6. BUILDING AND CONSTRUCTION LAW

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Overview

6.1 During the year, several decisions were delivered which clarified important aspects of the law affecting the construction industry. First, in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782, a case involving an architect in a design and build contract, the Court of Appeal discussed the issue of proximity for liability in tort in relation to a separate relationship in contract and the subject of causation and remoteness of damage. Next in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100, a case dealing with the liability of a certifier in a construction contract, the Court of Appeal clarified several of the more difficult issues relating to the principles of foreseeability and the application of the two-stage test laid down in *Anns v Merton London Borough Council* [1978] AC 728 in determining liability for economic loss. Thirdly in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364, the High Court heard the first case arising from a claim for final payment under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed). Finally in *Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR 500, the High Court was afforded a rare opportunity to review the arbitration provisions of the Singapore Institute of Architects Standard Form of Building Contract.

Contractual arrangements

Supplemental agreements

6.2 During the course of a construction contract, parties may vary the terms of the original stipulations relating to the scope of the contract, specifications or the time for completion of the works. These

and other changes are normally introduced by way of a supplemental agreement. The operation of a supplemental agreement presupposes that there is a principal contract. Consequently, a party seeking to enforce the terms of such an agreement cannot at the same time dispute the existence of the principal agreement

6.3 In *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2007] SGHC 194, the plaintiff was employed by the defendant as main contractors to construct a block of apartments. In this action, the plaintiff claimed that of a certified amount of $4.11m, they were only paid $3.34m. The defendant had issued a letter of award for the contract on 21 November 2002 but the parties only signed what purportedly constituted the other contract documents on 20 November 2003. The contract documents were set out as Volumes 1 and 2 of the tender documents and incorporated the terms and conditions of the lump sum version of the Singapore Institute of Architects Standard Form (1990 edition). Under the terms of the letter of award, the completion date of the works would have been 11 March 2004. On 2 December 2003, the parties executed a Supplemental Agreement the effect of which was to extend the completion date to 28 August 2004 and to waive liquidated damages for the period 12 March 2004 to 28 August 2004. In their pleadings, the plaintiff alleged that, in so far as the original contract was concerned, the letter of award was the only document that governed the contract between the parties until 20 November 2003 and that, except for the letter of award, they had neither seen nor signed other contract documents and that, accordingly, they did not form part of the contract between the parties. The plaintiff's case, therefore, was that the subject contract was partly oral and partly written and that the effect of the oral terms was that ten items were either omitted or materially changed. These included the omission of items such as site supervision, provision of ground instrumentation and design of temporary works as well as changes in the specifications.

6.4 In her judgment, Lai Siu Chiu J noted that first, there was no dispute that Volume I of the contract documents was signed by the plaintiff and the evidence showed that it was part of the tender documents which had been examined by their representative. Secondly, the plaintiff had accepted that the Supplemental Agreement formed part of the contract between the parties. This being the case, the learned judge held that the plaintiff could not maintain that Volume I of the tender documents did not apply to the contract since logically, "there cannot be a Supplemental Agreement unless there is a principal agreement in the first place" (at [72], [73]). Consequently, by applying the parol evidence rule as set out in s 94 of the Evidence Act (Cap 97, 1997 Rev Ed), the plaintiff could not introduce oral terms which contradicted the terms of Volume I.

"Back-to-back" subcontracts

6.5 The expression "back-to-back" is frequently used within the industry in relation to the incorporation of the terms of one contract into the particular contract in which the expression is used. The effect of this expression was considered by the High Court in *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR 918. In that case, the defendant was the main contractor appointed to provide a fire protection system for the construction of a prison complex. The defendant appointed the plaintiff to supply, test and commission a fire alarm system. The letter of award of the sub-contract had stated that "[a]ny variation works, omission or addition, shall be back to back basis. Such variation claim shall be base [*sic*] on your unit price break down as per your quotation to us in appendix A." The plaintiff's claim was founded on its assertion that the defendant had represented to them that the contract would be awarded as a fixed lump sum contract so that the contract sum of $860,000 would be payable regardless of whether there were any additions or omissions to the plaintiff's scope of work.

6.6 In his judgment, Sundaresh Menon JC noted that while the words "back to back basis" were not the "most felicitous", he considered that they were "adequate in my view to convey the sense that any variations would be valued and taken into account if and to the extent a like adjustment was made in the defendant's own contract." (at [7]). He further noted that the express terms contained in the letter of award "make it clear that additions and omissions were liable to be valued and that this would be on the basis of the unit prices supplied by the plaintiff" (at [7]). Accordingly, he ruled that the plaintiff's assertion that the contract sum would be payable regardless of whether there was any addition or omission "was inconsistent with the express terms of the letter of award and no evidence was led to suggest that the letter of award had been consensually varied or in what circumstances this had transpired" (at [8]).

6.7 In the course of his judgment, the learned judge reviewed the usage of the expression and observed (at [45]):

> A clause providing for a particular contract to be entered into on a 'back-to-back' basis to another is commonly found in construction sub-contracts in Singapore. To the extent this is intended to incorporate all the terms of some other contract into that containing the back-to-back stipulation, it may not always be successful. The commercial reality as I have noted above at [35] is that a party seeking to invoke the clause is usually an intermediate contractor who has undertaken certain obligations under a head contract and then attempts to pass on those obligations to a sub-contractor. However, it would be overly simplistic to conclude that such a desire can always be so easily achieved.

6.8 Menon JC suggested that such clauses are not to be taken as "a term of art" and their defect depends on the construction to be accorded to "the sub-contract document as a whole" (at [35]). He emphasised that notwithstanding the use of the expression, the approach to construction is to determine the intentions of the parties objectively and that, accordingly, "a back-to-back provision is to be construed in the light of the factual matrix known to the parties at the time they contracted" (at [49]). Earlier (at [48]) he said:

> The weight to be attached to the fact that a party had not seen the main contract must be considered in the light of the factual matrix as a whole. It may not be decisive if the circumstances are such that the terms said to be affected by the back-to-back provision are matters that would fall within the general appreciation and knowledge of the parties to the subcontract. On the other hand, if the terms are highly technical and particular, it may be more important. Further, consideration should be given to the subcontractor's ability to ask for a copy of the main contract. It may also be overcome with sufficiently explicit language making it clear that the head contract was being incorporated and that the subcontractor was deemed to have acquainted itself with its terms.

Success fee agreements

6.9 A subject which has received considerable publicity some years ago concerns whether the prohibition against champerty should continue to apply to legal advisers and claim consultants in construction disputes. The Court of Appeal had to consider this subject in *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR 989. In its judgment, the Court of Appeal approved the definition of the term "champerty" as found in *Cheshire, Fifoot and Furmston's Law of Contract* (2nd Singapore and Malaysian Ed, 1998) at 639:

> [C]hamperty exists where one party agrees to aid another to bring a claim on the basis that the person who gives the aid shall receive a share of what may be recovered in the action. Public policy is offended by such an agreement because of its tendency to pervert the due course of justice.

