

# THE ARCHITECT & PAM CONTRACT 2018 - Certification & Architect's Responsibilities



## **INTEGRITY: PROBITY AND ETHICS**

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*“ It ain’t what you don’t know that gets you into trouble.*

*It’s what you know for sure that just ain’t so.”*

*Mark Twain*

# *Outline*

- Introduction
- Trust & integrity
- The Architect's Duties
- Overview of Certification
- Recent Caselaw
- Conclusion



## **'Wonky' home cinema court case 'warning to all architects'**

6 March, 2019 By [Richard Waite](#)

A court case in which an architect was ordered to pay £500,000 in damages plus costs over a 'wonky' home cinema, could have 'wide implications' for the profession, architects have been warned

The judge in the landmark High Court action held that architect Daniel Marcal's failure to produce a written brief on the high-end domestic job 'was a serious breach of duty which went to the root of the difficulties which he and the claimants encountered' (*see full judgement below*).

Banker Philip Freeborn and his wife Christina Goldie sued Marcal for negligence over his delivery of a floating 'sleek modern' cube in the poolhouse at their £7 million home in Totteridge, north London.

The clients claimed they were 'shocked' when the box-like structure was completed, saying the designs were not what they had expected, had not been agreed on and, according to Mr Justice Bowdrey, sitting as a deputy Technology and Construction Court judge, had left them with an 'ugly duckling' which could not 'be turned into a swan'.

The couple's list of complaints included: that Marcal had delivered a 'wooden box' with glazed panelling rather than 'glass walls'; that it had 'visible spider bolts'; was supported on six legs and not four, and had a 'wonky industrial' aesthetic.

## “Wonky” home cinema

- Architect sued for negligence - delivered a wooden box with glazed panelling, rather than glass walls. It had visible spider bolts supported on 6 legs not 4 & had wonky industrial aesthetic.
- Architect could not defend himself because there was no agreed written brief & no accurate set of notes. Architect’s evidence was confused rather than dishonest. Do not rely on oral agreements or your memory. If there is a dispute the client is likely to be given the benefit of the doubt.
- Court : Any architect authorised to spend £460,000 would be expected to produce a bespoke design and high end. Architect ordered to pay £500,000. “The standard of reasonable care and skill is not a standard of perfection.”

# The 3D



3d

# Image from Pininterest

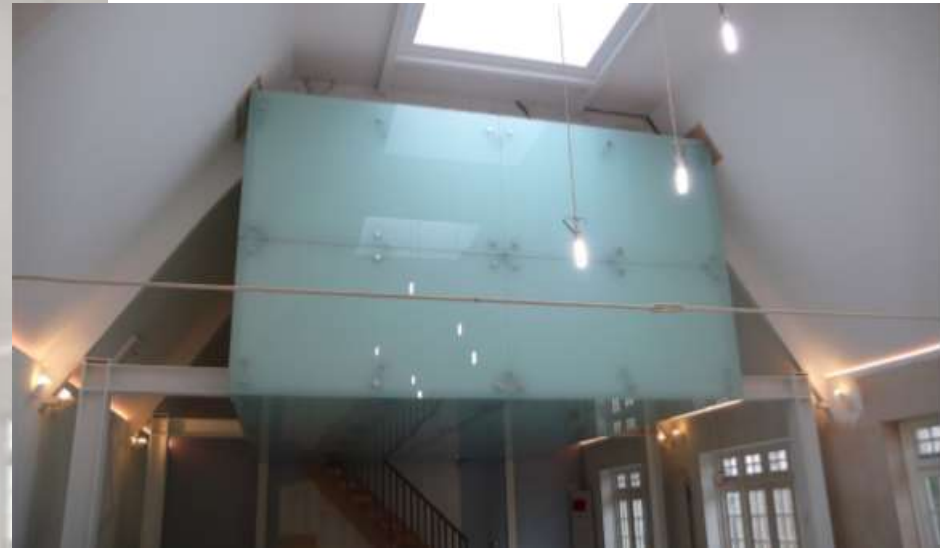


# As-Built of Cinema Room





# Comparison



# INTRODUCTION

- Trust and integrity in certification
- The law imposes a duty on Architects to exercise reasonable skill and care in practising as professionals.
- The standard of care is to exercise such skill and care measured against the standard of an ordinarily skilled Architect carrying out the same duties.

