7. BUILDING AND CONSTRUCTION LAW

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

PART A

Extensions of time: Time bar provisions

7.1 The operation of time bar provisions in relation to construction contracts has been the subject of some debate following some inconclusive determinations on this issue in other jurisdictions, most notably, the Australian decisions of *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* (1999) 18 BCL 449 and *Peninsula Balmain Pty Ltd v Abigroup Contractors Construction Group Ltd* [2002] NSWCA 211. Although the position taken in these decisions were rejected in the Inner House decision of the Scottish Court of Session in *City Inn Ltd v Shepherd Construction Ltd* [2010] CSIH 68, the matter has never surfaced in Singapore.

7.2 In *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2010] SGHC 106 ("*Ho Pak Kim Realty Co Pte Ltd*"), the High Court had to consider the operation of cl 23(2) of the Singapore Institute of Architects Conditions of Contract. This clause provided:

> It shall be a condition precedent to an extension of time by the Architect under any provision of this Contract including the present clause (unless the Architect has already informed the Contractor of his willingness to grant an extension of time) that the Contractor shall within 28 days notify the Architect in writing of any event or direction or instruction which he considers entitles him to an extension of time, together with a short statement of the reasons why the delay to completion will result …

7.3 The case was described as the third tranche of an ongoing dispute between the parties – the first tranche having been heard before

another court in October 2006 and the second tranche was heard by the High Court in May 2007. The point was raised in connection with a letter written by the contractor which complained of persistent under-certification and payment defaults and which attributed delays in construction to late approval of drainage and sewage connections and late supply of marble and granite tiles. The letter invited the architect to "consider carefully" in relation to the issue of the delay certificate. Before the High Court, the contractor contended that the letter constituted notice of a claim for extension of time. Although, the Australian and Scottish authorities on the subject were not cited before the court, Lai Siu Chiu J held that a contractor in making a request for extension of time has to serve a request which complies with the requirements of cl 23(2). This includes making the request within the time stipulated in the provision. While no form is prescribed under the contract, it must be clear that what was served was indeed a request for time extension. In deciding that the letter did not amount to a request for extension of time, the learned judge said (*Ho Pak Kim Realty Co Pte Ltd* at [97]–[98]):

> [The] plaintiff's letter did not even mention let alone make a request for EOT, it made no reference at all to cl 23(2) of the contract set out earlier at [54], which compliance is a condition precedent to a request for an EOT. Further, a request for EOT must be submitted to the architect within 28 days of an event or direction or instruction which the plaintiff considered entitled him to an EOT. Even if the 28 November letter can be said to amount to a request for EOT, it is noteworthy that it was sent to the architect twelve days *after* the issuance of the Delay Certificate, which fact (as the defendant contended) showed that the same was an afterthought.
>
> While I agree no particular format for an EOT is required under the contract, it must be clear to the architect that the plaintiff was making a request for an EOT. I cannot see how the 28 November letter can be said to amount to a request for EOT especially when Ho's concluding paragraph therein seemed to suggest that he was requesting the architect to reconsider the Delay Certificate.

Developer's entitlement to claim for defects

7.4 It was also argued on behalf of the contractor in *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* that since the employer in that case had sold off all the units of the residential development, the employer no longer retained any interest in the project to make the counterclaim for defects. Lai Siu Chiu J dismissed this line of argument, holding that the position as settled in *Prosperland Pte Ltd v Civic Construction Pte Ltd* [2004] 4 SLR(R) 129 (affirmed on appeal in *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR(R) 484) is that the developer retained an interest to sustain this action given that it remains liable to the

management corporation and in turn to the subsidiary proprietors for the contractor's defective works: *Ho Pak Kim Realty Co Pte* at [116].

Supplemental agreements and construction claims

7.5 In the midst of a construction project, various events on site may lead to an elaborate myriad of disputes between parties to a construction contract. Typically, the works have been disrupted by delay events such as changes to the works but these are frequently juxtaposed with the contractor's own difficulties with the works. In many of these situations, it is extremely unwieldy to resolve these complications and parties may prefer to negotiate and settle these matters as the project proceeds. This ensures that the problems and uncertainties do not fester to an intolerable extent and minimise the distraction they would otherwise cause to the continued construction of the works. In a large and complex project, it is not uncommon therefore for parties to record these settlements in one or more supplemental agreements.

7.6 In *Shanghai Tunnel Engineering Co Ltd v Econ-NCC Joint Venture* [2011] 1 SLR 217 ("*Shanghai Tunnel Engineering Co Ltd*"), the High Court considered the operation of a supplemental agreement in relation to the underlying contract between the parties. In this case, the defendants, ENJV, were main contractors for the construction of two MRT stations and the tunnels for a section of the Circle line. ENJV employed STEC, the plaintiffs, as the subcontractor for the bored tunnelling works in one of the phases of the main contract. Under the subcontract, STEC's works were to commence on 15 December 2002 and to complete on 31 December 2004 in accordance with ENJV's programme. However, before STEC could commence work, ENJV had to complete certain preparatory works, including the design and construction of the launch shaft and base slab for the crane so that the tunnel boring machine ("TBM") could be lowered into the launch shaft. For various reasons, ENJV did not complete these preparatory works on the dates as scheduled. The launch shaft and the shaft for the north bound tunnels were only handed over to STEC on 27 June 2003 and 11 August 2003 respectively. On 26 July 2003, the parties entered into what was referred to as a second supplemental agreement ("2nd SA"), under which ENJV would pay STEC a sum of $1.008m for the out-of-sequence working as well as other expenses borne by STEC. The 2nd SA also provides for STEC to withdraw and waive all claims relating to the subcontract works, including claims for loss of profit.

7.7 Nevertheless, the subcontract works were further delayed and, as a consequence, further disputes between the parties arose. In May 2005, STEC commenced arbitration proceedings against ENJV. Before the arbitrator, STEC claimed a sum of $7.10m for variations, sought an

extension of time of between 112 days and 156 days and claimed a further sum of $1.35m as delay-related expenses. On their part, ENJV attributed the delays to STEC and their counterclaim includes $1m as liquidated damages, a sum of $10.68m in respect of their prolongation costs and $1.19m in contra charges. (All figures were rounded up to the nearest $10,000.00.) In January 2009, the arbitrator issued a partial award which determined, *inter alia*, that STEC was entitled to a sum of $6.11m for their claim for variations and allowed ENJV a large portion of the contra charges claimed. He also held that STEC was entitled to 44 days extension of time and $183,000 for delay-related expenses. However, he made no order with respect to certain issues, most significantly ENJV's counterclaim of $10.68m on account of their liability to LTA arising from the subcontract delays.

7.8 Although the result of this case turns eventually on the court's finding under the "Complete Decision Question" that the arbitrator should have, in this case, rendered a complete decision in respect of all issues referred to him, Judith Prakash J also considered at length (see *Shanghai Tunnel Engineering Co Ltd* at [41]) the construction of the 2nd SA, in particular, whether it should be construed as a compromise agreement or as a variation to the subcontract. This was referred to in the judgment of the court as the "Commercial Purpose – Reciprocity Question".