6.10 The court also cited the following passage from the judgment of Lord Denning in *Re Trepca Mines Ltd (No 2)* [1963] Ch 199 at 219–220:

> The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law …

6.11 On the issue as to whether the prohibition is confined only to court proceedings, the Court of Appeal expressed agreement with the views of Scott VC in *Bevan Ashford v Geoff Yeandle (Contractors) Ltd* [1999] Ch 239 and noted that the public policy considerations behind the prohibition apply to all types of legal disputes and claims, whether the parties have chosen to use the court process to enforce their claims or have resorted to a private dispute resolution system like arbitration. The concerns that the course of justice should not be perverted and that claims should not be brought on a speculation or for extravagant amounts apply just as much to arbitration as they do to litigation. Accordingly, the court ruled that it would be "artificial to differentiate between litigation and arbitration proceedings and say that champerty applies to the one because it is conducted in a public forum and not to the other because it is conducted in private" (*Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR 989 at [38]).

Implied terms

Effect of oral terms in a written contract

6.12 A number of cases decided by the courts during the year concerned the implication of terms in a contract. The first of these has already been noted in relation to supplemental agreements. In *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2007] SGHC 194, it was held that where there is a written contract in place, by virtue of s 94 of the Evidence Act (Cap 97, 1997 Rev Ed), a party cannot introduce oral terms to contradict the terms in the written contract.

Doctrine of prevention

6.13 The second of these cases is *Jaya Sarana Engineering Pte Ltd v GIB Automation Pte Ltd* [2007] SGHC 49. In that case, the High Court affirmed that there is an implied term in a construction contract that the employer shall do everything which is reasonably necessary for a contractor to perform his obligations under the contract. The facts in that case concerned a subcontract and the contractor was held to have committed a breach of this implied term *vis-à-vis* the subcontractor when it failed to provide the subcontractor with the drawings which were reasonably necessary for the subcontractor to carry out the subcontract works. As an aside, a breach of this particular implied term is sometimes described as an act of prevention. Although there have been a number of English authorities on this point beginning with the case of *Neodox Ltd v Swindon and Pendlebury Borough Council* (1958) 5 BLR 34, this is the first time that the Singapore court has been invited to rule on this issue.

Affirmation of general principle

6.14 In *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413, considered in detail below, a contract for the supply of ready-mixed concrete contained a provision which read: "The above quoted prices shall be held firm from 1st September 2003 to 30th June 2006 and the concrete quantity to be supplied to the project is estimated to be approximately 70,000m^3". The Court of Appeal was invited to imply a term that the supplier in this case was to be an "exclusive" or "sole supplier". In rejecting this construction, the court affirmed the principle that a term should only be implied "to give business efficacy to the contract or where the term represents the obvious, but unexpressed, intention of the parties" (at [26]). The court added that in order "to uphold the concept of sanctity and freedom of contract, courts have generally been reluctant to imply terms into contracts, especially contracts entered into between two commercial parties" (at [26]). Indeed, the court noted that "implying such a term would considerably alter the nature of the bargain as the Plaintiff would be deemed to be in breach of the Contract whenever it obtained concrete from alternative suppliers during the contract period, *even if* it had already purchased the requisite 70,000m^3 of concrete from the Defendant" (at [31]).

Force majeure

6.15 The subject of *force majeure* featured again during the year because of the decision of the Court of Appeal in respect of one of the cases noted in the previous volume of this series at (2006) 7 SAL Ann Rev 102. In *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413, the main contractors for the construction of one of the stations on the Circle Line of the Mass Rapid Transit subway system contracted with a supplier for the supply of ready mixed concrete for the project. Some months after the parties had executed the contract, the defendant suspended the supply of the ready mixed concrete. The defence relied, *inter alia*, on a clause in the contract which read:

> In the event of any circumstance constituting *Force Majeure*, which is defined as act of God, or due to any cause beyond the supplier's control, such as market raw material shortages, unforeseen plant breakdowns or labour disputes, the duty of the affected party to perform its obligations shall be suspended or limited until such circumstance ceases.

6.16 In the High Court, Lai Siu Chiu J had held that, on the construction of the terms of the supply contract, the defendant supplier was entitled to withhold supply of ready mixed concrete on this basis. However, she also ruled that these clauses did not entitle the defendant supplier to withhold supply due to "unforeseen plant breakdown" because the plaintiff had relied on the defendant's representation that it

had "two back-up plants and two friendly suppliers to accommodate the supply of concrete to the plaintiff."

Scope of force majeure

6.17 On appeal, the Court of Appeal in its judgment pointed out that the defence of *force majeure* has to be specifically pleaded in compliance with O 18 r 8(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) before it can be relied on by a party (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 at [51]). On the nature of *force majeure* clauses, the court held, *inter alia*, that there can be no general rule as to what constitutes a situation of *force majeure*: "Whether such a (*force majeure*) situation arises, and, where it does arise, the rights and obligations that follow, would all depend on what the parties, in their contract, have provided for" (at [57]). That said, the court considered that the expression *force majeure* is likely to be restricted to "supervening events which arise without the fault of either party and for which neither of them has undertaken responsibility": see *The Kriti Rex* [1996] 2 Lloyd's Rep 171 at 196 (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 at [59]). The authorities suggest that the courts have to construe *force majeure* clauses strictly: see, for example, the House of Lords decisions of *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119 ("*Metropolitan Water Board*") and *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 (at [63]).

Force majeure *and frustration*

6.18 In the course of its *judgment*, the Court of Appeal took the opportunity to examine the concept of *force majeure* in relation to the common law doctrine of frustration. The court observed (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 at [56]):

> Whereas a *force majeure* clause is an agreement as to how outstanding obligations should be resolved upon the onset of a *foreseeable* event, the doctrine of frustration concerns the treatment of contractual obligations from the onset of an *unforeseeable* event: see the decision of this court in *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 2 SLR 620 ("*Glahe*") at [26].

6.19 The court emphasised (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 at [60]):

> [W]here a *force majeure* clause *excludes* the doctrine of frustration, the principal effect and difference between the two is with respect to the nature of the relief. The relief available under a *force majeure* clause will, of course, be determined by the specific content of that clause itself. In a situation where the doctrine of frustration is sought to be excluded, the clause concerned would expressly stipulate that the contract is *not* to be discharged *despite* the fact that the situation

> would otherwise be one that would have frustrated the contract. [emphasis in original]

6.20 On the other hand, where the *force majeure* clause concerned does *not exclude* the doctrine of frustration, then the legal consequences which flow from an application of the common law doctrine of frustration would follow instead (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 at [62]). The Court of Appeal also pointed out in the course of its judgment that a party who relies on a *force majeure* clause has "the burden of bringing himself squarely within that clause." Furthermore, the party must show that it "has taken all reasonable steps to avoid its operation, or mitigate its results: see … *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323 … at 327" (*RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 at [65], [64]).

