7. BUILDING AND CONSTRUCTION LAW

CHOW Kok Fong
LLB (Hons), BSc (Bldg) (Hons), MBA; FRICS, FCIArb, FCIS, FSIArb; Chartered Arbitrator, Chartered Quantity Surveyor.

Philip **CHAN** Chuen Fye
Dip Bldg, LLB (Hons), LLM, PhD, Dip Ed; FSIArb; Barrister-at-law (Middle Temple), Advocate and Solicitor (Singapore); Associate Professor, National University of Singapore.

[NB: Part A was contributed by Chow Kok Fong; and Part B was contributed by Philip Chan.]

PART A

Overview

7.1 Among the subjects considered by the courts during the year are the authority of certifiers in construction contracts, the interpretation of endeavours clauses, novation and the determination of rectification costs. In addition, several decisions on the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOP Act") are noteworthy. These include a case which settled the issue of repeat claims and a decision which affirmed that the best result for a respondent in adjudication is that no part of the claimed amount is payable.

Contract terms: "Endeavours" provisions

7.2 "Endeavours" provisions may be provided in a construction contract to address situations where performance outcomes are subject to a degree of uncertainty. An important decision on the subject delivered by the Court of Appeal during the year considered how a party may satisfy its obligations in the context of dynamic and often unforeseen circumstances in which these clauses are expected to operate.

7.3 In *KS Energy Services Ltd v BR Energy (M) Sdn Bhd* [2014] 2 SLR 905 ("*KS Energy Services*"), BR Energy (M) Sdn Bhd ("BRE") was contracted to charter an oil rig to Petronas Carigali Sdn Bhd ("Petronas"). The rig was described as a "workover pulling unit" ("WPU"). After the original rig builder pulled out of the project, BRE approached KS Energy Services Ltd ("KSE") to find a rig builder to

construct the WPU. KSE arranged for Oderco Inc ("Oderco") to replace the original builder, following which BRE and KSE formed a joint venture company to charter the rig. Petronas was assured by BRE that notwithstanding the replacement of the original rig builder, the WPU would be constructed according to specifications and that the WPU would be delivered within six months. The joint venture agreement between KSE and BRE contained an endeavours clause which provided as follows:

> [KSE] shall use all reasonable endeavours to procure the WPU is constructed and ready for delivery in Abu Dhabi or other location specified by [KSE] within six months after the Charter Agreement is executed.

7.4 Oderco did not construct and deliver the WPU on time. Petronas terminated the charter agreement with BRE. BRE in turn terminated the joint venture agreement with KSE on the ground that KSE had breached the endeavours clause. The primary issue before the court was whether KSE had discharged its obligation to use "all reasonable endeavours" to procure Oderco's construction of the WPU in accordance with the terms of the clause. On the facts, it was clear that Oderco's performance was woeful and KSE had to keep "close tabs on the goings-on": at [126].

7.5 V K Rajah JA, in delivering the judgment of the Court of Appeal, noted that while the phrase "all reasonable endeavours" had not previously been considered in Singapore, the interpretation of the phrase "best endeavours" had been authoritatively set out in an earlier Court of Appeal decision in *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474 ("*Travista*"). He agreed with the judge below that, despite some authorities pointing otherwise, there is little or no relevant difference between the standard constituted by the formulation "all reasonable endeavours" and that constituted by the formulation "best endeavours" (*KS Energy Services* at [62]):

> We therefore hold that the test for determining whether an 'all reasonable endeavours' obligation has been fulfilled should ordinarily be the same as the test for determining whether a 'best endeavours' obligation has been fulfilled, *ie*, the *Travista* test … should apply in both situations. This test should ordinarily apply even if the parties use a variation of the phrase 'all reasonable endeavours' or 'best endeavours' (as the case may be).

7.6 However, the court considered that the *Travista* test may not be entirely applicable where the contract stipulates the steps which are to be taken in connection with the endeavours clause (*KS Energy Services* at [62]):

> In that scenario, the inquiry would be centred on whether the stipulated steps have been taken. It also bears emphasis that whether an 'all reasonable endeavours' or 'best endeavours' obligation has been fulfilled can only be ascertained through a fact-intensive inquiry.

7.7 Rajah JA endorsed the following "guidelines" in determining the operation of both "all reasonable endeavours" and "best endeavours" clauses (*KS Energy Services* at [93]):

> (a) Such clauses require the obligor 'to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted' (see [*Yewbelle Ltd v London Green Developments Ltd, Knightsbridge Green Ltd* [2007] 1 EGLR 137 ('*Yewbelle (HC)*')] at [123] …) or 'to do all that it reasonably could' (see [*Jet2.com Ltd v Blackpool Airport Ltd* [2011] EWHC 1529 (Comm) ('*Jet2com*')] at [31]).
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> (b) The obligor need only do that which has a significant (see [*A P Stephen v Scottish Boatowners Mutual Insurance Association* [1989] 1 Lloyd's Rep 535 ('*The Talisman*')]) or real prospect of success (see *Yewbelle (HC)* and [*Yewbelle Ltd v London Green Developments Ltd, Knightsbridge Green Ltd* [2007] 2 EGLR 152 ('*Yewbelle (CA)*')]) in procuring the contractually-stipulated outcome.
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> (c) If there is an insuperable obstacle to procuring the contractually-stipulated outcome, the obligor is not required to do anything more to overcome other problems which also stood in the way of procuring that outcome but which might have been resolved (see *Yewbelle (CA)*).
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> (d) The obligor is not always required to sacrifice its own commercial interests in satisfaction of its obligations (see [*CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535]), but it may be required to do so where the nature and terms of the contract indicate that it is in the parties' contemplation that the obligor should make such sacrifice (see [*Jet2.com*]).
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> (e) An obligor cannot just sit back and say that it could not reasonably have done more to procure the contractually-stipulated outcome in cases where, if it had asked the obligee, it might have discovered that there were other steps which could reasonably have been taken (see [*EDI Central Ltd v National Car Parks Ltd* [2011] SLT 75 ('*EDI*')]).
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> (f) Once the obligee points to certain steps which the obligor could have taken to procure the contractually-stipulated outcome, the burden ordinarily shifts to the obligor to show that it took those steps, or that those steps were not reasonably required, or that those steps would have been bound to fail (see *EDI*).

7.8 In this case, the Court of Appeal held that KSE had duly discharged the diligence expected of the subject endeavours clause when it asked for recovery schedules as construction of the WPU fell behind

schedule and when periodic inspections coupled with constant and robustly worded correspondence proved ineffective, they deployed a supervisor to Oderco's yard: *KS Energy Services* at [126].

Breach and causation

7.9 One of the issues considered in *KS Energy Services* (above, para 7.3) was whether the alleged breach by KSE – that it failed to procure the construction of the WPU by the date stipulated in the contract led Petronas to terminate its contract with BRE. On the facts, the Court of Appeal thought that the alleged loss did not occur immediately upon the non-delivery of the WPU. In the course of its judgment, the court reiterated (at [139]) that "it is almost too obvious to state as a principle", but damages may only be awarded if the breach of contract is shown to have caused the loss sustained by the aggrieved party. To sustain its case, BRE had to demonstrate on a balance of probabilities that KSE's breach of cl 6.2 of the joint venture agreement had led to that termination: at [145]. The court held (at [148]) that this had not been established in this case, particularly given that the effective cause of delay was the time taken for the delivery, installation and commissioning of an important item of equipment, the Variable Frequency Drive.