7.9 In the partial award, the arbitrator found that on the terms of the 2nd SA, STEC had effectively waived its claims against ENJV for extension of time arising from ENJV's late handover of the launch shafts. In disputing this finding, STEC contended that the 2nd SA was in effect a compromise agreement and that, accordingly, if it had resulted in STEC waiving its claim for 84 days' extension of time against ENJV, then the agreement should also have the reciprocal result that ENJV waived its claims against STEC for damages in respect of 84 days' delay to the subcontract works. In their submission, STEC relied on two important Court of Appeal decisions. First, they relied on the contextual approach in the interpretation of contracts as affirmed by the majority of the Court of Appeal in *Yamashita Tetsuo v See Hup Seng Ltd* [2009] 2 SLR(R) 265 ("*Yamashita*") and that such an approach involves, in appropriate cases, a consideration of the commercial purpose of the contract in question: *Yamashita* at [64]. Extrinsic evidence is admissible under proviso (*f*) of s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) to aid in the interpretation of written words but such extrinsic evidence should not contradict or vary them. Secondly, STEC referred to *Gay Choong Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 ("*Gay Choong Ing*"), where the Court of Appeal addressed an argument for the existence of a compromise agreement by reference to the contemporaneous points of agreement and a waiver letter by both parties. The Court of Appeal in *Gay Choong Ing* at [41] defined

"compromise" as the settlement of a dispute by mutual concession and that its essential foundation is the ordinary law of contract.

7.10 In the case before Judith Prakash J, STEC sought to rely on certain "contemporaneous documents" to show that the 2nd SA was intended to be a compromise agreement. Judith Prakash J noted, however, that such extrinsic evidence can only be resorted to when the words of the contract are not clear and unambiguous or when the circumstances make ambiguous what would otherwise be plain (*Shanghai Tunnel Engineering Co Ltd* at [49]). In her view, the 2nd SA should be construed as providing that, in consideration of an advance payment made by ENJV, STEC was to waive all current claims, that is, all claims relating to the subcontract up to the date of the 2nd SA. The learned judge further observed that there was "absolutely no mention of any waiver of claims on ENJV's part": *Shanghai Tunnel Engineering Co Ltd* at [51]. The learned judge also noted that one of the clauses of the 2nd SA provides that the 2nd SA should take precedence in the event of any conflict between it and any other document comprising the subcontract. She held this to mean that the parties had agreed that "to the extent that other provisions of the Sub-Contract concluded prior to the 2nd SA were contrary to the provisions of the 2nd SA, they would be superseded by and subject to the provisions of the 2nd SA": *Shanghai Tunnel Engineering Co Ltd* at [52]. Prakash J concluded from this analysis that the 2nd SA was not intended as a compromise agreement. *Gay Choong Ing* was distinguishable because, in this case, only STEC was obliged to waive its claims against ENJV and there was nothing in the plain unambiguous wording of the 2nd SA that provided for a similar waiver of claims against STEC by ENJV: *Shanghai Tunnel Engineering Co Ltd* at [53]–[55]. Furthermore, it was expressly stated in the preamble that the 2nd SA was entered into out of a "desire to amend the Domestic Sub-contract" *Shanghai Tunnel Engineering Co Ltd* at [56]. The evidence supported ENJV's submission that the purpose of the 2nd SA was to give financial assistance to STEC and was not to effect a compromise arrangement between the parties: *Shanghai Tunnel Engineering Co Ltd* at [64].

Payments

Payment upon acceptance of design

7.11 Contracts for the employment of architects and design consultants typically provide for certain fees to be paid only if the design work has been accepted by the employer. Usually the terms of the employment of the architect or consultant may be expected to provide for acceptance of a design to be expressed in a particular form. However, where the appointments are made through brief exchanges between the

parties, the state of acceptance frequently fall to be determined by the conduct of the parties during the course of the project.

7.12 In *Boonchai Sompolpong v Low Tuck Kwong* [2010] SGHC 266, an architect was commissioned to prepare designs for a house in Joondalup (Australia) and a condominium in Balikpapan (Indonesia). In each case, the architect had set out the terms of his appointment in a letter to the defendant. The High Court held that the architect's designs had been accepted by the owner on the basis of exchanges between the parties in which the owner had stated, *inter alia*, that "approval of the designs will be granted in principle" and that "the basic design and form … was acceptable". The court also relied on the fact that the architect was directed to appoint a local counterpart in each country to prepare planning submissions to the local authorities and, in the case of the Balikpapan project, the owner had instructed that the design be sent for planning approval.

Payment in the absence of certificates

7.13 Where the relationship between the parties to a construction contract is highly informal and the contractor has been consistently paid without having first produced interim payment certificates issued by the architect, the issuance of a certificate may cease to operate as a condition precedent for subsequent payment. In *Bing Integrated Construction Pte Ltd v Eco Special Waste Management Pte Ltd* [2010] SGHC 183, two contracts were formed by way of a letter of award incorporating the SIA Conditions of Contract (1997 Ed). The contract sums were $11.13m and $14.70m respectively. In each case, the contract sum was expressed to be subject to measurement of actual work done and the final contract sum was to be determined on the basis of measurements by a quantity surveyor and valuation on agreed rates. During the progress of the works, the architect issued a series of interim payment certificates, the last of which was issued in September 1999. However, because the projects were undertaken with a high degree of informality, the contractor was never required to produce these certificates for interim payment. Upon completion of the works, no final certificate was issued for either of the projects. This was despite the fact that the contractor had tendered a final account for $7.92m and $8.84m. In 2006, the architect issued penultimate certificates where the valuation of the work done was certified at $7.78m and $8.11m respectively for the two projects. The main contractor claimed for specific sums of $721,442.88 and $1,543,449.51 for the two contracts or alternatively for a *quantum meruit*. The employer resisted payment on the final account, on the submission that the issuance of a final certificate was a condition precedent for payment to be made under the contract.

7.14 Chan Seng Onn J held that, in the circumstances, the employer was not entitled to rely on the lack of a final certificate to deny payment to the contractor. In the course of his judgment, the learned judge cited two reasons. Firstly, he noted that both the architect and the quantity surveyor were both appointed by the employer under the contracts and the employer had failed to ensure that the value of work done by the contractor was properly measured and certified despite the fact that the contractor had submitted detailed claims to the architect, the quantity surveyor and the employer. Secondly, he also considered that the dealings between the parties were highly informal and payments were never made on the basis of the architect's certificates. The first ground of the decision appears to suggest that there is a principle in law that an employer has to ensure that the consultants appointed to administer a construction contract do in fact discharge these functions properly. Unfortunately from the judgment, none of the usual authorities appear to have been cited or considered. The second ground for the court's decision may be arguable on the premise of a concept of reliance but, again, it was a finding made without the court being invited to consider the usual authorities on this point.

Set-offs in building contracts

7.15 A very important decision on the law of set-off was delivered during the year under review. In *Engineering Construction Pte Ltd v Sanchoon Builders Pte Ltd* [2011] 1 SLR 681 ("*Engineering Construction Pte Ltd*"), a contractor secured a contract for improvement works from a town council and subcontracted the whole contract to another party with a 5% margin for profit and attendance. The contract incorporated the terms of the main contractor's own subcontract form and provided for payments to be made by the main contractor within ten days from their receipt of payment from the employer after netting off 5% for profit and attendance. There were also provisions for the main contractor to deduct from these progress payments sums in respect of "any outstanding invoices and payment due to the main contractor" as well as "any ascertained or contra accounts". In the action, the subcontractor alleged that the main contractor failed to make monthly payments notwithstanding that these had been certified and paid to the contractor under the main contract. When subsequent payments were not made, the subcontractor terminated the subcontract and abandoned the works. The arbitrator who heard the dispute ruled that the subcontractor had wrongfully terminated the subcontract and that the main contractor was entitled to set off loss and damage suffered on account of the subcontractor's abandonment of the contract against sums due to the subcontractor for work done. The subcontractor sought leave to appeal under s 49 of the Arbitration Act (Cap 10, 2002 Rev Ed).