Insurance contract

6.21 In *B-Gold Interior Design & Construction Pte Ltd v Zurich Insurance (Singapore) Pte Ltd* [2007] 4 SLR 82, the High Court had to consider the operation of an exclusion clause in a contractors' all-risk insurance policy, more commonly known within the industry by its acronym CAR. In that case, the policy was taken in respect of a renovation project. Section I of the subject policy stipulates that the policy covers "items or any part thereof entered in the Schedule" and what was entered in the Schedule was "[p]ermanent & temporary work including all materials to be incorporated therein". Section II of the policy provides for the insurer to indemnify the insured up to the amount specified in the Schedule in respect of accidental bodily injury or illness of third parties and accidental loss of or damage to property belonging to third parties. Among the express exclusions stipulated in respect of this coverage were the deductibles stated in the schedule, the expenditure incurred in making good or repairing anything covered under Section I and liability consequent upon loss or damage to property of the contractor or principal or any other party in respect of which is insured under Section I or an employee or workman of any of these parties.

6.22 The employer sued the contractor for damage caused to its property during the course of the works and the insurer was made a third party in the proceedings. The insurer sought to deny liability on the basis of an exclusion clause in the policy. The District Judge had decided the matter in favour of the insurer and the contractor appealed to the High Court. In his judgment, Andrew Ang J noted that in *Siang Hoa Goldsmith Pte Ltd v The Wing On Fire & Marine Insurance Co Ltd* [1998] 2 SLR 777, the Court of Appeal had pointed out that an all-risks policy does not literally cover all risks, both foreseeable and unforeseeable. There is usually a contractual limit and an express

exception of particular risks. A leading writer (The Honourable Mr Justice Derrington, *The Law of Liability Insurance* (Butterworths, 1st Ed, 1990) at p 525) had, thus, suggested that the term CAR is "somewhat misleading in that it does not cover all risks involved in the insured's activities" (*B-Gold Interior Design & Construction Pte Ltd v Zurich Insurance (Singapore) Pte Ltd* [2007] 4 SLR 82 at [25]). At [27], the learned judge agreed that the expression "material damage" refers to damage relating to "the permanent and temporary works erected in performance of the particular contract, the materials brought onto the contract site for the purposes of the contract and constructional plant and equipment." Hence, insurance cover against loss of or damage to the owner's property does not fall under this head. Instead, it falls under "Public Liability" the coverage of which in the subject insurance policy is set out under Section II. Accordingly, Andrew Ang J rejected the appellant's argument that the phrase "permanent & temporary work" as used in the Schedule to Section I of the policy should cover the existing permanent structures, items and objects encountered in the project.

6.23 However, the court considered that, while a literal reading of the Special Exclusion provisions appear to exclude any liability for loss of or damage to the employer's property, such an outcome in the case before the court would be unjust given that the appellant's taking out of the Policy was to comply with its obligation under the building contract and that this was known to the insurer (*B-Gold Interior Design & Construction Pte Ltd v Zurich Insurance (Singapore) Pte Ltd* [2007] 4 SLR 82 at [47]). The learned judge referred to similar approaches taken by the Supreme Court of Victoria in *Carlingford Australia General Insurance Ltd v EZ Industries Ltd* [1988] VR 349; the decision of the Privy Council on appeal from the Supreme Court of Canada in *Home Insurance Co of New York v Victoria Montreal Fire Insurance Co* [1907] AC 59 and the decision of the English Court of Appeal in *Hydarnes Steamship Co v Indemnity Mutual Marine Assurance Co* [1895] 1 QB 500. In allowing the appeal, Andrew Ang J said (at [55], [57]):

> In the present case, the uncontroverted evidence shows that the respondent had been told that the appellant required a CAR policy and that the coverage was required for the purposes of the Contract with [the employer]. A copy of the Contract was furnished to the respondent. Clauses 18 and 19 of the Contract required the appellant to take out insurance for the benefit of [the employer], the appellant and subcontractors against liability or lost arising, *inter alia*, from damage to any property in the course of or by reason of the works where the same was due to any negligence, omission or default of the appellant or any subcontractor. The respondent did not, at any time prior to the issue of the Policy, say that they were not prepared to provide such cover …
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> Commercial morality must perforce temper the unrelenting quest for profit; the more so with respect to insurers whose *raison d'être* is their

> provision of indemnity against the vicissitudes of life or the vagaries of fortune and where (in the absence of agreement or legislation to the contrary) utmost good faith underlies the relationship between the parties.

Damages

Election to claim liquidated damages

6.24 In *LF Construction Pte Ltd v Yeo Pia Thian* [2007] SGHC 45, the plaintiff was the principal subcontractor of a building project. They had employed the defendant to supply and install certain aluminium ceilings and fascia boards. Because of delays caused by the defendant, the plaintiff had to employ another subcontractor to complete the unfinished work. In the result, the High Court, affirming the position laid down in *Bulsing Ltd v Joon Seng & Co* [1969–1971] SLR 565, held (at [27]) that the plaintiff may elect to either (a) sue for breach of contract and prove the loss to recover the damages suffered in full or (b) claim only the rate of liquidated damages stipulated in the contract as a genuine pre-estimate of its loss.

Claims for loss of interest

6.25 The High Court in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2007] SGHC 30 reaffirmed that the basis for the recovery of loss of interest in respect of delays in a construction project must be brought within the rule in *Hadley v Baxendale* [1854] 9 Ex 341. To succeed, the plaintiff had to show actual loss and not merely a notional loss. In that case, the plaintiff was a developer of a hotel. The action was brought against the third defendant in respect of losses arising from the latter's structural design for the hotel, which had led a number of structural columns to be "under built" and, as a consequence, to require remedial work. The remedial work resulted in a delay to the project of 101 days. Among the heads of damages claimed were two items in respect of loss by reason of interest payments which the plaintiff had to make on shareholder loans and bank loans respectively. The plaintiff argued that they had to borrow money from these two sources to finance the construction of the hotel and that these costs had to be "capitalised, and had to form part of the construction costs". The High Court rejected this argument. In his judgment, Choo Han Teck J said (at [8]):

> The question was whether capitalising the interest payments in this manner entitled the plaintiff to claim it as a loss within the meaning of loss contemplated in *Hadley v Baxendale*. … [In] this case it is clear that the capitalisation of interest, through an accounting procedure, does not change its nature from interest to capital. To succeed, the

> plaintiff had to show actual loss because I think that the loss contemplated in *Hadley v Baxendale* could only be an actual loss (which might include imminent loss) and not a notional loss. Since a loss of profit in the event that the hotel was sold in the future would be a future loss, clear evidence would be required to prove such loss. Since that was not possible, there was no loss on this head to be recovered.

