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Case Note

THE EMPLOYER REPRESENTATIVE'S DUTY OF INDEPENDENCE UNDER THE REDAS CONTRACT

CEQ v CER [2020] SGHC 70

Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd [2023] SGHC 120

Construction contracts are unique in having a contractor administrator, whose role has been described as an "officer of the contract".[1] The conventional wisdom in common law jurisdictions is that where the contract administrator is called upon to decide an issue which affects the interests of both the employer and the contractor, he is required to exercise independent judgment. This case note considers two recent Singapore High Court cases which have held that a contract administrator under the most popular design-and-build standard form of contract in Singapore does not owe such a duty of independence.

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I. Introduction: contract administrator in construction contract

1 Construction contracts are notorious for their voluminous nature, often running into hundreds or even thousands of pages. Even after the contract has been signed, there will almost invariably be variations to the original scope of works and/or disruptions encountered during the works,[3]

1 Anthony Lavers, "To Hold the Scales Even: The Duty of a Construction Contract Administrator" in *Construction Law, Costs and Contemporary Developments* (Julian Bailey ed) (Bloomsbury, 2018) at p 258.

2 The author thanks the anonymous reviewer and journal editors for their helpful suggestions. Any errors remain the author's own.

3 William Ibbs, "Construction Change: Likelihood, Severity and Impact on Productivity" (2012) 4(3) *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 67 at 71.

which necessitate changes to the original terms and conditions through a patchwork of written instructions, variation orders, extension of time certificates and/or supplemental agreements. It is a common feature of virtually all standard forms of construction contract to designate a person with overall responsibility for administering the contract throughout the project's life cycle. Different standard forms might employ different terms, *eg*, architect, engineer, employer's representative, project manager or superintending officer, but the "contract administrator" is generally vested with the following two categories of responsibilities:

> (a) supervision of the construction works, including issuing instructions on behalf of the employer for the conduct of the works; and
>
> (b) determining the value and quality of work done, time and cost claims, and proper construction of the contract documents (including technical specifications and drawings).

2 The first category of responsibilities is commonly referred to as the "agency" or "supervision" function, while the second is known as the "certifier" or "decision-making" function.[4]

3 It is trite in most common law jurisdictions that, in exercising the certifier function, the contract administrator is required to exercise independent and impartial professional judgment. *Hudson's Building and Engineering Contracts* notes in this regard that:[5]

> A Certifier is usually appointed by the Employer to carry out many functions which are distinct from certification. In relation to those non-certifying functions the certifying firm will be the agent of the Employer and owe the duties of an agent, including the loyalty and fidelity owed by an agent to the principal. The Certifier will also often be a designer or manager, and owe duties of skill and care in respect of those functions to the Employer and the Employer alone.

4 See, *eg*, *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 1 SLR(R) 458 at [35] and *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 at [21].

5 *Hudson's Building and Engineering Contracts* (Nicholas Dennys & Robert Clay gen eds) (Sweet & Maxwell, 14th Ed, 2020) at para 4-051. See also Stephen Furst & Vivian Ramsey, *Keating on Construction Contracts* (Sweet & Maxwell, 11th Ed, 2021) at para 5-062; Chow Kok Fong, *Law & Practice of Construction Contracts in Singapore* vol 1 (Sweet & Maxwell, 5th Ed, 2018) at para 2.023; and Julian Bailey, *Construction Law* vol 1 (London Publishing Partnership, 3rd Ed, 2020) at pp 370–375.

> *However, the certifying functions themselves are discharged for the benefit of both parties. So far as those functions are concerned, the Certifier must act independently.*
>
> [emphasis added]

4 This note considers two recent decisions by the Singapore High Court, which have cast doubt on whether the requirement of independent judgment exists in the context of an Employer's Representative issuing certificates under the Real Estate Developers' Association of Singapore ("REDAS") Design & Build Conditions of Main Contract: 3rd Edition ("REDAS 2013").

II. *CEQ v CER*[6]

5 *CEQ v CER* arose out of a statutory adjudication proceeding under the Building and Construction Industry Security of Payment Act[7] ("SOPA").