# The Duties of an Architect

## **STATUTORY DUTIES**

- An architect is expected to have a reasonable working knowledge of the various legislation which governs the discharge of the duties of an Architect.

# The Duties of an Architect

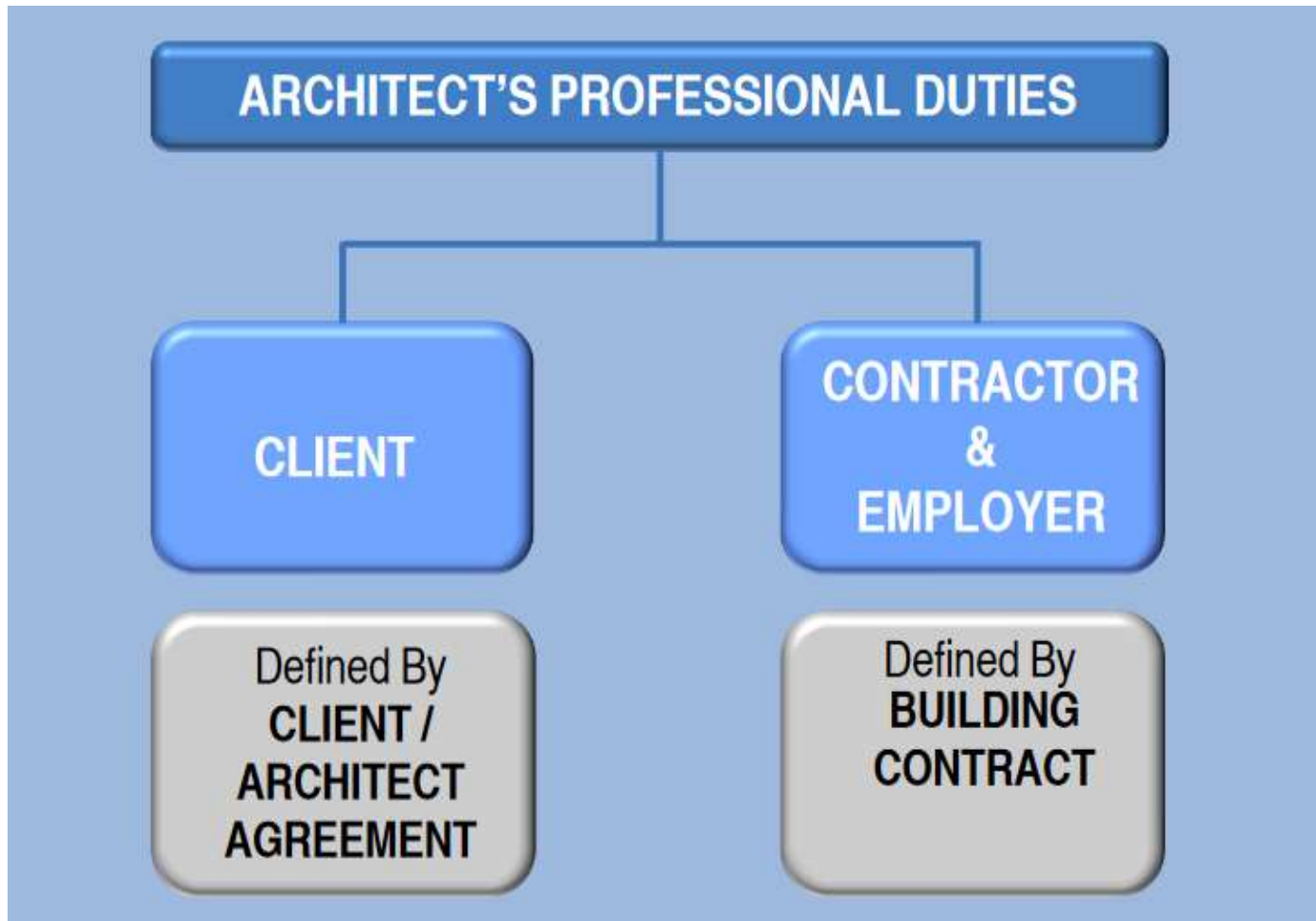
- In addition to statutory duties, the Architect has :
  - **Contractual Duties**; and,
  - **Duties independent of contract**

# Architect's Duties Independent of Contract

## **LIABILITY IN TORT**

- Apart from his contractual duties, an Architect may be liable in tort to third parties if his acts or omissions cause loss and damage to persons or property resulting from negligently designed or constructed buildings.