Conversion – Determination of damages

6.26 The case of *Erect Scaffolding Pte Ltd v Hor Kew Pte Ltd* [2007] SGHC 160 is one of those rare instances where a case involving conversion in a construction project proceeded to litigation. In that case, the plaintiff was a subcontractor who entered into a subcontract for the rental, erection and dismantling of metal scaffolding for a building project. Before the High Court, it was submitted that the measure of damages for conversion is a "reasonable sum for hire during the period of detention". However, the court held that "it would not be reasonable to use market rates of individual components to assess damages in a bulk situation as this one" and that a better approach would be to use the evidence that is available of "the rate that the plaintiff could have fetched in a situation where he is renting out a similar quantity of scaffolding in similar circumstances" (at [10]).

Termination

6.27 The Court of Appeal in *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd* [2007] 4 SLR 413 reviewed the position of an innocent party in relation to the termination of a contract where the other party has committed a serious breach of contract. It is instructive to recognise that the plausible situations fall into two categories. There should be few difficulties with the first of these categories. This consists of situations where the underlying contract "clearly and unambiguously states that, in the event of a certain event or events occurring, the innocent party will be entitled to terminate the contract" (at [91]). Within the second category, three specific situations may be readily identified:

> (a) The first of these is "where a party, by his words or conduct, simply *renounces* its contract inasmuch as it clearly conveys to the other party to the contract that it will not perform its contractual obligations at all." In this situation the innocent party is entitled to terminate the contract (at [93]).
>
> (b) The second situation within this category is where the parties had intended to designate a specific term "as one that is *so important* that *any* breach, *regardless* of the *actual consequences* of such a breach, would *entitle* the innocent party

to *terminate* the contract". This approach relies on the distinction between a condition and a warranty (at [97]).

(c) Finally, there is the situation where the breach in question gives rise to an event which deprives "the party not in default of *substantially the whole benefit* which it was *intended* that he should obtain from the contract": this is the approach taken in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26 (at [99]).

6.28 The Court of Appeal in its judgment ruled that in determining whether an innocent party is entitled to terminate a contract upon breach, "the *foremost* consideration is (and must be) *to give* effect *to the intentions of the contracting parties*" and that, accordingly, the condition-warranty approach must *take precedence* over the *Hongkong Fir* approach because "it is premised on the intentions of the contracting parties themselves" (at [106]). Hence, if the term breached is a warranty, the court would take the view that "the innocent party is not thereby prevented from terminating the contract." Despite the way the approaches were framed in the judgment, it would appear that the paramount consideration of the court would be the consequence of the breach. Thus at [107], the court said that "if the consequences of the breach are such as to deprive the innocent party of substantially the whole benefit that it was intended that the innocent party should obtain from the contract, then the innocent party would be entitled to terminate the contract, notwithstanding that it only constitutes a warranty".

Liability of consultants for economic loss

Existing position

6.29 One of the areas of law where the courts in Singapore have explicitly departed from the position in England concerns the recovery of economic loss in respect of liability in negligence. In the two leading cases on the subject, *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 ("*Ocean Front*") and *RSP Architects Planners & Engineers v MCST Plan No 1075* [1999] 2 SLR 449 ("*Eastern Lagoon*"), the Court of Appeal in Singapore allowed claims of pure economic loss arising from building defects. However, the development of the law had in recent years been affected by the uncertainty arising from the overruling of *Anns v Merton London Borough Council* [1978] AC 728 in England which had propounded what appeared to be a test which resembled that applied by the Singapore courts in *Ocean Front* and *Eastern Lagoon*. Furthermore, it is not clear as to whether the premise for recovery of economic loss is confined only to the very limited category of *Ocean Front* type of situations, that is, principally in relation

to residential property since the financial outlay in such properties represented a significant investment in a person's lifetime: *Man B & W Diesel S E Asia Pte Ltd v P T Bumi International Tankers* [2004] 2 SLR 300. Specifically, of special interest to contractors is whether these principles may be invoked to sustain actions in negligence against certifiers in respect of their duties to act fairly and impartially in the administration of a construction contract: see *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] SGHC 131.

6.30 Notwithstanding the considerable jurisprudence which has emerged on this subject in recent years, the state of the law has been described as "rudderless" and the difficulties and uncertainties had largely remained: *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [2]. In *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*, the Court of Appeal was afforded an opportunity to review the law on the subject which it considered to be an "intensely practical problem in the law of negligence" (at [2]). In that case, the appellant had submitted a "base tender" and an "alternative tender" for a project to construct a military medical facility for the Ministry of Defence ("the Employer"). In the "alternative tender", the appellant offered an alternative design for the building structure which consisted of substituting the original cast-in-situ design with a pre-cast structure design. The purported benefits of the alternative design would be cost savings of about $200,000 and a shortening of the construction time by two months. The Employer accepted the alternative design and, on 24 June 1999, awarded the appellant the contract for the project at a lump sum price of $31.78m.

6.31 The terms of the contract incorporated the public sector standard conditions of contract ("PSSCOC"). Clause 2.8(1) of the conditions provided that the Superintending Officer ("SO") and the Superintending Officer's Representative "shall at no time be under any obligation or duty to the Contractor either on behalf of the Employer or his own account to exercise or not to exercise any of his powers under the Contract …". The Employer appointed one of its officers in the Land & Estate Organisation as SO for the project. In addition, the Employer also appointed KPK Quantity Surveyors (1995) Pte Ltd as the quantity surveyor and RDC Architects Pte Ltd as the architect for the project. Sometime after the award of the contract, the role of SO passed to the respondent which was an agency constituted by statute. As part of their tender, the appellant had to price the tender in the form of a cost breakdown ("CBD") and a revised version of the cost breakdown was incorporated into the contract documents.

6.32 During the course of the contract, the appellant complained that numerous items related to the alternative tender were omitted from the contract CBD and this in turn allegedly led to the under-

certification of the progress payments to the appellant. In its action against the respondent for negligence, the appellant claimed that the respondent owed it a duty of care to apply professional skill and judgment in certifying, in a fair and unbiased manner, payment for work carried out by the appellant to avoid causing it any loss due to undervaluation and under-certification of works. It was alleged that the respondent breached this duty by negligently undervaluing and under-certifying the appellant's works and the appellant sought to recover a sum of $2.23m representing the amount which had been under-certified, a sum of $290,000 in respect of unpaid variations and three other separate sums for loss of profit, management fees and interest.

6.33 The trial judge dismissed the appellant's claim: see *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 1 SLR 720 and the previous volume of this series at (2006) 7 *SAL Ann Rev* at pp 110–111. Lai Siu Chiu J found that the respondent did not owe the appellant a duty of care to avoid causing the latter to suffer pure economic loss. In her judgment, the learned trial judge shows how she was led to this decision on the basis of the two-stage test in *Anns v Merton London Borough Council* [1978] AC 728 ("*Anns*") and the three-part test in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 ("*Caparo*"). She placed considerable emphasis on the following factors: (a) there was no assumption of direct responsibility by the respondent to the appellant for the economic loss claimed; (b) there was no direct contractual relationship between the appellant as the main contractor and the respondent as the SO; (c) the appellant had recourse under the contract to claim additional payments for variation works from the Employer; and (d) the property in question was an army camp, not a residential development. The learned judge went on to hold that *even if* a duty of care had been owed, the evidence was against the appellant and "clearly disproved" the breach of any such duty by the respondent to the appellant.