6 On 1 February 2016, Dong Cheng Construction Pte Ltd ("Dong Cheng") was engaged by Orion-One Residential Pte Ltd ("Orion") as the main contractor for a residential development project. The contract adopted the REDAS 2013, which is the most popular standard form of contract in Singapore for private sector design-and-build works. Under cl 22.2.1 of the REDAS 2013, the Employer's Representative was to be responsible for assessing the contractor's payment claims and issuing interim payment certificates. The Employer's Representative for the project was an external professional.[8]

7 On 2 March 2017, Orion terminated Dong Cheng's employment for alleged failure to complete the works with reasonable diligence.[9] Almost two years later, from March 2019 to September 2019, Dong Cheng served a series of seven payment claims under the SOPA. Of these payment claims, three proceeded to adjudication. The first adjudication application was dismissed on jurisdictional grounds. The second was withdrawn by Dong Cheng. In the third adjudication application, Dong Cheng was partially successful and awarded the sum of S$1,981,579.50.[10]

6 [2020] SGHC 70.
7 Cap 30B, 2006 Rev Ed.
8 *CEQ v CER* [2020] SGHC 70 at [5].
9 *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 at [12].
10 *CEQ v CER* [2020] SGHC 70 at [6].

8 Orion applied to the High Court to set aside the adjudication determination on the ground, *inter alia*, that the underlying payment claim was invalid. This was because the Employer's Representative's employment on the project had concluded by May 2017, and he no longer had the authority to certify payments after that date.[11] In this regard, Orion sought to draw parallels with the case of *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd*[12] ("*Yau Lee*"), wherein the Court of Appeal held that:[13]

> In the light of the integral role that the architect plays in the administration of the SIA Form of Contract, it is axiomatic that once he becomes *functus officio*, the entire certification process under the contract comes to an end. As we observed at [30]–[31] above, the entitlement to submit progress claims under the SOPA stems from the underlying contract. Once the role of the architect under the contract has come to an end, there is simply no *basis* to submit further payment claims. As it is undeniable that the architect's certificate is a 'condition precedent' to the contractor's right to receive payment, the contractor would no longer be able to receive progress payments once the architect loses his capacity to issue such certificates. Hence, any payment claim that is issued after the architect is *functus officio* would be incapable of being certified by the architect so as to entitle the contractor to progress claims under the SOPA. [emphasis in original]

9 Orion argued that, by parity of reasoning, the REDAS 2013 envisioned the Employer's Representative acting as the certifier of Dong Cheng's payment claims, with certification of the latter being a condition precedent to Dong Cheng's entitlement to payment. Following the termination of the Employer's Representative's employment in the project in May 2017, he was *functus officio* and any payment claim submitted after that point was invalid as it was incapable of being certified by the Employer's Representative.[14]

10 The High Court did not agree with Orion. The learned judge held that a "crucial" difference between *Yau Lee* and *CEQ v CER* was that the former involved the Singapore Institute of Architects Articles and Conditions of Building Contract ("SIA Form of Contract") whilst the latter involved the REDAS 2013.[15] The court further found that the role of the Architect under the SIA Form of Contract was "markedly different" from that of the Employer's Representative under the REDAS 2013. The Architect under the SIA Form of Contract "plays a fundamental role in

11 *CEQ v CER* [2020] SGHC 70 at [15].
12 [2019] 2 SLR 189.
13 *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 at [39].
14 *CEQ v CER* [2020] SGHC 70 at [15] and [27].
15 *CEQ v CER* [2020] SGHC 70 at [25].

the entire construction process", "is the administrator of the construction contract", "plays an integral role in the payment certification process" and "is the quasi-adjudicator of both the contractor's right to receive payment for work done as well as the employer's right to withhold payment on account of any cross-claim".[16] The Employer's Representative under the REDAS 2013 was none of that. Instead, he was the employer's agent and "neither an independent certifier nor a referee between the parties in any meaningful sense".[17]

11 Although the SIA Form of Contract and REDAS 2013 respectively provide for the Architect and Employer's Representative to issue payment certificates, the High Court found it "simplistic" to assume equivalence between the two. According to the court, the Architect's certificates under the SIA Form of Contract was "the product of independent assessment and proper evaluation of the works done and monies owing between the parties" and "instruments of governance in a carefully constructed standard form".[18] Conversely, the Employer's Representative's certifications under the REDAS 2013 were "not an objective assessment of works done and monies due. They [were] instead, mere signals of the employer's assent to the payment claim, as submitted by the contractor."[19]

12 The aforementioned differences, coupled with the fact that the REDAS 2013 did not contain any provisions which expressly rendered the Employer's Representative *functus officio*, led the High Court to conclude that *Yau Lee* was not applicable, with the result that the subject payment claim served by Dong Cheng in August 2019 remained valid. It followed that the adjudication determination which arose out of the payment claim was valid and upheld.

13 The substantive outcome of *CEQ v CER* was reversed on appeal, based on an unrelated argument that was not raised before the High Court.[20] The Court of Appeal had no need to, and did not, disturb the

16 *CEQ v CER* [2020] SGHC 70 at [25], citing *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189.

