

HO GUAN HENG

Appellant

AND

HAJI ABDULLAH BIN HAJI METASSIM

Respondent

(as administrator of the estate of the late

Haji Metassim bin Abd Rahman @ Hj Metassim)

(Court of Appeal of Brunei Darussalam)

(Civil Appeal No. 15 of 2025)

HAJI ABDULLAH BIN HAJI METASSIM

Plaintiff

(as administrator of the estate of the late

Haji Metassim bin Abd Rahman @ Hj Metassim)

AND

HO GUAN HENG

Defendant

(High Court of Brunei Darussalam)

(Civil Suit No. 28 of 2022)

Before: Steven Chong, C.J., Lunn, and Sir Peter Gross, JJA.

Date of Hearing: 15th June 2026

Date of Judgment: 27th August 2026

Headnote:

- Appeal allowed – Landowner’s claim for liquidated and ascertained damages (“LAD”) for delay in Practical Completion in a Development Project, certified by Project Architect to be 16 March 2020, summarily determined in Developer’s favour under

O.14A, RSC ("determination of question of law or construction"), and, had it been necessary to do so, would have been struck out under O.18, r.18(1)(a) RSC ("no reasonable cause of action").

- Disposal: Judgments below set aside and Landowner's claim dismissed; Costs-Landowner to pay Developer's costs of appeal and below on standard basis, to be agreed within 28 days, failing which to be determined by the Registrar.
- 'Conclusive Evidence' clause- Cl. 2.7 of Development Agreement provided that "Any certification for extension of time in respect of the Development Project given by the Project Architect ... shall be final, conclusive and binding on the parties hereto."
- If given effect, Project Architect's certificate ("the Certificate"), dated 15 June 2022, granting an extension of time ("EOT") to 16 March 2020, meant that there was no delay, so that the Landowner's claim for LAD must fail.
- Developer applied for EOT on 9 March 2022, almost 2 years after Practical Completion, but relatively promptly after Landowner had claimed LAD on 10 February 2022.
- No general rule as to the meaning of a conclusive evidence clause, such as Cl. 2.7 – each clause turns on its own true construction - the foundation for reliance on the expertise of an expert to give a final, conclusive and binding determination is purely contractual – accordingly, a Court is dutybound, subject to well-settled exceptions, to give effect to the bargain made by the parties; it is not for the Court to make some different bargain for the parties.
- Only or principal ground for Landowner resisting application of Cl. 2.7 was allegation of bad faith – but the only basis for the allegation of bad faith was the mere timing of the Developer's application for an EOT and of the Project Architect's certificate granting an EOT; allegation of bad faith akin to allegation of fraud and treated as such; Court held there was not any or any sufficient foundation for an allegation of fraud; accordingly, no (realistically) arguable basis for this allegation of fraud/bad faith.
- No allegation of manifest error, nor could there have been; no challenge to the certificate as such.
- No reasonably arguable basis for allegation (insofar as pursued) that Project Architect had materially departed from his instructions; no contractual provision stipulating time period within which an EOT was to be sought or certified.
- Accordingly, Cl. 2.7 to be given final, conclusive and binding effect; Developer entitled to summary determination in its favour.

- Reasons for preferring the O.14A route to that provided by O.18, r.18: the former did not confine the Court to the pleadings, so that the Court could consider the evidence and look at the matter in the round.

Haji Mansur bin DP Dr Haji Abdul Latif (Messrs Pg Izad and Lee) for the Appellant/
Defendant.

Jaclyn Wong (Messrs Omar & Khan) for Respondent/ Plaintiff.

Case cited:

Malai Nuridah Sheikh Mohammad v Brunei Shell Petroleum Company (High Court of Brunei Darussalam) (Civil Suit No. 8 of 2015)

Evergreat Construction Co. Pte Ltd v Presscrete Engineering Pte Ltd [2005] SGHC 224

Geowin Construction Pte Ltd v MCST Plan No. 1256 [2006] SGHC 245

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

Malaysian Court of Appeal in Malaysia Land Properties, *ibid*

Jones v Sherwood Services Plc. [1992] 1 WLR 277

Keating on Construction Contracts (12th ed.)

Miller v London County Council [1934] All ER Rep 657

Amalgamated Building Contractors v Waltham Holy Cross [1952] 2 All ER 452

Sara & Hossen Asset Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2; [2023] 1 WLR 575

J U D G M E N T

Sir Peter Gross, JA:

INTRODUCTION

1. The Respondent (“the Landowner”) claims liquidated damages in the sum of B\$408,000 arising as a consequence of delay in a construction project, pursuant to a contract between the Landowner and the Appellant (“the Developer”), dated 28 October 2014 (“the Development Agreement”). The Developer submits that the claim is doomed to fail and has therefore applied for it to be summarily disposed of, either by way of a strike out pursuant to O.18, r.18 of the Rules of the Supreme Court (“RSC”) or by way of a determination against the Landowner under O.14A, RSC. The Developer relies on an extension of time certified by the Project Architect (“the Architect”), in the context of a clause in the Development Agreement providing that the Architect’s certification for extension of time is final, conclusive and binding.

2. O.18, r.18 of the RSC deals with striking out and provides as follows:

“(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action...on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court,

and may order the action to be ...dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph 1(a).

...”

3. O.14A is headed “*Determination of law or construction*” and is in these terms:

“Question of law...”

1. *(1) The Court may upon the application of a party...determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –*

(a) such question is suitable for determination without a full trial of the action; and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

...

(4) Nothing in this Order shall limit the powers of the Court under Order 18, rule 18...”

4. By his Decision, given on 15 January 2023, the Registrar, Mohammad Marzuqi bin Sabtu dismissed the Developer’s application (“the Registrar” and “the Decision of the Registrar” respectively). By his judgment dated 4 June 2024, the Judge, Judicial Commissioner Edward Timothy Starbuck Woolley (“the Judgment” and “the Judge” respectively) dismissed the Developer’s appeal and upheld the Decision of the

Registrar. An application, by the Developer for leave to appeal to this Court was dismissed by Hj Abdullah Soefri, J.C., in his Judgment dated 9 July 2025 (“the High Court Judge” and the “High Court Leave Judgment” respectively).

5. In the event, the Developer now appeals to this Court, pursuant to leave granted by this Court in a Judgment dated 22 November 2025 (“The Permission Judgment”): *Ho Guan Heng v Haji Abdullah bin Haji Metassim* (Court of Appeal of Brunei Darussalam) (Originating Motion No. 3 of 2025).
6. The appeal therefore raises a short but interesting and important point, whether the certification for an extension of time given by the Architect was “*final, conclusive and binding on the parties*” as provided by the Development Agreement, or whether the Landowner has a realistic prospect of displacing the Architect’s certification in the circumstances of this case. If the former, then the Developer’s appeal, by whichever of the routes canvassed, must succeed. If the latter, then the Judgments below must be upheld, and the case will go to trial.
7. We were grateful for the submissions of counsel on the appeal, Mr Mansur, who represented the Developer and Ms Wong, who represented the Landowner.

THE DEVELOPMENT AGREEMENT AND THE FACTUAL HISTORY

8. By the Development Agreement, the Landowner and the Developer agreed, *inter alia*, to the development of land known as EDR No. BD45153 Lot No. 52518, KG. Kiulap, Mukim Gadong, District of Brunei Muara, and to construct a commercial building on it, in accordance with the terms and conditions therein set out.
9. Cl. 2 was headed “*Commencement and Completion*”. Cl. 2.4 – 2.6 provided as follows:
“2.4 *The Developer shall only commence the Construction Works within **6 months** from the date of obtaining the Required Approvals (... ‘the Commencement of Construction Date’).*
2.5 *The Developer shall achieve Practical Completion of the Development Project within **36 months** from the Commencement of Construction Date...*
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 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

2.6.2 by reason of any war, chaos, hostility, civil commotion, strike, riot or lockout in the labour force or supply of building material; 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."

10. Crucially, for the purposes of the present dispute, cl.2.7 was in these terms:

"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."

11. Cl. 2.9 dealt further with Practical Completion:

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

12. As already foreshadowed the Landowner claimed liquidated damages ("LAD"), pursuant to cl.13:

*"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."*

13. "Practical Completion" and "Certificate of Practical Completion" were defined as follows:

" 1.1.9 'Practical Completion' shall mean the 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. 'Practical Completion' shall not include the issuance of the occupation permit by the relevant authorities...

1.1.10 '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 thereon;

1.1.11 'the Project Architect' shall mean the architect and/or architects that the Developer may have appointed."

14. There has been some skirmishing regarding dates, most obviously reflected in the amount claimed by the Landowner for LAD (BD 408,000), based upon a period of delay running from 12 November 2019 to 9 May 2020, the date when the occupational permit was issued, rather than 16 March 2020, the date of the Certificate of Practical Completion. It follows that **if** the case otherwise survives and proceeds to Trial, an issue will arise as to the correct quantum of LAD – but that is not something requiring consideration by us at this stage.

15. Ultimately, the dates relevant to this Appeal were not in dispute:

- Commencement of Construction Date: 12 November 2016
- Date Practical Completion due (subject to any extension of time, "EOT"): 12 November 2019
- Date of Certificate of Practical Completion: 16 March 2020
- Landowner demands LAD: 10 February 2022
- Developer applies to Architect for an EOT: 9 March 2022
- Architect's Certificate granting an EOT, limited to 125 days (12 November 2019 to 16 March 2020): 15 June 2022

16. It is common ground that the Architect's Certificate granting the EOT ("the Certificate") gave no reasons for the Architect's conclusion; it was an unreasoned Certificate. No complaint is made of that. The Certificate was in these terms:

"With reference to your letter dated 09th March 2022 regarding...the above mentioned matter.

*We would like to inform you that we can only **approve 125 days** of extension of time to your office from **12th November 2019 till 16th March 2020.***

Thank you.”

THE PROCEDURAL AND LITIGATION HISTORY

17. (A) *The pleadings and the Developer’s application:* The issue for decision was squarely canvassed in the pleadings. In the *Amended Statement of Claim*, the Landowner claimed liquidated damages in the amount of BD 408,000, on account of the Developer’s delay in completing the project.
18. In the *Defence*, the Developer denied the Landowner’s allegation and pleaded as follows:
- “9.1 *Skydeck Construction Sdn Bhd had on 9th March 2022 made an application in writing to the Project Architect for extensions of time to complete the Development Project due to inclement weather and the delayed approval from ABCi for the amendments to the building plans;*
- 9.2 *The Project Architect by way of letter dated 15th June 2022 to Skydeck...approved and granted an extension of time for achieving Practical Completion to 16th March 2020 (‘the extended Practical Completion date’);*
- 9.3 *By virtue of clause 2.7 of the Development Agreement, the extended Practical Completion date is final, binding and conclusive on the parties hereto.*
- 9.4 *As the deemed completion date falls on the extended Practical Completion date of 16th March 2020, there was no delay in completing the Development Project.”*
19. We were not referred to any pleading by way of Reply.
20. By a Summons in Chambers, dated 26 October 2023, the Developer applied for an order that:
- “1. *The Plaintiffs’ Writ and Statement of Claim be struck out pursuant to Order 18 Rule (1) on the grounds that it discloses no reasonable cause of action; it is scandalous, frivolous or vexatious or it is otherwise an abuse of the process of the Court;*
2. *That as a matter of a question of law and/or on the construction of documents, the Plaintiffs’ claim should be struck out on a determination pursuant to Order 14A;*

21. (B) *The Registrar's Decision:* The Registrar alluded to the period of delay claimed by the Landowner, i.e., six months running until 9 May 2020 and to the two stop orders which had been issued by Department of Labour and Ministry of Home Affairs ("the Stop Orders"). The fact of the Stop Orders was common ground and it appears likewise common ground that the Stop Orders formed the principal reason for the delay. The Landowner submitted that the Stop Orders were issued because of the Developer's failure to abide by safety requirements. The Developer submitted that the Stop Orders were beyond its control and, furthermore, placed reliance on the Certificate granting an EOT, which, the Developer contended was "*final, conclusive and binding*". Accordingly, the Landowner's claim was to be struck out with costs.
22. The Registrar refused to strike out the Landowner's claim. He referred to the observation in the Stop Orders that the project site was not safe for workers to continue working. The Registrar's concluding paragraph was in these terms:
"As such, I find the above Stop Order, sufficient for the matter to be resolved in trial before a trial Judge, and if a striking out to be allowed, this would leave the Plaintiff's claim be in vain. Furthermore, despite agreeing that, there is no specific time specified in the Development Agreement for the extension of time be obtained, I find it peculiar that Defendant only sought the written extension from the Project Architect, after they have received the Letter of Demand from the Plaintiff, which I believe could be further resolved in a trial."
23. Accordingly, the Developer's applications under O.18 and O.14A were dismissed, with costs to the Landowner.
24. (C) *The Judgment of the Judge:* The Developer appealed to the Judge in Chambers. The Judge observed (at [8]), rightly, that there was no point in debating the Stop Orders if the Developer's submissions based on the conclusive and binding nature of the Architect's Certificate were well-founded. We agree and say no more of the Stop Orders.
25. The Judge went on to say (at [9]) that the power of striking out was only to be exercised in plain and obvious cases and put the matter this way (at [10]):
"It is on the pleadings that the court will look to see if the plaintiff has an arguable case which ought to go to trial. While the defendant has pleaded the conclusive nature of the

architect's certificate in their defence, that is not necessarily the end of the matter. While I cannot here make a decision based on evidence put forward in affidavits, or documents exhibited to those affidavits, I can consider the case each party intends to put forward at trial based on the pleadings. It may well be that on consideration of all the evidence, the court at trial finds in favour of the defence case, but the plaintiff is entitled to put forward a case on the interpretation of the agreement, and possibly on the validity of the architect's certificate."

The Judge was of the view (at [12]) that this was not a proper case for striking out. He was unable to say that the Landowner's case as pleaded was unable to succeed and the matter therefore ought to go to trial.

26. Similarly (at [13] and following) the Judge was not persuaded that this was an appropriate case for determination under O.14A. The Judge said this (at [14]):

"...this is not just a question of law or construction but consideration of a document as part of a party's evidence which, as such, the other party is entitled to challenge. It is not for me to closely examine the evidence and make a finding on it, and certainly not under this Order."

27. (D) *The High Court Leave Judgment:* The High Court Judge dismissed the Developer's application for leave to appeal to this Court. He said this:

"I am in agreement with the Plaintiff, in their submission that the Defendant's defence raises contested factual questions that can only be resolved through oral evidence and full evidentiary proceedings. The Plaintiff's claim is clearly not frivolous or hopeless, and falls well outside the category of cases appropriate for striking out..."

28. (E) *The Permission Judgment:* As already recorded, the Developer's renewed application for leave succeeded before this Court. Giving the Permission Judgment of the Court, Lunn J.A. properly focused on the test for permission to appeal; the Court granted the Developer's application on the basis (at [58]) that it was arguable that the Judge fell into error in refusing the Developer's appeal from the Registrar's Decision.

29. It may be noted that, at that stage, the Landowner was not alleging "*fraud or dishonesty*", leading Lunn J.A. to remark (at [53]) that "*the residual scope for challenge...is narrow, namely 'manifest error'*". The focus at the time of that hearing was on "*manifest error*". As will be seen the Landowner's position before us is different.

30. (F) *The re-amendment ruling*: Very shortly before this Hearing, on 9 June 2026, the Landowner obtained permission to re-amend its statement of claim from the Honourable Muhammed Faisal JC, reversing, in a very clearly expressed ruling, a previous refusal by the Senior Registrar (“the re-amendment ruling”).
31. Pursuant to the re-amendment ruling, para. 8 of the Landowner’s Statement of Claim was re-amended to include the following allegation:
- “...Further, the Plaintiff avers that the Defendant on two (2) occasions pursuant to their letter dated 9th March 2022 applied for extension of time from the Architect. The two (2) applications was only made after receipt of the Plaintiff’s solicitor’s letter of demand dated 10th February 2022, which conduct evidences bad faith and an after-the-fact attempt to avoid liability for liquidated damages.”
32. While, on the face of it, this was an extremely serious allegation to be introducing so close to the Hearing of the Appeal, it is noteworthy that the re-amendment was not opposed by the Developer, on the stated ground that it was making express a matter already in play and was not intended to alter the Landowner’s case. The Developer did, however, amend para. 8 of its Defence on 12 June 2026 to meet the Landowner’s re-amended Statement of Claim, pleading as follows:
- “...The Defendant denies the Plaintiff’s allegation of bad faith, which is misconceived because clauses 2.5, 2.6, 2.7 and 13.1 of the Development Agreement expressly permit the Defendant to apply for an extension of time. Such an extension of time would be subject to the decision of the Project Architect.”
33. In the event, these (re-) amendments went a long way to encapsulating the rival cases before us on the Appeal.

THE RIVAL CASES

34. For the *Developer*, Mr Mansur emphasised that effect was to be given to the terms of the contract (the Development Agreement) agreed between the parties. Cl. 2.7 meant what it said; the Certificate was “*final, conclusive and binding*”. The Development Agreement was silent as to the time when an application was to be made for EOT; the contract was not to be rewritten to read in any such requirement. In the Developer’s Skeleton Argument, Mr Mansur put the matter (*inter alia*) this way:

- “1) *There is no manifest error in the EOT Certificate;*
2) *The EOT Certificate itself has not been disputed by the Respondent;*
...
4) *There are no terms in the DA that state when the EOT may be applied for;*
5) *The EOT Certificate is a non-speaking certification, and therefore, the Project Architect is not compelled to explain the EOT...*”

Accordingly, the Landowner’s claim for LAD was doomed to fail and should be summarily disposed of.

35. In the course of argument, the Court probed Mr Mansur as to why the application for an EOT had not been made sooner. Mr Mansur’s answer was forthright: the Developer had taken time to do so, because it had not previously received a claim for LAD. Practical completion had been followed by silence until the Landowner’s letter of demand; thereupon, the Developer exercised its rights.
36. For the *Landowner*, Ms Wong, who had not appeared at the Permission hearing, disclaimed any reliance on “*manifest error*” in or on the face of the Certificate. The only issue was bad faith. It was bad faith to apply for an EOT some two years after completion of the project; any such application should have been made within a reasonable period of time following completion of the project, once the cause of delay was known; two years fell outside any such reasonable period. Moreover, the application for EOT was only made after receipt of the Landowner’s demand for LAD, with the EOT mechanism utilised in an attempt to escape liability for LAD. If such applications were allowed, it would open the “*floodgates*” and “*be contrary to commercial certainty and would encourage the strategic use of retrospective EOT applications rather than the timely administration of delay claims contemplated by the contractual scheme.*”
37. Bearing in mind, *inter alia*, that no discovery had been given, Ms Wong submitted that the matter could not be determined summarily and ought to go to Trial. In the Landowner’s Supplementary Submission (at para. 19), Ms Wong asserted seven triable issues:
- “(a) *Whether the Development Agreement contemplates any temporal limitation on the Project Architect’s power to certify an extension of time;*

- (b) Whether the Project Architect's power to certify an extension of time may be exercised indefinitely after Practical Completion has been achieved;*
- (c) Whether, on a proper construction of the Development Agreement, the parties intended that an entitlement to EOT may be revisited and certified long after Practical Completion has been achieved, including approximately two years after Practical Completion, and only after the Plaintiff's entitlement to LAD had accrued and the Plaintiff had asserted its contractual rights by demanding payment of such LAD;*
- (d) What constitutes a reasonable period within which a retrospective EOT may be sought and certified under the Development Agreement, if such retrospective certification is permissible at all;*
- (e) Whether the purported EOT certification was sought and/or issued in good faith and for a proper contractual purpose;*
- (f) Whether the purported EOT certification was procured as a genuine assessment of delay or as a mechanism to defeat or diminish the Plaintiff's accrued entitlement to LAD; and*
- (g) Whether the purported EOT certification ought to be accorded the final, conclusive and binding effect contended for by the Defendant in the circumstances of this case."*

THE LEGAL FRAMEWORK

- 38. (A) O.18, r.18 and O.14A: There was no real dispute as to the principles governing these provisions; the issue centred on whether this was an appropriate case for the application of either or both. A working summary of these provisions accordingly suffices.
- 39. So far as concerns O.18, r.18 (set out above), the key provision is r.18(1)(a), though r. 18(1)(b) should be noted. Rr.1(c) and (d) do not realistically arise. As to paras. 1(a) and 1(b), it is unnecessary to go further than the judgment of Steven Chong J (as he then was) in *Malai Nuridah Sheikh Mohammad v Brunei Shell Petroleum Company* (High Court of Brunei Darussalam) (Civil Suit No. 8 of 2015), at p.2, where he said this: *"In general it is only in plain and obvious cases that the power to strike out should be invoked...The court will let the plaintiff proceed with the action unless his case is wholly and clearly unarguable..."*

A 'reasonable cause of action' has been defined as a cause of action which has some chance of success when only the allegations in the pleading are considered...

A proceeding is frivolous or vexatious if it is 'obviously unsustainable'..."

40. Two observations are appropriate:

(1) First, as provided by O.18, r.18(2), no evidence shall be admissible on an application under para.1(a). The matter is to be determined having regard only to the allegations in the pleadings.

(2) In the present proceedings, the only basis upon which para. 1(b) could arise is if it is held that the Landowner's action is "*obviously unsustainable*". It cannot otherwise be suggested that the proceedings were "*frivolous or vexatious*".

41. In the circumstances of this case, we need say no more of O.14A than that it means what it says. For O.14A to apply, *first*, the question must be one of "*law or construction of any document*". *Secondly*, the question must be suitable for determination "*without a full trial of the action*". The Court will be cognisant that discovery has not been provided, and evidence has not been called. The Court cannot and must not conduct a mini-trial. Conversely, the interests of all parties are best served by summary determination in an appropriate case, thus avoiding the time and expense of a trial when one party's case is doomed to fail; accordingly, the Court will not require a trial simply on the off-chance that something might turn up by way of discovery or evidence. *Thirdly*, the determination must finally determine (subject to any possible appeal) the entire cause or matter or any claim or issue therein.

42. (B) *Final, conclusive and binding certification clauses*: The interpretation of cl. 2.7 of the Development Agreement (set out above) goes to the heart of this Appeal. Cl. 2.7 is an example of a conclusive evidence clause which, by agreement of the parties, entrusts the determination of a matter in dispute between them to an expert – in this case the Architect but, in others, an accountant, valuer, engineer or other professional. Central to the applicable principles is the contract made by the parties, by which they are bound and which the Court is not entitled to rewrite. Our views are summarised in the propositions which follow.

43. (1) *The foundation for expert determinations is contractual*: First, the foundation for reliance on the expertise of an expert to give a final, conclusive and binding

determination is purely contractual. It follows that a Court is dutybound, subject to well-settled exceptions, to give effect to the bargain made by the parties; it is not for the Court to make some different bargain for them. In this regard, Courts in the common law family speak with one voice: see, *Evergreat Construction Co. Pte Ltd v Presscrete Engineering Pte Ltd* [2005] SGHC 224, esp., at [33] – [34]; *Geowin Construction Pte Ltd v MCST Plan No. 1256* [2006] SGHC 245, esp., at [7]; *Malaysia Land Properties v Tan Peng Foo* [2014] 1 MLJ 718, esp., at [12 (h)]. As observed by Mah Weng Kwai J, giving the judgment of the Malaysian Court of Appeal in *Malaysia Land Properties*, *ibid*:

“...it is for the parties who intend to be bound by mutual obligations to make a contract for themselves. It is outside the scope of judicial power to make one for them and where a contract is couched in unambiguous language, the court must give effect to it...”

So too, in the leading English Court of Appeal decision, *Jones v Sherwood Services Plc.* [1992] 1 WLR 277, Dillon LJ said this (at p.288):

“If the parties to an agreement have referred a matter which is within the expertise of the accountancy profession to accountants to determine, and have agreed that the determination of the accountants is to be conclusive, final and binding for all purposes, and the chosen accountants have made their determination, it does not seem appropriate that the court should rush in to substitute its own opinion, with the assistance of further accountants’ evidence, for the determination of the chosen accountants.”

44. (2) *Each case involves a question of construction of the individual clause in issue:*

Secondly, given the contractual foundation for clauses of this nature, whether, and if so to what extent, a certificate is final, conclusive and binding, depends on the construction of the particular term/s of the contract. There is no single comprehensive test; it is a question of construction in each case. Clear (or very clear) words are necessary for a certificate to have conclusive effect: see, generally, *Keating on Construction Contracts* (12th ed.), at paras. 5-038 and following. If, however, the words are clear, then the duty of the Court is to give effect to them, and thus to the bargain made by the parties.