6.34 The Court of Appeal unanimously dismissed the appeal. Chan Sek Keong CJ, in delivering the grounds of the Court of Appeal, began by pointing out that in the tort of negligence, careless conduct cannot, by itself, be used as a basis for tortious liability: "It is only carelessness within the context of *breach of a duty to take care vis-à-vis* another person that there is liability in negligence, and hence the necessity to determine the circumstances in which the duty of care arises" [emphasis in original] (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [29]). While the two concepts of duty and liability are related, at the same time each affects the operation of the other. The different conceptual tests such as reasonable foreseeability, proximity or public policy are thus "legal control mechanisms" which "ultimately seek to define the boundaries of liability".

Tests in Anns *and* Caparo

6.35 The judgment of the Court of Appeal in this case traced the development of this area of law in England, Singapore and other common law jurisdictions. In England, the concept of reasonable foresight was established as the criterion of negligence in the decision of the House of Lords in *Donoghue v Stevenson* [1932] AC 562. When it became apparent that a test based on foreseeability alone could be too wide and too pliable as a basis of liability in some situations, the courts sought to limit or exclude what was deemed as unwarranted recovery by resorting to deciding artificially that certain claimants were "unforeseeable". This led the English courts to consider foreseeability and the existence of a duty as simply a question of public policy. The pendulum then swung between foreseeability and policy as the determinant of duty until a series of decisions which meshed foreseeability with public policy which encapsulated with the two-stage test formulated by Lord Wilberforce in *Anns v Merton London Borough Council* [1978] AC 728 ("*Anns*") (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [33]–[34]). Lord Wilberforce's test was overruled by the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398 but this in turn allowed the emergence of the three-part test laid down in *Caparo Industries plc v Dickman* [1990] 2 AC 605 ("*Caparo*").

6.36 Chan CJ noted that the position of the courts in Singapore is to apply the "two-stage process" in *Anns* to cases of pure economic loss while the "three-part test" in *Caparo* is applied to cases which involve physical damage. The more restrictive approach to the imposition of a duty of care in relation to economic loss is necessitated by the differences between economic loss claims from most physical damage claims. Nevertheless, the court considered that it is unsatisfactory to maintain a different *test* for cases of pure economic loss, as distinguished from cases of physical damage (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [70]–[71]):

> In our opinion, quite apart from the doctrinal untidiness of having two applicable tests, depending on the *nature* of the damage (*ie*, the "two-stage process" in *Ocean Front* for cases of pure economic loss and the three-stage test in *Caparo* for cases of physical damage), this approach does not, in fact, address the concerns which prompted the more restrictive approach for *some*, but not all, cases of pure economic loss.
>
> As such, in our view, a *single* test is preferable in order to determine the imposition of a duty of care in all claims arising out of negligence, *irrespective* of the *type* of the damages claimed, and this should include claims for pure economic loss, whether they arise from negligent misstatements or acts/omissions. In cases of *physical* damage, there is

> usually no difficulty with regard to a control mechanism to prevent indeterminate liability. However, the adoption of a single test would serve to constrain liability *even in* those extremely rare cases where *physical* damage *might possibly* result in indeterminate liability. It may well be that there are policy considerations in restricting recovery for pure economic loss in *certain* situations, but this in itself does not make it necessary for a wholly different approach in the form of a separate test altogether.

Restatement of Anns

6.37 The court proceeded to lay down what it described as a "coherent and workable test". In outline, this may be understood as consisting of first a preliminary requirement of factual foreseeability and followed by the basic two-stage test premised on proximity and policy considerations. The entire test is to be applied "incrementally" and this is explained in the following terms (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [73]):

> … We would add that this test is to be applied *incrementally*, in the sense that when applying the test in each stage, it would be desirable to refer to decided cases in analogous situations to see how the courts have reached their conclusions in terms of proximity and/or policy. As is obvious, the existence of analogous precedents, which determines the current limits of liability, would make it easier for the later court to determine whether or not to extend its limits. However, the absence of a factual precedent, which implies the presence of a novel situation, should not preclude the court from extending liability where it is just and fair to do so, taking into account the relevant policy consideration against indeterminate liability against a tortfeasor.

6.38 Chan CJ conceded that the test as formulated is "basically a restatement of the two-stage test in *Anns*, tempered by the preliminary requirement of factual foreseeability" (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [73]) and that it has been applied in substance in several Commonwealth jurisdictions, including the Canadian case of *Cooper v Hobart* (2001) 206 DLR (4th) 193 and the New Zealand case of *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324.

Factual foreseeability and proximity

6.39 On the test of factual foreseeability, the court affirmed that it is consistent with the concept of "*reasonable* foreseeability" and that "it is a threshold question which the court must be satisfied is fulfilled [in any claim], failing which the claim does not even take off" (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [76]). On the test of proximity, the court considered that

the "focus here is necessarily on the closeness and directness of the relationship between the parties" (at [77]). The learned Chief Justice approved the observation of Brennan J in the Australian High Court decision of *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 ([2007] 4 SLR 100 at [36]) that proximity includes physical, circumstantial as well as causal proximity and that this provides substance to the concept since it includes the twin criteria of voluntary assumption of responsibility and reliance, where the facts support them, as essential factors in meeting the test of proximity ([2007] 4 SLR 100 at [81]):

> Where A voluntarily assumes responsibility for his acts or omissions towards B, and B relies on it, it is only fair and just that the law should hold A liable for negligence in causing economic loss or physical damage to B.

6.40 If both the preliminary question of factual foreseeability and the first stage of the legal proximity test have been answered in the affirmative, then a *prima facie* duty of care arises (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [83]):

> Policy considerations should then be applied to the factual matrix to determine whether or not to negate this duty. Among the relevant policy considerations would be, for example, the presence of a contractual matrix which has clearly defined the rights and liabilities of the parties and the relative bargaining positions of the parties .

6.41 In his analysis, Chan CJ first considered whether the appellant had satisfied the threshold issue, that is, the foreseeability of damage borne by the appellant. The appellant had contended that the respondent's responsibility as the SO included certification responsibilities under the terms of the Contract Conditions. The court accepted that it must have been foreseeable to the respondent that any negligence in its certification would directly deprive the appellant of moneys it would otherwise have been entitled to, and that if it had been paid the correct amounts, it might not have gotten into financial difficulties (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [89]).