7.16 The High Court refused leave. In the course of his judgment, Quentin Loh J undertook a review of the authorities on the law of set-off, in particular the House of Lords decision of *Gilbert-Ash (Norton) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 ("*Gilbert-Ash*") which he considered (*Engineering Construction Pte Ltd* at [24]) to be "good law in Singapore" on the basis of *Hua Khian Ceramics Tiles Supplies Pte Ltd v Torie Construction Ltd* [1991] 2 SLR(R) 901 ("*Hua Khian Ceramics Tiles*"). The learned judge stated in his judgment that a number of principles arise from these authorities. Firstly, under common law, there is a right of set-off *pending* the determination of the cross-claims, but this right can be excluded by contract (*Engineering Construction Pte Ltd* at [19]). Secondly, a party had the right in equity to set-off any *bona fide* unliquidated claims. He said (*Engineering Construction Pte Ltd* at [20]):

> Building contracts and claims in that context clearly fulfil the criteria of contra claims that are so closely connected with the subject matter of the claim that it would be unjust to allow the Plaintiff's claim without taking into account the Defendant's set-offs.

7.17 Thirdly, it is clear from the speech of Lord Morris in *Gilbert-Ash* and *Hua Khian Ceramics Tiles* (above, para 7.16), that the doctrine of abatement applies to building contracts. Loh J observed (*Engineering Construction Pte Ltd* at [21]):

> The Defendant's claims for rectifying defective works and providing a supervisor to drive the Plaintiff's work are classic situations for the application of the doctrine of abatement. These claims can clearly be taken into account as they relate directly to the value of work done by the Plaintiff. Depending on the case and evidence, taking over uncompleted work and the incurring of additional costs therefor can also be factors taken into account in reducing the claims by the subcontractor that it has done that work. There can be no doubt that under the common law doctrine of abatement, a main contractor is entitled to raise an unliquidated claim which, if established, would reduce or extinguish the subcontractor plaintiff's claim. An example would be the case of a piling subcontractor's bad workmanship or errors in the foundation which can cause an entire building to be torn down and reconstructed or require extensive and very expensive remedial works resulting in long delays.

7.18 He helpfully elaborated the general position on this point (*Engineering Construction Pte Ltd* at [26]):

> The authorities therefore only require the party exercising his right of set-off to have an 'entitlement' to a contra claim before he can do so. He must have the 'justification' in exercising his right and it must be exercised *bona fide*. It is for this very reason that Lord Morris said, in *Gilbert-Ash*: 'There could not be a deduction of something that lacked specification'. A party exercising the right to set-off cannot have no idea why he is making a deduction, or withholding payment. He must

> know of his *entitlement* to set-off or his *justification* for doing so even though at that time of exercising his right, he is not able to quantify the set-off. He is exercising his remedy of self-help. Indeed, in the case of an unliquidated contra claim, that party will not know what the eventual figure will be. Of course in many cases, such a party will be able to make a reasonable and *bona fide* estimate of his contra claims and if his estimate turns out to be wrong, he is not in default, but has to refund the excess … [emphasis in original]

7.19 On the issue as to whether a sum deducted represents a reasonable and *bona fide* estimate of the contra claims, the learned judge said (*Engineering Construction Pte Ltd* at [29]):

> However, if the amount withheld or set-off is so large, and later confirmed to be so excessive or so disproportionate to the likely amount of those damages or the counterclaims, then there is the obvious difficulty in proving the *bona fide* belief in the amount set-off and the party effecting a set-off cannot satisfy the element of reasonableness or that he was justified in so doing. A court will then legitimately ask, did that party claiming the set-off, pause to think about his entitlement or estimate his set-off? Also, '*possible* future' losses cannot be the basis for a right of set-off, as it cannot amount to an 'entitlement' since it must be necessarily speculative in nature … [emphasis in original]

Performance bonds

7.20 Two judgments delivered during the year provided a seminal review of the subject of performance bonds. The first of these is the decision of the Court of Appeal in *JBE Properties Pte Ltd v Gammon Pte Ltd* [2010] SGCA 46 ("*JBE Properties Pte Ltd*"), which recounted the rationale behind the conscious departure of the law in Singapore from the traditional position in England. In the second decision, the High Court in *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 ("*Shanghai Electric Group Co Ltd*") had to consider, *inter alia*, whether the nature of the relief granted to restrain a call on the bond is a substantive right which is subject to the governing law or merely a matter to be governed by procedural law.

Distinction between on-demand bonds and indemnity bonds

7.21 *JBE Properties Pte Ltd*, the case concerns a bond for a sum of $1.15m furnished in relation to a building contract for the construction of an eight-storey building. The owners of the building had made a call on the bond in relation to the alleged cost of rectifying certain defects arising from the construction of the building. In the court of first instance, the contractor had argued that the subject bond was not an on-demand bond but, on appeal, the arguments were confined to

whether an interim injunction should be granted on the ground of unconscionability.

7.22 In the course of its judgment, the Court of Appeal considered the distinction between an on-demand performance bond and an indemnity performance bond. It decided that a crucial factor on this point was a clause in the bond which provided that the bank "was obliged to indemnify JBE only against 'all losses, damages, costs, expenses or [*sic*] otherwise *sustained* by [JBE] [emphasis added]'" as a result of any breach of contract by the contractor. Chan Sek Keong CJ ruled that this amounted to an obligation by the bank to indemnify the owners against actual losses *sustained* due to the breach and that, accordingly, the bond "had the character of a true indemnity performance bond" (*JBE Properties Pte Ltd* at [19]). In the circumstances, a separate clause which provided that the bank was "under no duty to inquire into the reasons, circumstances or authenticity of the grounds [of any call on the Bond]" would not affect the requirement that owners could only call on the bond if and when they actually suffered loss arising from any breach by the contractor of the building contract.

7.23 Since the bond was to be construed as a true indemnity performance bond, it followed that the owners were not entitled to call on the bond until they had suffered actual loss as a result of the contractor's breach of contract. The court decided that this would depend, in turn, on the evidence adduced by the owners to support their alleged loss. The owners, in this case, relied on the fact that it had appointed another contractor to rectify the defects in the cladding of the building at a price of $2.20m. The court noted that while the completion certificate had stated that the cladding defects were "minor", the basis of the rectification contractor's quotation of $2.20m was the removal of the defective cladding and the installation of new cladding for the whole of the building: *JBE Properties Pte Ltd* at [28]. Chan Sek Keong CJ, in delivering the judgment of the court, said (*JBE Properties Pte Ltd* at [29]):

> Given the nature of the Cladding Defects, and assuming that the quotations obtained by JBE from the Contractors were genuine, it was incongruous for JBE to have relied on quotations for *replacing* the existing cladding of the whole of the Building and *installing new cladding*, as opposed to quotations for *rectifying* the Cladding Defects. Further, even if the Contractors' quotations were indeed for the rectification of the Cladding Defects, they were *prima facie* grossly inflated and exorbitant, given that the highest quotation for the Rectification Works which Gammon obtained pursuant to the Judge's direction was only $560,000 … [emphasis in original]

7.24 In the circumstances, the court decided that the owners had failed to show that, at the date of its call on the bond, they had suffered actual loss for the sum called as a result of the contractor's breach of the building contract.

