6. BUILDING AND CONSTRUCTION LAW

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

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

Interpretation of contracts

6.1 A persistent issue encountered with disputes arising from construction contracts remains the extent to which extrinsic materials may be imported in the interpretation of the terms recorded in a contract. There is, on the one hand, the compelling presumption that the essential terms of a modern commercial transaction are expected to be reduced to writing and, on the other, the reality that the task of interpreting contracts frequently requires an inquiry into the surrounding circumstances or context of a contract. In Singapore, the extent to which extrinsic evidence may be imported in the construction of written terms in a contract has been reviewed by the courts on a number of occasions, but many in the construction industry will welcome the searching analysis on the subject undertaken by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029.

6.2 In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029, B-Gold was engaged as the term contractor to carry out maintenance, repair, addition and alteration works at a broadcast centre. In accordance with cl 18 of the contract conditions, B-Gold took out a Contractors All Risks Policy with Zurich Insurance. Section I of the policy covered physical loss of or damage to items listed in a schedule to the policy. Section II of the policy covered third-party liability with two material exclusions: Special Exclusion 2, which excluded coverage in respect of expenditure incurred in repairing anything covered or coverable under Section I and Special Exclusion 4(b), which excluded coverage in respect of liability consequent upon loss of or damage to property belonging to, *inter alia*, the building owner. A fire broke out on the premises, caused by the negligence of one of the B-Gold's subcontractors. The building owner successfully sued B-Gold for the damage caused by the fire. B-Gold commenced third party proceedings against Zurich Insurance on the policy.

6.3 The District Judge found that the schedule under Section I of the policy did not include the physical premises on which the works were undertaken: *Media Corporation of Singapore Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2007] SGDC 7. He observed that it had been open to B-Gold to require the insurance cover to cover these physical premises but they did not ask for such an extension. Special Exclusion 2 stated that Zurich was not liable to indemnify B-Gold for loss or damage "covered or coverable under Section I". Furthermore, Special Exclusion 4(b) expressly excluded any indemnity in respect of loss or damage to property owned or possessed by the building owner. The result of this analysis is that B-Gold was precluded from making a claim under Section II and, accordingly, the District Judge dismissed B-Gold's claim in the third party action.

6.4 B-Gold appealed to the High Court. The learned judge accepted that B-Gold's claim in respect of the damaged property was not covered under Section I: *B-Gold Interior Design & Construction Pte Ltd v Zurich Insurance (Singapore) Pte Ltd* [2007] 4 SLR 82 at [30]. He considered that Special Exclusion 2 had to be read in the light of a memo which had the effect of limiting the "insurable" items. He agreed that Special Exclusion 4(b) was prima facie applicable to the claim. However, he decided – after taking into account the genesis of the Policy, in particular, his finding that B-Gold had relied on the insurer to provide cover for a specific purpose – that the exclusion clause should be denied its efficacy. The learned judge thereupon set aside the decision of the District Court (at 62).

6.5 The Court of Appeal held that where, as in this case, the parties did not dispute that the terms of the policy represented the complete agreement between them, the parol evidence rule as provided under s 94 of the Evidence Act (Cap 97, 1997 Rev Ed) applied. No extrinsic evidence was admissible to "contradict, vary, add to or subtract from the terms of the Policy". The court took the opportunity to review the common law contextual approach to contractual interpretation, in particular the principles laid down by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("*Investors Compensation Scheme*"), and held (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [121]) that this approach was statutorily embedded in proviso (*f*) to s 94 of the Evidence Act. This proviso would admit extrinsic evidence not only to ascertain the identity or extent of the subjects referred to in a document or the sense in which particular terms have been used, but also to clear up any other doubt that may arise in applying the document to the case. The court also affirmed the contextual approach to contractual interpretation as laid down in its earlier decision of *Sandar Aung v Parkway Hospitals Singapore Pte Ltd* [2007] 2 SLR 891. Extrinsic evidence is always admissible even if there is

no ambiguity in the language of the contract (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [115]), but, as stated by Lord Hoffmann in *Investors Compensation Scheme,* such extrinsic evidence must be relevant and reasonably available to all the contracting parties (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [125]) and they must relate to a clear or obvious context (at [129]).

6.6 However, in the instant case (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029), the court ruled that, in relying on the genesis of the policy to hold that an entire exclusion clause – Special Exclusion 4(b) – was inoperable, the learned judge had "strayed far into the realm of varying a contract in contravention of s 94". V K Rajah JA in delivering the judgment of the court said (at [134]):

> This was not a case where the court read down broad words within the scope of their penumbral meaning … nor could one argue that this was merely a case of aggressive or intrusive interpretation. Instead, it was a case where the court read an entire provision *out* of the contract being construed. There is a conceptual difference between attributing a meaning to words or phrases that might strain the contours of their penumbral meaning and simply ignoring a provision altogether. Thus, on the basis of the parol evidence rule (as statutorily embodied in s 94 of the Evidence Act) alone, the Judge's approach was legally impermissible.

6.7 Accordingly, since extrinsic evidence could not be introduced to render Special Exclusion 4(b) inoperative, this provision was held to be effective to exclude Zurich Insurance's liability to indemnify B-Gold under Section II.

Contract administration

Choice of construction contract

6.8 In *Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385, the architect offered the owner, who was a layman, the choice between (a) an arrangement under which the appointment of the architect was separate from that of a contractor employed to undertake the construction and (b) the "design and build" route, where the architect and contractor were subsumed under a single appointment. The question arose as to whether the architect was obliged, in this instance, to go beyond just stating the convenience of the design and build option and to draw to the attention of the owner the disadvantages of this route.