Decision in Pacific Associates Inc v Baxter

6.42 The next stage of the analysis turns on the issue of proximity and it is useful to set out in some detail the appellant's submission on this point. The appellant had argued that, as the contractor in the project under a contract framed on the PSSCOC, it had to rely on the professional judgment of the respondent as an independent certifier and that the respondent would discharge its duties professionally, that is, fairly and impartially (*Spandeck Engineering (S) Pte Ltd v Defence*

Science & Technology Agency [2007] 4 SLR 100 at [91]). The appellant also relied on cl 2.8(1) of the PSSCOC conditions which states that the Superintending Officer ("SO") and the SO's Representative "shall at no time be under any obligation or duty to the Contractor either on behalf of the Employer or his own account to exercise or not to exercise any of his powers under the Contract …". The appellant contended that, properly construed, this clause meant that it would only apply if the respondent did nothing, but not if he did something, and that once he decided to exercise his power under the contract it must follow that he had assumed responsibility to the appellant to do it properly and professionally. Finally, the appellant pointed out that cl 32.8 of the PSSCOC severely limits any recourse by the appellant to the Employer for damages arising from any failure or delay by the respondent in certifying any payment due or payable to the contractor. As such, it was argued that the decision of the English Court of Appeal in *Pacific Associates Inc v Baxter* [1990] 1 QB 993 ("*Pacific Associates*"), which denies a duty of care in similar circumstances, is distinguishable as in that case there was no such restriction of the contractor's right of recourse to the employer.

6.43 In his judgment, Chan CJ said that the Court of Appeal found the salient facts in *Pacific Associates Inc v Baxter* [1990] 1 QB 993 ("*Pacific Associates*") to be "materially the same" as those in *Spandeck* (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [97]). In *Pacific Associates*, the contractor claimed that the geological information in the tender document issued by the engineer had under-estimated the amount of hard materials to be dredged and that the engineer had acted negligently in rejecting the contractor's claims for extra payment for removal of unforeseen hard materials. The court in *Pacific Associates* held that the engineer did not owe a duty of care to a contractor who had suffered economic loss as a result of his decisions as the contractor was safeguarded by the terms of its contract with the employer. Purchas LJ in that case held that if the contractor required extra-contractual protection for the defaults of the engineer, it was open to the contractor to stipulate for it when contracting. By accepting the invitation to tender, the contractor must be taken to accept the role to be played by the engineer as defined in the contract. As such, the court could not accept that the engineer had held himself out as accepting a duty of care outside the contractual framework, or that the contractor had relied on such an assumption of responsibility. Purchas LJ, however, noted that the position might have been different if the arbitration clause had not been included in that contract. Ralph Gibson LJ gave a similar analysis. In his judgment, he noted that there was no *express or implied assumption of responsibility*, emphasising that there was no approach or request by the contractor inviting the provision of a service or advice or information directly to

the engineer. The engineer's duty to act fairly and impartially was owed only to the employer.

6.44 On the other hand, Russell LJ, while reaching the same result, regarded the *policy* test as pivotal in the appeal. He thought that the engineer, in preparing tenders and contract documents, held himself out as an expert on whom the contractor was entitled to rely. However, on the policy test, he held that the contractor had freely entered into the contract and knew that a claim against the engineer must be ex-contractual. The contractor had its rights adequately protected by the contract with the owner and, had it thought the protection inadequate, it was at liberty to insist on a tri-partite contract. In Russell LJ's view, while the requirement of foreseeability and proximity might be satisfied, it was not just and reasonable that there should be imposed on the engineer a duty which the contractor chose not to make a contractual one because, *inter alia*, the arbitration clause provided an adequate remedy in the event of under-certification.

Application

6.45 Applying the findings in *Pacific Associates Inc v Baxter* [1990] 1 QB 993 in relation to proximity to *Spandeck*, Chan CJ ruled that the requirement of proximity was not satisfied. In view of the presence of the arbitration clause in the Contract in the case before him, the learned Chief Justice felt that it was not possible for the court to depart from the reasoning in *Pacific Associates* and hold that the respondent had a duty of care to the appellant to certify the payments for work done correctly. For this reason, the court ruled that there was no legal proximity to support the existence of a duty of care. With respect to the arguments based on cl 32.8 of the PSSCOC, the court was of the view that although the appellant had no recourse to the Employer for any failure or delay by the respondent in certifying any payment due or payable to the contractor, the appellant was always free to claim the amounts *under-certified* and interest thereon by arbitration proceedings against the Employer pursuant to cll 32 and 34. Chan CJ further pointed out that cl 22 specifically allows the contractor to claim "Loss and Expense" against the Employer under many stated grounds.

6.46 Finally, in reaching its decision, the Court of Appeal also held that, had there been sufficient proximity, the reasons articulated by Russell LJ in *Pacific Associates Inc v Baxter* [1990] 1 QB 993 would serve as policy considerations under the second stage of the test in *Anns* to deny the appellants the remedy they sought (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 at [114]).

Design and build contract: architect's duties

Duties in absence of a contract

6.47 The Court of Appeal has held that in the absence of a contractual relationship, an architect in a design and build contract does not owe any duty in tort to the employer in respect of duties such as supervision and certification. In *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782 ("*Sunny Metal*"), the appellants had employed a contractor under an arrangement described as a "design and build" contract for the construction of a factory. The contract incorporated the terms and conditions of the Public Sector Standard Conditions of Contract and incorporated a cost estimate prepared by the appellants which showed the cost of the project as $3.926m. In compliance with the building regulations, the main contractor in turn employed the respondent as the architect and as the qualified person ("QP") for the project. The appellants signed the contract with the contractor on 21 October 1996. One of the terms of this contract explicitly requires the "Contractor's Architect" to "apply and obtain for the Employer a Temporary Occupation Permit (TOP) for the Building". The respondent entered into a separate deed of indemnity ("the Deed") with the appellants on 22 October 1996. Subsequently, the works suffered from delays and defects. The main contractor went into liquidation and the appellants proceeded against the respondent contending that he was in breach of his duties to the appellants in that he failed to (a) adequately supervise and monitor the progress of the works and (b) procure from the main contractor the inspection reports, builders' certificates and registered inspection forms for the purpose of obtaining the TOP.

Warranty to use reasonable skill and care

6.48 The Court of Appeal took the view that these duties are "additional duties" and are distinguishable from the respondent's contractual duty under the main contract to apply for the TOP upon receipt of the relevant documents. Since these additional duties were beyond the respondent's duties as a QP, the court had to consider whether these arose either by way of the deed signed by the respondent or by way of common law as duties of care in tort. In the event, the court decided that, on a proper construction of the deed, it was in essence a warranty which functioned as follows: that in consideration of the appellants awarding the main contract to the main contractor, the respondent as the architect undertakes to the appellants to use reasonable skill and care in performing the work subcontracted to him by the main contractor. All that the respondent agreed to directly undertake by way of the deed was to properly perform the work

subcontracted to him by the main contractor. He had not agreed to undertake the additional duties.

