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

Architect's certificates

The effect of fraud

7.1 Disputes arising from an architect's or a superintending officer's certificates frequently require a consideration of the concept of temporary finality. The purpose of according temporary finality to these certificates is to minimise *undue* cash flow problems that may affect contractors, typically when unverified counterclaims are raised by an employer to hold back payments which are due to a contractor.

7.2 In *H P Construction & Engineering Pte Ltd v Chin Ivan* [2014] 3 SLR 1318 (reviewed in (2014) SAL Ann Rev 102 at 105–109, paras 7.11–7.21), an employer resisted the enforcement of two architect's certificates on the ground that the certificates should not be accorded temporary finality because they had been procured by fraud. The High Court had held that a *prima facie* case of fraud had been made out but that since the alleged fraud affected only certain items, a stay against enforcement would only apply to the affected items. During the year under review, the case came before the Court of Appeal in *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] 3 SLR 124 ("*Ivan Chin*"). The Court of Appeal decided that the proceedings should be stayed in their entirety because there was no basis under the contract for dissecting or severing the disputed certificates: *Ivan Chin* at [3]. In arriving at its decision, the Court of Appeal clarified a number of important points on the effect of architect's certificates which will be welcomed by the construction industry.

7.3 The facts relate to a building contract which incorporated the articles and conditions of the Singapore Institute of Architects' *Articles and Conditions of Building Contract* (Lump Sum Contract, 7th Ed, April 2005) ("SIA Conditions 2005"). The architect issued a progress payment certificate which included a sum for certain "Disputed Items". Subsequently, this certified sum was reflected in a payment certificate with respect to the final payment claim. The employer did not pay the amounts certified by the architect under the progress payment certificate and the final payment certificate. Before the High Court, the employer argued that the two architect's certificates had been procured by fraud and sought a stay of proceedings for the matter to be referred to arbitration as provided under the arbitration clause of the contract. The employer 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.

7.4 In the High Court, the judicial commissioner found that a *prima facie* case of fraud had been made out but that the alleged fraud affected only the Disputed Items. He noted in particular, that apart from the disputed items, the other items in the certificates were not infected by fraud: *Ivan Chin* at [11]. In the light of this finding, he ordered a partial stay of proceedings and allowed the contractor to proceed with the portion of its claim which he considered was not affected by the alleged fraud. The employer appealed against the judicial commissioner's decision to grant only a partial stay of proceedings. The issue before the Court of Appeal in *Ivan Chin* was thus framed in the following terms (at [12]):

> [C]ould the court enforce *in part* an Architect's certificate that had been tainted by fraud and/or that had not been issued in accordance with the conditions stipulated under cl 31(13) of the SIA Conditions by granting summary judgment in respect of *only a part* of the sum certified in such a certificate? [emphasis in original]

Operation of temporary finality

7.5 In delivering the judgment of the Court, Sundaresh Menon CJ noted that the concept of "temporary finality" accorded to a valid architect's certificate has the effect of binding parties to the matters certified unless and until the certificates are opened up and reviewed in the course of proceedings typically brought at the end of the project when a final judgment or award as to the parties' substantive rights is rendered: *Ivan Chin* at [14]. However, he noted that in the case of an architect's certificate issued under the SIA Conditions 2005, the granting

of such temporary finality is subject to certain conditions (*Ivan Chin* at [18]):

> First, the certificate must be issued 'in the absence of fraud or improper pressure or interference by either party'. Secondly, it must be issued '*strictly* in accordance with the terms of the Contract' … For example, it cannot be issued at a time when the contractor has yet to submit a payment claim. Thirdly, as can be seen from the need for the Architect to clarify, upon either party's request '[i]n any case of doubt', what was or was not taken into account in his certificate, the Architect must have considered the matters which are said to have been dealt with in his certificate. [emphasis in original]

7.6 The judgment in *Ivan Chin* also referred to the decision of the same court in the classic case of *Lojan Properties Pte Ltd v Tropicon Contractors Pte Ltd* [1991] 1 SLR(R) 622 ("*Lojan Properties*") that a properly-issued architect's certificate functions as a condition precedent to the contractor's right to receive payment and the employer's right to deduct claims. Menon CJ elaborated on this point (*Ivan Chin* at [20]):

> The 'financial machinery' of a standard form SIA contract is 'regulated by the certificates of the Architect', which, if issued in accordance with cl 31(13), place the contractor or the employer (as the case may be) 'in a position to enforce payment … [or] to deduct his legitimate claims' respectively. A contractor's right to receive payment and an employer's right to deduct claims would typically not even materialise if the particular Architect's certificate in question was not issued in accordance with the contract concerned. This much is also noted in Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 4th Ed, 2012) …

7.7 He pointed out (at [21]) that in "enforcement proceedings" the court is not concerned with the merits of architect's certificates, in the sense of whether the certificates are ultimately correct as to matters which they purport to deal with. He noted in the same passage:

> The only question in this context will usually be whether the Architect's certificates concerned were validly issued in accordance with the terms of the contract. Because the certification process is concerned primarily with regulating the process and mechanism for payments (or, in the case of an employer, deductions) to be made, it will generally *not* affect either party's substantive rights, at the appropriate time and before the appropriate forum, to contend that the Architect's certificates concerned, even if validly issued in accordance with the terms of the contract, were not in fact correct as to the matters set out therein. This understanding of the true nature of Architect's certificates is also noted in *Chow Kok Fong* (at vol 1, paras 8.12–8.13):
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> > **8.12** … *These certifications are never intended to be a precise or final determination of the value of the works.* Thus,

> Hobhouse J in *Secretary of State for Transport v Birse-Farr Joint Venture* [(1993) 62 BLR 45] noted:
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> > At the interim stage, it cannot always be a wholly exact exercise. It must include an element of assessment and judgment. *Its purpose is not to produce a final determination of the remuneration to which the contractor is entitled but is to provide a fair-system of monthly progress payments to be made to the contractor.*
>
> **8.13** In the absence of any provision to the contrary, the sum certified in an interim certificate is thus taken to be an estimate of the value of the work done up to the date shown in the certificate. Thus, while the employer or owner is obliged to pay what is certified, *the amount certified is not binding on the parties and may be adjusted upon completion of the works.* … Since *the assessment does not represent a final and binding determination of the price for the work done* it could be corrected at a later date but the burden of proof falls on the party arguing for the amount assessed to be correct.
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> [emphasis added]

Severability of certificates in enforcement

7.8 The Court of Appeal upheld the learned judge's finding on the facts that a *prima facie* case of fraud had been made. However, the court considered that there was no basis under the parties' contract to warrant that the disputed certificates were divisible or severable in the manner as ruled by the judge. Menon CJ said (*Ivan Chin* at [27]):

> As we have noted above, one of the fundamental objectives of the scheme established by the SIA Conditions is to have matters relating to payment and deduction regulated by way of Architect's certificates only. Once an Architect's certificate is found in any material way to have been issued not in accordance with the contract and/or as a result of fraud or improper pressure or interference, then it loses its claim to temporary finality. There is nothing in a standard form SIA contract that would permit a court, in such circumstances, to substitute its assessment for that of the Architect and, in effect, to conjure up a new certificate.

7.9 Finally, it was held that the court cannot go behind an architect's certificate and adjust the matters certified. The Court of Appeal disagreed with the views expressed in *Lojan Properties* on this point and considered the views to be in any case *obiter*. The present position arising from *Ivan Chin* is simply this (*Ivan Chin* at [29]):

> If the certificate is impugned because it was, in some material part, not issued in accordance with the contract and/or was tainted by fraud or

> improper pressure or interference, then that certificate *in its entirety* ceases to attract any finality. [emphasis in original]

Performance bonds

7.10 Most construction contracts provide for the contractor to furnish an on-demand bond or guarantee to secure the performance of the contractor's obligations under a contract. These bonds are typically issued by banks or insurance companies. It is settled law in Singapore that an on-demand bond may be restrained on grounds of unconscionability. Although there has been no "precise definition" of the term "unconscionability", the term is generally understood to describe some "unsatisfactory conduct tainted by bad faith" and also incorporates an element of "unfairness": see Andrew Phang JA in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 at [36] and [37]. The doctrine of unconscionability with respect to performance bonds has been embedded in local jurisprudence since its introduction by the Court of Appeal in *Bocotra Construction Pte Ltd v Attorney-General (No 2)* [1995] 2 SLR(R) 262 and appears throughout this time to effectively militate against the stricter position taken in England and elsewhere as exemplified by the classic decision of the English Court of Appeal in *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159.

7.11 During the year under review, a decision of the Court of Appeal upheld the right of parties to limit the circumstances under which a call on a performance bond may be restrained and this includes an agreement to exclude unconscionability as a ground for restraining the call on the bond. In *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2015] 3 SLR 1041 ("*Asplenium*"), the facts related to a construction contract for the construction of a condominium. Clause 3.5.8 of the preliminaries which formed part of the terms of the construction contract provided that the contractor was not entitled to restrain the employer from making any call or demand on the performance bond on any ground, except in the case of fraud. Subsequently, the employer made a call on the performance bond and the contractor applied for an injunction to restrain the payment by the bank of the secured sum to the employer.

7.12 The High Court decided that cl 3.5.8 was void and unenforceable because it was contrary to public policy as an ouster of the jurisdiction of the court. However, the trial judge decided that on the facts the high threshold for the grant of injunctive relief on the ground of unconscionability had not been satisfied. The contractor appealed against the finding that there was no unconscionability on the part of the employer in calling on the bond.

7.13 The Court of Appeal disagreed with the High Court and held that cl 3.5.8 was enforceable. In delivering the grounds of decision of the court, Andrew Phang JA stated that while courts are on occasion prepared to override the contractual rights of parties in order to give effect to the greater public good, given the inherently nebulous nature of public policy, such occasions will be rare: *Asplenium* at [17]. He said (at [19]):

> [L]imitations placed on the rights and remedies available to the parties have not been treated as an ouster of the court's jurisdiction … Clauses which attempt to do so are (as the case may be) termed either limitation clauses or exclusion clauses. More importantly, they seek to *restrict or exclude* a ***common law*** *remedy* (since an innocent party is entitled, as of right at common law, to damages for breach of contract). What is clear, however, is that such clauses have ***never*** been treated as being void and unenforceable as clauses seeking to *oust the jurisdiction of the court*; after all *neither* party has been denied *access* to the court as such. [emphasis in original]

7.14 While cl 3.5.8 does *not* attempt to restrict or limit an innocent party's right to *damages* at *common law*, it is a restriction of an equitable *remedy* in that it restricts a contracting party's right to an injunction in equity in the context of calls on performance bonds (*Asplenium* at [22]):

> Looked at in this light, such a clause is more in the nature of an *exclusion or exception clause* (*as opposed to* a clause seeking to *oust the jurisdiction of the court*). Indeed, such a clause might itself be potentially subject to common law principles (for example, to the argument that the clause was not incorporated into the contract in the first place or to the argument that the language of the clause did not cover the situation in question to begin with) … [emphasis in original]

7.15 The court was impressed with a particular practical point raised during the course of oral submissions. This particular point centres on the fact that the employer could have asked for *a cash deposit* instead of a performance bond. This appears from the wording of cl 3.5.8 itself where it states that the intent is that "the performance bond is provided … in lieu of a cash deposit". Phang JA therefore observed (*Asplenium* at [31]):

> If so, then there is no pressing reason in either principle or policy why a clause such as cl 3.5.8 should be considered as somehow being contrary to public policy (in particular, in the context of purporting to oust the jurisdiction of the court).