Rationale for the doctrine of unconscionability

7.25 Jurisprudentially the decision in JBE Properties Pte Ltd will also be significant for its careful justification of the principle of unconscionability as a ground for restraining a call on an on-demand bond some 15 years after this principle was first laid down in *Bocotra Construction Pte Ltd v Attorney-General* [1995] 2 SLR(R) 262 ("*Bocotra Construction*"). In this part of its judgment in JBE Properties Pte Ltd, the Court of Appeal traced the development of the law in Singapore from the English position as laid down in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 ("*Edward Owen*") that fraud is the only ground for restraining a call on a performance bond. Chan CJ considered that the English position was influenced by the "well-established autonomy principle applicable to letters of credit" which was acknowledged by Lord Denning to be the "lifeblood of international trade" (see *Edward Owen* at 171). The autonomy principle entails that the paying bank must pay under a letter of credit so long as conforming documents are tendered to it. The only exception recognised by the English courts is that of fraud – specifically, the paying bank need not pay "only where there is clear evidence as to the fact of fraud and as to the [paying] bank's knowledge": *JBE Properties Pte Ltd* at [8].

7.26 In its judgment, the Court of Appeal recorded that the Singapore courts first cast doubt on whether the strict test of "clear fraud" was the only basis for the purposes of restraining calls on performance bond in *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1990] 2 SLR(R) 520. These reservations were elaborated on in *Chartered Electronics Industries Pte Ltd v Development Bank of Singapore* [1992] 2 SLR(R) 20. From this, the test of unconscionability was subsequently developed as a *separate and independent* ground for the court to grant an interim injunction restraining a beneficiary from making a call on a performance bond: *Bocotra Construction* and *GHL Pte Ltd v Unitrack Building Construction Pte Ltd* [1999] 3 SLR(R) 44. Explaining the rationale behind this development, the court distinguished between the function served by a performance bond from the function of a letter of credit and pointed out that the considerations against interfering with the primary obligation of an obligor in a letter of credit are not present in the case of a performance bond. Chan Sek Keong CJ said (*JBE Properties Pte Ltd* at [10]):

> The Singapore courts' rationale in applying unconscionability as a separate and independent ground for restraining a call on a performance bond (especially one given by the contractor-obligor in a building contract) is that a performance bond serves a different function from a letter of credit. The latter performs the role of payment by the obligor for goods shipped to it by the beneficiary (typically via sea or air from another country), and 'has been the life blood of commerce in international trade for hundreds of years' (see *Chartered Electronics* at [36]). Interfering with payment under a letter of credit is tantamount to interfering with the *primary* obligation of the obligor to make payment under its contract with the beneficiary. Hence, payment under a letter of credit should not be disrupted or restrained by the court in the absence of fraud. In contrast, a performance bond is merely security for the *secondary* obligation of the obligor to pay damages *if* it breaches its primary contractual obligations to the beneficiary. A performance bond is not the lifeblood of commerce, whether generally or in the context of the construction industry specifically. Thus, a less stringent standard (as compared to the standard applicable *vis-à-vis* letters of credit) can justifiably be adopted for determining whether a call on a performance bond should be restrained. We should also add that where the wording of a performance bond is ambiguous, the court would be entitled to interpret the performance bond as being conditioned upon facts rather than upon documents or upon a mere demand, contrary to the *dictum* of Staughton LJ in *IE Contractors Ltd v Lloyds Bank Plc and Rafidain Bank* [1990] 2 Lloyd's Rep 496 at 500. [emphasis in original]

7.27 Thus, even where a performance bond is expressed to be payable "on first demand without proof or conditions", there is no reason why fraud should be the sole ground for restraining the beneficiary because the standard of proof required would virtually assure the beneficiary of immediate payment and does no more than to transfer the security from the paying bank to the beneficiary (*JBE Properties Pte Ltd* at [11]):

> This may in turn cause undue hardship to the obligor in many cases. For instance, where a call is made in bad faith, especially a call for payment of a sum well in excess of the quantum of the beneficiary's actual or potential loss, the beneficiary will gain more than what it has bargained for. Furthermore, if the amount paid to the beneficiary pursuant to a call is subsequently proved to be in excess of the quantum of its actual loss, the obligor runs the risk of being unable to recover any part of the excess amount should the beneficiary become insolvent. Yet another relevant consideration is that an excessive or abusive call can cause unwarranted economic harm to the obligor. This is particularly relevant in the context of the construction industry, where liquidity is frequently of the essence to contractors. In this regard, while the sum stipulated to be paid under a performance bond is usually pegged at only 5% to 10% of the contract price, this typically amounts to one or more progress payments under a building contract. In very large building contracts, the deprivation of a whole

> progress payment might well be fatal to the contractor-obligor's liquidity. These concerns are by no means fanciful, as evidenced by the mechanisms evolved by the construction industry to ensure the quick settlement of disputes relating to progress payments.

Whether injunction is a substantive right

7.28 In *Shanghai Electric Group Co Ltd* (above, para 7.20), a contract for the construction of a power plant provided for the owners to pay the contractor an advance payment calculated at 10% of the contract price which amounted to US$10.8m. As a security for the advance payment, the contractor furnished the owners a bond for the same amount. Under the bond, the bank undertook to pay the owners the sum up to US$10.8m upon receipt of a written demand by the owners stating (a) the amount to be paid, (b) that this was due to the owners under the contract, and (c) that the contractor had been given notice of default (collectively "the conditions"). The bond further provided for English law as the governing law.

7.29 Following a series of disagreements over the state of the contractor's works, the owners issued a "notice of contractor default" to the contractor, alleging, *inter alia*, that the contractor had failed to complete the work in respect of certain payment milestones stipulated in the notice. Shortly after that, the owners served on the contractor a "notice of termination" which terminated the contract and, on the same day, made the demand on the advance payment bond. The owners applied to set aside an injunction which had been granted to the contractor to restrain the call on the bond. An issue before the court was the applicable law governing the restraint on the calling of the bond, specifically whether this should be governed by the governing law of the bond, or a matter of procedure in which case it would be governed by the *lex fori*.