Duty in tort

6.49 This left the Court of Appeal to consider whether the additional duties could be founded in tort. V K Rajah JA in delivering the judgment of the court noted that the trial judge had held that the proximity between the parties had arisen because "there was a contractual relationship between them in the first instance" (*Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782 at [45]). However, since it was now decided that the deed did not impose on the respondent the additional duties, the Court of Appeal ruled that "it must necessarily follow that the Deed could not provide the proximity between [the appellant] and the [respondent] on a tortious basis as well" (at [45]). The court then considered whether, apart from the deed, there was any basis for legal proximity. In their findings, they noted that the evidence showed that the appellants had dealt directly with the main contractor and had relied on the Superintending Officer and Project Co-ordinator who were both the appellants' employees. The court concluded that there was no evidence of reliance on the respondent by the appellants and that, accordingly, there was no duty of care in respect of the additional duties imposed on the respondent in tort.

Causation and remoteness of damage

6.50 However, for completeness of the analysis, the court ventured to consider that even if the respondent had owed these additional duties to the appellants by way of the deed or in tort and had breached these duties, the appellants' claims would still have failed on the issue of causation. In arriving at this decision, the court discussed the difficulties arising from the operation of existing principles on the subject and clarified a number of issues. First, the court said (*Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782 at [51]–[53]) that there is a distinction between causation and the remoteness of damage, with the latter embodying legal principles founded strictly upon reasons of policy. Secondly, within the realm of causation, there exists both causation in fact and causation in law. Causation in fact is concerned with the question of whether the relation between the defendant's breach of duty and the claimant's damage is one of cause and effect in accordance with scientific or objective notions of physical sequence. It is concerned with establishing the *physical connection* between the defendant's wrong and the claimant's damage and the universally accepted test in this regard is the "but for" test. Thirdly, satisfying the "but for" test is by no means a sufficient condition because

the all important "causation in law" test must be satisfied as well. Thus, a mother who gave birth to a son who commits murder cannot be held responsible for the murder because there is no causation in law.

6.51 In *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782, the appellants' claim was framed in both contract and tort. Accordingly, the court had to consider, as a preliminary point, whether different principles of causation apply in contract and tort. While it was clear to the court that different principles apply in so far as remoteness of damage is concerned, the court proceeded to hold (at [63]) that, in respect of causation, "there is no reason why the 'but for' test in tort cannot also be used in contract cases". In the instant case, the appellants were unable to adduce any evidence to show that the main contractor would have heeded the respondent's exercise of the additional duties in view of the payment dispute between the main contractor and the appellants. Instead, the documentary evidence suggested that the main contractor would have, nonetheless, delayed its construction works in view of the payment dispute it had with the appellants, *whether or not* the respondent had exercised his duties of supervision. Accordingly, in the court's judgment, the appellants failed on the causation issue.

Security of payment

6.52 The Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) was enacted to redress some of the difficulties arising from progress payment delays in construction contracts which had, for many years, affected the financial state of contractors, subcontractors, sub-subcontractors and suppliers. Section 5 of the Act confers a right to progress payment on a party who undertakes construction work or supplies goods and services in relation to construction work. It thus ensures that the right of a contractor, consultant, subcontractor or supplier to be paid progressively could no longer be arbitrarily dismissed by the party who has to pay for the works, supplies or services. However, ever since the Act came into force, it is uncertain as to whether the operation of the Act extends to the final payment of a contract.

6.53 In *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364 ("*Tiong Seng Contractors (Pte) Ltd*"), the High Court took the opportunity to deliver a timely "determinative pronouncement" on the matter. The case involves the payment of a "Final Claim" arising from an earthworks subcontract. The Final Claim was for an amount of $481,156 in respect of which the main contractor paid a sum of $210,554, leaving unpaid the remainder of $270,602. When further payment was not forthcoming, the subcontractor sought

adjudication under the Building and Construction Industry Security of Payment Act. The adjudicator determined that the subcontractor was entitled to receive a further sum of $182,542. The main contractor took out an originating summons to set aside the adjudication on the grounds that the Act does not extend to "final claims" and that, accordingly, the adjudicator had no jurisdiction to make the determination in respect of the subject adjudication application.

6.54 In her judgment, Lai Siu Chiu J reviewed the background of the legislation, noting that the Singapore Act was modelled on statutes on this subject in other jurisdictions, such as Australia, the UK and New Zealand and discussed the judgment of Austin J in the NSW Supreme Court in relation to the definition of "progress payments" under the New South Wales Building and Construction Industry Security of Payment Act, 1999 as well as the subsequent amendments to that definition: see the case of *Jemzone Pty Ltd v Trytan Pty Ltd* [2002] NSWSC 395. She ruled that on a proper interpretation of the Singapore Act, the definition of "progress payments" should include "final payments". The learned judge said (*Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364 at [27]) that "final payments" can only be excluded from the ambit of the Act by express wording to that effect:

> It would not suffice to infer a legislative intention to exclude simply on the basis that 'final payments' were not included in a non-exhaustive supplementary definition, ostensibly provided for clarification. If the legislature had intended to exclude final claims from the adjudicatory ambit of the Act, it could have clearly included a proviso or provision to that effect. In the absence of such express exclusion, the primary broad ranging definition in the main limb must be determinative.

6.55 The learned judge was of the view that a plain reading of "a payment that is based on an event or a date" or a "single or one-off payment" clearly encompasses final payments. She observed (*Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364 at [28]):

> Such a conclusion is vindicated by the fact that the Act at no time makes any distinction between 'final claims' and 'non-final claims'. Implying such a distinction from the supplementary limb would severely impair the protection afforded by the Act, as it would create a *carte blanche* for contractors to renege on the final stages of payment, which would have an equally deleterious effect on cash flow affecting other ongoing construction projects.

6.56 Lai J considered that the policy objective of the Act is to safeguard "the continued viability of contractors who are victims of payment delays or disputes made in bad faith perpetuated by upstream contracting parties" and that, from this perspective, "it makes no sense

to draw an artificial distinction between allegedly 'final' and 'non-final' payments, as the withholding of either would create the exact same downstream ripple effect intended to be 'deterred and weeded out' by the Act" (*Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR 364 at [33]).

Arbitration under SIA Contract

6.57 During the year, the High Court was afforded a rare opportunity to review the arbitration provisions of one of the major standard forms used in the local construction industry, the Singapore Institute of Architects Standard Form of Building Contract, more commonly referred to as simply "the SIA Contract". In *Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR 500 ("*Anwar Siraj*"), the plaintiffs employed the defendant as contractors for the construction of a two-storey dwelling house. The plaintiffs sought to recover a sum of $348,000, being the amount certified by the architect as owing to them by the defendant. The defendant successfully applied to the assistant registrar for a stay of proceedings in favour of arbitration and the plaintiffs appealed to the High Court against the assistant registrar's decision.

6.58 The subject building contract incorporated the terms of the SIA Contract. The disputes and differences between the parties relate to issues of delay, defects and payments. Prior to the reference to arbitration, the architect had issued an Interim Certificate No 11 which valued the works at $726,000 and a subsequent Interim Certificate No 12 which reduced the valuation to $712,294. Sometime thereafter, the defendant gave notice of their intention to refer the disputes to arbitration. An arbitrator was duly appointed by the Singapore Institute of Architects. The plaintiffs unsuccessfully applied to the High Court for the arbitrator's removal on the grounds of incompetence and bias and they were similarly unsuccessful in their appeal to the Court of Appeal on this decision. As a consequence, the plaintiffs were obliged to proceed with the arbitration.