7.16 It may be expected that, arising from this ruling, more employers are likely to adopt the provision in the *Asplenium* contract to narrow the grounds on which a call on a performance bond may be resisted. While the doctrine of unconscionability remains law, this

practice may arguably diminish the significance of the doctrine in this area of contract administration.

Determining method of measurement

Versions of contract

7.17 Frequently, parties may be expected to review and amend different versions of a contract before arriving at the version on which they are agreed. The issue as to the version which effectively binds the parties involves a careful consideration of the factual matrix.

7.18 In *Bumi Geo Engineering Pte Ltd v Civil Tech Pte Ltd* [2015] 5 SLR 1322 ("*Bumi Geo Engineering*"), a subcontractor was employed by a main contractor to carry out ground improvement works by installing jet grout piles. The works involved installing multiple overlapping columns in the ground in order to produce a block of cemented soil. Under the terms of the subcontract, the subcontractor was to be paid $92 for each cubic metre of soil treated. The dispute before the High Court was as to the method to be used to calculate the volume of treated soil. To allow for the overlaps between columns, the subcontractor deducted 10% of the nominal volumes in arriving at the quantity for its interim payment claims. The main contractor in assessing these claims deducted 18%. In its assessment of the final claim, the main contractor deducted the volume of actual overlaps which could go up to 53.2% *per* column. The subcontractor argued that the words "triangle grid spacing" stipulated in the subcontract supports its contention that the measurement should be based on the triangle grid method which would result in a 5.77% deduction. In the course of the proceedings, it transpired that the main contractor had in its possession another version of the subcontract which did not contain the words "triangle grid spacing".

7.19 In his judgment, Lee Seiu Kin J considered that, unlike the main contractor's version of the contract which was largely uncorroborated, the subcontractor's version appears to be consistent with contemporaneous evidence. He noted firstly that the subcontractor's version of the contract came later in time and thus evidenced the final agreement between the parties: *Bumi Geo Engineering* at [21]. This finding was reinforced by the initialling on every page of the subcontractor's version as compared to their conspicuous absence from the main body of the version of the contract produced by the main contractor. However, the triangle grid method was never mentioned in the subcontractor's version of the contract. Accordingly, in the circumstances, Lee J held that the works should be valued on the basis of the treated area method.

Estoppel

7.20 In the course of his judgment, Lee J expressed the view that had the subcontractor pleaded an estoppel based on the 18% deduction, the court would have been prepared to find that the main contractor was estopped from relying on the treated area method. He cited the following reasons for this (*Bumi Geo Engineering* at [98]):

> *First*, the defendant had consistently been applying an 18% deduction to the interim claims. *Second*, under cross-examination, Mr Chua conceded that the final account of the C482 Project was settled at a fixed deduction of 18%. This settlement was reached despite clear words in the contract for the C482 Project providing for measurement based on the 'treated area of JGP works'. *Finally*, the plaintiff appears to have relied on the assumption of an 18% deduction to its detriment, although I must state that the evidence, such as it is, is not conclusive.

Termination

7.21 In *CAA Technologies Pte Ltd v HP Construction & Engineering Pte Ltd* [2015] SGHC 32 ("*CAA Technologies*"), a clause in a precast subcontract provided for the subcontract to be terminated on certain specified grounds. The main contractor exercised this clause stating in its notice of termination that the subcontractor failed to: (a) deliver precast components under the subcontract in accordance with the agreed schedule; and (b) rectify defective precast work.

Relevance of repudiatory intention

7.22 The court found that the subcontractor was "consistently and persistently unresponsive to the [main contractor's] concerns about the slow progress" of the works and held that the main contractor was justified in terminating the subcontract. One of the arguments raised by the subcontractor was that termination is only justified if the defaulting party shows an intention to repudiate the contract and deprives the innocent party of substantially the whole benefit of the contract: *CAA Technologies* at [51]. Tan Siong Thye J rejected this argument because the termination in this case was grounded on an express provision of the contract and was premised on the common intention of the parties: *CAA Technologies* at [53]. Thus, the main contractor did not have to rely on the common law to justify termination when it would be necessary to show that the breach had deprived the innocent party of substantially the whole benefit. The court also dismissed the subcontractor's argument that the main contractor had "pre-planned" the termination and "would have terminated it regardless of the reasons given in the Notice and the Letter [of Termination]". The court considered that the question of whether the termination was

pre-planned was irrelevant. "The key issue here is whether the defendant was in fact and in law entitled to terminate the subcontract": *CAA Technologies* at [63].

Liquidated damages for completion

7.23 On the main contractor's claim for liquidated damages pursuant to cl 31.3 of the Public Sector Standard Conditions of Contract for Construction Works 2008 (Building and Construction Authority, 6th Ed, 2008) (to which the subcontract was subordinate), the learned judge cited with approval the decision in *Re Sanpete Builders (S) Pte Ltd* [1989] 1 SLR(R) 5. In *Re Sanpete (S) Pte Ltd*, Chao Hick Tin JC (as he then was) had decided that "a condition precedent for imposing liquidated damages on a defaulting contractor is that the contractor must have had until the last hour of the day fixed for completion to finish the works". In the present case, Tan J noted (at [83]–[86]) that the subcontract was terminated before the completion date and that consequently the claim for liquidated damages did not arise: *CAA Technologies* at [83]. In any case, the court considered the main contractor's quantification of liquidated damages to be very arbitrary because the provision relied on by the main contractor contemplated that the superintending officer under the main contract had to issue a certificate that works out the exact period of delay attributable to the subcontractor and no such certificate was produced.

Quantum meruit

7.24 The learned judge also decided that the subcontractor is entitled to be paid for the precast components which had been manufactured but had not been delivered at the time of termination. The learned judge arrived at this decision on the consideration that in the first six progress payments, the amount claimed for the manufacture of precast components was shown separately from the amount shown for components which had been delivered: *CAA Technologies* at [99].

Security of payment

7.25 The volume of adjudication applications made pursuant to the Building and Construction Industry Security of Payment Act (Cap 30, 2006 Rev Ed) ("SOP Act") continued to grow during the year under review. On the basis of the filing references, it is considered that more than 480 adjudication applications were filed with the Singapore Mediation Centre in 2015. Not surprisingly, this has resulted in a corresponding rise in the number of security of payment matters raised before the courts.

Nature of underlying contract

7.26 An important distinction which has to be made at the commencement of adjudication proceedings is the character of the subject contract, specifically whether it is a construction contract or a supply contract. The significance of the distinction lies in the timeline which parties have to follow and the applicability of provisions under the SOP Act relating to the payment response and the dispute settlement period.

7.27 In *Eng Seng Precast Pte Ltd v SLF Construction Pte Ltd* [2015] 5 SLR 948 ("*Eng Seng Precast*"), a main contractor was awarded a subcontract for the "supply and delivery of precast concrete components for the entire project, all as specified" at a fixed price unit rate. A precast contract fell within the definitions of both "construction contract" and "supply contract" under s 2 of the SOP Act. It was a supply contract because the plaintiff undertook to supply and deliver goods but the subcontract did not include any work on site. It was also a construction contract because it involved the offsite production of prefabricated components and this was expressly included as a category of work within the definition of "construction work".

7.28 Lee Seiu Kin J considered but dismissed the submission that a claimant was entitled in the situation to elect to make the payment claim as a construction contract or as a supply contract. He cited two reasons. Firstly, there is no indication in the SOP Act that the Legislature contemplated a contract as being capable of falling within both definitions. Secondly, such an outcome would introduce a degree of uncertainty and this uncertainty is shifted to the party receiving the payment claim "who would not know what timelines to apply to the contract": *Eng Seng Precast* at [15].

7.29 The learned judge noted that the definition of a supply contract in s 2 ended with the words "but does not include such agreements as may be prescribed". He considered that the word "prescribed" as defined under the Interpretation Act (Cap 1, 2002 Rev Ed) is capable of meaning both prescribed by the Act in which the act occurs and by any subsidiary legislation made thereunder: *Eng Seng Precast* at [16]–[18].

7.30 The learned judge stated that he was persuaded that contracts for prefabricated components are construction contracts for the following reasons (*Eng Seng Precast* at [29]):

> (a) Offsite production of prefabricated components clearly fall within the definition of 'construction work' and therefore a contract that calls for such work falls within the definition of 'construction contract'.

> (b) The words 'whether including the supply of goods or services or otherwise' in the definition of 'construction contract' envisage that a contract in which a party carries out construction work and supplies goods at the same time is a construction contract.
>
> (c) The SOP Act envisages that a contract cannot at the same time be a construction contract and a supply contract …

Frequency of payment claims

7.31 In *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR 481 ("*Libra Building Construction*"), the High Court addressed the issue as to whether a claimant may serve more than one payment claim within a given payment claim period. The claimant in that case made three payment claims: Payment Claim 3 dated 5 December 2014 ("PC3"), a revised Payment Claim 3 ("PC3R") dated 26 December 2014 and Payment Claim 4 ("PC4") dated 30 December 2014. It was common ground that PC3R was issued at the behest of the respondent main contractor to replace PC3. Each of the payment claims covered different reference periods. The claimant alleged that it had issued PC4 after being told by the main contractor's new general manager that all payment claims should be served *not by but on* the 30th of the month. Nevertheless the subcontractor did not withdraw PC3R when it issued PC4. PC4 was for work up to December 2014 while PC3R was for work up to November 2014. The subject adjudication application was filed in respect of PC4.

7.32 In his judgment, Kannan Ramesh JC referred to the decision of the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 that the effect of s 10(1) of the SOP Act read with reg 5(1) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("SOP Regulations) was to restrict the claimant to a maximum of one payment claim a month in respect of a progress payment. The learned judicial commissioner held that it follows that these provisions preclude the claimant from serving multiple payment claims in the same payment claim period, regardless of whether the claims are for different reference periods or otherwise: *Libra Building Construction* at [36].

7.33 The subcontractor also argued that the main contractor had approbated and reprobated on the validity of PC3R in that it had acted in bad faith by misrepresenting the invalidity of PC3R and that by the time the main contractor had made its position clear on PC4, the time for filing an adjudication application on PC3R had lapsed. The learned judicial commissioner could "see no reason why the doctrine should not apply to payment claims under the Act": *Libra Building Construction* at [108]. However, he considered that in this case the claimant

subcontractor had elected to rely on a payment claim for the purpose of the SOP Act. This election is binding on the claimant but it "ran straight into the wall" formed by the unequivocal and mandatory language of s 10(1). The learned judicial commissioner said (*Libra Building Construction* at [111]):

> The language of s 10(1) is unequivocal and mandatory – only one payment claim may be served in respect of a progress payment. It would surely be incorrect to conclude that the doctrine of approbation and reprobation could allow two or more payment claims in the same payment claim period to be presented notwithstanding the limitation in s 10(1).