6.9 Justice Judith Prakash decided (*Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385 at [166]) that the architect owed a duty in this case not only not to give the owner negligent advice, but also to be careful to ensure that he gave the respondent complete advice. In this case, the learned judge considered that the architect was in breach of this duty of care when he failed to give the owner a complete picture of what each of the options entailed. In the process, the architect prevented the owner from making an informed decision or from choosing to adopt practices that would make up for the absence of the architect in his role of supervisor, certifier and arbiter. She emphasised (at [169]) that, whilst it was correct that from January 2004 architects had been permitted to offer both architectural and building services, their actions in this regard were still subject to the duty encompassed in r 13(1) of the Board of Architects' Code of Professional Conduct and Ethics. This code prohibits an architect from holding, assuming or consciously accepting a position in which his interest is in conflict with his professional duty to his client without previously informing his client of the same. He is also obliged to inform his client of the possibility of any conflict between his own interest and that of his client.

Negligent certification

6.10 The year under review also saw the courts dealing with an action against an architect for negligent certification. In *Lian Kok Hong v Ow Wah Foong* [2008] 4 SLR 165, the plaintiff had terminated the contract of his contractor in reliance of a termination certificate issued by the defendant architect. In an ensuing arbitration, the contractor succeeded against the plaintiff for wrongful termination, the arbitrator having decided that the architect's termination certificate was procedurally incorrect and in breach of the contract between the plaintiff and the contractor. Thereafter, the plaintiff sought an indemnity from the defendant which led to the matter being brought before the courts.

6.11 In the Court of Appeal, the case centred on the operation of s 24A(3)(*b*) of the Limitation Act (Cap 163, 1996 Rev Ed). The plaintiff appellant had argued that, in respect of the subject action, time did not start to run until the appellant had knowledge that the respondents were negligent in issuing the termination certificate. This was only known for certain when the arbitrator issued his interim award on 7 April 2003 and, since the subject action was commenced on 17 March 2006, it was within the three-year limitation period prescribed by s 24A(3).

6.12 The Court of Appeal first considered the relationship between s 6(1)(*a*) of the Limitation Act (Cap 163, 1996 Rev Ed), which prescribes the limitation period for contract and tort, and s 24A, which prescribes

the limitation period for negligence, nuisance or breach of contract. In delivering the judgment of the Court of Appeal, V K Rajah JA held that the true position is that, under the Limitation Act, an action for damages for negligence, nuisance or breach of duty is *subject* to s 24A. In other words, s 24A carves out certain exceptions to s 6(1)(*a*) and, as such, the two cannot apply concurrently (*Lian Kok Hong v Ow Wah Foong* [2008] 4 SLR 165 at [14]).

6.13 On the requisite knowledge for the purpose of determining the date when time begins to run under s 24A, the learned judge considered (*Lian Kok Hong v Ow Wah Foong* [2008] 4 SLR 165 at [28]) that the authorities suggest that this is knowledge of the following:

> (a) the fact that the damage was attributable in whole or in part to the act or omission which was alleged to constitute negligence, nuisance or breach of duty;
>
> (b) the identity of the defendant;
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> (c) if it were alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant; and
>
> (d) such material facts about the damage as would lead a reasonable person, who had suffered such damage, to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.

6.14 On the point of attributability, the learned judge was of the view that "the claimant need not know the details of what went wrong and it is wholly irrelevant whether he appreciated that what went wrong amounted in law to negligence, *as long as he knows of the factual essence of his complaint*" [emphasis in original]: *Lian Kok Hong v Ow Wah Foong* [2008] 4 SLR 165 at [36]. Knowledge is to be interpreted in broad terms of the facts on which the claim is based and of the defendant's acts or omissions and knowing that there is a real possibility that those acts or omissions have been a cause of the damage. In addition, s 25(6) extends this to include knowledge which the claimant might reasonably have been expected to acquire. He also considered the meaning of the expression "sufficiently serious" and decided that this means that the action considered must not be frivolous or wholly without merit, taking into account the effort required in instituting a court action (at [39]).

6.15 Applying these principles to the case before the court, the learned judge determined that the appellant would have been reasonably suspicious (though not absolutely certain) that the injury or damage he suffered was attributable in whole or in part to the act or

omission of the respondents. The requirement of "sufficient seriousness" must also have been fulfilled as the appellant was actually being sued by the contractor. He concluded (*Lian Kok Hong v Ow Wah Foong* [2008] 4 SLR 165 at [59]):

> In short, this is factually more than the requisite knowledge under s 24A(3)(*b*) and the appellant would thus have had the knowledge required for bringing an action for damages against the respondents at the latest from about July 2001.

6.16 Accordingly, the appeal was dismissed.

Construction delay

Determination of extension of time

6.17 Given the predominance of arbitration in the resolution of construction disputes, it has been some years since issues such as delay and time extensions have appeared before the courts. A rare opportunity for this surfaced in the decision of *Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385 where the High Court also had to consider the issues of defects, the measure of damages for defective works and the importance of a construction professional such as an architect to advise an owner on the risks associated with any construction contract model which had been proposed. The latter issues are considered in a subsequent part of this review.