Architect's instructions and certificates: Effect of fraud

7.10 Both the authority of a certifier (such as an architect in a building contract) and the effect of certificates derive from the terms of the underlying contract. The matters certified for purposes of interim payments (or progress payments) frequently include variations and these may turn on the validity of instructions issued in respect of the variation work. Issues relating to certificates and instructions are at the core of most construction disputes. In recent years, there have been relatively few opportunities for the courts to address these issues because they are generally disposed of in arbitration or adjudication under the SOP Act. Since the courts have generally refrained from disturbing the substantive findings of these proceedings, these issues have not been visited by the courts in recent years. During the year under review, the issues surfaced before the High Court in a case which is expected to attract considerable interest from the construction industry.

7.11 In *H P Construction & Engineering Pte Ltd v Chin Ivan* [2014] 3 SLR 1318 ("*H P Construction*"), the building contract incorporated the Singapore Institute of Architects ("SIA") Articles and Conditions of Building Contract (Lump Sum Contract) (7th Ed, April 2005)

("SIA Conditions"). The architect issued two instructions which approved a list of variations, including items relating to preliminaries for extension of time and certain items described as "Disputed Items" arising from the alleged extension of the defects liability period. The contractor raised a payment claim of $1,171,646.37 in respect of which a sum of $614,375 related to the disputed items. The quantity surveyor allowed a sum of $120,000 in respect of the claim for extended preliminaries but did not provide any sum in respect of the Disputed Items. On the basis of these valuations, the architect issued a progress payment certificate for $321,383.94. A year later, in response to the contractor's final payment claim, the architect certified a sum of $720,417.29 which included a sum of $334,000 assessed by the quantity surveyor in respect of the Disputed Items.

7.12 The employer did not pay the two amounts certified by the architect under the progress payment certificate and the final payment certificate. Before the High Court, the employer contended, *inter alia*, that the certificates of the architect had been procured by fraud. It alleged that the architect was told by the contractor that the parties had agreed that the Disputed Items constituted variations when there was in fact no such agreement. Relying on this misrepresentation, the architect issued the respective architect's instructions and approved the variation claims. In seeking to invalidate the two certificates, the employer relied on cl 31(13) of the SIA Conditions which states:

> No certificate of the Architect under this Contract shall be final and binding in any dispute between the Employer and the Contractor, whether before an arbitrator or in the Courts, save only 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 …

7.13 It is settled law that, arising from the decisions of the High Court and Court of Appeal in *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] 1 SLR(R) 622, an architect's certificate issued under the SIA Conditions enjoys temporary finality. The employer's case was that since the two certificates were procured through fraudulent representation and the architect did not objectively evaluate the matters certified, they were improperly issued and therefore did not enjoy temporary finality. It relied on this ground in its application for a stay of proceedings in favour of arbitration.

7.14 In his judgment, Edmund Leow JC accepted that there are sound policy considerations in according payment certificates the effect of temporary finality so that the cash flow of a contractor is not held up by specious counterclaims and set-offs: *H P Construction* at [19]. However, he noted that until this case, there had been no decided cases in the

High Court where an allegation of fraud was raised as a ground for such a stay: *H P Construction* at [26]. In a passage of his judgment, he considered the meaning and implications of the term "temporary finality" (*H P Construction* at [30], citing Chow Kok Fong, *The Law and Practice of Construction Contracts* vol 2 (Sweet & Maxwell Asia, 4th Ed, 2012) at para 21.423):

> [T]emporary finality embodies the concept of 'pay first, argue later', and as the Plaintiff had rightly pointed out, the underlying objective of minimising cash flow problems should not be easily defeated by 'bare assertions' of fraud … I would however also note that, although temporary finality is intended to protect the cash position of contractors, both contractor and employer may rely on it under the SIA Conditions. One example is where an employer is seeking to recover sums from the contractor pursuant to a certificate to enable the employer to recover a sum which represents any over-certification by the architect.

7.15 However, Leow JC also accepted that the concept of temporary finality can be misused as a shield for excesses or abuses of power and the exceptions of fraud, improper pressure or interference by either party therefore act as a safeguard: *H P Construction* at [31]. Consequently, an architect's certificate does not enjoy temporary finality if there is fraud, improper pressure, interference by either party or where the contract contains an express provision stipulating otherwise. He noted that in *Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR(R) 500, the High Court had held that a stay of proceedings in favour of arbitration would be granted if the defendant could show that there was *prima facie* a *bona fide* dispute as to whether there was improper pressure or interference. Similarly, he considered that for the purpose of deciding whether a stay of proceedings should be granted on the premise that the certificates were procured by fraud, it is sufficient if the employer established a *prima facie* dispute but there should be some credible evidence of fraud and mere allegations are insufficient: *H P Construction* at [42], citing *Samsung Corp v Chinese Chamber Realty Pte Ltd* [2004] 1 SLR(R) 382 ("Samsung Corp") at [25]. The learned Judicial Commissioner said in his judgment (*H P Construction* at [49]):

> All I have to do is decide whether *prima facie* there was a *bona fide* dispute as to whether there was fraud. It cannot be said that the Defendant's allegation of fraud is a mere assertion or that the Letter is not credible. I therefore find that it is not indisputable that the Certificates are not affected by fraud, and the Plaintiff has not provided me with a sufficient reason why the matter should not be referred to arbitration.

7.16 Nevertheless, the issue of fraud in this case related only to the Disputed Items. A finding that *prima facie* there was a *bona fide* dispute as to whether there was a fraud is not tantamount to a finding that fraud

had been established: there was no allegation of collusion or that the architect himself was privy to the fraud, if there was indeed fraud. Hence, there is no suggestion that apart from the Disputed Items, the other items were in any way infected by fraud: *H P Construction* at [66]. The learned Judicial Commissioner therefore granted a stay only in respect of the part of the claim which related to the Disputed Items but refused the stay in respect of the remaining sums claimed.

Limits of scope of certification

7.17 A separate argument advanced by the employer in its application for a stay of proceedings in *H P Construction* (above, para 7.11) was that the architect's certificates had included sums for extended preliminaries. Its submission was that these items should be characterised as loss and damage and therefore should fall outside the scope of the architect's certifying powers as provided under cl 31(14) of the SIA Conditions.

7.18 Leow JC considered that if a certificate is not issued in accordance with the contract, it can be regarded as a nullity. This may be treated as an additional exception to the exceptions of fraud, improper pressure and interference: *H P Construction* at [53]. However, he agreed with Warren Khoo J in *China Construction (South Pacific) Development Co Pte Ltd v Leisure Park (Singapore) Pte Ltd* [1999] 3 SLR(R) 583 that non-compliance is not always fatal, such as where there is evidence of waiver, in the absence of substantial vitiating factors.

7.19 For the reasons noted in the next section of this commentary, the learned Judicial Commissioner disagreed with the employer's submission that sums for extended preliminaries should be treated as amounts for loss and damages. In any case, he noted that in this case the extended preliminaries related to only two of the total of 46 items on the architect's instructions. Accordingly, the alleged discrepancies in the architect's instructions should not be regarded as substantial vitiating factors and the court would not "undermine the temporary finality of a certificate on such a minor point": *H P Construction* at [55].

Whether a claim for extended preliminaries constitutes a claim for loss and damage

7.20 It is useful to consider the basis for the court's ruling on the character of a claim for extended preliminaries in the context of the contract in *H P Construction*. The employer had relied on the decision of the English Technology and Construction Court in *Pitchmastic v Birse No 1* (unreported) (19 May 2000) ("*Pitchmastic*") in support of the

proposition that they should be treated as a claim for loss and damages arising from a breach of contract. In its case, there is no express provision in cl 31(14) of the SIA Conditions for the architect to certify these matters; consequently, these certifications must be a nullity.

7.21 In his judgment, Leow JC distinguished the case before him from *Pitchmastic* because that case was based on the UK DOM/2 standard form. In the case before him, cl 12(1) of the SIA Conditions expressly empowered the architect to issue instructions ordering variations and this included the valuation of preliminary items under cl 12(4). Furthermore, the Technology and Construction Court in *Pitchmastic* had noted that the claim for extended preliminaries could have been made under cl 13 of the subcontract if not for the fact that cl 13.3.7 had been varied to exclude variation instructions from its ambit. A claim for loss and expense does not necessarily mean that it is a claim for a breach of contract: *H P Construction* at [54]. For these reasons, the court dismissed the employer's submission on this point.