7.30 In granting the owner's application to set aside the injunction, Lee Seiu Kin J considered the contractor's argument that an injunction takes the form of a judicial remedy that is of an equitable nature and that all remedies invoke questions of procedure. Consequently, these should be governed by the *lex fori*. The learned judge accepted that the *lex fori* must regulate remedies to a certain extent because the court can only give its own remedies as opposed to alien remedies. However, he held that, in determining the issue, a material consideration is the purpose of the bond which is that of providing security to the owners in the event that the contractor was unable to perform its contractual obligations: *Shanghai Electric Group Co Ltd* at [21]. In his judgment, Lee J took the view that the so-called "fraud exception" first laid down in the English Court of Appeal decision in *Edward Owen* (above, para 7.25) is properly attributed to a "presumption of good faith":

Shanghai Electric Group Co Ltd at [22]. He agreed with the decision in *Econ Corp International Ltd v Ballast-Nedam International BV* [2003] 2 SLR(R) 15 where Lai Kew Chai J had held that an injunction sought by a party to restrain a call on a bond is a substantive relief in that it determines the rights of the parties under the bond. Accordingly, he decided that English law governed the grant of this relief. Thus, the learned judge concluded on this point as follows (*Shanghai Electric Group Co Ltd* at [30]):

> Any restraint on the right of the beneficiary to receive immediate payment upon a demand on the Bond would effectively deprive him of such right to immediate payment. The application by Shanghai Electric for an injunction therefore concerns a substantive right vested in PT Merak under both the Contract it had with Shanghai Electric and the terms of the Bond. It follows therefore that English law governs the restraint on the calling of the Bond.

The fraud exception

7.31 Since English law determines the grant of the relief, the only ground to restrain the call on the bond is fraud. On this issue, Lee J (*Shanghai Electric Group Co Ltd* at [37]) cited with approval the English decision of *United Trading Corporation SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554 and the following statement by Ackner LJ at 561 on the standard of proof to sustain a case made on the fraud exception:

> The evidence of fraud must be clear, both as to the fact of fraud and as to the bank's knowledge. The mere assertion or allegation of fraud would not be sufficient … We would expect the Court to require strong corroborative evidence of the allegation, usually in the form of contemporary documents, particularly those emanating from the buyer. In general, for the evidence of fraud to be clear, we would also expect the buyer to have been given an opportunity to answer the allegation and to have failed to provide any, or any adequate answer in circumstances where one could properly be expected. If the Court considers that on the material before it the only realistic inference to draw is that of fraud, then the seller would have made out a sufficient case of fraud.

7.32 Although Lee J considered that fraud was not established in this case, for the sake of completeness, he also considered whether unconscionability had been established by the contractor and decided that it had not. He noted (*Shanghai Electric Group Co Ltd* at [47]) that a particularly important factor in the case is the fact that the owners had already paid the advance payment and that by calling on the bond they were only effecting the return of the moneys it had paid out in advance to the contractor. Thus, in his view, even if Singapore law had applied, the owners would still have succeeded.

Subcontracts

Substantial completion

7.33 The case of *Econ Piling Pte Ltd v Shanghai Tunnel Engineering Co Ltd* [2011] 1 SLR 246 ("*Econ Piling Pte Ltd*") is the second between the parties which came before the High Court during the year. Like the earlier case, the second of the cases also came before Judith Prakash J. The background relating to the contractual dispute between the parties and the results of the arbitration arising from the dispute have been described in the discussion on the earlier of the two decisions in this note, *Shanghai Tunnel Engineering Co Ltd* (above, para 7.6). The pertinent facts in the second case, as in the first, were the late handing over by the main contractors, ENJV, of the launch shaft and base slab to the subcontractor, STEC, to enable STEC to lower the tunnel boring machine ("TBM") for the construction of the tunnel. The issues raised in the second case concern the arbitrator's determination of the date of substantial completion as a result of the delay in the handover of these works and the meaning and effect of the defects liability period or "DLP".

7.34 Clause 5 of the letter of acceptance stipulated that the DLP shall be "24 months from the completion of the installation of the tunnelling works (as described in item 4 above)". Clause 17 of the general terms of the subcontract had provided that the subcontract works shall be deemed to have been substantially completed on the day named in the certificate of substantial completion ("CSC") issued by the main contractor and that the issue of the CSC shall be on a "back-to-back" basis, that is, it shall be subject to the issue of a similar certificate by the employer's engineer under the main contract. The court held that, on these terms, the commencement of the DLP and the date of completion of the subcontract works were not intended to coincide. Prakash J said (*Econ Piling Pte Ltd* at [27]):

> Under cl 5.0 of the LA [Letter of Award], the DLP commences upon the 'completion of the installation of the tunneling works' as described in cl 4.0 of the LA. Under cl 4.0 of the LA, STEC was under the obligation to 'complete the installation of the tunnelling works (last segment lining) including First Stage Concrete by 16 Nov 04', which is a separate date from the date of completion of the Sub-Contract works, which was stipulated to be 31 December 2004. If the works had progressed as the parties had envisaged under the Sub-Contract, ideally, the DLP should have commenced on 16 November 2004, even though the date of completion of the Sub-Contract, *viz*, 31 December 2004, had not arrived yet.

7.35 Accordingly, in order to determine the actual date of substantial completion, it was necessary to examine the evidence in relation to what

the subcontractor had done on the material date and the state of the sub-contract works on that date.

"Delay" and "interruption"

7.36 In the course of her judgment, the learned judge also considered the distinction between a "delay" and an "interruption" for the purpose of assessing the actual duration of delay arising from an event referred to as delay event 5 in the subcontractor's claim. The subcontractor had claimed that the progress of its works on a stretch of the tunnel was delayed by 34 days as a result of the transfer of a transformer to replace a malfunctioning transformer used by one of the boring machines. One of the experts had suggested that this period was merely an "interruption" and not "delay". The learned judge agreed with the arbitrator that this was merely a matter of semantics, not substance. She considered that so long as there had been either "a period of time by which the works have fallen behind a specified time target or a difference between the time taken for the works to be actually completed and the duration allowed for completion under the contract, there could be said to have been "delay" caused: *Econ Piling Pte Ltd* at [35]. The critical question was really which party had caused the delay. Prakash J concluded as follows (*Econ Piling Pte Ltd* at [38]):

> The question of law must therefore be answered in the negative and it must be stated that the question posed turned out not to be a question of law at all.

Security of payment

Generally

7.37 During the year, the High Court heard two matters arising from adjudication determinations made pursuant to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). As noted in previous volumes of this series, the scheme of adjudication provided under the Act allows a party who has carried out construction work, provided services or supplied materials in relation to a construction project in Singapore to obtain a quick, interim decision by an adjudicator on a payment dispute. The determination of the adjudicator binds both parties until the matter is resolved by an arbitrator or the courts.

Whether a document was intended as a payment claim

7.38 In *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459 ("*Sungdo Engineering & Construction*"), the

alleged payment claim was in the form of a one-page letter accompanied by 164 pages of supporting documents. The one-page letter requested early payment and was signed off with "greetings of the season". It was held that the letter did not amount to a payment claim under the Act. Lee Seiu Kin J ruled that a payment claim should not be thought as valid merely because it "satisfies all the requirements under the Act". To be a valid payment claim, it must be intended to be such by the party submitting it and, importantly, such intention must be communicated to the recipient: *Sungdo Engineering & Construction* at [22].