17 *CEQ v CER* [2020] SGHC 70 at [4] and [25].

18 *CEQ v CER* [2020] SGHC 70 at [28].

19 *CEQ v CER* [2020] SGHC 70 at [25].

20 In brief, the Court of Appeal found that the enabling provision in the REDAS Design & Build Conditions of Main Contract: 3rd Edition ("REDAS 2013"), which Dong Cheng relied on for its payment claim was not applicable on the facts, as the termination of Dong Cheng's employment was premised on a clause in the supplementary agreement between the parties, instead of the termination provisions of the REDAS 2013. Moreover, the enabling provision relied on by Dong Cheng related to the final settlement of accounts as opposed to progress claims. See *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd* [2021] 1 SLR 791 at [23]–[31].

High Court's holding that the Employer's Representative under the REDAS 2013 played a substantially different role to that of the Architect under the SIA Form of Contract.

III. *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd*[21]

14 Given that *CEQ v CER* was overturned on appeal, one might have assumed that the lower court's decision would only be of limited precedential value in the future.[22] However, *CEQ v CER* was recently followed in the case of *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* ("*Builders Hub*").

15 *Builders Hub* similarly stemmed from an adjudication proceeding under the SOPA, in which the employer in a construction contract based on the REDAS 2013[23] sought to invoke the *Yau Lee* line of reasoning by arguing that the Employer's Representative had become *functus officio* following the termination of the contractor's employment, with the result that the contractor was no longer entitled to commence an adjudication application.[24] A nuanced difference between *CEQ v CER* and *Builders Hub* is that the former focused on the termination of the Employer's Representative's employment, whilst the latter focused on the termination of the contractor's employment, but this difference did not turn out to be material to the court.

16 A different judge of the High Court declined to apply the *functus officio* analysis in *Yau Lee*. In doing so, the court cited with approval the observations made in *CEQ v CER* that the certification functions of the Employer's Representative under the REDAS 2013 were "categorically different" from that of the Architect under the SIA Form of Contract, due to the Employer's Representative being "neither independent nor objective".[25] Another distinguishing factor between *Builders Hub* and *Yau Lee* was that the subject payment claim in *Builders Hub* which gave rise to the adjudication application was served before the termination of the contractor's employment, whilst the payment claim in *Yau Lee*

21 [2023] SGHC 120.

22 *R (Al-Mehdawi) v Secretary of State for the Home Department* [1989] 2 WLR 603 at 608. Though, *cf*, the doubts expressed on this principle by Underhill LJ in *FS Cairo (Nile Plaza) LLC v Brownlie* [2020] EWCA Civ 996 at [173].

23 Strictly speaking, the form used in *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* was the REDAS Design and Build Conditions of Contract: 3rd Edition, issued in October 2010, but this is the same third edition that was reissued in July 2013 without material amendment.

24 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 at [25].

25 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 at [40].

was served after the event which rendered the Architect *functus officio* (*viz*, the issuance of a final payment certificate).

17 Moreover, on a conceptual level, the court in *Builders Hub* found that whether the Employer's Representative was *functus officio* was immaterial to the contractor's entitlement to lodge the adjudication application.[26] This was because the SOPA was premised on the service of a payment claim by the claimant and the provision of a payment response by the defendant. Section 12 of the SOPA, which addressed a claimant's entitlement to lodge adjudication applications, did not refer to the payment certifier. The interim payment certificate of the Employer's Representative was only relevant to the extent that it was deemed by cl 22.4 of the REDAS 2013 to be the employer's payment response under the SOPA in the event the employer did not provide a separate payment response.[27] On the facts, the employer did provide a separate payment response, which fortified the court's conclusion that the claimant-contractor was entitled to lodge an adjudication application under s 12 of the SOPA even if the Employer's Representative was *functus officio* and could not validly issue an interim payment certificate.

IV. Commentary

A. Analysis in CEQ v CER *is against established authority*

18 As mentioned in the introduction of this note, it is settled law in most common law jurisdictions that the contract administrator of a construction contract is required to exercise his certifier function in an independent and impartial manner.

19 In the case of *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd*[28] ("*Scheldebouw*"), Jackson J considered a long line of cases in the UK and Australia before concluding that:[29]

> When performing his decision-making function, the decision-maker is required to act in a manner which has variously been described as independent, impartial, fair and honest. These concepts are overlapping but not synonymous. They connote that the decision-maker must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer.