6.18 In the instant case, the first defendant was a design-and-build contractor and the second defendant was an architect who brokered the design-and-build contract between the plaintiff and the first defendant. In addition, the architect was a principal shareholder and director of the first defendant contractor. The architect had advised the plaintiff to build his house on a design-and-build basis, using the standard form of contract known as the REDAS Design & Build Conditions of Contract. In the action, the plaintiff claimed damages for the late completion of the works. As there was no provision in the contract for liquidated damages, this was claimed in the form of rental that the completed house would have earned in respect of the period of delay. In order to determine the period of delay, the court had to establish the date of completion in accordance with the terms of the contract and to determine the contractor's entitlement to extension of time.

6.19 The court ruled (*Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385 at [51]) that the meaning of completion of works must come from the definition given in the contract in cl 11.1, which provided for the issue of the handing-over certificate. By that clause, the contractor was to apply for such a

certificate only when the contractor considered that the whole of the works was suitable for beneficial use and occupation. The court further held (at [55]) that although the contractor was entitled to rectify many of the building defects during the defects liability period, defects which affected the state of completion of the works must be rectified before completion could be said to have taken place. The court then accepted that the date of completion was the date when the actual handing over took place.

6.20 The court then dealt with the extension of time in two parts. First, the court held that the contractor was entitled to the two weeks agreed in the contract for the mobilisation period. Second, the court held (*Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385 at [41]) that the plaintiff's rejection of the interior design ("ID") subcontractor nominated by the contractor and the subsequent appointment of the ID subcontractor by the plaintiff was an act of prevention and had set time at large. This entitled the contractor to a reasonable time to complete the works, which was held to be two weeks after the completion of the ID works as originally envisaged by the contractor.

6.21 Following the analysis, the court decided that the contractor was indeed liable for some part of the delay and established the period of culpable delay to span between 29 January 2006 and the date of the handing over on 15 March 2006. Nevertheless, Judith Prakash J decided (*Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385 at [121]) that the plaintiff should be awarded only nominal damages of $1,000 because there was no direct evidence of what the plaintiff could have expected to earn if he had rented out the flat where he was living while waiting for the house to be completed. The court had earlier rejected the claim for rental in respect of the uncompleted house because the evidence had shown that it was the plaintiff's intention to move into the completed house and live there.

Damages for financial charges and interest

6.22 Construction cases involving project delays inevitably invite consideration of a claim for interest or financial charges borne by the aggrieved party. That a claim for additional interest incurred on construction loans as a result of a delay in the completion of a construction project falls within the *first* limb of *Hadley v Baxendale* (1854) 9 Exch 341 is now well settled. However, as shown in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623, it cannot be over emphasised that the starting point for any claimant in these cases is to show that the loss or damage derives directly from the delay caused by the defendant and that this proof is not discharged

merely by adducing evidence showing the quantum of the alleged damage or loss.

6.23 In *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623, a consulting firm was employed in the design, planning and supervision for the structural works for the construction of a hotel. The structural drawings of the project were completed but were subsequently found to be under-designed. The drawings were, therefore, corrected and submitted to the relevant building authorities in 1997. Unfortunately, the uncorrected drawings were issued to the builders and, as a result, the hotel as built had serious structural problems. These required remedial and strengthening works and delayed the completion of the project by 101 days. Both the consulting firm and the engineer who was principally responsible for the under-designed drawings admitted liability and judgment was entered by consent against them on 9 November 2005 for a claim in respect of the main contractor's preliminaries and clerk of works' salary and for other damages to be assessed.

6.24 At the hearing to assess damages under the other heads of claim, the assistant registrar awarded the hotel developer a total sum of $699,429.41 which included a substantial component for interest on various loans incurred by the developer during the period of delay (at [10]). The interest component consisted of $279,363.82 for interest on loans from the developer's shareholders ("the Shareholder Loans") and $215,859.84 for interest on a term loan and an overdraft facility. Interest was also awarded for the total damages at the rate of 6% *per annum* from the date of the original writ to the date of judgment. However, the assistant registrar rejected the claim for loss of rental income in respect of the hotel. On appeal, the High Court upheld (in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2007] SGHC 30) the assistant registrar's award of damages for most of the heads of claim, but set aside the award of $495,223.66 for the interest which the developer allegedly incurred on the various loans.

6.25 In the Court of Appeal (*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623), Andrew Phang JA, in delivering judgment of the court, affirmed the principle that to justify an award of substantial damages, the claimant has to satisfy the court both as to the fact of damage and as to its amount. Until damage is proved, there is no need to even discuss topics such as remoteness of damage and mitigation because they are potentially relevant only *after* there is proof of damage to begin with (at [27]). However, the law does not demand that the plaintiff prove with complete certainty the exact amount of damage that he has suffered. A court has to adopt a flexible approach and different occasions may call for different evidence with regard to certainty of proof, depending on the circumstances of the case

and the nature of the damages claimed. The correct approach is that where precise evidence is obtainable, the court naturally expects to have it, but where it is not, the court must do the best it can. The position was summarised as follows (at [31]):

> To summarise, a plaintiff cannot simply make a claim for damages without placing before the court sufficient evidence of the loss it has suffered even if it is otherwise entitled in principle to recover damages. On the other hand, where the plaintiff has attempted its level best to prove its loss *and* the evidence is cogent, the court should allow it to recover the damages claimed.

6.26 In this case, the developer attempted to support their claim for additional interest by adducing copies of statements from the banks, payment vouchers and receipts evidencing the interest it incurred and paid during the period of delay. The court considered that "all this evidence merely established the quantum of the alleged damage" but not the fact that the alleged damage was suffered on account of the delay caused by the respondents (at [33]). On the developer's argument that, under Financial Reporting Standard 23 ("FRS 23"), this additional interest was capitalised as part of the additional cost of the asset, the Court of Appeal agreed with the High Court that the accounting practice of interest capitalisation did not constitute proof that the developer had indeed incurred the additional interest and had, as a result, suffered damage (*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [33]). On the Shareholder Loans, the court noted that the developer's expert was unable to determine if the interest on the loans were directly attributable to the construction of the hotel (at [37]). Accordingly, the court considered that it was unable to attribute the interest incurred on the Shareholder Loans as a loss suffered by the developer as a result of the delay caused by the respondents' mistake. While the bank loans were taken out for the financing of the project, the court pointed out that the evidence showed that the overdraft was used to pay the interest on the Shareholder Loans. It would follow, therefore, that the interest incurred on the overdraft as a result of using that credit facility to service the Shareholder Loans could not be recovered as well since this interest was, strictly speaking, not a loss suffered by the developer as a result of the delay caused by the respondents' mistake (at [37] and [38]).

6.27 The court ruled that the developer had failed to establish a *factual link* between the delay in the project's completion on the one hand and the additional interest on the loans. To establish this factual link, a plaintiff in the developer's shoes is expected to *go further* and prove that, had the project been completed on time, full repayment of the various loans would have been made *using the income generated from the hotel's operations*. Given that none of the loans was contractually repayable upon the timely completion of the project, the facts suggest

that the developer would not have repaid the loans in full by that point and that, even if the project had been completed on time, the loans would still have remained unpaid (*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [39]–[41]).

6.28 In the course of its judgment, the court affirmed that the rule in *Hadley v Baxendale* (1854) 9 Exch 341, as restated by Asquith LJ in *Victoria Laundry (Windsor) Ld v Newman Industries Ld* [1949] 2 KB 528 ("*Victoria Laundry*"), represented the law in relation to remoteness of damage in contract. While noting that the House of Lords in *Koufos v C Czarnikow Ltd* [1969] 1 AC 350 ("*The Heron II*") had criticised the terminology used by Asquith LJ in *Victoria Laundry*, the court considered that an important aspect of the rule in *Hadley* was the distinction between the rules and principles relating to remoteness in the law of contract and those in the law of tort. The rule in *Hadley* is also important for its description of the rules relating to remoteness in the *context* of the law of *contract*. The task of the courts, in the context of remoteness of damage in contract, is to formulate rules and principles that would apply universally to all contracting parties in situations where the contract had not expressly provided what was to happen in the event of a breach (*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [74]–[79]).

6.29 Damage which falls under the *first limb* of *Hadley v Baxendale* (1854) 9 Exch 341 (*ie*, "ordinary" *damage*) is *well within* the reasonable contemplation of all of the contracting parties concerned. Since contracting parties must, *as reasonable people*, be taken to know of damage which flowed "naturally" from a breach of contract, the first limb of *Hadley* did *no* violence to the original bargain between the contracting parties. If the contracting parties had thought about this issue, they would, in all likelihood, have agreed that the contract-breaker should be liable in damages for all such "*ordinary*" damage. It is therefore neither unjust nor unfair to impute knowledge of such damage to them. Damage which falls under the *second limb* of *Hadley* (*ie*, "extraordinary" or "non-natural" damage) is not, by its *very nature*, within the reasonable contemplation of the contracting parties. It would be both unjust and unfair to impute to them knowledge that such damage or loss would arise upon a breach of contract. However, if, armed with such actual knowledge, the contracting parties did not make express provision in their contract for what was to happen in the event of a breach of that contract resulting in "extraordinary" or "non-natural" damage, then they must be taken to have agreed that should such damage occur, the contract-breaker would be liable for such damage (*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [80]–[83]).

6.30 Additional interest incurred on construction loans as a result of a delay in the completion of a construction project was not too remote to be recoverable under the *first* limb of *Hadley v Baxendale* (1854) 9 Exch 341. Third-party financing of the costs of construction in large, commercial construction projects is inevitable in this day and age, and, accordingly, the parties to such a project, as reasonable people, must be imputed with the knowledge that a delay in completion would certainly give rise to additional financing costs. The risk of opening the floodgates to claims against construction professionals for such additional interest, although real, was not so substantial as to justify loss of that nature being adjudged as irrecoverable as damages in law. The claim by the developer for additional interest would thus have been allowed *if not for* its failure to prove its loss with regard to the alleged additional interest incurred (*Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR 623 at [91]–[94]).

Security of payment

Rise in adjudication applications

6.31 It will be recalled from the previous volume of this series that there has been a sustained increase in the number of adjudication applications lodged pursuant to the provisions of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). In essence, the Act provides for a scheme of "adjudication" by which parties in a construction contract can obtain a quick, interim decision by an adjudicator on a payment dispute for construction work done or materials supplied in relation to a construction project located in Singapore. The decision of the adjudicator, referred to in the Act as a "determination", binds both parties until such time that the matter is decided by an arbitrator or the courts.

6.32 During the year under review, the number of applications rose by 80% from that in the previous year. It was suggested in the previous volume in this series that, following the High Court decision in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364, it was expected that the adjudication regime might be increasingly invoked for *final payment* claims. This has indeed been borne out by the volume of adjudication applications lodged with the Singapore Mediation Centre in 2008. The amounts involved in the adjudication claims have also been rising considerably. In one of the adjudications made during the year, the sum claimed was $12.58m: SOP AA63 of 2008.

Operation of s 15(3) of Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)

6.33 As in the United Kingdom and Australia, understandably, there continue to be interest within the construction industry whenever an opportunity is presented to the courts to consider the operation of some of the seemingly more radical provisions of the Act. One of these provisions is s 15(3) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), which essentially compels a respondent to state his reasons for disputing a payment claim in the form of a payment response issued within the time prescribed under the Act. In the ensuing adjudication, the respondent may only rely on such reasons as had been stated in the payment response to resist the payment claim. This point was the subject of a High Court decision in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159.

6.34 In *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159, the respondent was the main contractor for the construction of the hotel portion of a resort project. The claimant was appointed the subcontractor for the reinforced concrete structural works of that project. On 21 April 2008, the claimant served a payment claim on the respondent. Under s 11 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed), the deadline for the respondent to submit its payment response was 12 May 2008, but the respondent did not submit any payment response. On 17 May 2008, the claimant sent a reminder to the respondent on the payment response, but there was still no payment response. On 22 May 2008, after the expiry of the mandatory dispute settlement period, the claimant served the respondent a notice of their intention to apply for adjudication as required by s 13(2) of the Act. On the same day, the claimant submitted its adjudication application for the payment claim. The respondent only provided a payment response by way of Payment Certificate No 5 on 23 May 2008, after it had been served a copy of the claimant's adjudication application. In Payment Certificate No 5, the respondent listed the reasons for withholding payment:

> (a) the rectification of defects in the claimant's works at the respondent's cost;
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> (b) the provision of workers and materials for the claimant by the respondent; and
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> (c) the penalty which the respondent paid on behalf of the claimant for breach of safety regulations.

6.35 Section 15(3) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) provides:

> The respondent shall not include in the adjudication response, and the adjudicator shall not consider any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off unless –
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> (*a*) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or
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> (*b*) where the adjudication relates to a supply contract, the reason was provided by the respondent to the claimant on or before the relevant due date.

6.36 The adjudicator decided that he was precluded by s 15(3) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) from considering the reasons given by the respondent in their payment response as the response was not made within the stipulated time. That being the case, the adjudicator awarded the claimant the full amount under its payment claim. The respondent applied to set aside the adjudication determination on the basis that the adjudicator wrongly interpreted s 15(3) of the Act and offended the rules of natural justice by denying the respondent the opportunity to be heard.

6.37 Before the High Court, the respondent submitted, *inter alia*, that s 15(3) did not apply to cases where there was no payment response made within the prescribed period, as was the case before the court (*Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 at [34]). The court rejected this submission because such a construction would result in "the perverse situation" where such respondents who had tendered a payment response were in a worse position than respondents who did not tender any payment response at all (at [56]). In his judgment, the learned assistant registrar considered that the subsection was driven by a "general policy of efficiency" and this necessarily required that "the respondent should make the reasons for withholding payment known as early as possible in the proceedings". As the learned assistant registrar noted (at [57]):

> Ironic as it may seem, the goal of the entire adjudication process is not to reach an adjudication determination. The SOP Act [Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)] recognises that the fastest and most efficient means of disposing of the dispute is through settlement, and this ideal is enshrined in the dispute settlement period provided for in ss 12(4) and 12(5) of the SOP Act. In order for such dispute settlement negotiations to even take place, it is essential for the SOP Act to

> encourage the parties to air their respective positions as early as possible. Hence, from this angle, it is not unreasonable to require a respondent to make his reasons known sooner rather than later. In this respect, no purpose is served by allowing him to play with his cards close to his chest.

6.38 The learned assistant registrar affirmed the approach taken by the adjudicator in disposing of the issues in his determination. He took the opportunity to consider how an adjudicator in such a situation should approach the determination and decided that "where there are no reasons provided in any valid payment response, the adjudicator cannot examine whether the claimant's claim is supported by the documents" and that apart from considering procedural or jurisdictional objections, "the adjudicator must accept the claim at its face value" (*Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 at [93]).

Illegality

6.39 An interesting decision during the year concerns a construction contract which involved the issue of illegality. A contract tainted by illegality frequently invokes two opposing policy considerations. On the one hand, it is clear that the court should not lend its authority to the enforcement of an object or agreement which has been tainted by illegality. On the other hand, in certain situations, it may be equally unsatisfactory that the right of a party to be paid is denied where the illegality does not reside with that party's performance of the contract itself.

6.40 In *Sin Yong Contractor Pte Ltd v United Engineers (Singapore) Pte Ltd* [2008] SGHC 43, an action was brought by a subcontractor to seek payment from the main contractor for work done in a series of subcontracts for the installation of fire protection systems. Secret payments had been paid by the subcontractor to the main contractor's engineering manager for a period of more than ten years. The engineering manager would instruct the subcontractor on the price to be tendered for each of the subcontract to ensure that the price would come within the main contractor's budget for the subcontract. After each subcontract was awarded, the subcontractor would pay the engineering manager a sum calculated according to the number of sprinklers installed multiplied by an agreed rate. The main contractor had earlier brought an action against the parties involved in the bribery – including the subcontractor's principal shareholder and director – and was granted judgment for a sum of $365,758. When the subcontractor failed in its appeal against this decision, the subcontractor was placed in liquidation by the main contractor. Subsequently, the subcontractor obtained sanction of the Official Receiver to commence

the action for the recovery of 53 unpaid invoices aggregating $491,934 for sprinkler systems installed between 2001 and 2003.