7.39 In the course of his judgment, the learned judge observed (*Sungdo Engineering & Construction* at [17]–[19]) that, unlike the Act by the same name in New South Wales, it is not a requirement of the Singapore Act (Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)) that a payment claim for the purpose of the security of payment regime has to contain a statement that it is a payment claim made under the Act. However, in his view, it does not necessarily follow that any document that satisfies all the requirements under the Act and the Regulations as to how it is made and what it must contain would amount to a Payment Claim. As he noted (*Sungdo Engineering & Construction* at [20]):

> This would mean that a document containing all such information but also containing the statement 'This is not a payment claim under the Act' would be a payment claim under the Act, which would be contrary to commonsense. To the argument that in such a situation the claimant is estopped from relying on it as a Payment Claim, there are two responses. The first is that this argument will not address the situation where the respondent, out of an abundance of caution, submits a payment response and therefore has not been prejudiced. The second is a matter of principle: surely intention must be a necessary element and such a document cannot be a Payment Claim even if it contains all the prescribed requirements for one, simply because it was not intended to be one by the maker of the document …

Judicial review

7.40 In *Sungdo Engineering & Construction*, the court also had to address an important jurisdictional point. In *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658, *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") and *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260, Judith Prakash J had held that the jurisdiction of an adjudicator stems from his appointment by an authorised nominating body ("ANB") and is independent of the validity of the payment claim.

7.41 In *Sungdo Engineering & Construction*, Lee Seiu Kin J expressed agreement with the view that the jurisdiction of the adjudicator is not vested until his appointment by an ANB. However, he differed with the proposition that the adjudicator's jurisdiction is not affected by the validity of the Payment Claim or its service. Nevertheless, he cautioned (*Sungdo Engineering & Construction* at [34]) that the courts will not lightly interfere with an adjudicator's determination of the issue:

> In principle, if the validity of a Payment Claim goes to jurisdiction, I do not see how a court is precluded from examining this issue on judicial review and I would, with respect, disagree with this. Notwithstanding this, the 2008 Letter did not purport to be a payment claim under the Act as nothing therein states that it is so. Therefore *SEF Construction* does not stand in the way of my decision in the present case. However I should state that in practice, where a document purports to be a Payment Claim, then unless the adjudicator has made an unreasonable finding on the evidence (unreasonableness as in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223), his decision that it satisfies all the requirements of a Payment Claim may not be interfered with by the court when exercising its powers of judicial review.

7.42 The court's power to review an adjudicator's decision as to jurisdiction was also considered in another case in the High Court later that year. In *Chua Say Eng v Lee Wee Lick Terence* [2010] SGHC 333 ("*Chua Say Eng*"), three issues were canvassed before the learned assistant registrar:

> (a) whether the court in a setting aside application, should review the adjudicator's decision as to the validity of an alleged payment claim;
>
> (b) whether service, in the case of an individual, can be effected by leaving the payment claim at the last known address of the place of residence of that individual; and
>
> (c) whether the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) prescribes a limitation period within which a payment claim must be served.

7.43 On the first issue, the learned assistant registrar decided that having regard to both *Sungdo Engineering & Construction* (above, para 7.38) and *SEF Construction* (above, para 7.40) as well as the policy behind the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), the court in a setting aside application should not delve into the details of whether an alleged payment claim complies with the requirements of the Act as long as the document, on its face, purports to be a payment claim under the Act. He said (*Chua Say Eng* at [15]):

> In other words, if the document expressly states that it is a payment claim under the SOPA or even simply states that it is a payment claim, then unless the adjudicator has made an unreasonable finding on the evidence, the court should not interfere with his decision that all the requirements of the SOPA are fulfilled. In contrast, if the document appears, on its face, to either be something other than a payment claim (as was the case in *Sungdo*) or to clearly fall afoul of one of the requirements set out in the SOPA and the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the SOPR"), then the court should examine the document and make a determination as to whether it actually is a payment claim within the meaning of s 10.

7.44 On the second issue, he construed sub-ss 37(1) and 37(2) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) to mean that the modes of service stipulated therein are not exhaustive and that there is scope for other modes of service of documents as prescribed by "any other law". This would necessarily include the modes of service provided for in the Interpretation Act (Cap 1, 2002 Rev Ed): *Chua Say Eng* at [21]. Therefore, the payment claim could be served by leaving it at the last known address of the respondent. On the issue of the existence of a limitation period for a payment claim, the learned assistant registrar considered the views expressed by two textbook writers as well as the case of *Fyntray Constructions Pty Ltd v Macind Drainage & Hydraulic Services Pty Ltd* [2002] NSWCA 238 ("*Fyntray Constructions*"). In *Fyntray Constructions*, the New South Wales Court of Appeal discussed this point in its judgment with respect to the Building and Construction Industry Security of Payment Act 1999 No 46 (NSW) and decided that if there were to be a substantive strict requirement such as a limitation period for the service of a payment claim, it would be reasonable to expect the requirement to be stated in the legislation. In the case before him, the learned assistant registrar considered that reg 5(1) of the Building and Construction Industry Security of Payment Regulations (Rg 30B, 2006 Rev Ed) does not clearly set out a limitation period, but merely stated that a payment claim "shall be served by the last day of each month following the month in which the contract is made". He, accordingly, dismissed the application.

7.45 The respondent appealed this decision (*Chua Say Eng v Lee Wee Lick Terence* Registrar's Appeal 454 of 2010 (unreported)). Tay Yong Kwang J allowed the appeal. Unfortunately, the judgment delivered by Tay Yong Kwang J has not been reported at the time of writing. However, from a briefing note on the case published by the firm who acted on behalf of one of the parties (undated briefing note of M/s Rajah & Tann LLC), Tay J appeared to have decided as follows:

> (a) Firstly, the courts have supervisory jurisdiction over the adjudication determination of the adjudicator. The jurisdiction

of an adjudicator is not a matter reserved solely for the adjudicator. This position appears to differ from that taken in *SEF Construction* (above, para 7.40).

(b) Secondly, on a proper construction of s 10(2) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) and reg 5(1) of the SOP Regulations, there is a time limit from the date of the execution of the work within which a payment claim may be served for the purposes of the Act.

7.46 Tay J appeared to have decided as he did with respect to the question of limitation on the basis that the language in s 10(2) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) and reg 5(1) of the Building and Construction Industry Security of Payment Regulations (Rg 30B, 2006 Rev Ed) are mandatory. Consequently, the effect of these provisions is that, in a situation where the contract does not stipulate on the matter, a payment claim should be served by the end of the month following the month in which work was done. Thus, in the briefing note, the example was cited that if an item of construction work was done in January, the final date on which a claim for such work could be validly served was the last day of February. In *Chua Say Eng* (above, para 7.42), the contractor last carried out the works in March 2010 before the works were abandoned. The payment claim was served on 2 June 2010 and the court held that, on a proper construction of these provisions, this payment claim was served out of time.

PART B

Damages

7.47 In a claim for damages arising from a contractor's negligence and nuisance, the damages might not be assessed before the trial judge as in *OTF Aquarium Farm v Lian Shing Construction Co Pte Ltd* [2010] SGHC 245 ("*OTF Aquarium Farm*"). In the forum for the assessment of damages which is usually before an assistant registrar, the successful plaintiff's right to and scope of damages would have already been decided by the trial judge. Any head of claim that is not part of the judgment would rightly be rejected.

7.48 There was an attempt by the plaintiff to claim damages for the reinstatement of the ponds that were allegedly damaged by the contractor undertaking drainage works on an adjacent plot to the ponds. This was rejected by the assistant registrar and, upon appeal, the learned judge held that "his role was to assess the damages he was

directed to assess" (*OTF Aquarium Farm* at [27]) and this was based on the trial judge's order: "I order interlocutory judgment in favour of the plaintiff with damages to be assessed by the Registrar for these 31 dead arowanas."