Payment claim made after final claim

7.34 An interesting point arose during the year under review where the High Court considered, admittedly *obiter*, the validity of a payment claim made under the SOP Act after the same contractor had earlier submitted a final claim made pursuant to the terms of a contract.

7.35 In *Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd* [2015] 4 SLR 615 ("*Lau Fook Hoong Adam*"), the subject construction contract incorporated the SIA Conditions 2005. After the issue of the completion certificate, the contractor submitted two versions of a final claim, both described as being claims in respect of the final account. While the architect was preparing the final certificate arising from the final claim ("Payment Claim 16B"), the contractor issued "Payment Claim 17". This was not described as a claim for the final account but referred specifically to work carried out between 23 July 2010 and 31 July 2014. The respondent did not issue a payment response to Payment Claim 17. He explained that since the contractor had issued a final claim under cl 31(11) of the SIA Conditions 2005, it was not open for the contractor to issue any further progress claim subsequent to the final claim. The contractor lodged an adjudication application on the basis of Payment Claim 17. The adjudicator decided that there was nothing in the SIA Conditions 2005 and the SOP Act that prohibited the filing of a payment claim after a final claim had been issued. Because there was no payment response, the adjudicator ruled that the contractor was entitled to the claimed amount in full of $625,167.98.

7.36 Aedit Abdullah JC found that the dispute as to whether Payment Claim 16B was a final claim arose because the quantity surveyor proceeded on the mistaken premise that the subject contract incorporated the Singapore Institute of Architects' *Articles and Conditions of Building Contract* (Lump Sum Contract, 9th Ed, Reprint August 2011) ("SIA Conditions 2011") when in fact the contract

incorporated the SIA Conditions 2005. The SIA Conditions 2011 provided for a different final payment mechanism as contrasted with that provided for under the SIA Conditions 2005. The learned judicial commissioner considered that whether Payment Claim 16B was a final claim had to be determined in accordance with the terms of the SIA Conditions 2005: *Lau Fook Hoong Adam* at [36]–[44]. Nevertheless, had this point been in contention before him, Abdullah JC took the view that a final payment claim, or final claim, as the word "final" suggested, should be the last payment claim issued by the contractor. Further, while an architect might revise previously issued interim certificates by issuing a further certificate pursuant to cl 31(6) of both the SIA Conditions 2005 and the SIA Conditions 2011, cl 37(3)(i) stated unequivocally that this power expired after the architect issued the final certificate: *Lau Fook Hoong Adam* at [48]. Accordingly, he observed (*Lau Fook Hoong Adam* at [49]):

> In my view, it would not be within the contemplation of the drafters of the SIA Conditions 2005 and the SIA Conditions 2011 for further payment claims made after the final claim or final payment claim to be resolved in ways other than the architect certification mechanism provided. To my mind, they probably did not expect any further payment claims to be made after the final payment claim as the final payment process is intended to resolve all matters concerning all the work done by the contractor.

Timelines of SOP Act

7.37 It is settled on the authorities that arising from the enactment of the SOP Act, parties to a construction contract have to distinguish between the contractual track and a statutory track in a payment process: see *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 ("*Choi Peng Kum*"). This issue surfaced again during the year under review in *Tienrui Design & Construction Pte Ltd v G & Y Trading and Manufacturing Pte Ltd* [2015] 5 SLR 852 ("*Tienrui*"). In *Tienrui*, the court had to consider whether parties intended the payment certificate to function as a statutory payment response for the purpose of the SOP Act. Although the case of *Choi Peng Kum* did not appear to have been before the court, in his analysis, Lee J distinguished between the contractual and statutory tracks of the payment processes. The learned judge concluded that in this case, the parties had envisaged the contractual and statutory tracks to operate separately on account of, firstly, the notable linguistic variations between the relevant provisions of the contract and the SOP Act (at [38]), and secondly, the fact that the contract "did not appear to pay heed to the statutory requirements of payment claims and responses" (at [41]).

7.38 The courts have once again emphasised the importance of strict compliance with the timelines prescribed for the payment process. In

UES Holdings Pte Ltd v Grouteam Pte Ltd [2016] 1 SLR 312 ("*UES Holdings*"), the payment claim related to a subcontract for certain civil and architectural works. A payment claim was served by the subcontractor on 20 April 2015, and when no payment response was issued by the main contractor, the adjudication application was lodged. Three issues were raised before the High Court in this case: (a) whether the payment claim was defective on the ground that it was served out of time; (b) whether the adjudication notice and the adjudication application were defective because they were served out of time; and (c) whether the adjudication application was defective because it did not contain an extract of the terms and conditions of the subject contract.

7.39 On the first of these issues, Quentin Loh J noted that the subcontract was "poorly drafted". Nevertheless, the learned judge considered that, on a true construction of the contract, the parties intended the service of the payment claim to be governed by the timeline prescribed for this purpose in the preliminaries of the subcontract (referred to in the judgment as "Preliminaries E"). On the basis of Preliminaries E, the payment claim has to be submitted within seven days from the end of each month. Since the subject payment claim was submitted on 20 April 2015, the court held that it did not comply with s 10(2)(*a*) of the SOP Act as it was submitted out of time. Section 10(2)(*a*) is framed in mandatory terms, and on the authorities, it has to be strictly adhered to: *UES Holdings* at [42]–[44].

7.40 That should have been sufficient to dispose of the case but for completeness, Loh J commented briefly on the two remaining issues. On the second issue, he held that since the payment claim was served out of time, it follows that the adjudication application was also served out of time as well. On the third issue, Loh J considered that had the payment claim been validly served in this case, this ground of challenge would not have succeeded. In his view, the subcontractor had not failed to provide extracts of the terms or conditions of the contract relevant to the payment claim. The learned judge noted that this challenge was premised on reg 7(2)(*d*) of the SOP Regulations and he approved the test suggested in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 9.68 that for the purpose of an application to enforce the adjudication determination "whether, on the extracts of the documents as furnished, the respondent understands the case he has to meet and is afforded a basis to formulate its case" (at [56]).

Service by e-mail

7.41 The issue as to whether documents may be served for the purpose of the SOP Act by e-mail appears to have been settled in *Progressive Builders Pte Ltd v Long Rise Pte Ltd* [2015] 5 SLR 689 ("*Progressive Builders*"). The facts of that case concerned a subcontract under which a subcontractor was to provide labour and tools to carry out certain structural works. The subject payment claim was sent by e-mail, and in the adjudication, the adjudicator ruled that it was properly served as e-mail was a valid mode of service under the Act. Lee Seiu Kin J agreed with the adjudicator. He considered that s 37 of the SOP Act did not prohibit the e-mail service of documents so long as the said documents were brought to the attention of the intended recipient (*Progressive Builders* at [39]):

> In my view, the legislative purpose of s 37 of the Act was to assist parties in bringing notices and documents required under the Act, not to shut out other modes of service. Since the permissive verb 'may' is utilised in s 37, and there is nothing in the Act to bar the chosen mode of service, service will be valid where the document has indeed been brought to the attention of the intended recipient. The permissive nature of s 37 is further illustrated by the saving provision in s 37(3), which preserves the applicability of other laws in relation to service of documents. This reading is consonant with both the object of the Act and the commercial context in which the Act operates … An unduly pedantic approach would be inimical to the objective of the Act which was to achieve an expeditious resolution of payment disputes.

Dispute settlement period

7.42 In *Tienrui Design* (above, para 7.37), the issue before the High Court was the date when the dispute settlement period started to run. The two competing dates for this purpose were the date on which the payment response was actually served and the date on which the payment response was due. Lee Seiu Kin J decided that on a plain reading of s 12(5) of the SOP Act, the dispute settlement period started to run from the date when the payment response was due, not the date on which the payment response was actually served. In the course of arriving at this finding, he considered that if the period started to run from the latter date, other problems would be introduced (*Tienrui Design* at [64]):

> Although an argument may be made that the dispute settlement period should commence earlier (*ie*, after the service of a payment response) since the objective of the SOP Act was to provide a speedy and effective dispute resolution mechanism, this could introduce other problems. One of these would be that the date of service of the payment response may itself be in dispute and this would further delay the process. Therefore reducing the number of facts that may be in

> dispute would promote greater certainty and further the objective of the SOP Act of facilitating cash flow in the construction industry.

Notice of intention to apply for adjudication

7.43 In *Aik Heng Contracts and Services Pte Ltd v Deshin Engineering & Construction Pte Ltd* [2015] SGHC 293 ("*Aik Heng*"), the payment claim related to work done under a subcontract for the carrying out of certain aluminium and glazing work. It was argued before the court that a notice of intention to apply for adjudication was defective because it did not set out the date on which the subcontract was made although the notice did state the date of the letter of award. Lee Seiu Kin J dismissed this objection. He referred to *Australian Timber Products v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776 and *Progressive Builders*. While both decisions related to the validity of a payment claim, he considered that the reasoning was equally applicable to the notice of intention. Lee J noted (*Aik Heng* at [12]):

> There is no doubt that the service of a notice of intention under s 13(2) of the Act is a jurisdictional requirement. What founds the jurisdictional nature of the requirement under s 13(2), in the sense that the condition is essential to the existence of an adjudicator's determination, is that a respondent must know of the case he has to meet and be allowed to prepare his response. As pointed out in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 8.16:
>
> > The notice is clearly intended to alert the respondent that the adjudication application has been made to the authorised nominating body in order to enable the respondent to commence the preparation of his case. It is important that this requirement is scrupulously complied with, given the demanding timeline of the ensuing adjudication …

7.44 The learned judge found that in this case, the main contractor conceded that it was able to identify the subcontract in dispute despite the fact that the date of the letter of award (and not the date of the subcontract was made) was stated in the notice. The main contractor had been notified of the applicant's intention to apply for adjudication and was able to prepare a substantive payment response.

Best result for respondent in adjudication

7.45 Section 17(2)(*a*) of the SOP Act provides for an adjudicator to determine the amount to be paid by a respondent to a claimant. 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. Consequently, the best result for a respondent in adjudication is that the claimant is not entitled to be paid.