45. (3) *There are limited but well-settled grounds for setting aside an expert determination:*

A purported final, conclusive and binding expert determination may be set aside on a limited number of well-settled grounds. While we do not suggest that these grounds are *exhaustive* of the circumstances when such a determination may be set aside, it is to be remembered that there needs to be a properly reasoned basis for a Court declining to give effect to the bargain agreed between the parties. Thus, merely because a Court takes a different view on the merits or thinks that the expert was or may have been mistaken will not suffice to displace the expert determination under a clause of this nature: *Jones v Sherwood*, esp., at p.287. As observed in *Geowin Construction*, at [7], together with the authorities there cited, anyone who agrees to accept the opinion of an expert, accepts the risk of (put broadly) mistakes on his part, provided the expert has acted within his contractual mandate.

46. As it seems to us, for present purposes, the limited grounds for setting aside a purportedly conclusive expert determination are these:

- (i) Where it is shown that the expert has departed from his instructions in a material respect;
- (ii) Fraud;
- (iii) Manifest error.

We take each in turn.

47. (i) *Where it is shown that the expert has departed from his instructions in a material respect:* In this instance, the expert has not done what he was appointed to do; accordingly, the contractual basis for giving effect to his determination is (fatally) undermined and his certificate would not be binding. By way of examples, *Jones v Sherwood* (at p.287) contemplated an expert valuing the wrong number of shares or shares in the wrong company. The Court therefore retains jurisdiction to ensure that the expert has not exceeded his remit: *Evergreat Construction*, at [37]. See too, *Geowin*, at [7] – [8], together with the authorities there cited.

48. As is apparent, the question of whether an expert has (materially) strayed outside his contractual mandate is itself a question of construction, necessarily turning on the terms of the contract in the individual case. In our judgment, that is the explanation for the observations in the first instance decision in *Miller v London County Council*

[1934] All ER Rep 657, at pp. 662-663, much relied on by the Landowner, that a certificate granting an EOT was required to be given within a reasonable time after the delay has come to an end and could not fix a new date for completion *ex post facto*. In this regard, we respectfully accept and adopt the explanation of *Miller*, given by Denning LJ (as he then was) in *Amalgamated Building Contractors v Waltham Holy Cross* [1952] 2 All ER 452, at p.455:

“...Miller v London County Council is distinguishable. I regard that case as turning on the very special wording of the clause which enabled the engineer ‘to assign such other time or times for completion as to him may seem reasonable’. Those words, as Du Parc J said, were not apt to refer to the fixing of a new date for completion ex post facto.”

Accordingly, we are unable to accept the Landowner’s submission that *Miller* is authority for any general proposition that a certificate granting an EOT must be given within a reasonable time of the delay coming to an end and a new date for completion cannot be given *ex post facto*. See too, *Malaysia Land*, at [12(m)].

49. (ii) *Fraud*: Indisputably, fraud or collusion, *if established* (see below), unravels all. Parties do not contract to be bound by a fraudulently issued certificate. Observations to this effect understandably feature in all the authorities to which we have referred; it suffices to refer to *Malaysia Land*, at [12(g)]:

“...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...”

50. (iii) *Manifest error*: “*Manifest error*” provides no more than a narrow route for displacing a purportedly conclusive expert determination. Self-evidently, the scope of its application is still further reduced in the case of a certificate giving no reasons for the expert’s determination: see, *Geowin Construction*, at [16], [17] and [19] and the references there to “...a patent error on the ‘face’ of the...decision” (at [16]).

51. The meaning of “*manifest error*” has been authoritatively explained in the judgment of Lord Hamblen JSC, in *Sara & Hossen Asset Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2; [2023] 1 WLR 575, at [30] and following. While the precise meaning of “*manifest error*” might depend on the particular contract and context, Lord Hamblen alluded to a number of authorities which had considered its meaning in

conclusive evidence cases. From those authorities (which need not be cited here), Lord Hamblen distilled the following:

- (i) A “manifest error” is “one that is obvious or easily demonstrable without extensive investigation”.
- (ii) As to the meaning of “obvious or easily demonstrable”, these were “oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion.”
- (iii) The meaning of being demonstrable “without extensive investigation” could (subject to contrary contractual terms) involve the admissibility of extrinsic evidence; although it might 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”.

52. Lord Hamblen added (at [34]) that an arguable error would not suffice, “however well founded the allegation of error may ultimately prove to be”.

53. (4) A “speaking” or “reasoned” determination is not required unless contractually stipulated: We accept, with respect, the comprehensive statement and explanation in this regard given by VK Rajah J in *Evergreat Construction*, at [45]:

“...if the parties in appointing an expert fail to stipulate or mandate in the terms of reference for a ‘speaking’ or ‘reasoned’ award the court itself cannot, and indeed should not, insist on this. To require reasons to be given apropos such an award would be tantamount to rewriting the bargain. By the same token it would be akin to imposing a new obligation on an expert...The notion and objective of providing reasons is inextricably linked to the notion and possibility of review by another body. One must bear in mind however that when an expert’s award is made as opposed to an arbitrator’s award, there is no legal review process prescribed by law. Parties, who appoint an expert, must acknowledge and accept the risk that though an expert might and can err, they consciously and sanguinely accept that risk in lieu of the expense, uncertainty and perhaps delay that court and/or arbitration proceedings may occasion....”

DISCUSSION AND CONCLUSIONS

54. (A) *Introduction*: Is summary determination appropriate when considering giving effect to the Architect's Certificate granting the Developer an EOT under cl. 2.7 of the Development Agreement, thereby defeating the Landowner's LAD claim? That is the question for our decision.
55. As already recorded, Ms Wong submitted that the only issue was bad faith. That said, Ms Wong's proposed triable issues may additionally have gone to the issue of whether the Architect had strayed outside his mandate. On this assumption, we address both these issues below.
56. What is clear is that no case is advanced by the Landowner, on this Appeal, on "*manifest error*"; indeed, Ms Wong disclaimed any reliance on it. The Certificate not being a "*speaking*" or "*reasoned*" determination, the Landowner was right not to pursue "*manifest error*". Furthermore, it would have been hopeless to seek to do so, given that there has (rightly) been no criticism by the Landowner of the Certificate itself. We therefore say no more of "*manifest error*".
57. In the view we take of the matter, it is convenient to deal, first, with O.14A before turning to the extent necessary to O.18, r.18.
58. (B) *O.14A: (1) The requirements of O.14A*: On any view, this Appeal is concerned with the true construction of cl. 2.7 of the Development Agreement and thus gives rise to a question of law or construction. It therefore satisfies the first requirement for the application of O.14A. There can further be no doubt that a determination in the Developer's favour will finally determine the entire cause or matter; accordingly, the third requirement for the application of O.14A is satisfied. The key question which remains is the second requirement for the application of O.14A: namely, whether the question of law or construction is suitable for determination without a full trial of the action. The answer depends on the view we take of the ground/s advanced by the Landowner in seeking to resist giving effect to the purportedly "*final, conclusive and binding*" Certificate relied on by the Developer.
59. (2) *Bad faith/fraud*: An allegation of bad faith is akin to an allegation of fraud. We treat it as such. As we have seen, Ms Wong pinned her colours to this mast. We would

readily accept that an arguable case of fraud, at least if it is a case of fraud with a realistic prospect of success, would dissuade us from the route of summary determination under 0.14A; the parties did not contract to be bound by a Certificate (realistically) arguably infected by bad faith or fraud. The Landowner's difficulty, however, is establishing *any* such case. All that is relied upon is that it was bad faith for the Developer to apply for an EOT some two years after practical completion, at a time when the Landowner's demand for LAD had already been advanced. That there is nothing else is reconfirmed by the re-amendment (set out above).

60. We are quite unable to accept that the mere fact of timing of the Developer's application for an EOT provides any, or any sufficient, foundation for an allegation of fraud such as to require this dispute to go to trial. Our reasons are these:

- (1) The starting point is the bargain made by the parties: the Certificate given by the Architect under cl. 2.7 of the Development Agreement is final, conclusive and binding. We must give effect to this bargain, absent good reason to the contrary. If we do so, the EOT granted by the Architect to the Developer defeats the Landowner's LAD claim in its entirety.
- (2) As we have seen, the Certificate itself is not challenged and, we add, could not be challenged. Furthermore, there is (rightly) no suggestion that the Architect could be called to explain the Certificate.
- (3) The *express* terms of the Development Agreement nowhere provide:
 - (i) A time limit or period within which an EOT must be sought;
 - (ii) A requirement that an EOT must be sought and/or a Certificate must be issued within a "*reasonable period*";
 - (iii) That an EOT must be sought from the Architect prior to a demand from the Landowner for LAD.
- (4) There is no arguable case, let alone a good arguable case, for *implying* any such term/s.
- (5) Without more, the objective facts, based on no more than the terms of the Development Agreement and the undisputed dates, do not show that the Developer was doing anything other than that which it was entitled to do, i.e., applying for an EOT under the applicable contractual provisions. Of itself, that is not in any way suggestive of fraud.

- (6) Furthermore, it is noteworthy that the Developer's EOT application followed relatively promptly upon the Landowner's demand for LAD. Contrary to the Landowner's submission, that does not begin to suggest bad faith on the part of the Developer. In both contractual and practical terms, there is an obvious (in very general terms, inverse) relationship between an EOT and LAD and, for our part, we are unable to see why any opprobrium should, *ipso facto*, attach to an application for EOT closely following a demand for LAD, subject always to the provisions of the contract in question. While a prompt EOT application following Practical Completion may well be *desirable* for the administration of the contract in general and delay claims in particular, we are unable to accept that an EOT at some earlier stage and in advance of the demand for LAD was, even (realistically) arguably, a *requirement* of the Development Agreement. All the more so, we would add, where, as here, the Landowner's LAD demand was itself not advanced until a little less than 2 years after Practical Completion.
- (7) As will be clear, our views have been based on the undisputed dates before us. In reaching our decision on the Landowner's allegation of bad faith, we have recorded but not relied upon Mr Mansur's explanation from the Bar (not itself evidence) of the sequence of events.
61. For the reasons given, we reject the Landowner's submission that the Certificate should not be given effect because of fraud. As matters stand, the allegation of fraud does not go beyond a bare assertion and an unpersuasive suggested inference based on the timing of events. This is not an arguable, or good arguable, case of fraud, which should be permitted to go to a full trial so that it can be tested by reference to discovery and evidence. To the contrary, it is no more than an allegation advanced in the hope that something might turn up. With respect, we therefore part company with the view taken in the Courts below.
62. (3) *Material departure from instructions*: As foreshadowed, the Landowner's case may possibly be seen as additionally, or in the alternative, seeking to resist giving effect to the Certificate by reason of a material departure by the Architect from his instructions, in issuing the Certificate – putting the matter broadly – too late. Such a case may be discerned from the proposed triable issues suggested by Ms Wong.