7.49 It was noted by the learned judge that the trial judge "did not disclose the reason for not making any order regarding the re-instatement. It could have been that she found that the claim was not properly pleaded, or it could be that she was not satisfied that the ponds required re-instatement": *OTF Aquarium Farm* at [25].

7.50 It is particularly instructive to counsel to ascertain every head of claim given in the judgment before preparing the plaintiff's case for the assessment of damages.

7.51 Another issue that was dealt with in this case was whether a claim for economic loss from the fishes that were held to be killed by the contractor's negligence and nuisance would be granted in the face of another claim for damages for the said dead fishes as represented by their replacement cost. The court held that "[i]t should be apparent that the plaintiff was double claiming" (*OTF Aquarium Farm* at [18]) and that the plaintiff cannot recover economic loss in addition to the replacement cost of the dead fishes.

7.52 Further, even if the claim is limited to that of economic loss while forgoing the replacement cost, the claim would, nevertheless, be rejected because, "the claim was fundamentally flawed": *OTF Aquarium Farm* at [21]. The court held that "[t]he plaintiff cannot claim for the lost prospective income because the loss could be mitigated by the replacement of the dead fishes": *OTF Aquarium Farm* at [22].

7.53 Yet another issue was the relevant date for the valuation of the cost of replacement of the dead fishes. The court held that "the replacement prices should be for fishes of the ages of the dead fishes at prices prevailing at the time of their death or within a reasonable period": *OTF Aquarium Farm* at [15]. The court added that "[t]he plaintiff was entitled to the replacement cost if replacements were available and if the plaintiff was in a position to purchase the replacement fishes": *OTF Aquarium Farm* at [16]. However, the court emphasised that while "[t]he plaintiff should be allowed time to attend to the ponds and to source for suitable replacement fishes … it cannot wait till the time of assessment": *OTF Aquarium Farm* at [15].

7.54 The above mentioned issues appear to be fundamental and therefore care must be taken to avoid such situations as they do take up the time of the courts and impose a heavy burden on the party concerned.

Evidence

7.55 In the two cases, *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2010] 4 SLR 821 ("*Sin Lian Heng Construction*") and *Bing Integrated Construction Pte Ltd v Eco Special Waste Management Pte Ltd* [2010] SGHC 183 ("*Bing Integrated Construction*"), evidence peculiar to construction disputes were examined, namely, as-built drawings in Sin Lian Heng Construction and QS reports in Bing Integrated Construction. The main query about the two items of evidence concerned their respective admissibility as evidence of fact and/or opinion.

7.56 In *Sin Lian Heng Construction*, the defendant, Singtel, had relied on as-built drawings to discharge its burden of proof in respect of the total quantity of cable that were to be recovered by the plaintiff, SLH, in order to establish that SLH when delivering a smaller quantity, would be responsible for the missing quantity. The as-built drawings were rejected by the court which held that "… such documents have to be proved by calling their makers to give evidence that such cables were actually in the ground when those drawings were made. However they were not called to give evidence and therefore the evidence was not admissible": *Sin Lian Heng Construction* at [14].

7.57 Further, the court held that even assuming that the as-built drawings were accurate at the time they were created, "Singtel must also prove that they remained accurate at the time SLH carried out the cable recovery works": *Sin Lian Heng Construction* at [11]. The court had noted that the "cables could have been removed by others, whether legally or illegally, before SLH came into the picture": *Sin Lian Heng Construction* at [11]. Accordingly, Singtel was required to rebut the evidence of SLH's witnesses who said certain cables were missing when they went to the ducts to recover them.

7.58 However, Singtel was allowed to rely on the as-built drawings to rebut SLH's claim for works done as the court held that "the best evidence available – and indeed the only evidence – in relation to these recovery works would be found in Singtel's as-built drawings" in the face of SLH's failure to offer any iota of proof: *Sin Lian Heng Construction* at [15].

7.59 In *Bing Integrated Construction* (above, para 7.55), the plaintiff was claiming against the defendant in a contract that provided for payment based on certification by an architect. However, as the architect had failed to issue the final certificates for the two projects under claim, the plaintiff attempted to prove its claim by relying on two reports on the valuation of the works done prepared by the project quantity surveyor that was engaged by the defendant.

7.60 The court, however, rejected the two reports as it found them inadmissible: *Bing Integrated Construction* at [14]. The court noted that the witness called to be present in court was not the person who carried out the measurement of the works. In fact, neither the person who carried out the measurement of the works in the two projects nor the person who signed the reports was called as witness.

7.61 Whilst the two reports were not allowed to prove the contents therein (*Bing Integrated Construction* at [14], the court noted that the existence of the two reports post dated the last issue of the architect's certificates for the two projects. The court noted that this "… indicated that the valuation of the work done by the plaintiff was ongoing even after the value of the Architect's Certificates stopped increasing, …": *Bing Integrated Construction* at [15]. Accordingly, the court held that "[t]his, coupled with the fact that no final certificate had been issued by the architect for each project gave rise to the necessary inference, and supported the plaintiff's testimony, that the architect's penultimate certificates did not accurately reflect the full value of work done under both contracts": *Bing Integrated Construction* at [15].

7.62 In the two cases discussed above, the party required to discharge its burden of proof had fallen into the same error, that is, the failure to call the maker of the document as a witness. In the construction industry, it is not uncommon for most construction professionals to be on the move globally. The industry should seek to introduce practices that would assist the stakeholders concerned to secure the necessary admissibility of the documents that have the potential of being used as evidence in court or arbitration.

7.63 Perhaps the industry should consider requiring the joint production of as-built drawings that would bind parties involved in the original construction contract, and in the case of subsequent contracts like those of recovery of cables in *Sin Lian Heng Construction* (above, para 7.55), a joint inspection to verify the accuracy of the as-built drawings prior to the commencement of work. Similarly, in *Bing Integrated Construction* (above, para 7.55), the parties in the construction contract could have agreed on the joint measurement and valuation of the works done that would be binding on both parties.

Building defects

7.64 In *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd* [2010] SGHC 351 ("*Anti-Corrosion Pte Ltd*"), the plaintiff contractor claimed the cost of repainting from the defendant who supplied paint that was alleged to have discoloured after being used on the surfaces as required in the project. In order to succeed, the plaintiff had to prove

that the paint supplied by the defendant caused the discolouration. Hence, reliance on expert evidence was necessary with the burden of proof resting on the plaintiff. For a start, the experts from both sides agreed that the paint had disintegrated. However, the court noted that "[t]he discolouration could have been caused by any one or a combination of the Paint, the preparation or application of the Paint, the surface preparation or condition of the skim coat": *Anti-Corrosion Pte Ltd* at [13].

7.65 The plaintiff's expert's concluded that the "poor paint condition in container resulted in coating discoloration at the [Project]": *Anti-Corrosion Pte Ltd* at [14]. This was challenged by the defendant's expert who said that "the plaintiff had failed to rule out excessive moisture and the alkalinity of the skim coat underlying the Paint, as possible causes of the discoloration": *Anti-Corrosion Pte Ltd* at [14]. It is interesting to note at this point that whereas the plaintiff's expert had based her report on a site inspection and several tests, the defendant's expert had "merely reviewed [the plaintiff's expert's] report": *Anti-Corrosion Pte Ltd* at [14].