7.46 This was affirmed by the High Court in *Quanta Industries Pte Ltd v Strategic Construction Pte Ltd* [2015] 2 SLR 70 ("*Quanta Industries*"). In that case, an adjudicator ordered the claimant to pay the respondent an adjudicated sum of $141,508.56. The High Court set aside the determination. In his judgment, Chan Seng Onn J agreed with the construction that s 17(2)(*a*) of the Act only empowered the adjudicator to determine an 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 said in the course of his judgment (*Quanta Industries* at [11]):

> Quite rightly, the defendant's solicitors did not dispute this. They candidly admitted that the adjudicator fell into error in this respect. They accepted that under the SOPA, the claimant either gets a nil amount or he gets paid. The adjudicator has no power to determine that the plaintiff is to *refund* the defendant for the amount that the latter allegedly overpaid the former. As stated in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 16.63:
>
> > … upon the construction of section 17(2) of the Singapore SOP Act, an adjudicator can either dismiss a claim or award a sum in favour of the claimant in an adjudication determination. This arises clearly from the stipulation that the adjudicated amount is to be determined by the adjudicator. This is described in section 17(2)(a) as "the adjudicated amount (if any) to be paid by the respondent to the claimant". Thus, while an adjudicator may determine the entitlement of the respondent to counterclaims and set-offs – such as deductions for liquidated damages, back charges and sums expended for rectifying defects – and set these off against the amount to which the claimant is otherwise entitled, *he has no mandate to order any amount to be paid to a respondent by the claimant*. It follows that, under the Singapore SOP Act, even if the adjudicator determines that the aggregate of a respondent's set-offs and counterclaims exceeds the amount determined in favour of the claimant, *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*.
>
> [emphasis added by the High Court]

7.47 As noted in the extract of the judgment, the respondent in this case candidly admitted that the adjudicator had fallen 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, it argued that the adjudication determination should not be set aside because, *inter alia*, "there were no live issues between the parties" as it had assured the claimant that it would not ask the claimant to make payment. 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: *Quanta Industries* at [16].

Natural justice

7.48 One of the issues judicially considered during the year is the date when the adjudicator may properly begin to carry out his functions under the SOP Act. In *JRP & Associates Pte Ltd v Kindly Construction & Services Pte Ltd* [2015] 3 SLR 575 ("*JRP*"), the court had to consider whether an adjudicator exceeded his powers under the Act when he called for an adjudication conference a day before the commencement of the adjudication. Chan Seng Onn J held that while s 16(4) of the SOP Act did not entitle the adjudicator to call for an adjudication conference before the commencement of the adjudication, an adjudicator is not precluded from calling the parties to meet him prior to the commencement of the adjudication to deal with administrative matters. In this case, the adjudicator accepted the main contractor's objection that he called for the conference prematurely. He thereupon used it as a meeting to deal with administrative matters and did not deal with any substantive matters. As a result, the adjudicator had not acted in excess of his powers under the Act. Chan J also rejected the argument that the adjudicator did not afford the parties an adequate opportunity to be heard. The learned judge noted that the adjudication determination had been made on the primary facts and evidence before the adjudicator and that it "reasonably flowed from the parties' arguments": *JRP* at [71].

7.49 In *Aik Heng Contracts* (above, para 7.43), a subcontractor served a payment claim for a sum of $85,974.19. The main contractor did not file any payment response and the subcontractor duly lodged its adjudication application. In resisting the enforcement of the resulting adjudication determination, the main contractor raised two allegations of breach of natural justice. First, it argued that the adjudicator failed to properly adjudicate the claim by blindly endorsing the applicant's variation claims despite the absence of evidence of instructions and despite errors in the supporting documents. Secondly, it submitted that it had not been given the opportunity to raise its contentions as the adjudicator had declined to hear from it during the adjudication conference.

7.50 The court rejected these submissions. In the course of his judgment, Lee Seiu Kin J examined the operation of s 15(3) in the light of the decision of the Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380. He said (*Aik Heng Contracts* at [23]):

> To the extent that the respondent was referring to reasons which it could, and indeed should, have raised in a payment response, I was unable to agree with this proposition. Although the ordinary literal construction of the phrase 'shall not consider' says nothing as to the respondent's right to address the adjudicator, the respondent did not put forward any reason why an adjudicator would have to hear from a respondent on matters which he was expressly prohibited from considering. The Court of Appeal did not make this distinction in *W Y Steel*, holding at [34]:
>
> > In our judgment, Parliament intended that a respondent should ventilate his reasons for withholding payment within the timelines prescribed by the Act or suffer the consequences, namely, *losing the opportunity to* ***ventilate those reasons*** *at all at the adjudication stage* …
>
> [emphasis added by the Court of Appeal in *W Y Steel* in italics and bold italics]

Requirement for provision of security under s 27(5)

7.51 Under s 27(5) of the SOP Act, a party who applies to set aside an adjudication determination is required to pay the unpaid adjudicated amount as security for the unpaid portion of the adjudicated amount. In *Lau Fook Hoong Adam* (above, para 7.35), the High Court recognised that these provisions provided successful claimants with a very important safeguard against non-payment of adjudicated amounts which was aligned with the SOP Act's overarching aim of ensuring timeous payments to contractors.

7.52 In that case, an employer in seeking to resist the enforcement of an adjudication determination attempted to circumvent the s 27(5) requirement by applying instead for a declaration that the adjudication determination was null and void because, *inter alia*, the adjudicator lacked jurisdiction to adjudicate the matter under the SOP Act. Had this party applied to set the adjudication determination aside, he would have been required to provide security for the adjudicated amount under s 27(5) of the SOP Act and O 95 r 3 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). In agreeing that the employer should not be allowed to side-step the need to provide security for the adjudicated amount, Aedit Abdullah JC noted in his judgment that (*Lau Fook Hoong Adam* at [26]):

> With regard to the requirement for the provision of security in a setting aside application, I would only add that this requirement also protects the successful claimant's right to be paid by guarding that claimant against the risk of the respondent becoming insolvent and the risk of the respondent dissipating assets to avoid payment. It also ensures that the claimant would be paid immediately upon the conclusion of the setting aside application (which may sometimes take a substantial amount of time to conclude) in the event that the application is dismissed. The claimant should not be put through the entire process of having to enforce the adjudication determination against the respondent when that process was delayed as a result of the setting aside application itself. All in all, s 27(5) of the SOPA and O 95 r 3(3) of the Rules of Court provides successful claimants with a very important safeguard against non-payment of adjudicated amounts which, in the grand scheme of things, is aligned with the SOPA's overarching aim of ensuring timeous payments to contractors.

7.53 The learned judicial commissioner held that the provision of security under s 27(5) of the SOP Act and O 95 r 3(3) of the Rules of Court is a strict requirement that must be observed if one seeks to challenge an adjudication determination in court: *Lau Fook Hoong Adam* at [27]. He agreed with the contractor that the employer in this case attempted to disguise his application as something other than a setting aside application so that he may evade the statutory requirement to provide security for the unpaid portion of the adjudicated amount. If this is permitted, it "would result in the complete erosion of the protection conferred on successful claimants in an adjudication determination under s 27(5) of the SOPA and O 95 r 3(3) of the Rules of Court": *Lau Fook Hoong Adam* at [28]. He further said (at [29]):

> Thus, regardless of the form of the applications from which challenges against adjudication determinations are brought, challenges against adjudication determinations must be regarded as being effectively setting aside applications governed by s 27(5) …

7.54 After the High Court issued oral judgment on 25 May 2015, the employer applied to tender further submissions. The court allowed the further submissions. In the further submissions, the employer argued firstly that the adjudication determination "was not existent" at the time of the filing of the originating summons, and thus, their application could not be considered "as a poorly concealed attempt to set aside the adjudication determination". The employer's second argument was that the application was for a stay of the adjudication proceedings and not a stay of the enforcement of an adjudication determination.

7.55 In *Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd* [2015] 5 SLR 516 ("*Lau Fook Hoong Adam No 2*"), the learned judicial commissioner accepted that the employer was entitled to apply for a declaration that the adjudication application was null and void

prior to the issuance of the adjudication determination. However, since the adjudication had proceeded, the adjudicator was entitled to issue an adjudication determination before the court determined the employer's application. While an adjudication determination was not in existence at the time when the employer's application was filed, it was in existence at the time of judgment. Thus, if the judgment allowed the jurisdictional challenge, it would have led to the conclusion that the subsequently issued adjudication determination was null and void. Accordingly, the better course of action would be for the employer to convert his application into a setting aside application and provide the requisite security since he would have been well aware of the effect of the success of his application: *Lau Fook Hoong Adam No 2* at [5] and [6]. On the employer's second submission, the learned judicial commissioner held that while the employer was correct to say that he could not have intended to challenge the adjudication determination at the time he filed his application, such an intention could not be sustained in good faith after the issuance of the adjudication determination. Regardless of when the application was filed, it was, at the time the matter was heard, an application that would lead to the setting aside of the adjudication determination if the applicant was successful: *Lau Fook Hoong Adam No 2* at [8].

Supervisory jurisdiction of the courts

7.56 The Court of Appeal has clarified that in hearing and determining an application to set aside an adjudication determination made under the SOP Act, a court is essentially exercising its supervisory jurisdiction. In *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 ("*Mansource No 1*"), the main contractor took out a summons to strike out the notice of appeal by a subcontractor against a decision of the High Court in setting aside an adjudication determination. The main contractor argued that the subcontractor should have obtained the requisite leave of appeal under s 34(2)(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). The Court of Appeal dismissed the main contractor's summons. In the course of its judgment, the court agreed with the position stated in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 18.94 that for the purpose of an application to enforce the adjudication determination as a judgment, 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. Whether the enforcement proceedings are to be brought in the State Courts or the High Court depends on the adjudicated amount. On the other hand, an application to set aside an adjudication determination or a s 27 judgment must be brought in the High Court. Sundaresh Menon CJ considered 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": *Mansource No 1* at [48].

7.57 In another instance, the High Court emphasised that this supervisory jurisdiction of the courts does not extend to reviewing the merits of the decision made by an adjudicator under the SOP Act. In *Newcon Builders Pte Ltd v Sino New Steel Pte Ltd* [2015] SGHC 226, the dispute before the court was whether an adjudication application was filed out of time. Quentin Loh J held that this inquiry does not constitute a review into the merits of the adjudicator's decision.

Filing of documents with authorised nominating body

7.58 The substantial issue in *Mansource No 1* was heard subsequently by the Court of Appeal in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 5 SLR 482 ("*Mansource No 2*"). The issue before the court concerned r 2.2 of the Singapore Mediation Centre's Adjudication Procedure Rules ("SMC Rules") which stated that the "opening hours" of the SMC were 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. The adjudication response in that case was filed with the SMC at 4.32pm on the last day for the lodgment. 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 and ruled that the adjudication response was not filed within the seven-day period stipulated by s 15(1) of the SOP Act. As a result, the adjudicator only considered the subcontractor's written submissions attached to the adjudication application and did not consider the main contractor's adjudication response.

7.59 The High Court decided that the word "day" should be understood to mean "any period of 24 hours beginning with one midnight and ending with the next". The learned judicial commissioner ruled that as long as the adjudication response is lodged on or before 2359 hours on the last day of the prescribed period, "then it is lodged within time": *Mansource Interior Pte Ltd v Citiwall Safety Glass Pte Ltd* [2014] 3 SLR 264 (*Mansource No 2* at [7]). He proceeded to order that the adjudication determination be set aside on the basis that there had been a breach of the rules of natural justice.