Novation

7.22 The subject of novation was considered by the Court of Appeal in *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd* [2014] 2 SLR 318 ("*Fairview*"). The dispute in that case relates to an agreement for architectural services entered into between a developer and a firm of architects sometime in 1983 ("the 1983 Agreement"). Under the agreement, the project to which architectural design services was related was for a conventional housing scheme but after the architects had secured the written permission for conventional housing, the developer instructed the architects to proceed with the design of the project as a cluster housing scheme. The partners of the architectural firm corporatised the firm and, on 3 April 2001, informed the developer that the business of the firm had been transferred to the incorporated entity. In 2009, the developer terminated the architect's services and asked for a letter of release. No reason for termination was cited.

7.23 In resisting the architect's claim for fees for abortive work and loss of profit for wrongful termination, the developer had argued, *inter alia*, that the novation which replaced the original architectural firm ("OOA") with the architect's incorporated entity ("OOPL") was ineffective. On this point, the architect had relied substantially on its letter of 3 April 2001. The letter had merely stated that "OOPL would succeed OOA" and would "handle and manage all … OOA projects and billings". The court decided that the novation was effective on these terms. Andrew Phang Boon Leong JA in his judgment explained (at [46]) the term "novation" as follows:

> The term 'novation' refers to the process by which the contract between the original contracting parties is *discharged through mutual consent* and *substituted with a new contract* between the new parties. A novation is therefore to be distinguished from an *assignment*. In a novation, *both the benefits and the burdens* of the original contract are transferred to the *new contracting parties*, essentially because, as just mentioned, the original contract is extinguished and a new contract is formed. And, as Lord Selborne LC observed in the House of Lords decision of *Benjamin Scarf v Alfred George Jardine* (1882) 7 App Cas 345 (at 351), the new contract can, of course, be either between the same parties to the original contract or between different parties … [emphasis in original]

7.24 In the same passage of the judgment, the term "novation" was distinguished from an assignment as follows (at [46]):

> In an assignment, however, *only the benefits of the contract* are transferred to the assignee. The assignor remains bound to perform the obligations under the contract. The assignee does *not* become a party to the contract, which continues to subsist as between the contracting parties. Accordingly, in an assignment, the consent of the other contracting party is *not* necessary for a contracting party to assign the benefits under the contract to a third party. [emphasis in original]

7.25 On the facts, the court held (at [48]) that the architect had in its letter of 3 April 2001 sought the developer's consent for the incorporated entity to step into the shoes of the original firm and, in their reply of 27 April 2001, the developer had unequivocally accepted the novation.

Consideration

7.26 One of the issues which had to be considered by the Court of Appeal in *Fairview* (above, para 7.22) was whether the novation in that agreement had been supported by sufficient consideration. The trial judge had held that there was insufficient consideration for the novation by analogising the facts to a debt situation. The Court of Appeal decided that this was unnecessary and indeed suggested (at [51]) that in so doing, the trial judge "had erroneously ventured into the issues of the adequacy of the consideration". In his judgment, Phang JA considered (at [51]) that such an approach was contrary to the general principle that the courts will only consider the sufficiency of the consideration and not the relative merits of the bargains that the parties had contracted for. He considered (at [43] and [51]) that a verbal assurance given by the architect to the developer on the continuity of the service for the project was sufficient for this purpose because "very little is required to find sufficient consideration in law". The Court of Appeal thus held that there was sufficient consideration for the novation.

Termination clause

7.27 In *Fairview*, one of the provisions of the 1983 Agreement provided that the architect's employment could not be determined without just cause. That being the case, the Court of Appeal found that the developer was not entitled to terminate the 1983 Agreement without disclosing any cause for the termination. The termination was, therefore, wrongful in the circumstances and the developer was liable for the architect's loss of profits arising out of the work on the remaining undeveloped land: at [57].

Determining amount to be paid for abortive work

7.28 Two other issues were determined by the Court of Appeal in *Fairview* (above, para 7.22) on the construction of the express terms of the contract. First, on the basis of the earlier letters exchanged between the parties, it was held that payment for abortive works should be calculated on the basis of 4.5% of the total construction cost since this had been expressly provided in the agreement. In the presence of such an express term, payment should not be made on a *quantum meruit* basis: at [82].

Time when limitation begins to run

7.29 Another issue in *Fairview* which turns on the contract related to the employer's argument that the architect's claim was time barred. The Court of Appeal rejected this argument because on the terms of the 1983 Agreement, the architect's entitlement to be paid would crystallise only when an invoice was issued and not upon the completion of each stage of work. In connection with this issue, the Court of Appeal considered (at [125]) that where there had been a valid acknowledgment of debt, a fresh action would accrue by virtue of s 26(2) of the Limitation Act (Cap 163, 1996 Rev Ed).

Damages for construction defects which had not been repaired

7.30 In *Ng Boo Han v Tan Boon Hiang Edward* [2014] SGHC 267 ("*Ng Boo Han*"), the appellants engaged the respondent to build a house at a price of $350,000 on a turnkey basis. The terms of the agreement were recorded in a simple written contract which provided for the works to be completed on or before 1 August 2011. The respondent was unable to complete the works by the stipulated date. Disputes arose between the parties and one of the issues before the court was the basis for determining the cost of rectifying the defects.

7.31 The High Court decided that the learned District Judge erred in dismissing the appellants' counterclaim for rectification costs merely because there were inconsistencies in their evidence on whether the repairs had been carried out. Edmund Leow JC referred to the principle settled in *Mahtani v Kiaw Aik Hang Land Pte Ltd* [1994] 2 SLR(R) 996 at [25] that the normal basis for determining damages for defective construction work is the cost of rectifying the work. He also considered that (*Ng Boo Han* at [61]):

> … [i]n cases where the cost of rectification is wholly disproportionate to the end to be attained, the diminution in the value of the property might be adopted as the measure of damages instead: *Ruxley Electronics and Construction Ltd v Forsyth* [1996] 1 AC 344 at 369 …

He then proceeded to observe (*Ng Boo Han* at [61]):

> But there has never been any rule that damages for defective work may only be awarded if the claimant proves that rectification works had in fact been carried out and paid for.

7.32 The learned Judicial Commissioner concluded that it is not essential for a claimant to have carried out rectification works before proceeding with a claim for defects in these cases and held that, where rectification works have not been carried out, damages may be awarded on the basis of the "estimated cost of rectification": *Ng Boo Han* at [61].

Frustration

7.33 During the year under review, the Court of Appeal had to consider once again the subject of frustration in relation to the Indonesian sand ban first imposed in 2007. The earlier cases on the same issue had led the courts to address a number of important points on the subject and many of these points were raised in *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] 3 SLR 857 ("*Alliance Concrete*").

7.34 In *Alliance Concrete*, the main contractor was awarded contracts for three construction projects in January 2007. They contracted with a supplier to supply ready-mixed concrete ("RMC") for all three projects. Sand is a key component of RMC and when the Indonesian sand ban took effect, the supplier had to look to the main contractor to procure sand from the stockpile of the Building and Construction Authority ("BCA"). Only main contractors with ongoing projects were entitled to procure sand from the BCA sand stockpile. Although the main contractor in this case procured sand from the BCA stockpile and passed it to the supplier, there was a significant shortfall between the quantity of sand required by the supplier to meet the main contractor's orders and the quantity of sand supplied by the main contractor through

the BCA stockpile. Parties began to argue whether the shortfall was caused by the supplier failing to take delivery of the sand or the contractor failing to properly deliver the sand. Disputes also arose from the price of the sand. The cost of sand from the BCA stockpile was $25 *per* tonne while the cost of sand prior to the sand ban was $20 *per* tonne. Each party alleged that the other had breached the supply contracts. The main issue before the Court of Appeal was whether the circumstances operated to frustrate the contracts.