6.59 The arbitrator required each of the parties to pay a sum of $25,000 to secure his fees and expenses. The defendant paid but the plaintiffs did not. On the application of the defendant, the arbitrator decided that he would not hear the claims or counterclaim of the *plaintiffs* as long as his direction to them to pay the $25,000 deposit went unheeded. The plaintiffs failed to appear for the hearing of the defendant's application despite twice having been given the opportunity to do so. The arbitrator then proceeded with the arbitration in the absence of the plaintiffs who had insisted that a number of matters had to be set right before they would appear. On 15 April 2005, the

arbitrator wrote to inform the parties that the award was ready for collection upon payment of his fees and expenses amounting to $199,178.40. Neither party collected the award. At least in the case of the defendant, it appeared that the award was not collected because of the quantum of the arbitrator's fees. On 20 January 2006, almost five years after Interim Certificates No 11 and No 12, the architect for the Project issued his 13th Interim Certificate reducing the value of the defendant's work substantially below what the architect had previously certified. On the basis of that Certificate, an amount of $348,000 would be payable to the plaintiffs, this being the amount by which the plaintiffs would have overpaid the defendant given the reduction in the value of the defendant's work.

6.60 In the High Court, Andrew Ang J had to consider several issues at some length. The first of these is whether the dispute between the parties over Interim Certificate No 13 falls within cl 37(1) of the SIA Contract. This clause provides in essence that any dispute between the parties as to any matter arising under or out of or in connection with the contract shall be referred to arbitration. The learned judge (*Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR 500 at [18]) held that "there is no gainsaying that the dispute between the parties over interim certificate no 13 falls squarely within cl 37(1)".

6.61 Secondly, the court had to decide whether the plaintiffs' claim is indisputable so that the court has jurisdiction to decide the claim despite the arbitration agreement in cl 37(1). In determining this issue, Andrew Ang J cited with approval the following passage from MJ Mustill and SC Boyd, *Commercial Arbitration* (LexisNexis, 2nd Ed, 2001) at p 123:

> Whatever might be the position as regards a defence which is manifestly put forward in bad faith, there are strong logical arguments for the view that a *bona fide* if unsubstantial defence ought to be ruled upon by the arbitrator, not the court. This is so especially where there is a non-domestic arbitration agreement, containing a valid agreement to exclude the power of appeal on questions of law. Here the parties are entitled by contract and statute to insist that their rights are decided by the arbitrator and nobody else. This entitlement plainly extends to cases where the defence is unsound in fact or law. A dispute which, it can be seen in retrospect, the plaintiff was always going to win is none the less a dispute. The practice whereby the court pre-empts the sole jurisdiction of the arbitrator can therefore be justified only if it is legitimate to treat a dispute arising from a bad defence as ceasing to be a dispute at all when the defence is very bad indeed.

6.62 The learned judge noted that in the case before him, there was a dispute as to whether the architect could properly issue Interim Certificate No 13 correcting Interim Certificates No 11 and No 12, given that nearly five years had passed since the issue of the earlier two

certificates. Nevertheless, after a careful analysis of the authorities, he was persuaded that the mere fact that Interim Certificate No 13 was issued after arbitration had commenced is unobjectionable in view of cl 37(3)(i). However, the learned judge accepted that the fact that the said certificate was issued some four and a half years after appointment of the arbitrator and almost five years after Interim Certificates No 11 and No 12 gives cause for disquiet in the absence of any reasonable explanation. He considered the following facts to be pertinent on this point (*Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR 500 at [35]):

> It is not explained why the architect did not use the SIA model revision certificate which would have required the architect to set out the nature and effect of his decision requiring the revision as well as the nature of the revision and the calculation. It is also significant that the defendant's letters of 13 February 2006 and 3 May 2006 calling on the architect to explain and justify Interim Certificate No 13 went unanswered altogether.

6.63 He, accordingly, concluded that in these circumstances, it was not easy to attribute bad faith to the defendant's allegation that Interim Certificate No 13 was issued by the architect under improper pressure or interference by the plaintiffs. He also noted that Interim Certificate No 13 had ignored the manner and form in which such certificate was to be issued under the contract and the authorities which had questioned the validity of these certificates on this point: *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] SLR 610 and *Steel Industries Pte Ltd v Deenn Engineering Pte Ltd* [2003] 3 SLR 377. In the instant case, while he was not required to decide on the validity of Interim Certificate No. 13, this fact reinforced the view that the plaintiffs' claim under Interim Certificate No 13 could not be said to be undisputed or indisputable (*Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR 500 at [40]–[43]).

6.64 Thirdly, the court had to decide whether cl 37(7) permits a party to apply to court for an order for repayment of sums overpaid bypassing arbitration provided for under cl 37(1). On this point, the learned judge decided that cl 37(7) cannot be read as allowing a party the option of suing in court or referring a dispute to arbitration.

6.65 Fourthly, the court had to address the question whether the arbitrator in this case was *functus officio* and, if so, whether for that reason, the plaintiffs were entitled to bring their action in court. Andrew Ang J affirmed the position that once the arbitrator has published his award, the arbitration proceedings are concluded (*Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR 500 at [45]). An award is made and published when the arbitrator gives notice to the parties that the award is ready for collection and not when they have notice of the

actual contents of the award: *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 2 SLR 609. Thereafter, the arbitrator is *functus officio*.

6.66 The fifth issue considered by the court was whether the arbitration agreement should have ceased to have effect by reason of the defendant's allegation of fraud against the architect. On this point, the learned judge ruled that under the Arbitration Act (Cap 10, 2002 Rev Ed), there is no justification for a court to refuse a stay of proceedings brought in breach of an arbitration agreement even if an allegation of fraud was raised by the party applying for the stay (*Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR 500 at [49]).

6.67 Sixthly, as to whether the court should refuse a stay of proceedings on the plaintiffs' contention that cl 37(11) applied, the learned judge noted (*Anwar Siraj v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR 500 at [50]) that the subject clause merely permits either party to request the court to exercise its discretion to refuse a stay of proceedings where third parties are involved directly or indirectly in a dispute with or between the parties to the agreement. Where, as in the case before the court, the parties were in dispute over the architect's Interim Certificate, it might be said that the architect was "involved" in the dispute. Indeed, each time that there is a dispute between an employer and a contractor as to any architect's direction, instruction or certificate, the architect could be said to be involved in the dispute irrespective of whether he has a dispute with either of them. In the case before the court, the learned judge decided that there was no reason to exercise his discretion to set aside the assistant registrar's order staying proceedings in favour of arbitration: "If the court were to allow the arbitration agreement to be bypassed each time this happens, clause 37(1) will be as good as 'writ on water'" (at [52]).