Commissioner for Work Safety and Health at Work*". Skydeck was required to submit reports in respect of:

1. Improvement measures relating to the collapse of the building structure;
2. Work Execution Plan; and
3. Workplace Safety and Health Management Systems with a risk hazard assessment.

Further, Skydeck was required to provide a letter of safety and health assurance in relation to the accident.

Applicant's case

14. The Registrar said that it was the Applicant's case that the Stop Order was issued for, "*reasons which are beyond the control of the Developer or the Developer's contractor.*" Importantly, the Applicant said they had applied for an extension of time and relied on a Certificate of extension of time issued by the Project Architect, which was "*final, conclusive and binding on all parties*". In the result, there was no delay. The Respondent's claim that there was a delay of six months was, "*scandalous, frivolous and vexatious*" and ought to be struck out.

Finding and Ruling

15. Having noted that the Stop Order stated that it was issued because the site was, "*not safe for workers to continue working due to collapsed buildings/constructions*", the Registrar said that

was sufficient for the matter to be resolved at trial. Further, whilst he accepted that there was no time stipulated for the issue of the Project Architect's Certificate, he said it was "*peculiar*" that the Defendant only sought the issue of the certificate after he had received the Letter of Demand from the Respondent. In consequence, he dismissed the Applicant's application, with costs to the Respondent to be taxed if not agreed.

The Judge's Ruling

Chronology of events

16. The Judge noted that, pursuant to the Development Agreement, Approvals having been obtained on 12 May 2016, construction should have commenced by 12 November 2016, so that Practical Completion should have been reached by 12 November 2019. However, a Certificate of Practical Completion was issued for 16 March 2020 only.

Applicant's case

Delay

17. Of the Applicant's case, the Judge noted that the Applicant claimed that the delay was due to two Stop Orders, one suspending work from August 2017 to March 2018 and the other from September 2019 to December 2019, and to delays caused by inclement weather. The Applicant claimed that they were '*force majeure*', delays allowed under the Development Agreement. By a letter, dated 15 June 2023 (sic), the Project Architect had approved an extension of 125 days for the completion of the work to 16 March 2020. That was the date of Practical Completion.¹

Project Architect's Certificate

18. Clause 2.7 of the Development Agreement, provided that any Certification for extension of time by the Project Architect:

"...shall be relied upon as valid and any such certification shall be final, conclusive and binding on the parties".

The Applicant said that was an unassailable defence to the claim, which should be struck out. Alternatively, the Court could dismiss the action having considered the Project Architect's letter of extension of time, pursuant to Order 14 A.²

Respondent's case

19. Of the Respondent's case, the Judge noted that it was asserted that the issue of the two Stop Orders was the result of the failure of the Applicant or his contractors to abide by safety requirements and/or their negligence. In those circumstances, the Applicant should not be allowed to rely on them to justify an extension of time. Secondly, the Certificate of extension of time from the Project Architect was not issued until 15 June 2022, the Applicant not having applied for it until 9 March 2022, two years after Practical Completion and after the Applicant

¹ Judge's Ruling, paragraph 5.

² Judge's Ruling, paragraph 6.

had received a letter of demand from the Respondent. That gave rise to a doubt concerning the certificate and ought to be investigated at trial.³

The issues

20. Of the issues before him, the Judge noted that the two letters from the Applicant's contractor to the Project Architect, dated 9 March 2022, invited consideration of the Stop Orders, rain and other delays in granting an extension of time. That raised the issue of whether the reason for the Stop Orders was the failure or negligence of the Applicant. On the other hand, the Applicant submitted that the Project Architect's Certificate of extension of time was conclusive and binding.⁴

9 March 2022: Skydeck letters to the Project Architect

21. In their two separate letters to the Project Architect, dated 9 March 2022, Skydeck applied for an extension of time of the date of practical completion of 12 November 2019 for the, "*reason and condition*" set out.

(i) Stop Orders

22. In one letter, the request was in respect of the first Stop Order, dated 12 August 2017, to the recommencement approval date of 19 March 2018, a total of 231 days. Secondly, a request was made for 88 days in respect of the second Stop Order, the recommencement approval date of which was 4 December 2019. It was asserted that a total of 10 months of extension of time for practical completion, arising from the two Stop Orders, was reasonable.