7.60 The Court of Appeal disagreed with the trial judge and allowed the appeal. It held that the rule requiring documents to be lodged on or before 4.30pm on the appointed day is perfectly consistent with s 15(1) of the SOP Act when the latter is read together with s 37 of the Act. The respondent must observe what is set out in the rule laid down by the authorised nominating body ("ANB") for receiving documents. It is

within the power of the ANB to make these rules under s 28 when read together with s 37 of the SOP Act: *Mansource No 2* at [13]. In the course of his judgment, Chao Hick Tin JA observed (*Mansource No 2* at [14]):

> Section 37(1)(*b*) does not envisage that the SMC should remain open until 11.59pm, as the Judge seemed to have thought, in order to enable a party who has business with the SMC to lodge the relevant documents. Pursuant to s 37(1)(*b*) and s 28(4)(*e*), SMC has by r 2.2 prescribed a clear and sensible arrangement as to how it would discharge its functions under the SOPA … In our opinion, r 2.2 is wholly consistent with s 37(1)(*b*) and is therefore not *ultra vires*.

PART B

7.61 In this section, six contract cases and one tort case are reviewed. The underlying theme for the review of the contract cases will be to highlight the unique relationship between contractual clauses and the common law principles that the clauses are intended to modify. There are four subsections, namely, payment matters, contractual remedies, confidentiality of information and documents, and performance bond. The single tort case involves a review of the principles of joint and several liability.

Payment matters

7.62 In this subsection, one of the two cases reviewed is from the Court of Appeal which did not involve a construction dispute but offers the meaning to the not uncommon reference of the terms "market" and "market values". Such terms may be found in the mechanism usually agreed by parties for use in the formula for the valuation of variations ordered under the contract thereby replacing the need to rely on the quantification process prescribed by the common law under the *quantum meruit* principle.

7.63 The second case is from the High Court involving a construction dispute which decided that the contractual provision contained the applicable formula which was to be used to ascertain the quantity of the works that would be entitled to payment.

Marco Polo Shipping Company Pte Ltd v Fairmacs Shipping & Transport Services Pte Ltd *[2015] 5 SLR 541*

7.64 The selection of this case would at first glance be controversial in a chapter on construction law because it is an assessment of damages case in respect of a breach of a transportation contract. It becomes clear only when the issue of the existence of a market surfaced in order to

ascertain a market value in the assessment of the quantum of damages which the plaintiff was entitled at the hearing before the assistant registrar.

7.65 The construction industry with its well-established standard forms of building contract has in its provision for the order of variation works, *inter alia*, pre-agreed rates and mechanisms for valuation of the varied works. One of the mechanism available from the Public Sector Standard Conditions of Contract for Construction Works 2014 (7th Ed, July 2014) ("PSSCOC") and used in the local PSSCOC form makes reference to market rates and prices in cl 20.1(c) which provides that, "[w]here (a) and (b) above do not apply, then by measurement and valuation at fair *market* rates and prices" [emphasis added].

7.66 Accordingly, construction professionals, particularly quantity surveyors and claim consultants, as well as construction lawyers, should be aware of the demands placed on the person having the responsibility to use a market pegged mechanism to carry out a valuation exercise required by the contract. If, for some reason, it is not possible to prove on a balance of probability the existence of a relevant market, the valuation carried out based on the supposed market pegged mechanism may be invalid and the common law valuation principle of *quantum meruit* may then become applicable.

7.67 In the case itself, the Court of Appeal laid down useful guidelines on the use and reliance of market pegged mechanism of valuation.

7.68 First, the court agreed (at [2]) that "a market index" is not an essential requirement to determine market value. Accordingly, the absence of such an index would not be fatal to the proof of a market pegged mechanism for valuation.

7.69 Whilst the court examined various definitions thrown up in the courts below, the Court of Appeal held (at [31]) that "the gist across these definitions [was], to borrow the [j]udge's words, that there [was] a *willing* seller and *willing* buyer *after negotiations*" [emphasis in original]. However, the court added (at [31]):

> This rules out command economies or monopolies in which there are no negotiations to speak of (although it may well be the case that the price which is fixed in either of *these* two particular contexts would not only constitute a 'market' price of sorts but would also (and more importantly) be the price which the court has recourse to as a measure of replacement cost). However, that does not mean only completely free markets are relevant. [emphasis in original]

Therefore, in the context of the construction industry, if building materials were actually bought from command economies or monopolies, then it would appear that even if it may satisfy the contractual mechanism of valuation, it could very well satisfy the common law principle of *quantum meruit*.

7.70 The matter did not end there as the Court of Appeal added (at [32]) a further requirement which is that, "the market must be a ***relevant*** market" [emphasis in original]. Although it was concluded (at [39]) that the evidence before the court, "was, at best, evidence of an ***irrelevant*** market" [emphasis in original]. The court noted (at [40]) that there "appeared to be at least three different 'markets' in the river sand industry in the context of the present case, at least as depicted by the limited evidence presented before the AR (and, by extension, before the Judge and this court)".

7.71 The three markets were the "wholesale market", the "retail market" and the market that connected the retailers to the wholesalers: at [40]. An equivalent scenario in the construction industry could be the respective markets of the materials supplier, the subcontractor and the main contractor.

Bumi Geo Engineering Pte Ltd v Civil Tech Pte Ltd *[2015] 5 SLR 1322*

7.72 The case brought before the courts have indeed several learning points for both lawyers and construction industry players. The important issue of payment not only forms the consideration of one party in most construction contracts but constantly remind parties to a contract that in the event of disputes, including payment disputes, the issues before the court are resolved not by industry practice but by the court interpreting and construing the contract unless there is a common departure from the contractual rights thereby giving way to the actual conduct of the parties. On the facts, the plaintiff subcontractor had "consistently claimed on the basis of a 10% deduction and the defendant had certified those claims on the basis of an 18% deduction": at [96]. Both parties had departed from the provision of the clause in the contract that was under scrutiny by the court.

7.73 The issue was whether payment should be made in the terms understood by the defendant main contractor, the paymaster, as being based on the *actual volume of soil treated* at the rate of $92 per cubic metre of soil treated or as understood by the subcontractor who did the work as being based on a *formula* where either a deduction of 10% or 18% from the nominal volume is applicable: at [6].

7.74 This formula is derived from the way the soil is being treated. There are two parts of the formula. The first part measures the volume of soil treated by inserting the soil treatment machine once which would be in the shape of a cylinder multiplied by the number of insertions. This is a nominal figure. The second part is a percentage reduction of the nominal figure to account for any overlaps. This is because the design of the soil treatment would require an overlap of the horizontal cross section of any two cylindrical columns of treated soil. In addition, when the soil treated abuts the wall formed by the sheet piles the treated soil will not form a full cylinder but one that would have been shaved off by the sheet piles.

First issue – Valid version of contract

7.75 The first issue that the court had to decide was the valid version of the contract. Although there were several versions of the contract, the parties had agreed that there was a common earlier version but it was overtaken by the revised version. The issue at hand was which revised version was valid as both parties had claimed that the one in their possession was the valid one: at [17].

Initialling of contract documents

7.76 One of the good practice points of the industry was highlighted by the court which was for the parties' representatives to initial on every page of the contract although this practice was not faithfully followed through in this case. The plaintiff's version had initials only on all the pages of the main body of the contract but not so for the defendant's version which partly contributed to the influence on the judge to believe that the plaintiff's version was the valid one: at [23] and [24]. However, the acknowledgment and acceptance pages in both versions were not signed: at [25]. This not uncommon situation may exist because of poor contractual housekeeping of the respective parties.

Adverse inference

7.77 Stakeholders in the construction industry should also be aware of some of the court practices which could tip the judicial scales against them if they fail to have certain witnesses appear before the court since the opposing party in court may call for the court to take an adverse inference when a witness is not so called to testify. In this case, the defendant failed to call a person whom the plaintiff alleged would be in the best position to, *inter alia*, identify the version of the contract that evidences the final agreement between the parties.

7.78 The court (at [32]) had explained that, "evidence which could be and [was] not produced would if produced be unfavourable to the

person who withholds it". However, the court added (at [35]) that, "[b]efore an adverse inference may be drawn against a party for the absence of a material witness, the court must be satisfied of the availability and materiality of the evidence". On the facts, the court was satisfied on both counts and adverse inference was taken from the failure to call the defendant's witness: at [37].

Second issue – Meaning of payment clause

7.79 The second issue before the court was the true meaning of cl 2.3 which ought to resolve the basis for calculating the amount to be paid for work done. Clause 2.3 is reproduced below for ease of reference:

> Payment and final Sub-Contract Sum shall be ascertained by re-measurement based on approved as-built drawings.

7.80 However, instead of relying on cl 2.3, the plaintiff had relied on the use of a formula to arrive at the quantum of work done multiplied by the agreed rate to justify its claim for payment; it was in establishing the circumstances that made the formula applicable that the plaintiff faced difficulties in convincing the court.

7.81 In this second issue, there was at least one red herring in that the plaintiff had relied on the formula used for making claims for payment in a previous contract with the defendant in making its current claim in the contract under scrutiny by the court based on the principle of previous dealing but was rejected: at [79]. The court had also rejected (at [80]) the expert evidence on industry practice which was adduced in support of the formula used in making the plaintiff's claims because one expert's account was unsubstantiated and the other expert failed to cite examples of subcontract in use or industry guide that supported his opinion. The third point rejected by the court was the submission that the defendant contractor ought to be estopped from denying that the formula using a deduction of 5.77% was applied to make payment to the plaintiff subcontractor. This was because "there is no evidence that the plaintiff assumed that a 5.77% deduction would apply": at [96].

7.82 After examining cl 2.3, the court held (at [83]) that "the method of valuation the parties agreed on, as discerned from the clear words of cl 2.3, is the treated area method". This is because "the fixed deduction method will not entail any 're-measurement' of the as-built drawings whereas this is consistent with the defendant's treated area method which entails measuring actual overlaps between columns and with sheet piles": at [83].

Contractual remedies

7.83 Two types of contractual remedies are reviewed. The first contractual remedy provides for a contractual termination of the contract but not the termination of the employment of the contractor or, as in the case, the subcontractor as is the usual provision. In the case concerned, the operation of the termination clause and the consequences of termination, including whether liquidated damages may be payable and the ascertainment of defects to determine the amount of outstanding payment due for work done were examined.

7.84 The second contractual remedy is in the form of an indemnity clause. The case concerned did not involve a construction dispute but rather an indemnity clause that is a common feature in building contracts. However, the case itself is limited to the issue of indemnification of "costs" which is seldom ventilated in court and therefore presents a rare opportunity for being instructed.

CAA Technologies Pte Ltd v HP Construction & Engineering Pte Ltd *[2015] SGHC 32*

7.85 Those who specialise in construction law would have been exposed to the close relationship between the common law principles and contractual provisions that modify the common law principles generally and in particular, the corresponding provisions found in standard form of building contracts that have been spawned in many Commonwealth jurisdictions. The case before the court included, *inter alia*, the issues relating to the areas of contractual termination, liquidated damages and a claim based on *quantum meruit* for work done.