26 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 at [65]–[72].
27 *Builders Hub Pte Ltd v JP Nelson Equipment Pte Ltd* [2023] SGHC 120 at [67]–[68].
28 [2006] EWHC 89.
29 *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 at [34(3)]. See also extensive cases and literature referenced in Julian Bailey, *Construction Law* vol 1 (London Publishing Partnership, 3rd Ed, 2020) ch 5, at fn 189.

20 A few years before *Scheldebouw*, the Singapore Court of Appeal separately held, in *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd*[30] ("*Hiap Hong*") that:[31]

> *It is vitally important to bear in mind the nature of the duties of the architect when he is exercising the function of a certifier. As stated before, it is settled law that he is to act fairly and independently. He is not subject to the directions or instructions of either party although he must listen to both parties before he arrives at his own decision.* Thus, in exercising the function of certification the architect cannot be the agent of the owners. The nature of that function is wholly inconsistent with the architect being an agent of the owner. …
>
> It is true that the architect is employed by the owner and to that extent the latter has control over him. But such control must necessarily be confined to matters in which the architect acts as the owner's agent and not in relation to matters where the architect is accorded a special role under the contract and where he is expected to exercise independent judgment. …
>
> [emphasis added]

21 While *Hiap Hong* involved a contract based on the SIA Form of Contract (which the court in *CEQ v CER* took pains to distinguish from the REDAS 2013), the decision in *Scheldebouw* relied on precedents involving a wide number of contract forms, which designate not only architects but also an engineer, a ship surveyor (who also happened to be the president of the employer company), and an in-house project director as contract administrator.[32] The authorities speak with one voice that the contract administrator in a construction contract is required to act fairly, independently, impartially and honestly in discharging his certifier duties.

22 Furthermore, the Singapore High Court had also previously considered, in *Engineering Construction Pte Ltd v Attorney-General*[33] ("*Engineering Construction*"), that a Superintending Officer (in that

30 [2001] 1 SLR(R) 458.

31 *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 1 SLR(R) 458 at [35]–[36].

32 *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 at [25]–[32].

33 [1992] 2 SLR(R) 905.

case, a firm of consulting engineers) under a public sector road works contract[34] was required to exercise his certifier function "fairly":[35]

> The SO has many functions under the contract. Those under cl 34 have been noted. Throughout he acts as the agent of the Government by whom he is appointed with responsibility expressly for the supervision and administration of the contract. The SO is not a party to the contract. The parties are the Government as employer and EC as contractor. *In the exercise of many of his functions the SO has to form an opinion or make a decision which will determine the amount the contractor is entitled to be paid or the quality of the completed works which the employer has contracted for. In all these matters the parties enter into the contract on the understanding that the SO is the agent of the Government but nevertheless will act fairly.* Examples of such functions can be found under cl 38 relating to the issue by the SO of certificates for payment. Others are to be found in cll 31(a) and 32(a). [emphasis added]

23 Even if one were to assume *arguendo* that the SIA Form of Contract is fundamentally different from the REDAS 2013, it is difficult to see why the Superintending Officer in *Engineering Construction* should be treated any differently to the Employer's Representative in *CEQ v CER*. The court in *CEQ v CER* took issue with the fact that "[t]he only certifier was the employer's representative ('ER') who, as the title suggests, was the plaintiff's agent".[36] In *Engineering Construction*, the court expressly recognised that the Superintending Officer "acts as the agent of the Government by whom he is appointed", but did not find this to affect the Superintending Officer's duty to act fairly. Both the Employer's Representative in *CEQ v CER* and the Superintending Officer in *Engineering Construction* were also external professionals engaged by the employer.

24 It is unclear if the cases cited in this Part had been considered by the courts in *CEQ v CER* or *Builders Hub*, but a future court should consider and reconcile these cases before following the analysis in *CEQ v CER*.

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34 The contract in *Engineering Construction Pte Ltd v Attorney-General* appears to have been the Singapore Public Works Department PWD Works 24 form, which was commonly used for public sector works before 1995, when the first edition of the Public Sector Standard Conditions of Contract was published: see *Engineering Construction Pte Ltd v Attorney-General* [1992] 2 SLR(R) 905 at [22] and Chow Kok Fong, *Law & Practice of Construction Contracts in Singapore* vol 1 (Sweet & Maxwell, 5th Ed, 2018) at para 2.159.

35 *Engineering Construction Pte Ltd v Attorney-General* [1992] 2 SLR(R) 905 at [30].

36 *CEQ v CER* [2020] SGHC 70 at [4] and [25].

B. Analysis in CEQ v CER *did not consider industry practice*

25 While some standard forms of construction contract reserve the role of contract administrator to qualified and practicing professionals,[37] there is no requirement at common law that a contract administrator must be a qualified professional in any field.[38] The contracting parties are generally free to designate anyone – architect, engineer, quantity surveyor – as the contract administrator.

26 In so far as *CEQ v CER* suggests some kind of value judgment based on whether the standard form in question ringfences the role of contract administrator to a certain profession, this author urges circumspection. Many popular standard forms of construction contract do not stipulate professional qualifications for the contract administrator. Some examples which spring to mind include the AS 4000-1997,[39] NEC4[40] and PSSCOC.[41] Just like the SIA Form of Contract, these are all "carefully constructed standard form[s]"[42] which have been refined over decades. There should not be a negative presumption that certificates issued by contract administrators under those forms are not "proper evaluation[s]".[43]

27 In practice, the contract administrator is typically nominated by the employer, who is also responsible for paying the contract administrator for his services, whether through a consultancy contract or as an employee.[44] Chow Kok Fong explains the market practice in Singapore:[45]

> [I]n the private sector a certifier is typically a consultant employed directly by the employer under a contract for professional services. Although this arrangement is also true with some construction contracts undertaken in the public sector, the larger public sector agencies often designate one of their senior officers as the Superintending Officer. In the latter situation the Superintending

37 Typically, those published by professional bodies, for arguably self-serving reasons. See, *eg*, FIDIC Conditions of Contract for Construction 2017 cl 3.1; SIA Building Contract 2016 Art 3(2).
38 Julian Bailey, *Construction Law* vol 1 (London Publishing Partnership, 3rd Ed, 2020) at p 349.
39 Australian Standard AS 4000-1997 General Conditions of Contract.
40 NEC4: Engineering and Construction Contract.
41 Public Sector Standard Conditions of Contract for Construction Works 2020.
42 *CEQ v CER* [2020] SGHC 70 at [28].
43 *CEQ v CER* [2020] SGHC 70 at [28].
44 Julian Bailey, *Construction Law* vol 1 (London Publishing Partnership, 3rd Ed, 2020) at p 350.
45 Chow Kok Fong, *Law & Practice of Construction Contracts in Singapore* vol 1 (Sweet & Maxwell, 5th Ed, 2018) at p 504.

> Officer is thus an employee of the very government body or agency which is a party to the subject construction contract.

28 Even where a senior in-house officer is appointed as the Superintending Officer for public sector projects, the day-to-day responsibilities are sometimes delegated to an external consultant who is appointed as the "Superintending Officer's Representative" under cl 2.2 of the PSSCOC. The Superintending Officer's Representative issues certificates in its own name pursuant to such delegated authority, though his certificates and decisions may be referred by a contracting party to the Superintending Officer for review by way of cl 35.1 of the PSSCOC.

29 Paragraph 3(1) of the Code of Professional Conduct and Ethics[46] for Singapore-registered architects requires that:

> An architect shall at all times apply the conditions of a contract with entire fairness between his client and the other party to the contract, and in any question arising between his client and the other party to the contract in which the architect is acting between the parties by reason of his professional expertise, he shall act in an impartial manner.

30 This duty of impartiality applies to all contracts, and not only those which adopt the SIA Form of Contract. The Rules for Professional Conduct of The Institution of Engineers, Singapore similarly impose a standard of "scrupulous impartiality" on professional engineers when it comes to interpretation of contract, with a view to "ensur[ing] that each party to the contract shall discharge his respective duties and enjoy respective rights as set down in the contract agreement".[47] Given this context, as well as the common practice of appointing professional consultants as certifiers, it is in most cases inaccurate to claim that an Architect's certification under the SIA Form of Contract is any more independent or objective than an Employer's Representative's certification under a REDAS 2013 contract.

31 Even in the case where the contract administrator is an in-house employee, there is a strong case for an implied term in law that the contract administrator must exercise his certifier function with fairness

46 Schedule to the Architects (Professional Conduct and Ethics) Rules (2003 Rev Ed).

47 As for quantity surveyors, para 3.4 of the Code of Professional Conduct of the Singapore Institute of Surveyors and Valuers requires quantity surveyors to "always act with integrity, fairness and impartiality", but does not refer specifically to the certifier function. In practice, quantity surveyors are less frequently appointed as contract administrators than architects and engineers.

and independence.[48] The content of the contract administrator's duties should not be left to the capriciousness of the employer's choice of contract administrator. Parties contracting using the REDAS form (or PSSCOC or NEC4 for that matter) should be entitled to expect the same degree of fairness and independence from an in-house contract administrator as they would an external consultant. Similarly, the content of the contract administrator's duties should also not vary according to the choice of contract form, the choice of which is informed primarily by the procurement strategy for the project, and not the duties of the contract administrator.[49]

32 Such an implied term will be consistent with the SOPA, which is a critical legislation for everyone involved in the construction industry in Singapore. In particular, s 17(3) of the SOPA elevates certificates under a construction contract to the same level as an "agreement between the claimant and the respondent":

> **Determination of adjudicator**
>
> **17.**— …
>
> (3) In determining an adjudication application, *an adjudicator must disregard any part of a payment claim or a payment response related to damage, loss or expense that is not supported by —*
>
> (*a*) any document showing agreement between the claimant and the respondent on the quantum of that part of the payment claim or the payment response; or
>
> (*b*) *any certificate or other document that is required to be issued under the contract.*
>
> [emphasis added]

33 As commented by Danna Er, implicit in s 17(3) is the assumption that an independent contractor administrator would make the certification.[50] If the court in *CEQ v CER* is correct that a payment certificate issued by the Employer's Representative under the

48 See, *eg*, the analysis in *Costain Ltd & Ors v Bechtel Ltd* [2005] EWHC 1018 at [40]–[53]. *Cf*, Neil Jones & Chris O'Carroll, "The Independence and Impartiality of Contract Administrators under Various Standard Forms of Construction Contracts" [2007] 23 *Construction Law Journal* 475.

49 See RICS, *Appropriate Contract Selection* (1st Ed, November 2014) <https://www.rics.org/content/dam/ricsglobal/documents/standards/Appropriate_contract_selection_1st_edition_PGguidance_2014_archived.pdf> (accessed 5 January 2024). In the Singapore context, the choices are typically: (a) the SIA Form of Contract for private sector design-bid-build procurement; (b) the REDAS contracts for private sector design-and-build procurement; and (c) the PSSCOC for public sector projects.

50 Danna Er, "No Rose without a Thorn" [2021] SAL Prac 28 at para 22.

REDAS 2013 is "not an objective assessment of works done and monies due"[51] [emphasis in original omitted] and instead "mere signals of the employer's assent to the payment claim, as submitted by the contractor", s 17(3) will create an inequality between a claimant-contractor and a respondent-employer, as the employer can legitimately instruct the Employer's Representative to reject all claims for damage, loss or expense made by the contractor, while conversely certifying all sorts of damages, losses or expenses in the employer's favour to reduce the contractor's entitlement to progress payment. Such an outcome would surely be prejudicial to the legislative purpose of the SOPA, which is to "promot[e] cash flow by facilitating prompt payments down the chain of contractors involved in any given construction project".[52]

34 Finally, as a reflection of industry practice, it will be recalled that the landmark tort case of *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[53] ("*Spandeck*") involved a contractor suing a Superintending Officer under the PSSCOC for improper certification. Neither of the parties, nor the High Court or the Court of Appeal questioned the premise that the Superintending Officer was required to exercise independent, fair and professional judgment when exercising its certifier function. Instead, the Court of Appeal cited *Pacific Associates Inc v Baxter*[54] for the proposition that "[t]he duty to act fairly and impartially was owed only to the employer", which presumes the existence of such a duty.[55]

35 Therefore, *CEQ v CER* does not appear to gel with industry practice. If left to stand, the observations in *CEQ v CER*, as reiterated in *Builders Hub*, could cause practical problems for many players in the construction industry. Suppose an architect is appointed as Employer's Representative under the REDAS 2013. The employer instructs the architect to disregard any claim for prolongation costs by the contractor even if there is legitimate basis for such claim. The architect will be in a catch-22 situation. On the one hand, the Code of Professional Conduct and Ethics is clear that he must act impartially and "apply the conditions of a contract with entire fairness between his client and the other party to the contract". On the other hand, the employer can legitimately rely on *CEQ v CER* and *Builders Hub* as basis for asserting that the architect must follow his instruction. If the architect were to refuse, this could result in a breach of the consultancy agreement between the architect and employer.

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51 *CEQ v CER* [2020] SGHC 70 at [25].
52 *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] 1 SLR 584 at [32].
53 [2007] 4 SLR 100.
54 [1990] 1 QB 993.
55 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [100].

If the architect were to follow through with the employer's instruction, he would not only place himself in professional jeopardy, but also stymie the contractor's right to claim prolongation costs under the SOPA, since there will not be any certificate upon which the contractor can invoke s 17(3) of the SOPA.

C. Employer's Representative under the REDAS 2013 performs very similar duties to Architect under the SIA Form of Contract

36 Putting aside the apparent contradictions with established authority and industry practice, this author respectfully questions the premise of the assertion in *CEQ v CER* that there is a qualitative difference between the role of the Employer's Representative under the REDAS 2013 and the role of the Architect under the SIA Form of Contract. This Part compares and contrasts a few key provisions of the Singapore Institute of Architects Articles and Conditions of Building Contract ("SIA 2005") (which was the version used in *Yau Lee*) and the REDAS 2013 (which was the standard form used in *CEQ v CER* and *Builders Hub*).

37 First, in relation to the nomination of contract administrator, Art 3 of the SIA 2005 requires that the Architect shall be a registered architect in Singapore and member of Singapore Institute of Architects against whom no reasonable objection is made by the contractor. Clause 5.1 of the REDAS 2013 does not stipulate any requirement for the Employer's Representative, who can be a "person or body corporate or firm" and shall be nominated by the Employer alone. It has been explained in Part IV.B. that the profession of the contract administrator should not matter. As for the ability of the contractor under the SIA 2005 to reasonably object to the employer's choice of Architect, this might point to a duty of independence on the Architect under the SIA 2005. However, it does not follow from this that the Employer's Representative under the REDAS 2013 need not be independent. Moreover, the employer's freedom of choice under the REDAS 2013 is not limitless either. The initial Employer's Representative will be named in Appendix 1 of the REDAS 2013, so the contractor can raise his objections (if any) before executing the contract. In *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd*,[56] it was held in the context of the NEC4 that where the parties initially contracted for a third-party professional to act as contract administrator, it was not open to the employer to subsequently appoint

56 [2017] EWHC 1763.

one of its employees as replacement contract administrator, even if the contract contained no express prohibition to this effect.[57]

38 Moving on to the provisions dealing with certification of progress payments, which was the central issue in *CEQ v CER*, the mechanisms in the SIA 2005 and the REDAS 2013 are virtually identical:

	SIA 2005	REDAS 2013
Payment claim	Served by Contractor on Employer, with copy to Architect.[58]	Served by Contractor on Employer, with copy to Employer's Representative.[59]
Payment certificate	Interim certificate issued by Architect to Contractor, with copy to Employer.[60]	Interim payment certificate Issued by Employer's Representative to Employer, with copy to Contractor.[61]
Content of payment certificate	Sum certified in interim certificate shall be based on a retrospective re-evaluation of all work carried out under the contract, adjusted by various additions and deductions as provided in sub-cll 31(4)(f)–31(4)(h).[62]	Interim payment certificate shall set out the amount which the Employer's Representative considers to be due to the Contractor, including deductions for sums due and payable to the Employer by the Contractor.[63]

57 *Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd* [2017] EWHC 1763 at [134].
58 Singapore Institute of Architects Articles and Conditions of Building Contract 2005 cl 31(2).
59 REDAS Design & Build Conditions of Main Contract: 3rd Edition cl 22.1.1.
60 Singapore Institute of Architects Articles and Conditions of Building Contract 2005 cl 31(3).
61 REDAS Design & Build Conditions of Main Contract: 3rd Edition cl 22.2.1.
62 Singapore Institute of Architects Articles and Conditions of Building Contract 2005 cl 31(4).
63 REDAS Design & Build Conditions of Main Contract: 3rd Edition cl 22.2.1.

	SIA 2005	REDAS 2013
Role of Employer	Employer shall provide a separate payment response within 21 days after the date the payment claim is served.[64]	Interim payment certificate shall be deemed to be the Employer's payment response under the SOPA, *unless* Employer provides a separate payment response within 21 days after the date the payment claim is served, in which case the Employer's payment response shall take precedence.[65]

39 It is hard to see how the court in *CEQ v CER* could conclude from the above that certification under the SIA 2005 was "the product of independent assessment and proper evaluation of the works done and monies owing between the parties" while certification under the REDAS 2013 was "not an objective assessment of works done and monies due [and] instead, mere signals of the employer's assent to the payment claim, as submitted by the contractor". If anything, the fact that the Employer may issue a separate payment response under cl 22.4 of the REDAS 2013 to dissent from the Employer's Representative interim payment certificate goes to show that such certificate is not a signal of the Employer's assent.

40 Aside from certification of payments, another important role of the contract administrator under construction contracts is the assessment of extension of time claims by the contractor. Such assessment can have significant commercial consequences in the form of liquidated damages for the employer or prolongation costs for the contractor. On this crucial matter, the REDAS 2013 arguably imposes even more stringent duties of fairness and independence than the SIA 2005, as the Employer's Representative is required to make a decision that is "fair, reasonable and necessary".