7.66 The court then considered evidence independent of the experts' reports. It accepted the evidence establishing that "at the time of painting, the internal surfaces of the Project probably did not have excessive moisture levels": *Anti-Corrosion Pte Ltd* at [15]. The evidence accepted was in the form of contemporaneous evidence comprising the testimony of a supervisor of the plaintiff who had carried out random tests on spots on surfaces to be painted with a moisture gauge before the start of the painting works. This prevailed over the evidence offered by the defendant which test relied on a touch test requiring that a person press his hand against the wall. Notably, the test was conducted several months after the discolouration had happened. Hence, the court's preference was for the test that was performed contemporaneously.

7.67 While the court ruled that the discolouration could not be caused by excessive moisture, it was not prepared to rule out the possibility of the discolouration being caused by the alkalinity of the skim coat for the following reasons. First, the plaintiff's expert's test, on which her report was prepared, did not use the same skim coat as applied in the project: *Anti-Corrosion Pte Ltd* at [17]. Second, the testing of the paint was carried out on the paint sample she used, which came from five pails chosen by the plaintiff. This would not have accurately acted as representative samples of the entire supply of paint used in the project (*Anti-Corrosion Pte Ltd* at [17]) since the paint came from 31 different batches of manufacture: *Anti-Corrosion Pte Ltd* at [6] and [19]. Third, "there had been a long time lag between the receipt of the Paint from the defendant and the handing over of the five pails to [the plaintiff's expert] for testing …": *Anti-Corrosion Pte Ltd* at [17].

7.68 Once again, the court looked at evidence independent of the experts' reports. The court noted that the paint had been taken from 31 different batches of manufacture. It then observed that if the paint were defective, it would have suggested that it must have been a manufacturing problem, *eg*, with the formulation of the paint: *Anti-Corrosion Pte Ltd* at [19]. The court also noted that as the paint was an off-the-shelf product, it was unlikely that a manufacturing problem concerning the formulation of the paint would have escaped the notice of the plaintiff in its previous uses of the paint: *Anti-Corrosion Pte Ltd* at [19]. "Further, the fact that the discolouration occurred in patterns rather than random patches suggested interaction with an underlying substances, rather than defects in the Paint alone": *Anti-Corrosion Pte Ltd* at [19].

7.69 This led the court to hold that "the plaintiff ha[d] not proven on balance of probability that the defects in the Paint had caused the discoloration": *Anti-Corrosion Pte Ltd* at [19].

7.70 As most construction disputes inevitably require expert evidence, this case, which highlights the intelligent use of expert evidence whereby the defendant's expert proved himself effective in his role even without carrying out any site inspection nor any test, is instructive. On the other hand, the plaintiff's expert must constantly ensure that the expert report and findings are able to prove that the cause of the defect is attributable to the defendant's scope of legal responsibility on a balance of probability basis. It would appear that experts who fail to appreciate the legal requirements in proving causation on a balance of probability basis might not be able to render the appropriate assistance to the court. Hence, counsel should ensure that experts have such knowledge in order to perform effectively.

Workmen's Compensation insurance

7.71 In *Mohammed Shahid Late Mahabubur Rahman v Lim Keenly Builders Pte Ltd* [2010] 3 SLR 1021 ("*Mohammed Shahid*"), the defendant main contractor accepted partial liability in favour of the plaintiff, an employee of the subcontractor, and which the defendant had hoped to recover from the third party insurance company. The outcome had depended on the interpretation of the typical Workmen's Compensation policy that is commonly taken out by contractors in every construction project as required under the law.

7.72 The issue then was whether the insurance cover would include the defendant's liability to the plaintiff at common law, namely, a claim for breach of statutory duty and for occupier's liability: *Mohammed Shahid* at [2]. In response to the issue, the court held that the policy

does not cover, "common law claims … brought by non-employees against the Insured as occupier of the worksite": *Mohammed Shahid* at [81].

7.73 The court began with an analysis of the operative clause and held that "the plain and ordinary meaning … [was] that the WC Policy only indemnifie[d] any of the Insured, including the defendant, against liabilities to workmen actually employed by such Insured": *Mohammed Shahid* at [72].

7.74 This position was arrived at because the relevant term used in the operative clause to determine the relationship between the workman who is making a claim and the employer against whom the workman is claiming is defined by the use of the word "employment". Whereas the definition given in the Workmen Compensation Act (Cap 354, 1998 Rev Ed) would have embraced the relationship between the defendant main contractor and the plaintiff who was the workman employee of the subcontractor, the court held that "it is not permissible to extend the definition of 'employer' in s 12(3) of the Act, expressed to be applicable only to s 12, to colour the meaning of 'employment' which is a different term in a different context under the Operative Clause when the term 'employment' can be objectively determined by reference to the common law: *Awang bin Dollah* ([20] *supra*) and *Vandyke v Fender*": *Mohammed Shahid* at [34].

7.75 There were three other arguments which the court rejected respectively which were, *inter alia*: (a) "an extremely strained interpretation …" (*Mohammed Shahid* at [40]); (b) "a construction … at odds with the defendant's own evidence" (*Mohammed Shahid* at [59]); and (c) "clear that the deletions of Exceptions (b) and (c) were to make the WC Policy consistent …" and "[a]s such, they do not take the defendant's case any further" (*Mohammed Shahid* at [66]).

7.76 On the point raised by the defendant that the *contra proferentum* rule applied in the construction of the insurance policy, the court observed that "[e]ven where a clause is ambiguous taken alone, the *contra proferentem* rule does not apply if its meaning becomes clear in the context of the overall policy (*Colinvaux* at para 3-10, n 69)": *Mohammed Shahid* at [68]. Accordingly, the court held that "the ambiguity can be resolved by considering the entire policy, and the *contra proferentem* rule should not be used to import any such ambiguity into the Operative Clause and thereby magnify it: *Cornish v The Accident Insurance Company Limited* (1889) 23 QBD 453 at 456, *per* Lindley LJ and *Direct Travel Insurance v Shirley McGeown* [2003] EWCA Civ 1606 at [13] *per* Auld LJ": *Mohammed Shahid* at [69].

7.77 The court observed that while "the defendant and its insurance broker believed that the WC Policy was sufficiently comprehensive to embrace the present indemnity claim", the court concluded that "[h]owever genuine their belief may be, the task of the court is to construe the terms of the insurance policy in order to determine its scope and whether on its true construction the indemnity claimed by the defendant is payable": *Mohammed Shahid* at [81].

7.78 The court had also earlier in the judgment left the construction industry stakeholders and lawyers some food for thought, namely, "It is hoped that this decision would shed some light on the scope and coverage of such policies so that contractors and their insurance brokers can review them to determine whether they in fact cover the intended liabilities and if not, whether steps should be taken to address the gaps in future": *Mohammed Shahid* at [2].

7.79 It would certainly be unwise for the industry not to take note of the case and continue with the current arrangement to secure policies in the same wording as the policy under scrutiny in this case. It is interesting to note that the players in the insurance industry were uncompromising in the above case even though it was observed that the insurance broker was under the belief that the claim by the defendant main contractor was covered.