6.41 The basic thrust of the main contractor's defence was that the unpaid invoices were tainted by illegality. They argued, *inter alia*, that the subcontractor was estopped by the earlier action from disputing that they were part of a conspiracy to commit a crime. This was the payment of bribes to the main contractor's engineering manager for the purposes of securing the subcontracts, for the smooth administration of such contracts and the subsequent inflation of the invoices by the bribe amount. The main contractor further submitted that the underlying contracts had an illegal purpose, and, therefore, the law should not assist such a party in recovering the fruits of their crime.

6.42 On the first argument, Andrew Ang J observed that in the earlier decision, the judgment was based on the admission that secret payments had been made. There was no finding of conspiracy. The learned judge concluded that the best that could be said was that the subcontractor was involved in making secret payments but that did not *ipso facto* make the subcontractor a party to a conspiracy and accordingly the issue of estoppel did not arise. Before the High Court, counsel for the subcontractor conceded that had the court found that the subcontractor was party to a conspiracy, the underlying subcontracts would be unenforceable since the subcontractor had defrauded the main contractor. Ang J considered that the concession was rightly made and cited the following passage from the judgment of Millet LJ in *Taylor v Bhail* [1996] 50 Con LR 70 at 76–78:

> Illegality is a question of substance, not form … It is important to bear in mind that the law refuses to enforce not only contracts which are in themselves illegal, but also contracts which are *ex facie* legal but which, to the knowledge of the parties, have an illegal purpose or are intended to be performed in an illegal manner …
>
> Let it be clearly understood if a builder or a garage or other supplier agrees to provide a false estimate for work in order to enable its customer to obtain payment from his insurers to which he is not entitled, then it will be unable to recover payment from its customer and the customer will be unable to claim on his insurers even if he has paid for the work …

6.43 Andrew Ang J noted (*Sin Yong Contractor Pte Ltd v United Engineers (Singapore) Pte Ltd* [2008] SGHC 43 at [33]) that, in the case before him, had the subcontractor connived with the engineering manager and inflated the invoices from which the engineering manager would take a cut, the subcontractor would, likewise, have been unable to claim on the invoices. But the only finding of fact emanating from the earlier decision was that secret payments had been made to the engineering manager; this did not mean that the subcontractor and the

engineer had conspired to defraud the main contractor. The learned judge further accepted the subcontractor's submission that their cause of action could be established independently of the illegality. He found, in particular, that the subject subcontracts were procured and discharged by the subcontractor in a perfectly legitimate manner for a legitimate purpose and held that the main contractor therefore owed a corresponding obligation to make payment. He agreed (at [44]) with the approach taken by Bingham LJ in *Saunders v Edwards* [1987] 1 WLR 1116 at 1134 (as cited in R A Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 2002) at para 7.23):

> Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the courts should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss or how disproportionate his loss to the unlawfulness of his conduct.

6.44 Thus, Andrew Ang J considered that, even if some illegality had been committed whilst the subcontractor had been installing the sprinklers under the contracts, it did not *ipso facto* render the contracts unenforceable: *Sin Yong Contractor Pte Ltd v United Engineers (Singapore) Pte Ltd* [2008] SGHC 43 at [54]. The main contractor had to show that the subcontractor intended to perform the contracts in an illegal manner at the time of the formation of the contracts. He found that, in this case, the subcontractor had discharged their contractual obligations legitimately, namely, they had supplied the sprinkler systems and raised the invoices. In this light, any illegality was not in the performance of the contracts sought to be enforced but was subsequent to it (at [55]).

Discharge of contract

Frustration

6.45 The ban on sand exports by Indonesia in 2007 featured in a decision of the High Court which considered the operation of the doctrine of frustration in circumstances of this nature. In *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2008] SGHC 231, the plaintiff undertook to supply ready-mixed concrete to the defendant, a construction company which had secured a contract to rebuild a school. The terms of the contract were set out in a quotation dated 25 August 2006. Arising from a ban by Indonesia on the export of sand to Singapore, the parties agreed on 29 January 2007 to an increase

in the price for all grades of concrete supplied under the contract ("the January Agreement"). On 1 March 2007, the parties agreed to vary the terms of the January Agreement by a second quotation ("the March Agreement") which included an undertaking by the defendant to supply sand and aggregates to the plaintiff for the manufacture of its ready-mixed concrete. The price of sand increased further when the construction industry had to resort to supplies from the government stockpile. However, the defendant refused to assist the plaintiff to obtain sand by drawing on the government stockpile notwithstanding that, as the defendant was a contractor undertaking a government project, it was entitled to obtain sand from the government stockpile while the plaintiff was not so entitled. In March 2007, when the defendant failed to pay outstanding sums for the concrete which had been supplied amounting to $330,900, the plaintiff suspended its supply of ready mixed concrete. Before the court, the plaintiff justified this suspension on the premise that the contract had been frustrated on account that the sand ban had made the performance of the contract impossible.

6.46 Lai Siu Chiu J accepted the plaintiff's submission that the subject contract was frustrated. In the course of her judgment, she applied the test laid down in *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 and *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 2 SLR 620 that a contract is not frustrated merely because an unexpected turn of events had rendered its performance more difficult or onerous. As she said (*Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2008] SGHC 231 at [76]):

> Would *Glahe* and *Davis Contractors* preclude the plaintiff from relying on the doctrine of frustration? The *ratio decidendi* of the two cases on their facts was undoubtedly correct – performance of contractual obligations at greater expense than had been anticipated did not amount to impossibility of performance. Is our case similar? Undoubtedly, the plaintiff would not be discharged from performance of the Quotation merely because it turned out to be too difficult or onerous. However, I do not view the plaintiff's inability to fulfil the Quotation as being categorised as such. Even a government minister had recognised that the sand ban (see [55]) was an abnormal situation that was totally beyond anyone's control. The sand ban was sudden and unexpected. I reject as absurd in this regard the defendant's submission (which was also put to Ghosh) that the sand ban was foreseeable – it was not.

Termination of contract

Determination of damages

6.47 In the year under review, the Court of Appeal had an opportunity to consider the approach generally taken in the

construction industry to the determination of damages in a situation where a contract has been terminated. In this particular case, the contract was terminated because of fraudulent misrepresentation but the result of the appeal rested pivotally on the requirement that the loss must be seen to have flowed from the breach. This case had a somewhat tortuous chronology. In its earlier decision, *Jurong Town Corp v Wishing Star Ltd* [2005] 3 SLR 283, the Court of Appeal had determined that the building contractor in this case had made certain fraudulent misrepresentations to the employer, a public sector agency, and that the employer was entitled in the circumstances to terminate the contract. The Court of Appeal ordered the building contractor to pay the employer damages to be assessed.

6.48 In *Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 909, the principal focus of the appeal before the Court of Appeal concerned the assessment of damages. The High Court had determined that the employer should be awarded a sum of $7.81m in damages: see *Wishing Star Ltd v Jurong Town Corp* [2007] SGHC 128. This sum consisted essentially of the difference between the contract sum of the terminated contract ($54m) and the final sum which they had paid to the replacement contractor ($61.81m). The contractor appealed.

6.49 In granting the appeal, the court affirmed the general requirement in an action for damages that the plaintiff must prove its loss (*Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 909 at [21]). Andrew Phang JA, in delivering the judgment of the Court, agreed in particular with Lord Browne-Wilkinson in the House of Lords decision of *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 who had said at p 266 that, in assessing the damages payable where the plaintiff has been induced by a fraudulent misrepresentation to buy property, the defendant is bound to make reparation of all damage flowing directly from the transaction and that although such damage need not have been foreseeable, it must have been caused by the transaction (*Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 909 at [21]).

6.50 The court noted that under the original contract, the contract sum payable to the appellant contractor was $5m. The sum paid to the replacement contractor who completed the works was $61.81m. The difference formed the basis of the claim of $7.81m by the employer. The analysis then turned to the results of the original tender. In that tender exercise, the appellant had submitted the lowest bid of $54m. This next higher bid by another tenderer was not considered acceptable by the employer because of the employer's previous experience with it. The third lowest bid for consideration was priced at $63.5m (*Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 909 at [36]). Andrew Phang JA considered that, in the circumstances, it was reasonable to infer that the employer could have accepted the third lowest bid of $63.5m instead of

calling for new bids. Since the replacement contract was awarded for a sum less than this (at $61.81m), the court concluded that the employer could not maintain that the loss sustained flowed directly from the transaction entered into as a result of the original contractor's fraudulent misrepresentation. The original contractor could not be made liable for loss which the employer would have suffered even if he had not entered into the transaction.

6.51 In the course of arriving at the decision, the learned judge also re-visited the distinction made between the objectives of awarding damages in contract and those in tort. He cited with approval (*Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR 909 at [28]) the following statement of principle on the subject in *Treitel on The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) at para 20-018:

> The object of damages for breach of contract is to put the victim 'so far as money can do it … in the same situation … as if the contract had been performed' ... In other words, the victim is entitled to be compensated for the loss of his bargain, so that his expectations arising out of or created by the contract are protected. This protection of the victim's expectations must be contrasted with the principle on which damages are awarded in tort: the purpose of such damages is simply to put the victim into the position in which he would have been, if the tort had not been committed … Tortious misrepresentation does, indeed, create new expectations, but the purpose of damages even for that tort is to put the victim into the position in which he would have been, if the misrepresentation had not been made, and not to protect his expectations by putting him into the position in which he would have been, if the representation had been true.

Construction defects

6.52 In *Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385, the facts of which were summarised earlier, the High Court had to consider, *inter alia*, the issue of construction defects. A major item of interest in this aspect of the judgment concerns the plaintiff's claim that the rooms of the house as completed were undersized. On this point, the court found that the contract documents did not "expressly" stipulate the size of the rooms. It was the case of the contractor that the plaintiff had signed a set of final drawings and, because they were drawn to scale, it was possible to measure the dimensions as represented by the drawings. However, the court noted (at [66]) that the plaintiff was a layman who did not know how to read plans. Furthermore, the sizes shown in the final drawings represented were different from the original dimensions set out in an e-mail sent from the architect's office and the plaintiff had relied on this statement

of the sizes of the rooms. The court held that the plaintiff was entitled to succeed in its claim for damages in respect of the undersized rooms.