7.35 The Court of Appeal reversed the decision of the High Court and held that the contracts were frustrated on account of the sand ban. In delivering the judgment of the court, Andrew Phang Boon Leong JA stated (at [33]) that the doctrine of frustration operates to automatically discharge both parties:

> … from their contract *by operation of law* because, *without* the default of either party, *a supervening event* that has occurred *after* the formation of the contract renders a contractual obligation *radically or fundamentally different* from what has been agreed in the contract. [emphasis in original]

He agreed, that in these cases, a multi-factorial approach is required and that among the factors to be considered are (at [37], citing *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd* [2007] 2 Lloyd's Rep 517 at [111], *per* Rix LJ):

> … the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.

7.36 The learned judge emphasised (at [38] and [39]) that the doctrine of frustration is an exception to the norm of sanctity of contract and, as a consequence, must be strictly applied. One instance of frustration is where the situation has rendered the performance of a contract impossible (even though literal impossibility is usually not required). Another situation is where the subject matter is derived from a specific source and that source turned out to be unavailable. Three scenarios may be distinguished in the latter situation:

> (a) In Scenario A, the source is expressly stated in the contract.
>
> (b) In Scenario B, only one party intended an unspecified source.

(c) Scenario C is where both parties contemplated an unspecified source.

7.37 In the event of the failure of the source, the doctrine of frustration operates to discharge the contract in Scenario A but not in Scenario B: at [49]–[52]. While there is no conclusive authority on whether frustration arises in Scenario C, Phang JA considered that on the applicable principles, frustration only applies to discharge the contract in this scenario because it had been preceded by a radical change in the expectations of parties. In this scenario, notwithstanding that the source was not specified in the contract and strict performance of the contract was still technically feasible, the contract could not be said to be the same as that originally entered by the parties: at [53]–[56].

7.38 On these principles, the Court of Appeal held that the subject contracts were frustrated by the sand ban. The judgment noted (at [62]) that the sand ban was an unforeseen supervening event that was not within the reasonable control of either of the parties. Both parties contemplated the use of Indonesian sand. This derives from the evidence that the market as a whole considered that Indonesia was the only source of sand; the project owners indicated their preference for Indonesian sand and the source of sand used to produce the RMC was important because this determined the design mix of the RMC: at [72]–[77]. Finally, there was no evidence suggesting that the supplier was acting unreasonably in failing to take delivery of the stockpile sand from the contractor: at [92].

Security of payment

A payment claim has to state the claimed amount

7.39 In *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142, a subcontractor served a payment claim stating that the cumulative value for work done from the start of the project until August 2013 was $6,152,032.37. However, it did not specify the claimed amount. The main contractor served a payment response on 30 September 2013 stating that the cumulative value of work done was $5,608,268.53 and that the amount certified for August 2013 was $695,370.76. In the adjudication application, the claimed amount was stated as $897,889.83. Before the adjudicator, the main contractor argued that the payment claim was invalid because it failed to specify the claimed amount for the reference period. The adjudicator agreed that the payment claim was not in order but found that the main contractor had conceded the certified amount of $695,370.76 and only rejected that part of the claim of $1,328,536.83 that was in excess of the certified amount.

7.40 Nevertheless, the court held that the payment claim was invalid because it did not state the specific claimed amount for the reference period. Tan Siong Thye J considered (at [26]) that on a proper reading of s 10(3) of the SOP Act, "Parliament had mandated that the payment claim must state the claimed amount". The learned judge said in the course of his judgment (at [28]):

> Here, it was not a situation whereby the figures provided in the payment claim would allow a person to logically ascertain what the actual claimed amount was at that point in time. There was no indication of the amount claimed. It was later at the adjudication application that figures were hand written and labelled as 'Amount approved previously' and 'Retention 10%'. These were added on in the amended payment claim. The amounts also did not correspond with any of the numbers in the Plaintiff's payment response. Thus, the Plaintiff would not have known the Defendant's claimed amount for the month of August 2013. In short, it was impossible for the Plaintiff to have figured out what was the Defendant's actual claim in its payment claim.

7.41 The statement of the claimed amount is a basic requirement which goes to the jurisdiction and hence affects the validity of the adjudicator and his competence to hear the adjudication. Accordingly, the learned judge held (at [32]) that no defence or estoppel may be relied upon by the subcontractor.

Service of payment claim by e-mail

7.42 Communications by e-mail are very much part and parcel of modern commerce but this mode of service is not expressly provided in s 37(1) of the SOP Act. This point was raised before the learned assistant registrar of the High Court in *Qingjian International (South Pacific) Group Development Co Pte Ltd v Capstone Engineering Pte Ltd* [2014] SGHCR 5 ("*Qingjian International*"). In that case, the subject payment claim was served by way of e-mail and it was argued that this was not one of the modes of service expressly prescribed in s 37(1) of the SOP Act which states as follows:

> Where this Act authorises or requires a document to be served on a person, whether the expression 'serve', 'lodge', 'provide' or 'submit' or any other expression is used, the document may be served on the person —
>
> (*a*) by delivering it to the person personally;
>
> (*b*) by leaving it during normal business hours at the usual place of business of the person; or
>
> (*c*) by sending it by post or facsimile transmission to the usual or last known place of business of the person.

7.43 The learned assistant registrar noted that in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng* [2013] 1 SLR 401 ("*Chua Say Eng*"), the Court of Appeal considered that s 37(1) of the SOP Act does not purport to be an exhaustive list of the permissible modes of service of documents under the Act. The use of the permissive "may" rather than the mandatory "shall" or "must" suggests that "other modes of service may also be possible": *Qingjian International* at [55]–[56]. In any case, it would be open to parties to agree on a particular mode of service which they consider expedient for their circumstances: at [57].

Repeat claims

7.44 Until last year, there was a divide in judicial views on the validity of repeat claims. The debate began with the decision of an assistant registrar in *Doo Ree Engineering & Trading Pte Ltd v Taisei Corp* [2009] SGHC 218 ("*Doo Ree*") where it was held that on a particular reading of s 10(1) of the SOP Act, a claimant is only entitled to make a single payment claim on work which had been carried out and this in turn permits the claimant only one opportunity to apply for adjudication. This decision was followed in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157. However, a chorus of opinions gradually gathered for the proposition that a repeat payment claim can be referred to adjudication except for aspects of the claim which had been adjudicated on its merits. The latter views were expressed *obiter* by *Chua Say Eng* and subsequently by the High Court in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 ("*Vivaldi*"). Both *Chua Say Eng* and *Vivaldi* were followed subsequently by the assistant registrar of the High Court in *Associate Dynamic Builder Pte Ltd v Tactic Foundation Pte Ltd* [2013] SGHCR 16.

7.45 During the year under review, the High Court finally settled the issue in *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648 ("*LH Aluminium*"). This case concerns a subcontract for aluminium and glazing works for a building project. On 22 June 2013, the subcontractor served on the main contractor "Payment Claim No 24" for a sum of $631,683.71. The main contractor responded by issuing a payment response for the sum of $0. The same "Payment Claim No 24" was served on three more occasions and on each occasion the main contractor issued a payment response for the same response amount. On 2 December 2013, the subcontractor served "Payment Claim No 24" for the sum of $631,683.71 expressed to be in respect of work done up to 22 November 2013 ("the Final Payment Claim"). Once again, the main contractor issued a payment response for the sum of $0 on 20 December 2013 ("the Final Payment Response"). This time round, the subcontractor proceeded to lodge an adjudication application on 3 January 2014, pursuant to which the main contractor submitted an

adjudication response on 13 January 2014. The adjudication determination was made on 7 February 2014 in favour of the subcontractor.