7.86 The plaintiff in this case was a subcontractor who sued the defendant main contractor for: "(a) wrongful termination of the subcontract between them ('the Subcontract') … (c) compensation on a *quantum meruit* basis for precast components that had been manufactured but undelivered". The defendant counterclaimed for, amongst others, "(c) damages for the delay caused by the plaintiff": at [2].

7.87 As is common in most construction disputes, there are important disputes of facts: at [23]. Hopefully, with the effective use of building information modeling ("BIM") in monitoring the progress of work, incidences of such dispute could possibly be significantly reduced and the 14 days which the court needed may be reduced if the relevant facts could be made indisputable by the facts being captured in the use of BIM.

Termination issues

7.88 One of the issues to be determined by the court was whether the defendant was entitled to terminate the subcontract. The termination clause is reproduced below (at [48]):

> **11. TERMINATION OF CONTRACT**
>
> This Sub-contract shall be terminated in the event the Sub-Contractor default in the following:
>
> (a) failure to proceed with the sub-contract works with due diligence and expedition after being required in writing so to do by the Main Contractor, or
>
> (b) refuses or neglects to remove defective materials or making good defective work after being directed in writing to do so by the Main Contractor, or
>
> (c) fails to perform his obligations in accordance with this Sub-Contract Agreement after being required in writing to do so by the Main Contractor
>
> …
>
> For items (a) to (c), the Sub-Contractor will be given three (3) (*sic*) days to comply. Upon such determination, the rights and liabilities of the Main Contractor shall be the same as if the Sub-Contractor has repudiated this contract. The Main Contractor reserves the right to recover all loss and cost from the Sub-Contractor.
>
> [emphasis in original omitted]

7.89 A termination clause presumably allows the person so empowered to terminate the contract or quite commonly, the employment of the contractor or the subcontractor, as the case may be, with greater certainty as compared to when the said person attempts to exercise termination under the common law principle of repudiation which requires acceptance. Exercising one's contractual right to terminate a contract is fraught with uncertainty judging by the case law on common law termination as many cases appear to have inconsistent results in terms of what a court would uphold as the necessary ingredients entitling a termination. Hence, termination clauses are commonly found in most contracts together with the attendant clauses on the immediate post-termination operational issues of the continuation of the incomplete works. However, whilst the intention may be good and worthy for having termination provisions so that the potential issues (including and not limited to whether the contractor must vacate the site; whether contractors and subcontractors may remove their materials and equipment from the site, *etc*) arising from such termination clauses could be avoided or reduced significantly, only a well-thought through clause would be helpful in achieving the said intention.

7.90 Therefore, the termination clause analysed in the case appear to be a curiosity in that it provides for the termination of the subcontract and not the employment of the subcontractor as in what many standard form contracts do provide and which are intended to terminate the employment but continue to rely on the existence of the contract to regulate post-termination management of the site and construction activities. In addition, there is also no provision in the subcontract under scrutiny for the usual post-termination matters like handing over, vacation of site, *etc*, or in the case concerned, no provision for the manufactured precast pieces at the factory to be delivered to site. However, these matters were not raised in the case.

7.91 The more common challenge in termination clauses that are also the bane of standard form building contracts is the inclusion of events that are not easy for the administration of the process of termination. It requires the person who issues documents that would trigger the termination process to be in a position to evaluate both factually and legally that the entitlement to do so has been crystallised. Accordingly, the main contractor in the clause under scrutiny by the court must be able to evaluate both factually and legally that the events named in cl 11 have occurred before informing the subcontractor in writing of the named events.

7.92 In cl 11(a), the event concerned is "failure to proceed with the sub-contract works with *due diligence and expedition*"; and in cl 11(b), "refuses or neglects to remove *defective* materials or making good *defective* work"; and in cl 11(c), "fails to perform his *obligations* in accordance with this Sub-Contract Agreement" [emphasis added]: at [48]. It is noted that the judgment did not mention that the words in italic were defined. If the main contractor had not been able to adduce evidence to prove the existence of the events factually, the tables may have been turned from lawful termination to unlawful termination.

7.93 Taking the italicised words in turn, an attempt is now made to convince you that it would not be easy for the main contractor or whoever bears the burden to make the evaluation and be found to be legally correct which would otherwise result in the termination being unlawful.

Due diligence and expedition

7.94 It is interesting to note that the learned judge held (at [52]) that:

> [T]he plaintiff had caused inordinate delays in the production of the precast components through (a) delays in the submission of shop drawings (see [22]–[32] above); (b) its cash flow problems (see [33]–[35] above); and (c) its shortage of materials and workers (see [36]–[43] above).

He then concluded that, "they constitute sufficient reasons for the plaintiff to terminate the Subcontract under cl 11(a)": at [52].

7.95 Although the learned judge did mention (at [46]) that he "found that the plaintiff repeatedly failed to improve its rate of production of the precast components", it would appear that "*inordinate delays*" (at [52]) was equated with the "failure to proceed with the sub-contract works with *due diligence and expedition*" [emphasis added]: at [48]. However, this reading may not be the best approach to give meaning to cl 11(a) since a delay, whether inordinate or not, is a conclusion that the agreed time for completion has already lapsed with remaining works that are still outstanding and not completed; whereas due diligence and expedition measures the rate of work performed without any indication of whether the completion date has lapsed.

7.96 There is a further challenge since *due diligence and expedition* rate of work must be given a meaning in the light of the other relevant provisions, such as provisions for responsibility for the method of work, updating of works programme and extension of time for completion, to name three usual provisions in the standard forms of building contract. This approach is important to the person bearing the burden to make the evaluation, the main contractor in this case, since his evaluation must confirm that the subcontractor failed to proceed with the subcontract works with *due diligence and expedition*.

7.97 It may be impossible to evaluate the *due diligence and expedition* rate of work if the works programme is not updated on a real time basis or as in this case, the subcontractor's work schedules have not been updated whether according to floors or otherwise. A real time update would be required since in the meanwhile, extension of time may have been granted and therefore distorting the works programme on at least two counts. First, the latest extension of time ("EOT") granted may not have been incorporated. Second, any acceleration of the progress of works by any change in methods of work may not be reflected in the works programme.

7.98 In any event, even if the subcontractor has not completed the volume of work as reflected by the updated programme, it is not possible to conclude that there is a delay to complete before the agreed completion date since in most contracts, the method of work is left to the sole responsibility of the contractor or subcontractor. As the case may be, and there is the possibility of accelerating the works by changing the method of work as long as the agreed completion date or the extended completion date, whichever may be the relevant situation, has not expired. In this case, it involved the failure to comply with any updated work schedule presumably for each floor, and accordingly, it would similarly not be possible to conclude that there is a delay to

complete before the single agreed completion date stated in the subcontract for the reasons mentioned above.

7.99 Therefore, a failure to proceed with the subcontract works with due diligence and expedition can only be properly concluded, if at all possible, at the earliest, on a day after the agreed completion date or the latest extended completion date. However, if the subcontract provides for completion dates for every floor, then it is possible to evaluate whether there is a delay on the completion date for each floor. It is not made known in the judgment whether there were provisions for completion dates for each floor in the subcontract and if so, what these dates might be.

7.100 What is made known in the judgment is a single agreed completion date which was 4 March 2014 and the date of the defendant's notice of termination was 3 April 2013 with no mention of the agreed completion dates for each floor.

7.101 Another important consideration for a meaningful evaluation of the rate of progress of work of due diligence and expedition would be to do so only after all the entitlement to EOTs have been granted. Therefore, unless prompt grants of EOT are made, it is almost not possible to meaningfully evaluate whether the works have progressed with due diligence or expedition since with a longer time after EOT is granted, the due diligence and expedition rate of work would be lower than before the EOTs are granted.

Defective

7.102 The factual dispute in this case was the quality of materials supplied and the works carried out. The issue was whether these were defective. Interestingly, it was not mentioned in the judgment whether "defective" was defined. According to the learned judge, "[t]he documents and photographs show that when the precast components were supplied, there were numerous defects in the precast components supplied that had to be rectified." In addition, it was noted by the learned judge that whilst the plaintiff's witness repeatedly denied that there were defects in the precast components, the same witness nevertheless did admit that there were defects several times during cross-examination: at [52].

7.103 It was alleged by the plaintiffs that, *inter alia*, the defendants failed to plead the particulars of the defects to which the learned judge held (at [110]) that "[w]hile the pleadings [were] short and the relevant claim [was] only dealt with through the abovementioned passage, the pleadings [were] adequate for the case at hand." It was further observed by the learned judge that:

> In *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18], the Court of Appeal held that pleadings were meant to 'narrow the parties to definite issues', and defective pleadings can be overcome as long as the other party is not taken by surprise, or is not irreparably prejudiced.

7.104 The relevant passage in the pleadings under scrutiny is reproduced below for ease of reference (at [109]):

> The precast components supplied by the Plaintiffs were defective as a result of which the Defendants also had to incur costs to rectify the defective precast components.

7.105 The defects identified by the court (at [111]) were:

> (a) There was evidence to suggest that honeycombing and concrete stains were present on the parts.
>
> (b) There were incorrectly threaded bars present.
>
> (c) There were also numerous other defects that were present according to the photographic evidence presented, such as incorrect beam links, incorrect placing of lifting wires, and sagging window frames.

7.106 The treatment of issues of defects appears not to be ventilated adequately in most cases because defects are associated with the lack of quality and in many cases may be both subjective and emotive. Even professionally, the almost sole reliance on the functionality test by many building professionals appears to have ignored the paramount legal requirement of a defect, that it must be a breach of the contract. Therefore, it would not be a breach of contract if a completed structure was built based on the contract specification but was not able to withstand the tremors of an earthquake. It may be negligence on the part of the designer but the builder may not be successfully sued for defective structure.

7.107 Therefore, a claim for compensation in respect of defects must set out (a) the term of the contract, whether express or implied; (b) the breach of the said term; and (c) the damages that flow from the breach. In particular, any failure for requirement (c) will result in a grant of nominal damages.

7.108 Therefore, it becomes more difficult to successfully claim in respect of defects if the word, "defects" or "defective", is not contractually defined, unlike in cl 1.1(j) of the PSSCOC:

> 'Defect' means any part of the Works not executed provided or completed in accordance with the Contract. For the avoidance of doubt and without limiting the generality of the expression the term

> shall be taken to include any item of Plant, material, goods or work incorporated or used in the Works which does not or may not conform to the relevant quality standards or pass the tests prescribed in or to be inferred from the Contract.

7.109 With such a definition, the meaning of a defect becomes more definitive and the defect concerned becomes easier to ascertain and to prove or disprove. Otherwise, given the nature of building works being cast on site or *in situ*, most completed components of a structure are given a tolerance rating since the environment to construct with accuracy and precision is not present when works are carried on site at least by implication. Of particular importance is the last sentence which effectively provides for the failure to include specification for any item of the works since this catch-all provision would at least ensure that the minimum quality standard is pegged to the "relevant quality standard" whatever that may be, even if no standard has been expressly provided in the contract documents themselves.