Basis for assessing damages for construction defects

6.53 In determining the quantum of damages to be awarded, the court in *Sonny Yap Boon Keng* rejected the two measures of compensation claimed by the plaintiff. Instead Judith Prakash J accepted the position of Lord Bridge of Harwich in *Ruxley Electronics and Construction Ltd v Forsyth* [1995] 3 WLR 118 that, in ascertaining damages for building defects, the court is not necessarily confined to choosing between the diminution in value of the building or the cost of reinstatement but could in certain situations award damages for loss of amenity. In the case before her, Judith Prakash J decided that damages should not be assessed on the basis of the cost of reinstatement as it would be unreasonable to demolish the rooms and reconstruct them as "the loss suffered is not the lack of usable bedrooms but the lack of some additional space in the bedrooms" (*Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385 at [127]). She also declined to assess damages on the basis of diminution in the value of the work occasioned by the contractor's breach of contract as there was no evidence to show that the value of the house had been adversely affected by the size of the bedrooms (*Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385 at [128]). Instead, the learned judge decided to compensate the respondent for the *loss of amenity* sustained by the shortfall in the sizes of the bedrooms. Bearing in mind the differing degrees to which the sizes of the various rooms fell short of the dimensions as stated in the e-mail, she held that the sum of $50,000 would be sufficient to compensate the respondent for the inconvenience to be experienced from the shortfall over the years.

Access for rectifying defects

6.54 A related issue which had to be addressed concerned the access to be given to the contractor to rectify a number of defects. Judith Prakash J considered that the extent and nature of access was dependent on the terms of the contract. She held (*Sonny Yap Boon Keng v Pacific Prince International Pte Ltd* [2009] 1 SLR 385 at [115]) that the plaintiff was obliged to give access to the contractor to rectify defects although the obligation was not an absolute one. Thus, the contractor's right to insist on being given access was valid so long as the rectification works did not interfere with the plaintiff's enjoyment and occupation of the property. In this case, she found that the plaintiff was unreasonable in not permitting the contractor to remedy certain defects and that, in the circumstances, the contractor was not liable in respect of these defects.

Construction arbitration

6.55 In certain situations, a party may find it strategically more advantageous to refer a dispute to the courts instead of allowing the matter to navigate what may sometimes appear to be a more contorted route through arbitration. In *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565, the plaintiff contractor applied for an interlocutory mandatory injunction pending arbitration to compel a ready-mixed concrete supplier defendant to supply ready-mixed concrete to the plaintiff pursuant to a contract between them. This approach was conceived presumably to short-circuit the process of arbitration. The application was dismissed by the High Court. The Court of Appeal upheld that decision.

Role of the court in arbitration proceedings

6.56 In delivering the judgment of the court, V K Rajah JA considered at some length the role of the court in arbitration proceedings and accepted that the courts have "a conspicuously circumscribed role in relation to all arbitration proceedings, whether pending or ongoing" (*NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [20]). Nevertheless, in the case of domestic arbitration, the court has a larger role and the rationale for this is founded on policy – "namely, for the development of domestic commercial and legal practice, and for a closer supervision of decisions which may affect weaker domestic parties" (at [50]). The learned judge continued (at [51]):

> For this reason, the court will generally play a relatively more interventionist role in domestic arbitration as compared to international arbitration. Nevertheless, this greater role for the court in the former scenario still remains firmly and unequivocally premised on the same principle that the court must intervene only in the limited circumstances where curial intervention will support arbitration.

6.57 He then summarised the position thus (*NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [53]):

> We conclude this section by emphasising that regardless of whether the court's jurisdiction is exercised under the AA [Arbitration Act (Cap 10, 2002 Rev Ed)] or the IAA [International Arbitration Act (Cap 143A, 2002 Rev Ed)], the same general principle of limited and cautious curial assistance applies. The court will intervene only sparingly and in very narrow circumstances, such as where the arbitral tribunal cannot be constituted expediently enough, where the court's coercive enforcement powers are required or where the arbitral tribunal has no jurisdiction to grant the relief sought in the matter at hand.

Abuse of court process

6.58 On the subject appeal, V K Rajah JA considered that, in the light of established principles, the appellant's conduct amounted to an abuse of the process of the court. He noted scathingly (*NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [70]) that the appellant had no genuine intention to commence arbitration and yet sought an interim injunction from the court on the ostensible basis that it intended to commence arbitral proceedings against the respondent:

> In effect, the appellant was using the curial process to resolve its dispute with the respondent contrary to the arbitration provision in the Concrete Contract.

6.59 The learned judge cited with approval the four categories of situations which the High Court had ruled in *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 would constitute an abuse of process in such cases (*NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [71]):

> (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
>
> (b) proceedings where the process of the court is not being fairly or honestly used but is employed instead for some ulterior or improper purpose or in an improper way;
>
> (c) proceedings which are *manifestly groundless or without foundation* or which serve no useful purpose; and
>
> (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

6.60 He considered that the subject appeal fell within the second of these categories. The appellant had used the court's process in an improper way as interim relief when this should rightly have been sought from an arbitral tribunal as provided in the contract. Further, there was more than a hint that the appellant was using the court's process for a collateral purpose because it took absolutely no steps to commence arbitration even after the lapse of more than seven months from the time the dispute arose. In addition, the appellant sought from the court an interlocutory mandatory injunction, which meant that if the application for the interim injunction were granted, the court would effectively be ordering specific performance of the concrete contract. As this particular issue of whether specific performance of that contract should be ordered fell squarely within the province of the arbitral tribunal, the appellant was in essence requesting the court to nakedly usurp the functions of the arbitral tribunal rather than to assist in or support the intended arbitration: *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR 565 at [73]–[74].