# The Duties of an Architect



# Architect's Contractual Duties

## **EXPRESS TERMS**

- The express terms governing an Architect's duties is set out in the contract between him and the client.
- The contract may be a standard contract such as the LAM Memorandum of Agreement between the Client and the Professional Architect for Architectural Consultancy Services or a bespoke Architectural Services Agreement.
- The contract will set out the terms and conditions of appointment, and the rights and obligations of parties

# Architect's Contractual Duties

## **IMPLIED TERMS**

- In addition to the express terms of a contract, the law implies certain terms to provide business efficacy into a contract.
- One such implied term is the use of “**reasonable care & skill**” by the Architect in carrying out his duties. The degree of skill required is that of an ordinarily competent Architect professing to have that skill.



# Challenges faced by Contract Administrator

As "**Employer's agent**" - to safeguard Employer's rights and to advise the Employer in fulfilling contractual obligations according to the contract provisions.

As "**Independent certifier**"

- (i) to act impartially in certifying conformity to construction drawings, specifications, conditions of contract or any certification requirement under the Contract.
- (ii) to discharge his professional duties in a timely and impartial manner to comply with the procedural requirements under the Contract.

# Architect's Role as Contract Administrator

**Architect as Contract Administrator**



**Competence + Duty of Care**

**Independent + Impartial + Fair**

# Architect's Duty of Care

- Architect duty bound to serve the Employer faithfully as his agent. The Employer would reasonably expect that the Architect possesses the requisite ability and skill, and the latter, by holding himself out as an Architect, impliedly warrants that he possesses such attributes.
- An Architect would be liable to the Employer if he had been professionally negligent.
- Breach of a professional's obligations to his Client = professional negligence.

# Architect's Duty of Care

- An error of judgement may or may not amount to negligence.
- A good defence against negligence is where the Architect can show that he acted according to general and approved practice.
- *Sutcliff v Thackrah* (1974) AC 727 : Architect is liable in damages if he causes loss to his Employer by failure to take due care or to exercise reasonable professional skill.

# Architect's Duty of Care

## **Client's Expectations :**

- Architect will administer the contract and supervise the work to safeguard Client's interests and to ensure the quality of work is as specified in the contract.
- Architect is to provide reasonable supervision to the works, not only in compliance with statutory provisions, but to enable him to issue the various certifications under the contract.
- Architect is not required to personally check or measure every detail, but should check substantial and critical aspects of the work.

# Architect as Independent Certifier

- Architect must exercise his function as certifier in good faith and to the best of his uninfluenced professional judgment.
- Architect has to act fairly and independently and should not be subject to the directions or instructions of either Employer or Contractor.
- Architect should never allow the Employer to improperly influence his decisions nor should the Employer prevent the independent exercise of the Architect's authority as certifier.

# How to act independently, fairly & impartially in practice?

- CA can discuss with Client, options in a scenario and how you are minded to act. CA can listen to Client's opinion and Contractor's opinion. CA may seek own legal advice and share the legal advice with all parties if you wish.
- If CA is influenced by one party to the detriment of the other, then CA is no longer acting independently.
- CA must manage Client's expectations as Client will struggle with the idea of a CA who makes decisions unfavourable to them.

# How to act independently, fairly & impartially in practice?

- Client may pressure CA to make decisions in a particular way or appeal to your desire for project to be completed and for all parties to maintain good working relationships. If CA departs from your legal and contractual obligations to keep everyone happy, the CA is most likely to suffer.
- Tell the party if they are making it impossible to perform your role.
- Resign if CA is effectively prevented from performing your role. CA cannot be criticised if you act correctly to the letter of your professional appointment and your duties under the building contract.



## Architect as Independent Certifier

- Architect's decisions and certificates bind both Employer and Contractor. Improper/ negligent certification may result in the Contractor suffering financial losses eg under-certification/ late/ non-certification of payment; late or non-certification of CPC/ CMGD;
- Wrongful issue of CNC.
- Unlikely for Contractor to successfully bring a claim in tort against the Architect for negligent certification : Pacific Associates v Baxter (1990).
- However the position is not clear-cut and the Architect should be wary of the possibility of a negligence claim by a contractor.

# Assessing EOT

- Depends on quality of info available – Contractor's delay notice, site meeting minutes, discussions with consultant team, Architect's site visits, etc.
- Whether Architect has discharged their duty to assess EOT depends on whether Archt's assessment was appropriate based on the info available. An impressionistic assessment may be adequate or a calculated, scientific approach may be needed.
- Architect has wide discretion, to be exercised reasonably, to decide what info is important.

# Liquidated Damages

- Fixing the correct amount of LD as a genuine pre-estimate of the Employer's loss and/or damage. Employer can claim for actual delay damages, if they can prove Contractor was responsible for delay and the delay caused their losses.
- Before imposing LD, Architect must consider all EOT claims and issue CNC.
- Employer must give Contractor notice for deduction of payment of LD.
- Architect to be alert on LD reduction if the Works are in partial possession by the Employer

# Certifying Practical Completion & Making Good

- Considerable pressure on Architect in the run-up to Practical Completion as PC is not defined. Once PC certified, Employer loses leverage and will struggle to get Contractor to complete defects rectification.
- Contractor must comply with their obligation to provide as-built drawings, warranties and O+M manuals.
- All construction work must be completed. CA can certify PC, with minor work being incomplete.
- Bad practice to certify PC, subject to a long list of patent defects, however minor. DLP is intended to allow for rectification of defects that are not apparent at the date of PC.

# Certifying Practical Completion & Making Good

- If Contractor unwilling to rectify defects, CA to issue notice to comply and allow 3<sup>rd</sup> party contractor to do the work.
- CA may instruct Employer to accept defective work, as deduction from the contract sum.
- CA must issue CMGD once Contractor has rectified all defects.

## Assessing the value of the works carried out

- QS measures and values the works as they progress. QS owes no duty of care to the Employer in relation to issues of quality. The Architect cannot rely on the QS to point out areas of defective work.
- Advise Employer of potential consequences of failure to make payment to Contractor.
- CA to issue Final Cert within time periods in the Contract – 28 days after CMGD.
- Final Cert to state Final Account less total sums certified in previous payment certificates. Period to complete FA is 15 months from PC.

# Architect's role in determination of Contractor's Employment by Employer

- Determination = ending Contractor's employment under the contract, but contract is not terminated as parties are bound and liable under it after determination. Both Employer and Contractor have right to determine Contractor's employment.
- Follow notice procedures strictly. Employer/CA's warning notice must clearly express the default forming the potential grounds for determination.
- CA must not take part in an unreasonable/ vexatious termination by Employer.
- CA must know and understand the notice mechanism and particular contractor defaults as well as the rights and obligations of the parties after termination.

# Architect's role in determination by Contractor

- Advise Employer of Contractor's rights to determine his employment for any specific Employer defaults
- Follows same notice procedure available to the Employer in the event of a Contractor default.
- CA must know and understand the accounting mechanics in the event of such determination.



## Architect's role in applying principles to the facts

- CA must exercise judgment in borderline cases.
- CA may be sued for negligence by Employer for failing to issue a default notice, but default/termination notices may be challenged by Contractor.
- If a notice is issued negligently, the CA will be sued by the Employer.
- **Repudiation** : common law termination rights other than provided in the contract. CA to advise Employer to the possibility of repudiation. If a party indicates an intention to no longer be bound by the contract, then the other party may treat this as “repudiation”; they can accept the repudiation and terminate the contract and sue for damages as a result of the breach.

# Recent Case Law on the Scope of Architect's duties and liabilities

- Recent developments in case law have sought to extend the scope of Architect's duty of third parties.
- These developments have been in the following fields:-
  - Architect's liability to contractors in a traditional method of project delivery; and,
  - Architect's liability in Design & Build Contracts.

# Architect's liability to Contractors

- Under traditional building contracts, there is no privity of contract between the Architect and the Contractor.
- But, the acts and omissions of the Architect can adversely affect the contractor directly.
- Until recently, it was the law that an architect does not owe any duty of care to the contractor in issuing certificates : *Pacific Associates V Baxter (1988)*.

# Architect's liability to Contractors

## **Bad faith, fraud or collusion claims between the Employer and the Architect**

- A claim based on these grounds would be very difficult to prove due to the evidential burden imposed on the Contractor. The Contractor would be alleging a conspiracy by the Employer and/or the Architect to defraud the Contractor of his financial or other entitlements under the contract.

*Chin Ivan v H P Construction & Engineering Pte Ltd*  
[2015] SGCA 14

- There is prima facie fraud committed by the Architect when the Certificate is issued on his own initiative to cover up his own mistake.
- Where part of the Certificate is tainted with fraud the whole Certificate is rendered invalid.

# *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] SGCA 14

## **FACTS :**

- Bungalow at Sentosa. Dispute over 2 Architect's Certificates based on 2 AIs.
- 2 AIs stated they were variation works as informed by the Contractor and requested by the Employer/ Employer's PM.
- After the inclusion of \$334,000 for these items in the Final Certificate, the Employer denied making the request and refused to pay the Final Certificate.

# *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] SGCA 14

- The Contractor commenced summary judgment proceedings in Court to recover the amount due in the Final Certificate.
- The Contractor during the Court proceedings denied that he informed the Architect that the Employer had made such a request for the AIs to be included in the Final Certificate.

# *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] SGCA 14

## **HIGH COURT'S DECISION:**

- Part of the Final Certificate for costs of the balance of the work was payable whereas that part of the Certificate in respect of 2 disputed AI items was tainted with fraud and hence was not payable.
- There was prima facie 'fraud' since the Architect was not acting on the initiative of either party when he issued the certificate.



# *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] SGCA 14

## **Court of Appeal :**

- set aside and held as invalid the whole of the Final Payment Certificate on the ground that where part of the Certificate was tainted with fraud, the whole Certificate was thereby affected and as such was invalid and did not enjoy temporary finality.
- there was fraud as the Architect did not apply his mind when issuing the certificates. AIs were made at the request of Contractor, Contractor denied the Employer agreed to the request and the Employer did not agree to the request.

# *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] SGCA 14

- [25]: ***“...In either scenario, the Architect would not have applied his mind to the Disputed Items when he included them in the Disputed Certificates. In these circumstances, it could not possibly be said that these certificates had been issued in accordance with the parties’ contract. It must follow from this that the entire basis of the respondent’s claim fails since there was no certificate properly issued by the Architect which the respondent could rely on to sustain its claim...”***

# Chin Ivan v H P Construction & Engineering Pte Ltd [2015] SGCA 14

- [25]: *“If the Architect was telling the truth, then the Contractor in representing that the appellant (Employer) had consented to the Disputed Items’ inclusion for valuation purposes, had defrauded him. On the other hand, if the respondent (Contractor) was telling the truth (i.e., that he never made such representations to the Architect), then the Architect must have issued the Disputed Certificates improperly since, implicit in his statement was the assertion that **he did not include the Disputed Items as a matter of his professional assessment**; and on this basis his subsequent claim as to the representations allegedly made to him by the respondent (Contractor) would seem to **suggest an ill-conceived attempt to cover up his error...**”*

# *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] SGCA 14

- Once the Disputed Certificate was found to have been tainted by any irregularity (be it fraud, impropriety and/or the Architect's failure to consider the Disputed Items at all), the entire foundation of the respondent's claim under the Final Certificate was demolished.
- The CA agreed with the High Court's finding that there was prima facie 'fraud' since the architect, not acting on the initiative of either party, issued the certificate to cover up his own mistakes

# *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] SGCA 14

- *A. If an Architect fails to exercise his professional judgment when he issued his Certificate but instead relied on a third party representation, then the certificate is not issued in accordance with the contract provisions and is thereby invalid.*

# *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] SGCA 14

- *B. There is fraud under cl 31 (13) of the SIA Conditions when the Architect on his own initiative issues a Certificate to cover up his own mistake.*
- *C. Although the fraud or the defect in the certificate affects only part of the certificate the whole certificate itself is rendered invalid since the certificate is indivisible.*

# *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] SGCA 14

- The Court of Appeal considered what is meant by the term “fraud” under 31(3) of the SIA Conditions of Contract.
- Fraud is not confined to fraud committed by either of the Parties, but would extend to fraud on the part of the Architect in the administration of the Contract.

# *Ser Kim Koi v GTMS Construction Pte Ltd [2016]*

## SGCA 7

- Architect for three 2-storey bungalows issued Completion Certificate contrary to the provisions for issuing the Completion Certificate, when :
  - (a) “all parts of the Works are ready for occupation **and use**”; and
  - (b) all works were tested, commissioned and operating satisfactorily and test certificates, operating instructions and warranties were given to the Owner.
- Architect certified completion on 17/4/13. Temporary Occupation Permit (TOP) inspection failed on 30/4/13 & 18/6/13.
- TOP obtained on 16/9/13.
- Owner alleged extensive defects. Contractor sued for unpaid Certificates.
- Court granted summary judgement \$620,000 in favour of Contractor. Employer appealed.