7.46 One of the main contractor's grounds of contention was that the payment claim was a repeat claim made in breach of s 10(1) of the SOP Act. It was pointed out that the payment claim merely "repeat[ed] an earlier claim without any additional item of claim". The subcontractor argued that the main contractor was estopped from challenging the validity of the payment claim because this point had not been raised in either the payment response or the adjudication response. In his judgment, Lee Seiu Kin J took the view (at [46]) that s 10 of the SOP Act "is equivocal as to whether a repeat claim is permitted and [that the subject] is a matter of judicial policy in interpreting the Act so as to achieve its objectives". After reviewing the pronouncements on this subject by the Court of Appeal in *Chua Say Eng* (above, para 7.43) as well the decision of Woo Bih Li J in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* and the decision of Quentin Loh J in *Vivaldi*, he noted the policy considerations arising from this issue. On the one hand, he accepted that by allowing repeat claims there is a risk that the clamant may "ambush the respondent by repeatedly serving the same payment claim month after month" as in the case before him: *LH Aluminium* at [46]. However, if repeat claims are prohibited, there are also disadvantages (*LH Aluminium* at [47]):

> [A] claimant would be persuaded to apply for adjudication or forever forego recourse to adjudication in respect of the works under that payment claim. This would also lead to many more applications for adjudications in cases where the payment response rejects a substantial portion of the payment claim. By permitting repeat claims, there is a cooling off period during which the claimant can assess his options or monitor developments and still have the option of resurrecting his right to adjudication by submitting a repeat claim.

7.47 The learned judge proceeded to describe the benefits and pitfalls as "finely balanced" but concluded that "permitting repeat claims is the lesser evil": *LH Aluminium* at [48]. At any rate, he considered the views expressed in *Chua Say Eng* (notwithstanding that it was *obiter dicta*) to be "too deeply entrenched to be changed": *LH Aluminium* at [48].

Hours for the filing of matters under the SOP Act

7.48 Another important decision during the year deals with the subject of filing hours for matters under the SOP Act. In *Mansource Interior Pte Ltd v Citiwall Safety Glass Pte Ltd* [2014] 3 SLR 264, following the lodgement of an adjudication application by a subcontractor, the main contractor filed its adjudication response with

the Singapore Mediation Centre ("SMC") (in its capacity as the authorised nominating body) at 4.32pm on the day appointed for the lodgement. Rule 2.2 of the SMC's Adjudication Procedure Rules ("SMC Rules") stipulates that the "opening hours" of the SMC are from 9.00am to 4.30pm on weekdays and that any document lodged after 4.30pm shall be treated as being lodged the next working day. In the ensuing adjudication, the adjudicator decided that on the basis of r 2.2, the adjudication response was deemed to be lodged on the next day; hence, the main contractor failed to file the adjudication response within the seven-day time limit stipulated by s 15(1) of the SOP Act. In his adjudication determination, the adjudicator only considered the subcontractor's written submissions attached to the adjudication application and did not consider the main contractor's adjudication response. As a consequence, he allowed nearly the entire amount claimed by the subcontractor. The main contractor failed before the assistant registrar in its application to set aside the adjudication determination.

7.49 In allowing the appeal against the decision of the assistant registrar, Tan Siong Thye JC (as he then was) accepted (at [15]) that the word "day" should be understood to mean "any period of 24 hours beginning with one midnight and ending with the next". As a result, he ruled (at [15]) that as long as the adjudication response is lodged on or before 2359hrs on the last day of the prescribed period, "then it is lodged within time". Since the adjudicator had, in this case, wrongly rejected the adjudication response, the learned Judicial Commissioner held (at [28]–[29]) that the main contractor was denied the opportunity to be heard and the adjudication determination should be set aside on the basis that there had been a breach of the rules of natural justice.

Jurisdiction of the court in a setting aside application

7.50 During the course of the year, the Court of Appeal had to consider whether the subcontractor in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 ("*Citiwall Safety Glass*") was required to obtain leave before filing an appeal against the decision of the High Court in that case. In *Citiwall Safety Glass*, in response to the notice of appeal filed by the subcontractor, the main contractor took out a summons to strike out the notice of appeal, *inter alia*, on the ground that the subcontractor failed to obtain the requisite leave of appeal under s 34(2)(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

7.51 The Court of Appeal dismissed the main contractor's summons. In the course of its judgment, it agreed with the position stated in a textbook (at [35], citing Chow Kok Fong, *Security of Payments and*

Construction Adjudication (LexisNexis, 2nd Ed, 2013) at para 18.94) that the term "court" as used in s 27 of the SOP Act is capable of referring to a Magistrate's Court, a District Court or the High Court. The court further agreed (at [45]) that a court is exercising its supervisory jurisdiction in hearing and determining an application to set aside an adjudication determination and/or a s 27 judgment. Sundaresh Menon CJ considered (at [48]) that "any setting aside must be premised on issues relating to the jurisdiction of the adjudicator, a breach of natural justice or non-compliance with the SOPA". The court is not concerned with the "procedural propriety of the process". Menon CJ elaborated in the following passage of his judgment (at [49]):

> This is because focusing only on the procedural propriety of the process by which the creditor obtained its s 27 leave order would not address the real concern of the debtor, which is to set aside the underlying AD and/or the s 27 judgment entered pursuant to that AD. Instead, the court, in hearing such a setting-aside application, is concerned with the propriety of the AD itself (that is to say, with issues relating to the jurisdiction of the adjudicator, including non-compliance with the SOPA, and procedural propriety in the adjudication, including whether there was a breach of natural justice). These go beyond the usual concerns which the court takes into account in deciding whether an order obtained pursuant to an *ex parte* application should be set aside for non-disclosure.

Only the respondent can be made to pay the adjudicated amount

7.52 It was settled during the year under review that the best result for a respondent in adjudication is that the claimant is not entitled to be paid. Thus, in a situation where the respondent succeeds in a counterclaim and the counterclaim exceeds the claimed amount, there is no mandate for an adjudicator to order the claimant to pay the difference to the respondent.

7.53 In *Quanta Industries Pte Ltd v Strategic Construction Pte Ltd* [2015] 2 SLR 70, the claimant subcontractor submitted a payment claim for a sum of $561,693.14. The respondent main contractor issued a payment response for a negative amount of $155,891.63. In his adjudication determination, the adjudicator ordered the claimant to pay the respondent the adjudicated sum of $141,508.56. The High Court set aside the determination.

7.54 In his judgment, Chan Seng Onn J examined the provisions of s 17(2)(*a*) of the SOP Act and noted that this only empowered the adjudicator to determine the amount to be paid by the respondent to the claimant. By determining that the claimant should make payment to the respondent, the adjudicator had acted in excess of the powers conferred

on him by the Act. He agreed with the observation made in a textbook (at [11]) that:

> … the best result for a respondent in an adjudication is a determination by the adjudicator that the claimant is not entitled to be paid any part of the subject payment claim.

7.55 Interestingly, the respondent in this case candidly admitted that the adjudicator fell into error and that the adjudicator had no power to determine that the claimant refund the respondent for the amount that had been allegedly overpaid. However, they argued that the adjudication determination should not be set aside because, *inter alia*, "there were no live issues between the parties" as they had assured the claimant that it would not ask the claimant to make payment: at [12]. Chan J disagreed because until the adjudication determination was set aside, the potential for the plaintiff to be sued on it remained a real prospect. More critically, the flawed adjudication determination had the effect of preventing the claimant from applying for further adjudication: at [16].