(ii) Rain delays and landowner's amendment of building plans

23. In the second letter, a total of 210 days, or 7 months, was sought in respect of rain delays on days on which the level of rainfall was prohibitive in the period November 2016 to November 2019. In addition, an extension of time of 4 months was sought in respect of the Respondent's request for an amendment of the building plans, to incorporate a function Hall. It was asserted that, for those two reasons, a total of 11 months of extension of time for practical completion, to 12 September 2020, was reasonable.

The Law

24. The Judge said that there was no dispute that striking out under Order 18 ought not to be ordered by the Court other than in "*plain and obvious cases*". In determining the issue, regard was to be had to the pleadings, "*not the evidence put forward in affidavits or documents exhibited to those affidavits.*" On that basis, he concluded that the Respondent was, "*entitled to put forward a case on the interpretation of the agreement, and possibly on the validity of the architect's certificate.*"⁵

25. Of the conclusive and binding nature of a Project Architect's Certificate, the Judge distinguished the decision of the Court of Appeal of Malaysia in *Malaysia Land Properties Sdn*

³ Judge's Ruling, paragraph 7.

⁴ Judge's Ruling, paragraph 8.

⁵ Judge's Ruling, paragraph 10.

*Bhd, v Tan Peng Foo*⁶. In that case, a challenge to the validity of such a certificate had been made at trial. It was only on appeal that the certificate was held to be conclusive and binding. The case was not authority for the proposition that the production of such a certificate, the validity of which was challenged on a striking out application, should be the end of the matter. In the result, the Judge determined that it was not a proper case for striking out.⁷

Order 14 A

26. Of the application of Order 14A, the Judge noted that the issue was not just a question of law or construction but consideration of a document as part of a party's evidence, so that it was not appropriate to deal with the issue pursuant to that Order.⁸

27. In the result, the Judge dismissed the application and ordered costs to the Respondent, to be taxed.

Leave to appeal

Judge's Ruling

28. In his Judgment, dated 9 July 2025, Haji Abdullah Soefri Bin POKSM Haji Abidin, JC dismissed the Applicant's application for leave to appeal Woolley JC's Judgment and Order, with costs to the Respondent to be taxed, if not agreed. Having referred to Woolley JC's description of the principles applicable to a striking out action, Haji Abdullah Soefri JC said that, "*...the Defendant's defence raises contested factual questions that can only be resolved through oral evidence and for evidentiary proceedings.*"

Application for leave to appeal to the Court of Appeal

Plainly wrong

29. The Applicant submitted that the Judge was plainly wrong to refuse to strike out the claim on the basis that the Respondent was entitled to put forward a case on the interpretation of the Development Agreement and on the issue of a Certificate of extension of time by the Project Architect, notwithstanding that the parties had agreed that his certificate was, "*final, conclusive and binding*".

Project Architect's Certificate: conclusive evidence

30. The Judge erred in holding that the, "*conclusive nature of the architect's certificate... is not necessarily the end of the matter.*" By Clause 2.6, the parties agreed that the Project Architect was the person to determine the extent, if any, of Practical Completion of the Development Project and, by Clause 2.7 his certification was to be, "*...final, conclusive and binding on the parties*". The Court must give effect to the plain meaning of the conclusive evidence clause.

31. In support of the Applicant's submissions as to the conclusive and binding nature of the certificate of the Project Architect, this Court was invited to follow the Judgment of the Court of

⁶ *Malaysia Land Properties Sdn Bhd, v Tan Peng Foo* [2014] 1 MLJ 718.

⁷ Judge's Ruling, paragraph 11.

⁸ Judge's Ruling, paragraph 14.

Appeal of England and Wales in *Jones and Others v Sherwood Computer Services PLC*.⁹ There, the Court had struck out a claim in a statement of claim, in face of a conclusive evidence provision in the contract that the opinion of an expert accountant, in a case involving share valuation, was “*conclusive and final and binding for all purposes.*” In his Judgment, having noted that the parties agreed that the determination of an independent accountant was to be “*conclusive, final and binding for all purposes*”, Dillon LJ said that it was not, “*...appropriate that the court should rush in to substitute its own opinion.*”

32. The Judgment of the Court of Appeal (Putrajaya) in *Malaysia Land Properties Sdn Bhd, v Tan Peng Foo*¹⁰ was to like effect, “*...the Court cannot and is not at liberty to go behind the certificate to question its validity in the absence of any evidence to suggest that the certificate was issued as a result of, inter-alia, fraud, misrepresentation or mala fides.*”¹¹

Pleadings

33. The Respondent did not plead that he disputed the interpretation of the Development Agreement and/or questioned the validity of the Project Architect’s extension of time certificate. There was no allegation that the Certificate was obtained fraudulently, by mistake or in bad faith. Rather, it was alleged that the delay in completing the project was the result of negligence of the Defendant and his contractor or subcontractor. However, no particulars of negligence were pleaded. The Respondent’s failure to plead a case disputing the interpretation of the Development Agreement and the validity of the Project Architect’s Certificate embarrassed and prejudiced the defendant.