Insofar as these submissions overlap with the allegation of fraud, we repeat the answer already given.

63. At all events, we answer the questions posed by Ms Wong's proposed triable issues (listed above at [37]) as follows (using Mr Wong's lettering):

- (a) The Development Agreement did not provide a temporal limitation on the Architect's power to certify an EOT.
- (b) The question is hypothetical and does not arise for decision here.
- (c) The Development Agreement did not preclude a (so-called) "*retrospective*" EOT application and certification by the Architect, at least at the times in question in this case. In any event, the submission that the Landowner's "*entitlement to LAD had accrued*" is fallacious. The Landowner had demanded payment of LAD (as recorded above) but no right to LAD had *accrued*; the mere assertion of the right to LAD is not to be equated with the accrual of the right. Any such right was subject to and to be considered together with any application by the Developer for an EOT, certified by the Architect.
- (d) The Development Agreement contained no provision requiring the seeking of a "*retrospective*" EOT and its certification by the Architect within a "*reasonable period*", or any contractually defined period. In any event no objection can be taken, even (realistically) arguably, to the timings of the EOT application and the Certificate issued by the Architect in this case.
- (e) There is nothing to suggest, even (realistically) arguably, that the EOT was sought and the Certificate issued other than in good faith and for a contractual purpose. In any event, the reference to "*proper contractual purpose*" was previously unheralded and was not developed in the written submissions or oral argument at all, still less satisfactorily. Although we have, *de bene esse*, answered the contention raised in this connection, it should not be assumed that the question of "*proper contractual purpose*" was properly in issue before us.
- (f) There is nothing to suggest, even (realistically) arguably, that the Certificate was sought and obtained other than as a genuine assessment of delay. As already underlined, the Landowner did not have an "*accrued entitlement*" to LAD. It is neither here nor there that the purpose or effect of the Certificate was to defeat or diminish

the Landowner's claim for LAD; ordinarily at least, that is the effect to be expected of such a Certificate.

(g) Yes, the EOT certification is to be accorded final, conclusive and binding effect.

64. (4) *Conclusion on O.14A*: Accordingly, the question of law or construction of cl. 2.7 of the Development Agreement is suitable for determination under O.14A and, with respect to the contrary view taken in the Courts below, without requiring a full trial. The Certificate is to be accorded the final, conclusive and binding effect contended for by the Developer. Neither the allegation of bad faith/ fraud, nor an allegation of material departure from instructions (insofar as that allegation was pursued) discloses any realistically arguable basis for not giving effect to the Certificate or for requiring the matter to go to trial. It follows that the Landowner's claim for LAD is doomed to fail. As we are entitled to do, we dismiss it summarily under O.14A.

65. (C) *O.18, r.18*: Having dismissed the Landowner's claim under O.14A, any conclusions we reach on O.18, r.18 are academic. We therefore keep our observations to a minimum.

66. (1) *O.18, r.18(1)(a)*: Had it been necessary to do so, we would have concluded that the Landowner's claim should be struck out under O.18, r.18(1)(a), on the basis that it was plainly unarguable. The Certificate is final, conclusive and binding unless displaced. The only pleaded allegation of fraud (or, for that matter, of any material departure by the Architect from his instructions) advanced to resist giving effect to the Certificate rested solely on the timing of the EOT application and the Certificate. As already decided in the context of O.14A, the timing point, without more, was unsustainable. Therefore, confined to the pleadings (as required by O.18, r.18 (1)(a) and (2)), we would have reached the same result and struck out the Landowner's claim. That said, O.14A presented a more appropriate route to follow because it did not confine us to the pleadings; thus, had it been necessary to go beyond the pleadings and consider evidence, we were free to do so and look at the matter in the round.

(3) *O.18, r.18 (1)(b)*: In the circumstances, it is unnecessary to say anything as to O.18, r.18 (1)(b) and we refrain from doing so.

OVERALL CONCLUSION, DISPOSAL and COSTS

67. For the reasons given, the Developer's Appeal must be allowed and the Judgment below set aside.
68. As ventilated with counsel at the conclusion of the Appeal Hearing, costs must follow the event. Accordingly, we order the Landowner to pay the Developer its costs of the Appeal and the proceedings below, on a standard basis, in an amount to be agreed within 28 days of this Judgment, otherwise, absent agreement, to be determined by the Registrar.



DATO SERI PADUKA STEVEN CHONG, C.J.



LUNN, J.A.



SIR PETER GROSS, J.A.