7.56 The respondent had also argued in the alternative that s 27(5) provides for "any party to an adjudication" to apply to set aside an adjudication determination. Chan J rejected the respondent's submission that this recourse was only open to the respondent. He considered (at [19]) that since (as decided by the Court of Appeal in *Citiwall Safety Glass* (above, para 7.50)) a court exercises its supervisory jurisdiction in hearing and determining an application to set aside an adjudication determination, "it is unthinkable that this jurisdiction is only exercisable when the respondent makes the application".

7.57 The court further held that the claimant is not required to make payment into court as a condition for its application under s 27(5). The learned judge noted that the term "adjudicated amount" is defined in s 2 of the Act as "the amount of a progress payment that is determined to be payable under section 17 or 19 as the case may be". In ss 17(2)(*a*) and 19(5)(*a*), the term "adjudicated amount" can only refer to amounts determined to be paid by the respondent to the claimant. Any sum to be paid by the claimant to the respondent would not, therefore, constitute an "adjudicated amount" for the purpose of s 27(5): at [22].

PART B

Introduction

7.58 In this part, three areas are reviewed. First, the ever growing importance in contribution by the construction industry is the area of construction torts. In particular, a "healthy" growth of cases would not

be unexpected in respect of negligence claims relating to breaches of the Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed) ("WSHA") regime given the high number of accidents on construction site and the potential damage that may be caused through accidents. The cases are beginning to compel the courts to explore the scope of not only the parent WSHA but the numerous pieces of subsidiary legislation.

7.59 The second area is the role of expert evidence in construction arbitration. A timely reminder comes in the form of a case whereby an application to set aside an arbitral award was made because of the introduction of expert evidence that was alleged to be excluded by the agreement of the parties and therefore was introduced by the supposed failure by the arbitral tribunal to comply with the agreed procedural rules of arbitration, which had set the ground for the application to set aside the arbitral award.

7.60 The third area has taken some time to make its appearance in court presumably because of the introduction of statutory adjudication through the SOP Act that allowed contractors and subcontractors an avenue to claim payment for construction work done, which was supposed to be cheap and fast but appears to be proving in certain cases to be getting expensive since the preparation for the payment claim documentation and subsequent statutory adjudication has been on the rise. The temporary finality status of the architect's interim certificate of payment issued pursuant to the current edition of the SIA form of building contract was affirmed by two High Court and one Court of Appeal decisions, the latter to be reviewed in the next Ann Rev.

Construction torts

7.61 Three cases which have been concerned with safety laws are examined – one from the Court of Appeal and two from the High Court. Together they are shaping the development of the current trend where one single test is used in three areas of tort, namely negligence, breach of statutory duty and occupiers' liability. In particular, the WSHA regime has come under greater scrutiny, and is shaping the perimeters for consideration in negligence suits that are regulated by the WSHA regime.

Jurong Primewide Pte Ltd v Moh Seng Cranes Pte Ltd *[2014] 2 SLR 360 ("*Jurong Primewide*")*

7.62 The action in this case included claims in contract and negligence relating to the collapse of a mobile crane. In this review, only issues concerning negligence are examined. At the High Court, the appellant was found solely liable in negligence. On appeal, the appellant

disputed the judge's factual findings on three matters and therefore the final outcome. Before the Court of Appeal, the issue of negligence was reviewed in respect of all the parties, namely, (a) the main contractor (Jurong Primewide Pte Ltd); (b) what in the construction industry is known as the building subcontractor (MA Builders Pte Ltd); (c) the crane supply subcontractor (Moh Seng Cranes Pte Ltd); and (d) the crane owner and operator subcontractor (in this case his position is that of sub-subcontractor) (Hup Hin Transport Co Pte Ltd).

7.63 It is instructive to note the following were considered by the Court of Appeal. First, this is one of many post- *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") cases that have seen the courts applying the *Spandeck* test for negligence. Second, as the case concerns a breach of statutory duty under the WSHAregime of statutory laws, the Court of Appeal had referred to two cases, namely, *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 and *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 ("*Tan Juay Pah*"). However, the claim was not made under breach of statutory duty. Third, as the appellant was the main contractor, it was an occupier under both common law and the WSHA. Accordingly, reference was made to the case of *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 ("*See Toh Siew Kee*") where the Court of Appeal had established that the "law in Singapore on occupiers' liability can and should be subsumed under the tort of negligence": *Jurong Primewide* at [47], citing *See Toh Siew Kee* at [76]. However, the claim was not made under occupiers' liability.

7.64 Indeed, this case is important because it gives an overview of the approach taken by the Court of Appeal in merging the legal principles of negligence, breach of statutory duty and occupiers' liability in the face of facts in the case that encompassed the three causes of action although the action was based on negligence. The main contractor's 100% negligence liability was reduced to 60% while the building subcontractor was found to be 40% liable. Both the crane supply subcontractor and the crane owner and operator subcontractor were found not to be liable because there was no causative link between their respective acts and omissions and the collapse of the mobile crane.

7.65 The crane owner and operator subcontractor had claimed for damages caused to its mobile crane which collapsed into a concealed manhole at the worksite. Two factual disputes were put before the Court of Appeal (*Jurong Primewide* at [23]):

> (a) whether the Lifting Supervisor was representing [the main contractor] or [the building subcontractor] at the time of the accident; and (b) whether [the main contractor]'s Safety Officer had given

> certain instructions to [the crane operator, crane owner and operator subcontractor] on the morning of the accident.

Having reviewed the evidence, the Court of Appeal reversed the findings of the High Court. Therefore, it was found that the lifting supervisor concerned was first seconded to the main contractor but at the time of the accident, the lifting supervisor was employed by the building subcontractor. Further, it was also found that the main contractor's safety officer did not give any instruction to the crane operator to remove the crane from the danger area. This then set the stage for the change in the composition of liability between the main contractor and the subcontractor from the ratio of 100:0 to that of 60:40.

7.66 A review of evidence at an appeal that influences a reversal of the decision in the court of first instance is not frequent in occurrence. Understandably, this case highlights the difficulty that a lawyer and an assessor of evidence potentially face since evidence is from several different sources and of different quality. The Court of Appeal, in its review of the evidence, found, contrary to the High Court, that (a) the building subcontractor did have, or at least should have had, knowledge of the manhole (*Jurong Primewide* at [59]); and (b) the lifting supervisor, who was the employee of the building subcontractor at the time of the accident and who was the key person in the entire lifting operation, had breached the standard of care set out in the Singapore Standard SS 536:2008 Code of Practice for the Safe Use of Mobile Cranes for the safe use of mobile cranes: *Jurong Primewide* at [63]. Accordingly, the building subcontractor was found to be also negligent in addition to the main contractor: *Jurong Primewide* at [66]. An interesting note would be the not insignificant reliance on the evidence in the form of the Ministry of Manpower's ("MOM") representative who interviewed the various persons on sight: *Jurong Primewide* at [28], [29], [46], [55] and [64].

7.67 This case builds upon the principles pronounced in *Tan Juay Pah* (above, para 7.63) where the Court of Appeal found that one of the named persons involved in the WSHA regime, the authorised examiner, did not owe any duty of care to contractors and subcontractors as the authorised examiner is not identified as part of the main category of persons whereby statutory responsibility for safety and health is imposed by Pt IV of the WSHA. In this case, the court held that contractors and subcontractors, who may take on the role(s) of employers, occupiers and principals identified in Pt IV of the WSHA, have "primary responsibility" in all areas of safety, given their "operational control" of workplaces: *Jurong Primewide* at [41]. Further, the court noted (*Jurong Primewide* at [41]) that:

> In fact, it would be very hard to think of situations where sufficient proximity to give rise to a common law duty of care will not be found

> to exist due to the control contractors and subcontractors have over the worksite and the on-going activities on it.