64 Singapore Institute of Architects Articles and Conditions of Building Contract 2005 cl 31(15).

65 REDAS Design & Build Conditions of Main Contract: 3rd Edition cl 22.4.

SIA 2005	REDAS 2013
23(3) After any delaying factor in respect of which an extension of time is permitted by the contract has ceased to operate and it is possible to decide the length of the period of extension beyond the contract completion Date (or any previous extension thereof) in respect of such matter, the Architect shall determine such period of extension and shall at any time up to and including the issue of the Final Certificate notify the contractor in writing of his decision and estimate of the same.	**18.1. Decision on Extension of Time** The Employer's Representative shall, on receipt of sufficient explanation, information, particulars or materials, within a reasonable time, determine such period of extension of time, if any, of the whole, Phase or Section of the Works, *as may in his opinion be fair, reasonable and necessary* for the completion of the Works and notify the Contractor in writing of the Employer's Representative's decision of the same. In making his determination on the extension of time, the Employer's Representative shall take into account … [emphasis added]

41 As regards certification of completion, assessment of defects and valuation of variations, the respective contractual mechanisms under the SIA 2005 and the REDAS 2013 are not materially different, at least in respect of the independence of the contract administrator.

42 That said, one notable distinction between the SIA 2005 and the REDAS 2013 is that the former provides for certificates of the Architect to have temporary finality, in that "in the absence of fraud or improper pressure or interference by either party, full effect by way of Summary Judgment or Interim Award or otherwise shall, in the absence of express provision, be given to all decisions and certificates of the Architect … until final judgment or award". The same clause also obliges the Architect to "in all matters certify strictly in accordance with the terms of the Contract". There is no equivalent clause on temporary finality in the REDAS 2013. One could therefore argue that REDAS does not prohibit the Employer's Representative from caving to the Employer's pressure or interference. Nevertheless, this argument is merely superficially attractive. The arbitration clause in the REDAS 2013 provides that "[t]he Arbitrator shall have the power to open up, review and revise any certificate, decision or opinion of the Employer's Representative".[66] Implicit in this is the recognition that the Employer's Representative's certificate, decision

66 REDAS Design and Build Conditions of Main Contract: 4th Edition cl 32.2.2.

or opinion is binding on the parties until it is revised by the Arbitrator, *ie*, the notion of temporary finality.

43 This author therefore submits that, on a considered review of the text of the two standard forms, the Employer's Representative's certification under the REDAS 2013 is no less "the product of independent assessment and proper evaluation" than the Architect's certification under the SIA 2005, and the courts in *CEQ v CER* and *Builders Hub* were perhaps too hasty in distinguishing the two.

IV. Conclusion

44 Following the decision in *CEQ v CER*, REDAS issued a new fourth edition of the Design and Build Conditions of Main Contract in 2022 ("REDAS 2022"), which expressly stipulates that the Employer's Representative "shall at all times act impartially and independently from the Employer in respect of all or any matter or decision in the Conditions which requires his exercise of discretion or judgement".[67] This amendment is clearly a reaction to *CEQ v CER* and reinstates the conventional wisdom on the independence of the contract administrator. Nevertheless, the inserted text does not have any retroactive application to the REDAS 2013, which will continue to govern many construction-related disputes in Singapore for the rest of this decade.[68]

45 Moreover, even if the REDAS 2022 were to quickly gain traction such that the REDAS 2013 becomes obsolete, the observations in *CEQ v CER* continue to apply with equal force to contracts like the PSSCOC and NEC4, both of which do not stipulate that the contract administrator must be a neutral professional, nor do they impose any express obligations of independence or impartiality on the contract administrator. An arbitrator, adjudicator or disciplinary tribunal, when faced with such a contract that is governed by Singapore law, may have little choice but to follow the two High Court authorities that the contract administrator in such a case is "neither an independent certifier nor a referee between the parties in any meaningful sense", even if this conclusion appears to be at odds with established common law precedents and industry practice.

67 REDAS Design and Build Conditions of Main Contract: 4th Edition cl 1.1.18.

68 It is likely to be years before the REDAS 2022 gains traction. By way of comparison, there have, since 2017, only been two reported cases on LawNet Legal Research involving the SIA Building Contract 2016, as compared to 16 cases involving earlier versions of the SIA Form of Contract (and even more of the latter if appeals and related proceedings are counted).

46 This author respectfully submits that a future court should revisit the decision in *CEQ v CER*, and either depart from the decision or reconcile it with the challenges identified in this note. Given the central role played by contract administrators in construction contracts, and the serious consequences their certificates and decisions have on the rights of the contracting parties, additional clarity on this important issue will be most welcomed.