# *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] SGCA 7

Court of Appeal **HELD** :

- when the Architect issued the Completion Certificate he was aware from the earlier failed TOP inspections that the works were not ready for use and occupation and that until the unlevelled steps and the unequal risers at all the staircases had been rectified as required ....., the TOP would not be issued. Hence there was no basis for the Architect to issue the Completion Certificate as the development could not be “used” by the employer.

# *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] SGCA 7

- The CA reversed the decision of the High Court and held the Completion Certificate was not issued by the Architect properly under the terms of the contract and the Architect had committed fraud.
- Fraud was committed when the Completion Certificate was issued by the Architect without any honest belief in its truth and/or recklessly without caring as to whether it is true or false.

# *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] SGCA 7

- The CA held that the term “fraud” includes recklessness in the certification by the Architect, i.e. carelessly without regard as to whether it is true or false.
- There is no requirement to show criminal intent to defraud.
- In construing the word “fraud”, the Court accepted the classic definition of fraud in *Derry v Peek* (1889) 14 App Cas 337:
  - *fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false...*

# *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] SGCA 7

- As the Completion Certificate was issued fraudulently, the Interim Payment Certificate for the release of half of the retention monies could not be recovered by the Contractor in the summary judgment proceedings.

# *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] SGCA 7

- Architect's certificates can be challenged by the Employer or Contractor if it can be shown that the certificates were issued in breach of the contract conditions or were issued fraudulently.
- Fraud means certificates which are false, or issued without any belief in its truth, or recklessly, without caring whether the certificate is true or false
- The commission of fraud is not confined to the Parties but is extended to the Architect.

# *Ser Kim Koi v GTMS Construction Pte Ltd* [2016] SGCA 7

- The concept of temporary finality of Architect's certificates will now have to be re-examined in light of the above 2 cases.
- It will be possible to set aside the Architect's Certificates by showing that when the Architect issued the same, he:
  - A. was not acting on the initiative of either party and did so to cover up his own mistakes (*Chin Ivan's case*); or
  - B. did know it was false or that he did so carelessly or recklessly without caring whether the contents were true or false (*Ser Kim Koi's case*); or
  - C. the issue was in breach of the contract conditions.

## *Wei Siang Design Construction v Euro Assets Holding (S) Pte Ltd [2018] SGHC 182*

Owner Euro Assets hired Contractor Wei Siang for shophouse conservation A + A work. Owner also hired Nota Group project consultants (NGPL) which hired Nota Design Architect & Engineers (NDAE). NDAE then hired an Engineer.

URA refused to approve the TOP because of breach of conservation guidelines. Contractor sued for unpaid bills, Owner counter-sued for 3 year delays and \$1.5 million losses.

❖ Contractor denied he was in breach. Architect argued there was no duty of care to the Owner. Engineer argued he owed no duty of care to the Owner to ensure consistency between the drawings and the Works.

## *Wei Siang Design Construction v Euro Assets Holding (S) Pte Ltd [2018] SGHC 182*

Owner claimed Architect failed to ensure renovation drawing were consistent. Engineer failed to ensure structural drawings were consistent with archi drawings & Contractor failed to clarify inconsistencies with Architect and demolished features and rebuilt in a manner inconsistent with the drawings.

Contractor alleged A + E failed to detect Contractor's deviations.



# *Wei Siang Design Construction v Euro Assets Holding (S) Pte Ltd* [2018] SGHC 182

Court HELD :

- ❖ Owner reasonably relied on the Architect's expertise and there was nothing in the contract to exclude the Architect's potential liability to the Owner in tort.
- ❖ All 3 liable to the Owner.
- ❖ Contractor failed to give notice to Architect of discrepancies between structural drawings and archi drawings. A + E breached their supervision duties and failed to ensure consistency between the drawings.

# CONCLUSIONS

- ❖ The PAM certification machinery depends upon ethics, integrity and professionalism of Architects.
- ❖ There is an increasing trend towards expanding the scope of the Architect's duty and liability.
- ❖ Do inadequate fees result in inadequate service, and lead to “fraudulent” certification?
- ❖ Are Architects performing their contract administration roles and responsibilities?

**Thank You!**