7.68 With the issue of the duty of care imposed on the main contractor and the building subcontractor established, it is then useful to note the court's comments on the factors for consideration in establishing the standard of care required. The court first made reference to the general objective standard of a reasonable person using ordinary care and skill and added that factors such as industry standards and normal practice can be taken into account at this stage: *Jurong Primewide* at [43]. In particular, the court held (*Jurong Primewide* at [43]) that:

> … the industry standard guidance provided by the Singapore Standard SS 536 2008 Code of Practice … for the safe use of mobile cranes would be applicable here.

7.69 The Court of Appeal might have missed the opportunity of considering two other factors in calibrating the standard of care required in cases governed by the WSHA regime: (a) the general standard imposed by the WSHA requiring those responsible to take *reasonably practicable measures*; and (b) the measures and steps taken in response to the risk assessment exercise required by the Workplace Safety and Health (Risk Management) Regulations (Cap 354A, Rg 8, 2007 Rev Ed) imposed only on the prescribed persons, which include the main contractor and subcontractor as employer, principal and/or occupiers.

7.70 However, two important factors were reviewed by the Court of Appeal. First, the status of the main contractor as an occupier was noted and examined as part of the circumstances for determination of whether the main contractor was negligent: *Jurong Primewide* at [46]. The court held (*Jurong Primewide* at [47]):

> (a) "As an 'occupier' under the WSHA, JPW [that is, the main contractor] could not expect to abrogate from its duty to ensure safety at the worksite simply by looking at the strict contractual arrangements between the parties".
>
> (b) "[A] distinction between a general duty of care owed by an occupier *vis-à-vis* the land (occupier's liability) and *vis-à-vis* the operations being carried out (negligence) … has already ceased to exist with this court's decision in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd and others* [2013] 3 SLR 284 … where it was emphatically established that the 'law in Singapore on occupiers' liability can and should be subsumed under the tort of negligence' (at [76])". This point is particularly apt for cases relating to the occupier breaching its statutory duty under

s 11(*a*) because the duty of the occupier under the WSHA is not limited to static premises but provides for the occupier to also:

> … take, so far as is reasonably practicable, such measures to ensure that the workplace [is] safe and without risks to health to every person within those premises, whether or not the person is at work or is an employee of the occupier.

(c) "[T]he first limb of *Spandeck* … would be satisfied in the vast majority of occupiers having control of the property which they occupy and/or the activities carried out there (at [80])" although "'this turns on the degree of control which an occupier has over the property concerned and/or the activities carried out there' (at [80])".

Unfortunately, the position of the principal under s 14 in the WSHA appeared not to have been reviewed in the case. By s 14 and defined in s 2 of the WSHA, the principal could be the main contractor, the main management contractor, as well as the party who engaged the main management contractor in this case.

7.71 Second, the impact of the subcontract between the main contractor and the building subcontractor in determining whether the main contractor, as against a subcontractor, owes a duty of care to the crane owner and operator subcontractor. The court held that:

(a) "[A]n 'occupier' under the WSHA … could not … abrogate from its duty to ensure safety at the worksite by looking at the strict contractual arrangements between parties": *Jurong Primewide* at [47]. This issue concerns the age-old confusion between what is permissible delegation of work and what is non-delegable responsibility.

(b) "On the second limb of *Spandeck*, JPW's argument that a duty of care should not be superimposed where there had been an established contractual framework consisting of the hiring contract between Hup Hin [that is, the crane supply subcontractor] and Moh Seng [that is, the crane owner and operator sub-subcontractor], the subcontracts between MA [that is, the building subcontractor] and JPW, and the crane supply contract between Hup Hin and JPW simply could not stand. From a legal policy point of view such an approach is plainly unpalatable": *Jurong Primewide* at [49]. This conclusion was arrived at after considering the parliamentary speech at the first reading of the Workplace Safety and Health Bill where the Minister tabling the bill had said (*Jurong Primewide* at [49]):

> ***The Bill thus places on him [principal] responsibility for the worker's safety and health as if he were the employer.*** If this were not the case, then the *duties under the Act could be*

> *simply circumvented by a careful crafting of the legal relationship*. [emphasis in italics and bold italics added by the Court of Appeal]

Lum Hon Ying v Buildmart Industries Pte Ltd *[2014] SGHC 136*

7.72 This decision of the High Court was in respect of two cases tried together involving the same accident whereby one person was killed and another was injured while attending a site meeting at the site office by the falling of a load weighing 500kg that was being hoisted by the tower crane which load was passing overhead of the site office: at [20] and [21]. The two plaintiffs relied on negligence and breach of statutory duty to recover damages. In particular, they relied on the doctrine of *res ipsa loquitur*. Judgment was given to the plaintiffs with the two defendants, the main contractor and the crane supply subcontractor, being found jointly and severally liable and each to bear 50% of the liability: at [56] and [57].

7.73 After making reference to the Court of Appeal's decision in *Tan Juay Pah* (above, para 7.63) that the WSHA is intended to protect persons present at workplaces from safety lapses by contractors and subcontractors (at [45]), the court held that (at [46]):

> On the facts here, it is clear that Chiu Teng as main contractor and employer of the lifting team and Buildmart as the supplier and provider of maintenance service for the tower crane owed a duty of care to Lum and to Lim who were lawfully at the worksite on 29 September 2009 although they were not employees of Chiu Teng or of Buildmart.

7.74 The court had relied on the following:

> (a) "the fact that the load could fall onto the site office showed that there was no proper delimiting [of the lifting arc of the crane's jib] or perhaps none at all" on the part of Buildmart, the crane supplier subcontractor (at [48]);
>
> (b) "the Matcor Report's conclusion that improper seizure was one of the reasons why the wire rope failed" thereby causing the load to fall during the lifting process and in particular, the failure of Buildmart to properly apply the clamping mechanism which was alleged to be far superior to normal seizure was accepted by the court (at [49]);
>
> (c) "[t]he failure by Buildmart to properly maintain the tower crane's wire rope could not be disputed in the light of its admissions in the criminal proceedings" (at [50]); and
>
> (d) "[t]he tower crane operator employed by Chiu Teng breached reg 16(i) of the Workplace Safety and Health

> (Operation of Cranes) Regulations 2011 which states that it is the duty of a crane operator not to manoeuvre or hold any suspended load over any public road or public area unless that road or area has been cordoned off. The site office was a public area where a meeting involving Lum and Lim was in progress that morning": at [52].

The not insignificant reliance on the evidence provided by the MOM appears to feature in every case concerning the breach of WSHA regime. In this case, the evidence concerned is through the accident report commissioned by the MOM called the Matcor Report. It would beg a few questions, including the need to quickly process the criminal actions in order for the related civil action to take place and whether parties in the civil action should proceed with engaging their own experts that would likely duplicate the work of the report commissioned by the MOM which in itself poses a real challenge since some of the items required for scrutiny by experts may be in the hands of the MOM.

Chen Qiangshi v Hong Fei CDY Construction Pte Ltd *[2014] SGHC 177*

7.75 This case is a post-*Jurong Primewide* case where the Court of Appeal in that case established for the first time that contractors and subcontractors owe the workers on-site a duty of care under the WSHA regime. A similar approach was taken in this case in the review of the roles of the contractor and the subcontractor with two differences. First, more roles under the WSHA regime were examined. Second, the issues of vicarious liability and contributory negligence were also examined.