7.110 Whilst the precast pieces under scrutiny in this case were manufactured in a factory and not on site, there is still the other challenge in terms of whether the defective pieces were manufactured in accordance with the contract specification and drawings that were approved, thereby requiring the identification of the same and if there were none, then the implied quality standard that would be applicable. This begs the following questions:

> (a) Whether the applicable contractual terms and/or specification or the applicable implied terms in respect of the named defects have been identified?
>
> (b) Whether the particulars of breach have been adequately pleaded so that the necessary expert witnesses may be called upon to give evidence as regards whether there exists a breach or whether it is within the acceptable tolerance range and/or whether the defects require repair which may affect the quantification of damages recoverable?
>
> (c) Whether the burden of proof in respect of the allegation of defects have been properly discharged by mere photographs, thereby displacing any contractually prescribed testing or other methods of verification by experts which may have been prescribed in the subcontract as the contractual quality check standards imposed on the finished product as the minimum quality control procedural requirements in the contract?

Liquidated damages claim

7.111 It was the plaintiff's case when faced with a claim of liquidated damages from the defendants that because of the termination, the

stipulated date for completion under the Subcontract would cease to be effective (*Chua Tian Chu v Chin Bay Ching* [2011] SGHC 126 at [60]) and the defendant would lose its right to enforce the liquidated damages provision (*Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 607) (at [81]), to which the learned judge responded by accepting this point (at [83]).

7.112 In addition, the learned judge adopted (at [83]) the judgment of *Re Sanpete Builders (S) Pte Ltd* [1989] 1 SLR(R) 5 where:

> Chao Hick Tin JC (as he then was) … held that a condition precedent for imposing liquidated damages on a defaulting contractor is that the contractor must have had until the last hour of the day fixed for completion to finish the works (at [21]). In this case, the defendant terminated the Subcontract before the completion date. Thus, its right to claim liquidated damages from the plaintiff did not arise.

7.113 The learned judge noted (at [84]) that:

> Typically in construction disputes, there are provisions for a trigger date from which liquidated damages start to run (see Chow Kok Fong, *Law and Practice of Construction Contracts* vol 1 (Sweet & Maxwell, 2012) at para 9.57), usually a date certified by the architect or engineer [which the subcontract liquidated damages clause did not have].

7.114 It was found that the subcontract liquidated damages clause had "no mechanism stipulating how a liquidated damages claim is to be quantified": at [85]. The learned judge accepted the plaintiff's position that the main contract was also applicable to the subcontract in respect of the imposition of liquidated damages: at [86]. Accordingly, since the certificate imposing liquidated damages in the main contract was not issued, the counterclaim for liquidated damages was disallowed: at [88].

7.115 For ease of reference, the subcontract liquidated damages clause is reproduced below (at [84]):

> **3. LIQUIDATED DAMAGES**
>
> The Liquidated and Ascertained Damages to be imposed shall be as per main contract inclusive of Sunday and Public Holidays, for each day that your subcontract work remains incomplete.

7.116 In addition, reference is also made to the finding of the court where it noted (at [89]) that "[t]o make its case even weaker, the HDB has not even imposed any liquidated damages onto it".

7.117 It is interesting to note that based on the wording of the clause and the court's note, it begs the question as to whether the liquidated damages ("LD") clause was actually an LD clause since the court also found that there was no mechanism to calculate the LD in the said LD

clause or was the clause an indemnity clause? This is especially true when whatever was imposed on the main contractor would have been imposed on the subcontractor based on the reading of the subcontract clause. Further, whether the main contract LD has been even imposed on the main contractor would not be relevant if the subcontract LD clause which was the relevant clause under scrutiny was indeed an LD provision. This would be because a LD provision remains valid even if the main contractor who would have been the recipient of the LD eventually may not have suffered any loss as long as the other requirements of a LD clause have been satisfied, including that the amount of LD ascertained was a genuine pre-estimate of the loss suffered. However, had the subcontract clause been an indemnity clause, then the fact of recovery of LD from the main contractor becomes a critical consideration to the invocation of the indemnity clause.

Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA *[2015] 4 SLR 1019*

7.118 This case represented a unique opportunity for the court to look into one aspect of an indemnity clause concerning costs incurred in a court proceeding in respect of the main action and a third party action. Broadly, the court noted (at [24]) that there are two ways in which a beneficiary of an indemnity costs clause could assert its entitlement. The first way is to invoke directly the contractual rights afforded by the said clause. The second way is to "urge the court to consider the costs agreement between the parties as a relevant factor in deciding whether indemnity costs ought to be awarded": at [24]. The court noted (at [33]) that "[i]n this present case, nothing turns on this [second way]." Nevertheless, the court included (at [34]) an interesting remark apparently for the benefit of a court in future when the occasion presents itself for scrutiny that:

> [C]ourts will have to deal with a possible inequality between the two legal avenues for recovery of costs. Where the court's statutory discretion to award costs is invoked, the court may disregard the contractual agreement between the parties if it would be manifestly unjust to uphold the agreement (see *Abani Trading* … at [94], *Hong Leong Finance* … at [75], and *Susilawati v American Express Bank Ltd* [2008] 1 SLR(R) 237 at [101]).

7.119 The indemnity costs clause (cl 7.15) analysed by the court (at [15] and [38]) is reproduced below for ease of reference:

> The client undertakes to indemnify the Bank, as well as its correspondents and respective directors and employees, for any damages, costs or other expenses incurred or which they are liable or might be liable towards any correspondent, authority, third party (Singapore, Swiss or foreign), as a result or due to acts effected on

> behalf of the client, including in the event of acts undertaken on instructions of representatives or agents of the client, or forgery or abuse made by persons other than the Bank's bodies or employees.

7.120 This case was chosen for review because indemnity clauses are commonly found in standard form of construction contracts. However, not all indemnity clauses include costs in the scope of indemnity. In the two local standard forms, only cll 26.1(1) and 26.2 in the PSSCOC include costs:

> 26.1 **Injury to Persons**
>
> (1) The Contractor shall be liable for and shall indemnify the Employer against any loss, expense, costs, damages, liability or claim whatsoever in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or by reason of the carrying out of the Works, unless the same is shown to be due solely to any negligent or wilful act of the Employer or of any person for whom the Employer is responsible.
>
> …
>
> 26.2 **Damage to Property**
>
> Without prejudice to his liabilities in regard to completing the Works under Clause 4.1, the Contractor shall be liable for and shall indemnify the Employer against any loss, expense, costs, damages, liability or claim due to injury or damage of any kind to any property real or personal (including any property of the Employer other than the Works) insofar as such injury or damage arises out of or in the course of or by reason of the carrying out of the Works, unless the Contractor proves to the satisfaction of the Superintending Officer that it was not due to any negligence, omission, breach of contract or default of the Contractor, or of any person for whom the Contractor is responsible including the Contractor's servants or agents or any subcontractors and their servants or agents.

Interestingly, the other local standard form of construction contract does not explicitly include costs in its indemnity clause.

Costs as a contractual claim

7.121 It was noted by the court that if costs are part of a contractual claim, it has to be "clearly and properly pleaded": at [30]. However, cl 7 was pleaded in this case and the other party did not raise any issue that it may have been insufficiently pleaded nor "submit that it had been caught by surprise". Accordingly, nothing further turned on this point: at [32]. By taking this avenue of claim under contract, the beneficiary of the indemnity clause might have avoided the manifest injustice test applicable to a claim for discretionary costs: at [35]. This effectively means that the indemnified may be denied an indemnity by the exercise

of the court's discretion. Accordingly, lawyers who either advised the client to pursue the costs claim as a statutory claim, unwittingly left out a contractual claim for costs or insufficiently pleaded the costs as a contractual claim, will be met with this challenge of not being awarded costs on an indemnity basis.

7.122 Another challenge faced by the beneficiary of the indemnity clause would be whether the indemnity clause is broad enough to cover the proceedings before the court. After examining the "actual wording of the clause" (at [41]), the court held that the "general language of the clause [was] only insufficient to require the [indemnifier] to indemnify the [indemnified] against legal costs and damages arising out of a [indemnifier's] successful suit against the [indemnified]" [emphasis in original omitted]: at [44]. Accordingly, the learned judge held (at [50]) that the said clause does cover the costs in the present case but at the same time noted that the parties had not made any "submissions … on the meaning of 'as a result' or 'due to' in cl 7.15".

7.123 The party to be indemnified may face a further challenge since there will be a bar to a contractual claim of costs if for some reasons, the said party "has already obtained costs … pursuant to the court's exercise of its statutory powers": at [33]. This would mean that the lawyers of the party to be indemnified should ideally include both the breach of contract claims for which the indemnity costs clause were meant to be applicable as a further contractual claim in the same action.

Costs as part of the court's statutory discretion

7.124 Generally, costs claimed under this head, unlike as a contractual claim, do not depend on the contractual provisions and claims being sufficiently pleaded: at [32]. However, this was not the case as the claim before the court was a contractual claim: at [33]. If this had been an issue before the court, an interesting situation might have developed in that "the court may disregard the contractual agreement between the parties if it would be manifestly unjust to uphold the agreement": at [34].

7.125 Nevertheless, the party to be indemnified was required "to assert that the costs agreement [was] a relevant factor in determining the basis of the award": at [33].

Confidentiality of drawings

7.126 Clauses that provide for parties to maintain confidentiality of documents are not uncommon in building contracts between the employer and the main contractor but they may not be present in every

single contract that is related to the project for which the main contract was entered into. Therefore, the issue would be whether such confidentiality clauses in the main contract would be effective in extending to all persons involved in the project and who may have access to the documents intended to be protected by the said confidentiality clauses.

7.127 Therefore, this case is instructive to all parties who are involved in a project and have access to information or documents, especially when the BIM platform is used, that are capable of being protected by confidentiality clauses prescribed in the main contract but may not be found in every contract related to the project. In this case, the decision sets the scope of protection as beyond the express terms of the contract and had applied equitable principles.

Tempcool Engineering (S) Pte Ltd v Chong Vincent *[2015] SGHC 100*

7.128 The case before the High Court involved an employer taking action against two former employees and a competing business for breach of confidentiality in respect of, *inter alia*, drawings. However, at the time of the alleged breach, one of them was still an employee who was allegedly passing information to the other former employee for use in the company set up by the other former employee. Accordingly, the learned judge noted (at [25]) that:

> This was not a situation that required the balancing of an employer's interests in protecting confidential information against its former employee's interests to use the skills and knowledge that he had gained in the course of employment.

7.129 Therefore, the court held that "the question of degree of confidentiality did not apply". Indeed, the recipient of the confidential information was a former employee "who obtained a company's confidential information from a serving employee with the knowledge that the employee had obtained the information in breach of confidence". The learned judge then held that "[i]n such a situation, an equitable duty of confidence" would apply "based on good faith and conscience": at [25].

7.130 The court adopted (at [26]) "[t]he general test for the equitable obligation of confidence … stated in [*Coco v A N Clark (Engineers) Ltd* [1969] RPC 41] (at 48)". The three elements for an action are as follows (at [13]):

> (a) First, the information must possess the necessary quality of confidentiality.