The ambit of the material to be considered

34. Further, the Judge erred in determining that, in considering the application, it was not permissible to have regard to evidence put forward in affidavits, or documents exhibited to those affidavits. In his Judgment in the High Court in *Malai Nuridah Sheikh Mohammad v Brunei Shell Petroleum Company Sdn Bhd & Anor*,¹² the Chief Justice, as he now is, had regard to affidavits and evidence in upholding a decision of a Senior Registrar to strike out the statement of claim. A reasonable consideration and evaluation of the evidence was appropriate.

35. It was submitted that there was a manifest error by the Judge, in concluding that there was a triable issue, notwithstanding that he failed to actually consider in detail whether the pleaded case gives rise to any dispute on the certificate. Further consideration or guidance as to the law in relation to a conclusive evidence clause would be in the interests of justice,

Order 14 A

36. Further, it was submitted that the Judge erred in declining to determine the application of Order 14 A. The Respondent had failed to plead the legal basis of his case disputing the Certificate of extension of time granted by the Project Architect. The issue was not, “*Is there a triable issue*”? Rather, it was “*Is there a triable issue on the pleadings*”?

⁹ *Jones and Others v Sherwood Computer Services PLC* [1992] 1 WLR 277.

¹⁰ *Malaysia Land Properties Sdn Bhd, v Tan Peng Foo* [2014] 1 MLJ 718.

¹¹ *Ibid*, paragraph 12 (g), page 726 G-I.

¹² *Malai Nuridah Sheikh Mohammad v Brunei Shell Petroleum Company Sdn Bhd & Anor*. (Civil Suit 8 of 2015-unreported, 2 November 2015).

Respondent's submissions

Pleadings

37. The Respondent submitted that the Judge was clearly correct to limit his regard to the pleadings and the triable issues there disclosed. The Respondent had pleaded breach of the Development Agreement. The Respondent's claim for liquidated damages arose from the Applicant's breach of the Development Agreement to reach practical completion in 36 months, as required. The delay was due to the issue of a Stop Order by the Department of Labour, Ministry of Home Affairs, on 12 August 2017, to Skydeck Construction. It was pleaded in the Amended Statement of Claim that the Stop Order, "...would not have been issued, but for the negligence of the Defendant and their appointed contractors/subcontractors." The result of that negligence was that the project had been delayed, in breach of the Development Agreement, so that the Respondent was entitled to the liquidated damages claimed.¹³

Project Architect's Certificate

38. Of the issue of the Project Architect's Certificate of extension of time, in the Respondent's written submissions it was acknowledged that the Respondent, "...does not allege fraud or dishonesty in the issuance of the ETO certificate." Rather, the Respondent challenged, "...its procedural regularity and legal effect, especially as it was issued more than two years after the original completion date and after a demand letter had already been served." However, in oral submissions, Ms. Atikah Omar accepted that the Development Agreement was silent as to the time at which an application for the issue of a Project Architect's Certificate was to be made or when the Certificate was to be issued. It follows that the contention of "procedural regularity" was of no substance.

39. The Judge was correct to determine that he could not make his decision based on the evidence in the affidavits. Despite the fact that the Project Architect's Certificate was stated to be conclusive, the Judge was correct to determine, "...that is not necessarily the end of the matter".

A consideration of the submissions

40. Clearly, crucial to the Judge's Ruling was his determination that, if challenged, production of the Project Architect's certification of an extension of time was not the end of the matter. That involved a consideration of the effect of the conclusive evidence provision in Clause 2.7 of the Development Agreement.

41. As noted earlier, Clause 2.6 of the Development Agreement provided that the Developer shall be allowed a reasonable period of extension of time if the delay in the Practical Completion, "is due to reasons beyond the control of the Developer or the Developer's Contractor such as:" Five examples were given of such circumstances.

42. Clause 2.7 provided that such certification for an extension of time of the Development Project by the Project Architect, "...shall be construed and relied upon as valid and any such certification shall be final, conclusive and binding on the parties hereto." j

¹³ Amended Statement of Claim, paragraphs 8 and 9.

43. The Project Architect’s letter, dated 15 June 2022, to Skydeck Construction Sdn Bhd. (“Skydeck”) of a certification of an extension of time was a ‘*non-speaking*’ certification. Having referred to Skydeck’s letter, dated 9 March 2022, requesting an extension of time, it simply asserted that, “... *we can only approve 125 days of extension of time to your office from 12th November 2019 till 16th March 2020.*” It is to be noted that the reference was made simply to Skydeck’s letter of 9 March 2022, not to Skydeck’s two letters of that date.

The Law

44. The only authority relevant to the applicability of a contractual conclusive evidence clause to which the Judge was referred in submissions by counsel was the Judgment of the Court of Appeal of Malaysia in *Malaysian Land Properties*. In that case, at trial the Purchaser/Respondent had succeeded in challenging Clause 30, the conclusive evidence provision, in a Sale and Purchase Agreement with the Appellant/Developer, in which he purchased a Unit from the Developer, vacant possession of which was delivered two years late.

45. Clause 30 provided that the Developer was not liable for loss or damage to the Purchaser for failure to fulfil any of the terms of the Agreement, if such fulfilment is delayed, hindered or prevented by *force majeure*, including... “*any delays caused by the contractor (s) involved in the construction of the development... Acts of God... inclement weather... or any other circumstances beyond the control of the Vendor...*”¹⁴

Conclusive evidence provision

46. Clause 30 went on to provide that:

“*All decisions of the Vendor’s Architect as to the reasons for any delay... shall be final and conclusive and binding upon the Purchaser.*” [Italics added.]

The Vendor was the Developer.

Architect’s letter of certification

47. The reasons provided in the Vendor’s Architect’s letter of certification were that delay by the contractor was caused by Acts of God, inclement weather and shortage of materials. In addition, the Architect’s letter stated that information could be made available to a purchaser who requested it. The Respondent made no such request.

Challenge to the certification

48. The Purchaser’s challenge, to the Architect’s letter of certification of an extension of time to one month beyond the scheduled date of delivery of vacant possession, was to the reasons provided by the Architect for the extension of time. The reasons given could not come within the conclusive evidence clause.¹⁵

Court of Appeal

49. In face of the Purchaser’s complaints, that the Developer had failed to provide documentary evidence to substantiate the reasons set out by the Developer’s Architect, the Court of Appeal was critical of the Respondent’s failure to seek discovery; it was “*incumbent*” on the Respondent

¹⁴ *Malaysia Land Properties Sdn Bhd, v Tan Peng Foo*; at paragraph 9, page 723

¹⁵ *Ibid*, at paragraph 12 (e), page 726.

to do so.¹⁶ The Court of Appeal allowed the appeal, determining the Judge erred in rejecting the Architect’s certificate on the ground that the stated reasons could not be substantiated, so that the certificate was not conclusive and final.¹⁷ Rather, the Court of Appeal determined that the certificate was deemed conclusive as to the reasons for the delay, adding that the Court could not, “...go behind the certificate to question its validity in the absence of any evidence to suggest that the certificate was issued as a result of, *inter-alia*, fraud misrepresentation or *mala fides*”¹⁸

Manifest error

50. The Court concluded, “...unless the respondent can demonstrate that the certificate issued was manifestly erroneous or was issued with *mala fides* the certificate will have to be accepted by the court.”¹⁹ [Italics added.] Earlier, the Court noted that in the High Court of Singapore, in a case concerning a conclusive evidence certificate of fact, the Judgment had referred to the relevance of an “*obvious error on the face of it*”.²⁰

51. Although the Applicant now relies on the Judgment of the Court of Appeal of England and Wales in *Jones and Others*²¹, Woolley JC was not referred to that Judgment. There, the Court of Appeal allowed an appeal against the dismissal of the Deputy-Judge of an application to strike out a part of the statement of claim. The Sales Contract between the parties required a valuation of shares, which in turn required the determination of the sales revenue. It provided for the appointment of an independent chartered accountant, if the accountants were unable to agree a statement, and stated of the accountant’s letter of certification, that:

“...his determination shall be conclusive and final and binding for all purposes.”

52. The certificate issued by the independent accountant was a “*non-speaking certificate*” simply stating, “We determine that the sales amounts to £2,527,135.” It was claimed that the certificate had been issued by mistake. There was no allegation of fraud or collusion. Dillon LJ noted that the independent accountant had been asked, “to consider only the points in which *Peats and Deloittes* were not in agreement, to decide whether two classes of disputed transactions were or were not included in the total of sales”. He concluded that, they having done precisely what they were instructed to do, “...the plaintiffs cannot challenge the determination of the amount of the sales.”²²

53. As noted earlier, it is be remembered that in its written submissions the Respondent now stipulated that he “...does not allege fraud or dishonesty” in the issuance of the Project Architect’s certification. Clearly, the residual scope for challenge of the certification is narrow, namely “*manifest error*”.

Manifest error

54. In *Sara Hossein Assets Holdings Ltd. v Blacks Outdoor Retail Ltd.*²³, the Supreme Court of the United Kingdom considered the effect of a conclusive evidence clause in a lease, in particular

¹⁶ Ibid, at paragraph 12 (d), page 726.

¹⁷ Ibid, at paragraph 12 (j), page 727.

¹⁸ Ibid, at paragraph 12 (g), page 726.

¹⁹ Ibid, at paragraph 12 (k), page 727,

²⁰ *Bangkok Bank Ltd v Cheng Lip Kwong* [1990] 2 MLJ 5.

²¹ *Jones and Others v Sherwood Computer Services PLC* [1992] 1 WLR 277.

²² Ibid, at page 287 C-G.

²³ *Sara Hossein Assets Holdings Ltd. v Blacks Outdoor Retail Ltd.* [2023] UKSC 2.

in respect of the provision as to the conclusive effect of the landlord's certification of the landlord's costs and the service charge sum payable by the tenant. The tenant accepted that the certification was conclusive as to the landlord's costs, but disputed that it was conclusive as to the tenant's service charge liability. The landlord sought summary judgment, but the application was dismissed by the Master and the appeal was dismissed by the Judge. The Court of Appeal granted summary judgment. The Supreme Court determined that the Court of Appeal was right to enter summary judgment.²⁴

55. The certification clause provided:²⁵

"The landlord shall on each occasion furnish to the tenant as soon as practicable after such total cost and the sum payable by the tenant shall have been ascertained a certificate as to the amount of the total cost and the sum payable by the tenant and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive." [Italics added.]

56. In the Judgment of Lord Hamblen, with whom the majority agreed, a review was conducted of the authorities on the issue of the narrowness of the permitted defences of "*manifest error*".²⁶

- It was, "*one that is obvious or easily demonstrable without extensive litigation*".²⁷
- Of what was obvious or easily demonstrated, it was noted that manifest errors were, "*oversights or blunders so obviously capable of affecting the determination as to admit of no difference of opinion.*"²⁸
- What was demonstrable without extensive investigation may depend on the context. Whilst it may not be necessary to be able to demonstrate the error immediately, in most cases this will need to be done readily-i.e. by an investigation limited in both time and extent.²⁹

57. In the result, Lord Hamblen concluded:³⁰

"It is therefore clear that the permitted defences of manifest or mathematical error or fraud" are indeed narrow. An arguable error will not suffice, however well-founded the allegation of error may ultimately prove to be."

Conclusion

58. Having regard to those considerations, we granted the Applicant leave to appeal, being satisfied that it is arguable that the Judge fell into error in refusing the Applicant's appeal from the Ruling of Registrar Mohammad Marzuqi, refusing the Applicant's application to strike out the Respondent's claim, pursuant to Order 18, r. (1) of the Rules of the Supreme Court; or as a

²⁴ Ibid, paragraph 58.

²⁵ Ibid, paragraph 21.

²⁶ Ibid, paragraphs 30-34.

²⁷ *IIG Capital PLC v Van Der Merve* [2007] EWHC 2631 (Ch), [2008] 1 All ER (Comm) 435, at para. 52.

²⁸ *Veba Oil Supply & Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832 at para, 32

²⁹ *ABM Amro Commercial Finance v McGinn* [2014] EWHC 1674 (Comm), at paragraphs 51 and 52.

³⁰ *Sara Hossein Assets Holdings Ltd. v Blacks Outdoor Retail Ltd.* paragraph 34.

matter of a question of law and/or the construction of documents, pursuant to Order 14 A of the RSC.

Costs

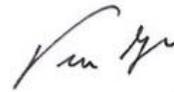
59. As noted earlier, we ordered that Costs be in the cause.



DATO SERI PADUKA STEVEN CHONG, C.J.



MICHAEL LUNN, J.A.



SIR PETER GROSS, J.A.