Roles under the WSHA regime

Contractor

7.76 It was held by the court that the contractor "had sufficient control such as to make him an occupier" under the WSHA (at [136]) and owed a duty of care to the plaintiff as an occupier: at [141] and [145]. The contractor was also made statutorily "responsible for the conduct and execution of lifting operations at the Worksite" because:

> (a) the contractor had applied for "daily lifting permits, which were a regulatory necessity under the Workplace Safety and Health (Construction) Regulations 2007 (Cap 354A) ('the Construction Regulations')" (at [137]);
>
> (b) "the entire lifting crew (including the tower crane operator and the riggers/signalmen) set out in the daily lifting permits took instructions from and were controlled by the

lifting supervisor", who was under the employment of the contractor (at [138]);

(c) the contractor was "Under the Workplace Safety and Health (Operation of Cranes) Regulations 2011 (Cap 354A) ("the Crane Regulations"), a principal who directs a person to operate a crane in a workplace [and] is responsible for appointing a lifting supervisor (reg 17(1) read with reg 2(b) of the Crane Regulations)" (at [139]); and

(d) accordingly, the "'responsible person' under reg 2(*b*) of the Crane Regulations" has a statutory duty under reg 4(1) "to establish and implement a lifting plan which shall be in accordance with the generally accepted principles of safe and sound practice": at [151].

Therefore, the court concluded (at [156]) that "[t]he contractor is responsible for creating and enforcing an effective system of risk assessment, management and supervision".

7.77 Another role of the contractor examined by the court for imposing a duty of care on the contractor in respect of the worker (who was the plaintiff in this case) was that of an employer under s 12(2); not in respect of the contractor's employees, but in respect of "persons (not being his employees) who may be affected by any undertaking carried on by him in the workplace": at [142]–[145].

Subcontractor

7.78 The subcontractor's role was that of employer. The question isolated by the court was "whether there was a breach of the … duty of care … to take adequate care in ensuring that there was proper supervision of the rebar workers": at [158]. It was held by the court (at [114]) that:

(a) An employer owes directly to its employees a "non-delegable duty to take care of health and safety of its employees": see also [134] and [145].

(b) An employer is vicariously liable for the breach of any duty which one employee owes to another employee.

Vicarious liability

7.79 In examining the factual matrix of the accident, two persons played roles that contributed to the accident: namely, the lifting supervisor, whose statutory duties are set out in reg 17(3) of the Workplace Safety and Health (Operation of Cranes) Regulations 2011 (S 515/2011) ("Crane Regulations") (at [153]); and the rigger, whose

statutory duties are set out in reg 18(4) of the Crane Regulations: at [154]. It was held by the court (at [156]) that "the duties of the persons on the ground actually carrying out such activities" are prescriptive duties "imposed on the rank and file workers executing activities on the ground".

7.80 In this case, the lifting supervisor was employed by the contractor (at [140] and [191]) and the rigger was employed by the subcontractor (at [139]), yet at the same time, the rigger was the contractor's "employee *pro hac vice*" (at [196]) and the contractor and subcontractor were held to be vicariously liable for the breaches of the lift supervisor and rigger respectively: at [162], [191] and [192]. Given the factual situation, the learned judge said (at [200]) that although "[d]ual vicarious liability was not addressed in the submissions, I nonetheless agree in principle that vicarious liability can be borne by two employers in the appropriate cases".

Contributory negligence

7.81 The court started by reminding itself (at [204]) that "[c]ontributory negligence arises where a claimant has acted in a careless manner that has contributed in part to the loss that was suffered" and that:

> … [t]here is no need for the defendant to show that a claimant has breached a legal duty of care, as is necessary in a claim for negligence (Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) ("*The Law of Torts in Singapore*") at para 7.071).

7.82 The court had taken the following points into consideration before reducing the contractor's and subcontractor's liability to 50%:

> (a) "It has been said that the court is slower to find contributory negligence in cases of breach of statutory duty, as opposed to negligence": at [221].
>
> (b) "[T]he English courts have drawn a dichotomy between situations of 'momentary inattention' referred to by Lord Tucker and situations where a risk has been consciously accepted by an employee": at [222].
>
> (c) "[T]he law tends, on balance, to lean in favour of the employee who had suffered damage due to the employer's negligence. Where the negligence of the employer related to the failure to ensure that there was a safe system of work, the fact that an employee took a risk or made an error of judgment does not inevitably support a heavy finding of contributory negligence (or at all)": at [223].

(d) "[I]n carrying out his duty to provide a safe system of work, an employer must take 'the employee's carelessness in relation to safety into account when devising a safe system of work'. Thereafter it behoves the employer to take reasonable care to see that the system is complied with. These observations are relevant not just in determining whether the employer has breached his duty of care. They are also pertinent in determining whether there is contributory negligence by the employee and, if so, the degree as compared to the negligence of the employer": at [224].

Expert evidence in construction arbitration

Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd *[2015] 1 SLR 114*

7.83 This case is interesting because it reminds arbitrators and lawyers acting in arbitrations that whereas the procedures in court are governed by the rules of court, the treatment of expert evidence in an arbitration may be governed by the parties' agreement or, by default, the parties' agreement, the arbitration rules of arbitral bodies and/or the mandatory provisions of the applicable arbitral laws. In short, navigating the sea of arbitral rules could be more challenging because of the autonomy given to the parties to agree on including, controlling or dispensing with expert evidence. Given that most if not all construction disputes would require the support of expert evidence, this case comes as a useful reminder.

7.84 There was an application to set aside the arbitral award, *inter alia*, on the ground that the arbitral tribunal admitted expert evidence in breach of the parties' arbitral procedure as permitted by Art 34(2)(a)(iv) of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration under the International Arbitration Act (Cap 143A, 2002 Rev Ed). At the end of the trial, the court decided that there was no agreed procedure to dispense with expert evidence and the application was dismissed: at [88].

7.85 However, it is instructive to bear in mind the relevant principles discussed by the court in the treatment of expert evidence in an arbitration. The court held that:

(a) "In the absence of any procedural agreement, Art 19(2) of the Model Law gives the arbitral tribunal wide procedural powers to determine the applicable rules of evidence on admissibility, relevance, materiality and weight of any evidence": at [47]. This provision would include expert evidence. Accordingly, parties may agree to include, exclude or manage

the expert evidence and on default of agreement, the tribunal has the power to do so. This agreement may be by way of agreeing to the institutional rules that govern arbitration: at [47].

(b) "Arguably, an agreement to dispense with expert evidence may be regarded as a procedural agreement. Once the parties have agreed upon the procedure to be adopted for the arbitration, the arbitral tribunal will be obliged to conduct the arbitration in accordance with the procedure agreed by the parties": at [49].

Construction dispute and summary judgment

H P Construction *and* GTMS Construction Pte Ltd v Ser Kim Koi *[2015] 1 SLR 671*

7.86 The two recent cases that involved successful recovery of moneys by contractors based on the SIA Articles and Conditions of Building Contract (Lump Sum Contract) (9th Ed, August 2011) and the continued recognition of the architect's interim certificates of payment's temporary finality status as agreed by the parties in the contract is important to the construction industry. (Although the Court of Appeal had reversed the decision of the High Court in *H P Construction* (above, para 7.11), it did not disagree with the High Court in respect of the interpretation of cl 31.)

When the SIA standard forms were amended in 2005 to include what was then known as SOP compliant clauses, the amended version, then known as the Articles and Conditions of Building Contract (Lump Sum Contract) (7th Ed, April 2005) ("7th Edition"), presented the construction industry with two sets of payment entitlement clauses, namely:

(a) cl 31(15) read with cl 31(6) which referred to the sum as stated in the employer's payment response as the amount which the contractor is entitled; and

(b) cl 31(4) read with cl 37(3)(h) where temporary effect is to be given to all certificates for payment in support of the agreement to make interim payment to the contractor based on the sum certified in the interim certificates.

7.87 The two cases would now appear to confirm that the certificate payment scheme is the valid contractual payment scheme in the current SIA form, thereby leaving unanswered the status of the payment scheme based on payment claim and payment response which was hastily included in the 7th Edition to supposedly comply with the SOP Act.

Interestingly, a similar action was taken by the BCA when they amended the Public Sector Standard Conditions of Contract and the provisions relating to payment claim, payment response and deemed payment response were collectively referred to by the Court of Appeal in the case of *Chua Say Eng* (above, para 7.43) wherein the court held that they were contractual provisions.