(b) Second, the information must have been imparted (or received) in circumstances such as to import an obligation of confidentiality.

(c) Third, there must be unauthorised use of the information and detriment.

7.131 Applying the "general test for the equitable obligation of confidence", the court held that "the Disputed Drawings possessed the necessary quality of confidentiality" (at [22]) and that both former employees "knew that the Disputed Drawings were confidential, and they were received and imparted in circumstances such as to import an obligation of confidentiality" (at [26]). Finally, the court held that based on the facts, there were breaches of the obligation of confidence by all the defendants.

7.132 This case would be of interest to all employers whose firms and companies are, *inter alia*, designers, cost and claims consultants, and specialist subcontractors who may have an interest in protecting confidential information like drawings and price information against leakages through employees and/or former employees. Further, this case was selected because similar confidentiality obligations are imposed on contractors by employers in the two standard forms of building contract in Singapore. These are reproduced below for ease of reference:

(a) Clause 6(8) of the Singapore Institute of Architects, *Articles and Conditions of Building Contract* (Lump Sum Contract, 9th Ed, 2011):

> **Restrictions on Use**
>
> None of the documents hereinbefore mentioned shall be used by the Contractor for any purpose other than this Contract and neither the Employer, the Architect nor the Quantity Surveyor shall divulge or use except for the purposes of this Contract any of the prices in the Schedule of Rates or in the Make-up of Contractor's Prices.

(b) Clause 3.2 of the PSSCOC:

> **Custody and Supply of Drawings and Documents**
>
> (1) The Drawings shall remain in the sole custody of the Superintending Officer but four copies of the Drawings shall be provided to the Contractor free of charge. The Contractor shall make at his own cost any further copies required by him. Unless it is strictly necessary for the purposes of the Contract, the Drawings, Specifications and other documents provided by the Employer or the Superintending Officer shall not, without the consent of the Superintending Officer, be used or communicated to a third party by the Contractor.

7.133 Accordingly, other parties like consultants, subcontractors and others involved in a project where such a standard form of main contract is used are likely to be exposed to an equitable duty of confidence owed to the employers of the project arising from the clauses set out above.

7.134 The case would be instructive in ascertaining when there exist the necessary factual ingredients to bring an action for breach of confidence involving drawings and price information.

7.135 In deciding on the first part of the "general test for the equitable obligation of confidence", the court made the following points which may be of interest to those who may have confidential information to protect but yet may have to actively use the information in their day-to-day building activities in a construction project (at [18] and [20]):

> (a) "the Disputed Drawings were sufficiently valuable to be confidential";
>
> (b) "there is no necessity for confidential information to be patentable or inventive to have a quality of confidentiality ([*Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2014] 2 SLR 1045 ("*Invenpro*")] at [130])";
>
> (c) "the air of confidentiality is dissipated depending on the degree of exposure to the public domain (*Invenpro* (at [130]))"; and
>
> (d) "whether information retains a necessary quality of confidentiality is ultimately a question of fact and degree (*Invenpro* at [130])".

7.136 After analysing the factual matrix, the learned judge held that the disputed drawings did not lose its quality of confidentiality and noted the following supporting circumstances (at [20]–[22]):

> (a) "[the] drawings and plans were not given out in an uncontrolled environment";
>
> (b) "[the] drawings remained relatively inaccessible to the public";
>
> (c) "[any] precautions [taken] had to be commercially practical. Perhaps the precautions were inadequate, but that did not, on their own, mean that the drawings were not confidential. Nor did it mean that anyone was authorised to take them … no drawing was put up on the shared folder without [the necessary] permission"; and

> (d) "information can be confidential as a whole even though the component parts are in the public domain: see *Invenpro* at [130(e)]. [For example,] while commercial refrigeration equipment and other components were freely available in the public domain, the drawings that detailed, *inter alia*, the selection of the equipment and how they were laid out in a particular project were not".

7.137 In the second part of the "general test for the equitable obligation of confidence", the court noted (at [24]) that one of the three defendants was shown to be bound by an express term of obligation of confidence, and even "without an express contractual term in an employment contract, an obligation against the use or disclosure of confidential information will be implied for employees. See, *eg*, *Faccenda Chicken Ltd v Fowler* [1987] 1 Ch 117": at [23]. The court held (at [25]) that in the situation before it, "an equitable duty of confidence would be imposed … based on good faith and conscience".

7.138 In the third part of the test, the court held (at [35]) that where "the information has been appropriated without the owner's consent, any form of use or disclosure will constitute unauthorised use: see *eg*, *Intellectual Property Law of Singapore* (Susanna H S Leong, Academy Publishing, 2013) at [40.154]".

Brief review on performance bond case

7.139 As Singapore law departs from the embrace of the English common law in respect of the principles entitling the call of an on-demand bond to be restrained by having an additional ground of unconscionability, it is not surprising that the law relating to contracts would evolve to exclude this ground and bring the matter back to be in line with the English common law. The issue settled by the Court of Appeal was the validity of such provisions.

CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd
[2015] 3 SLR 1041

7.140 The Court of Appeal reversed the judgment of the High Court, which held that the provision was invalid. The Court of Appeal held that when parties by agreement exclude the unconscionability ground to defeat a call on an on-demand performance bond, the said provision is valid.

7.141 The clause in question is reproduced below for ease of reference (at [5]):

> **[3.5 <u>Performance bond</u>]**
>
> 3.5.8 In keeping with the intent that the performance bond is provided by the Contractor in lieu of a cash deposit, the Contractor agrees that except in the case of fraud, the Contractor shall not for any reason whatsoever be entitled to enjoin or restrain:
>
> (a) the Employer from making any call or demand on the performance bond or receiving any cash proceeds under the performance bond; or
>
> (b) the obligor under the performance bond from paying any cash proceeds under the performance bond
>
> on any ground including the ground of unconscionability.

7.142 This ruling by the Court of Appeal would effectively make it almost impossible to prevent a call made on an on-demand bond if such clauses have been incorporated into the contracts since the finding of fraud at the interlocutory stage is rare. This is a good example to highlight the power of the contract in modifying the principles laid down by the common law to facilitate the contractual arrangement of commercial transactions.

Negligence

7.143 In *Chong Kim Beng v Lim Ka Poh* [2015] 3 SLR 652, the High Court heard an appeal from the District Court. This case gives a very stark reminder to those of us who choose to ply the court rooms for a living to be competent in our work, especially for those who have not had a good grounding in basic substantive law, practice matters and the evolving statutory laws, including pieces of subsidiary legislation. What was not mentioned in detail was the fact that the court eventually dismissed the case on the ground of lack of evidence thereby warranting readers to read the case if there is a desire to appreciate the challenges in obtaining evidence at the scene of an accident in a workshop and more so at a construction site.

7.144 The appeal was limited to one aspect of the judgment by the plaintiff worker ("Chong"), who was injured at work against his employer ("MEC"), in respect of the Chong's claim to be allowed for MEC to be jointly liable with another defendant who was found to be 75% liable: at [4]. This case is instructive in a number of ways. Thus, this case would also be of interest to contractors and subcontractors, as well as new or junior construction lawyers and insurance companies.

7.145 The factual matrix in which Chong was injured is not uncommon in the construction industry, that is, that of one contracting company loaning its workers to another contracting company. MEC had by arrangement loaned the employee to another contractor working on

site and this contractor was in law an occupier of the site and ought to be also the worker's *de facto* employer: at [54]. As there was no cross appeal by MEC, this judgment while exonerating MEC's liability, was ineffective in changing the 15% liability which was not under appeal: at [56].

7.146 The learned judge identified two main issues. The first issue was whether Chong's pleadings allowed him to claim that the liability of the defendants was joint (the "Pleading Issue"): at [7]. The second issue was whether in fact and in law, the liability of the defendants to Chong was joint (the "Substantive Issue"): at [8].

7.147 Interestingly, this case had a few twists in its judgment that may be of interest to especially new and junior lawyers. Whilst the judge's decision was in favour of Chong's Pleading Issue (at [13]), it was against Chong in the Substantive Issue (at [54]) leading to the dismissal of the appeal: at [55]. This decision, however, did not reverse the decision of the District Court in respect of MEC's liability for 15% since there was no cross appeal and MEC remained so liable: at [56].

The pleading issue

7.148 The arguments advanced by MEC (at [10]–[11]) against a finding of joint liability rests on two points, namely that:

> (a) MEC was taken by surprise as the words "joint and several" were not used in the body of the statement of claim and the prayers for relief; and
>
> (b) MEC would be prejudiced since they were not able to take a number of steps as they were taken by surprise.

7.149 The two points were neatly dismantled by the learned judge when he found (at [12]–[14]) that "the facts to establish joint liability were pleaded" and "the absence of the words 'joint and several' … is not fatal" thus MEC's "arguments about prejudice are therefore academic".

7.150 Arising from this case, the learned judge offered the advice that "it is in the interest of solicitors to learn from the present dispute and insert those words ['joint and several'] when they act for a plaintiff, if that is indeed the basis of the claim, so as to avoid argument in future": at [13].

The substantive issue

7.151 In setting out the perimeter of the scope of joint liability, the learned judge held that separate and distinct torts do not attract joint liability: at [29]. This was to be differentiated from different negligent

omissions which resulted in Chong's injury: at [30]. The court had taken the position (at [31]) that "different negligent conduct may yield a result that both tortfeasors are liable jointly to a plaintiff for the same injury".

7.152 Then the court noted (at [32]) that there was "some ambiguity in the authorities as to whether substantial contemporaneity is a requirement to find joint liability". In response to this ambiguity, the learned judge proceeded with his own scrutiny of the authorities and concluded that whereas "substantial contemporaneity, in the sense of contemporaneous conduct, [of two negligent conduct] is not a requirement to find joint liability", "both [negligent conduct must be] proximate cause[s] of the injury": at [43]–[44].

7.153 The two alleged negligent omissions on the part of MEC were failure to carry out a risk assessment exercise for signs of danger that Chong might be exposed to before he commenced work at the site and the failure to provide effective supervision of Chong's work: at [24]. Chong failed to adduce evidence in support of the two proximity points: at [52] and [54]. Accordingly, his appeal did not succeed: at [55].

Risk assessment under Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed)

7.154 In respect of the risk assessment point, the court (at [57(c)]) made an interesting observation although in the appeal itself, the court had "proceeded on the premise that MEC ought to have undertaken the assessment" but it noted that:

> The duty to carry out such an assessment was mentioned by the [Court of Appeal] in *Chandran a/l Subbiah v Dockers Marine Pte Ltd* [2010] 1 SLR 786 ('*Chandran*') at [31], and the CA had said at [33] that there may be circumstances where such an assessment need not be conducted. One such example is where an employee is assigned to do sedentary work in a foreign country.

It was acknowledged by the learned judge that this precedent may be inapplicable since the facts of the case under scrutiny before the Court of Appeal took place before the enactment of the Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed).