

5. BUILDING AND CONSTRUCTION LAW

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Introduction

5.1 The year under review was one of consolidation rather than novelty. It saw the Court of Appeal decide on appeals in two cases that had sparked the most comments within the industry in the previous year, namely *MCST Plan No 2297 v Seasons Park Ltd (No 2)* [2004] SGHC 160 (HC), *MCST Plan No 2297 v Seasons Park Ltd* [2005] 2 SLR 613 (CA); and *Prosperland Pte Ltd v Civic Construction Pte Ltd* [2004] 4 SLR 129 (HC), *Chia Kok Leong v Prosperland Pte Ltd* [2005] 2 SLR 484 (CA). In both cases, the first instance judgments were upheld. A management corporation's remedy against a developer in the tort of negligence is, therefore, limited to situations where the developer has itself been negligent; apart from a contractual relationship, a developer will not ordinarily be liable to purchasers for the negligence of the builder or consultants engaged by it. However, a developer can sue the builder or consultants in contract for defects in the property that it has already transferred in defence of its performance interest in the contract.

Interpretation of contract

5.2 The reduction of terms into writing should reduce uncertainty and, consequently, disputes. However, while the manner in which the agreement was expressed may be clear, what the words in fact mean may not be. Such a situation occurred in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379 ("*MAE Engineering Ltd*") where the subcontractor (the respondent, Fire-Stop Marketing Services Pte Ltd ("*Fire-Stop*")) was engaged by the appellant for what is described in the subcontract as the "Supply, Delivery, Installation, Warranty & Endorsement of 2 Hours Fire Rated Board Cladding to 5,000M² of ACMV Ductwork" (at [6]). It was common ground that the total area of ACMV duct actually cladded exceeded 5,000m², and the dispute was over whether on the true and proper construction of the subcontract, payment to Fire-Stop should have been based on the area of cladded or uncladded ACMV duct. In allowing the appeal, the Court of

Appeal held that on a plain and ordinary reading of the subcontract, payment should have been calculated on the basis of the area of uncladded ACMV duct. Lai Siu Chiu J, described the applicable principles (at [17]) as follows:

The principles applicable to the construction of contracts are well established. The object of the construction exercise is to determine the mutual intention of the parties as expressed in the words of the document ... The task of ascertaining the intention of the parties must be approached objectively; the question is not what one or the other of the parties meant or understood by the words used, but the meaning the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract ...

5.3 The court accepted the appellant's argument that "the fact that the quoted area of 5,000m² was only an estimate did not necessarily mean that it carried no weight whatsoever" (at [21]). The court observed that the area of 5000m² together with the lump sum price of \$400,000 indicated that the rate of \$80/m² should apply to the uncladded duct. Although the court recognised that evidence of prior negotiations was inadmissible, it nonetheless held that "evidence of an antecedent agreement [was] an objective fact that [could be taken] into account as part of the 'factual matrix' in which the parties made their contract" (at [24]). In the circumstances, the court took into account a pre-award document which provided that Fire-Stop would be paid "\$400,000 (Singapore Dollars Four Hundred Thousand Only) (5,000m² x \$80/m²)" and held that "the fact that the figure S\$400,000 corresponded exactly to the revised rate based on the area of the uncladded duct could hardly be a coincidence" [emphasis in original] (at [24]).

5.4 Thus, what proved decisive was evidence of an antecedent agreement as "an objective fact" that was "part of the 'factual matrix' in which the parties made their contract" (at [24]). In this way, a distinction was drawn between evidence of an antecedent agreement and evidence of prior negotiations which, in principle, is inadmissible. This illustrates a flexible and purposive approach to the construction of an agreement. However, it can sometimes be unclear whether the agreement being construed is meant to carry over a meaning from an antecedent agreement, or instead to vary that earlier meaning.

Estoppel

5.5 As an alternative to arguments on the construction of an agreement, a party may argue that regardless of the meaning of the words viewed in isolation, the parties conducted themselves on a different (conventional) basis so that the parties are estopped (by convention) from asserting the literal meaning of the words. This argument has become much more widely relied on in recent years, and the year under review saw several such cases reach trial.

5.6 One of these cases was *MAE Engineering Ltd* (*supra* para 5.2). The subcontractor, Fire-Stop, contended that the appellant “was estopped by its conduct from contending that payment should be made on the basis of the area of the uncladded duct” (at [42]). The Court of Appeal relied on the *locus classicus*, *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 (“*Amalgamated Investment*”) and applied its earlier decision in *Singapore Island Country Club v Hilborne* [1997] 1 SLR 248 (“*Singapore Island Country Club*”), which laid down the criteria for estoppel by convention (at [27]) as follows:

- (i) that there must be a course of dealing between the two parties in a contractual relationship;
- (ii) that the course of dealing must be such that both parties must have proceeded on the basis of an agreed interpretation of the contract; and
- (iii) that it must be unjust to allow one party to go back on the agreed interpretation.

5.7 While examining the circumstances in the light of the criteria, the Court of Appeal noted that “for a claim of estoppel by convention to succeed, it must be shown that acceptance of a particular state of things was the foundation of the dealings between the parties” (at [47]). There was an absence of evidence of “a *shared assumption* that the contract price should be derived from the area of cladded duct” [emphasis in original] (*ibid*). The court found that if there was indeed a shared assumption by the parties, the correspondence suggested that it was for payment to be based on the area of uncladded duct.

5.8 This statement of the law and its application by the court was uncontroversial. The decision to reject Fire-Stop’s argument was derived from the court’s conclusions on the evidence of the manner in which the parties had, in fact, conducted themselves following the agreement.

5.9 Estoppel was again raised as an alternative argument in *C S Geotechnic Pte Ltd v Neocorp Innovations Pte Ltd* [2005] SGHC 116. In an action by the plaintiff to recover amounts due under a subcontract, the defendant contended that it was not the “real party” to the subcontract. It argued that it had assigned the subcontract to another and that the plaintiff was estopped by its action from denying that the subcontract had been so assigned. In particular, the defendant relied on estoppel by convention and estoppel by acquiescence. Reference was made (at [25]) to *Amalgamated Investment* (*supra* para 5.6) and the decision of the Court of Appeal in *Yongnam Development Pte Ltd v Somerset Development Pte Ltd* [2004] SGCA 35.

5.10 The defendant relied mainly on the fact that the plaintiff had submitted progress payment claims and other concerns relating to the project to both the defendant and the alleged assignee. The court pointed out that “[f]or there to be estoppel, the words or conduct relied on must be clear and unequivocal” (at [27]). All parties involved were found to be at fault for not making the position clearer. What was supposed to be a notice of assignment was poorly drafted and made on the wrong letterhead. After reviewing the events that followed, the court found there was “insufficient evidence of estoppel by convention or any other type of estoppel” (at [38]). It is hard to see how the defendant’s argument, based on the material before the court, could succeed and the court was right to reject it notwithstanding its observation that both parties were at fault for not making the position clearer. It was, after all, the defendant who relied on estoppel as an argument and the onus was obviously on it to put forward adequate evidence on which a decision in its favour could be made.

5.11 The plaintiff’s failure to object to deductions made against progress payments whenever the payments were collected was, on the other hand, one of the factors taken into account by the court in *Tan Wai Kok v Hart Engineering (Pte) Ltd* [2005] SGHC 215 in deciding that the ingredients of estoppel were made out. The court (at [110]) found that “(a) [the plaintiff] accepted [these] payments ... without protest; (b) [that] the defendant continued to pay [the plaintiff] on that basis; and (c) [that] in [doing so], the defendant acted to its detriment when the plaintiff did a *volte-face* by suing to recover the [money] deducted”. The court concluded its decision on this point by stating that “it would be highly inequitable to now allow the plaintiff to recover the [money] deducted by the defendant” (at [110]).

5.12 It was not explained how the defendant’s payments of lesser sums in reliance on the plaintiff’s omissions to protest could really be said to have led

to the detriment of the defendant. The defendant was, after all, obliged under the terms of the contract to make payments subject only to contractually mandated deductions. The detriment identified was simply that the defendant had to face the consequences when the plaintiff had a subsequent change of mind.

5.13 In *Spandek Engineering (S) Pte Ltd v China Construction (South Pacific) Development Co Pte Ltd* [2005] SGCA 59, both *MAE Engineering Ltd* (*supra* para 5.2) and *Singapore Island Country Club* (*supra* para 5.6) were cited by the Court of Appeal with approval in dealing with estoppel being raised again as an alternative issue. The court agreed with the trial judge's conclusion (see *China Construction (South Pacific) Development Co Pte Ltd v Spandek Engineering (S) Pte Ltd* [2005] SGHC 86) that the main contractor was also estopped from asserting that its agreement with its subcontractor was a fixed or lump sum contract, instead of one where the price was subject to re-measurement. The Court of Appeal indicated that it would be unjust to ignore the parties' conduct which strongly suggested that "the parties were proceeding on the agreed interpretation that their contract was not a fixed price one but was one subject to re-measurement" (at [21]).

Contract formation

5.14 There are occasions when parties rely on an exchange of letters to record what they may think is a simple agreement between them. There are dangers associated with this practice that the parties may overlook at the time of contracting. In *Koon Seng Construction Pte Ltd v Siem Seng Hing & Co (Pte) Ltd* [2005] SGHC 8, the main issue was whether there was a binding agreement between the plaintiff and the defendant for the supply of steel bars by the defendant to the plaintiff. The main contractor (the plaintiff) had made requests for quotations from a number of suppliers including the defendant. The defendant, in its response by a letter of 9 October 2003, quoted a price but added that the price was subject to final confirmation. Upon the plaintiff's request, the defendant gave the plaintiff a revised price. The plaintiff then wrote to the defendant on 23 October 2003 to confirm the supply of the rebars at the revised price. The letter added that the plaintiff would follow up with a letter of award to the defendant. The plaintiff never issued a letter of award but, in the meantime, the defendant wrote to the plaintiff to increase the price for the rebars. Following this, the plaintiff wrote to the defendant to place an order for the rebars at the previously amended price. The defendant replied that it was unable to accept the order as it was not able to obtain supplies from its own supplier. The plaintiff filed an action against the defendant alleging that the defendant had repudiated the contract

and claimed damages to be assessed. The defence that was raised by the defendant was that there was no concluded contract.

5.15 In affirming *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, MPH Rubin J found that "the intention that the contract should not become binding until the said letter of award was issued was unmistakable" (at [22]). Rubin J considered this "fatal" to the plaintiff's claim (at [20]).

5.16 The court, therefore, rejected the plaintiff's contention that there was in existence a binding contract between the parties as at 23 October 2003.

5.17 This is one of those cases that demonstrate the dangers of relying simply on correspondence to form the basis of a binding agreement. Often, for some reason, the party who relies on the existence of a firm contract simply makes its own assumptions of what it thinks was agreed but fails to take the final step to set out in writing its own understanding of the terms. The classic example of this was *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 which also happened to involve the supply of steel products. Even the supply of materials, which may seem straightforward, would benefit if the parties paused and took a moment to record the details of the commercial arrangement in a signed contract.

Misrepresentation and construction contracts

5.18 Issues of misrepresentation are rare in construction disputes. Occasionally, contractors have made claims against employers based on what they contend is misleading and wrong information contained in tender documents (see for example, *Edgeworth Construction Ltd v ND Lea & Associates* [1993] 8 WWR 129). It is unusual for the reverse to happen, where the employer takes legal action against the contractor on the ground of misrepresentation in obtaining the award of a tender. The reasons why this is so are first, any misrepresentations are likely to be incorporated in the contract, and will therefore sound in damages, and second, unwinding an awarded and partly performed construction contract may not be possible.

5.19 Whether it is rare or not, such a situation occurred in *Jurong Town Corp v Wishing Star Ltd (No 2)* [2005] 3 SLR 283 where the Court of Appeal was given the opportunity to review the principles and the application of those principles relating to misrepresentations alleged to be contained in the information supplied by the contractor. In this case, the employer imposed what were described as "evaluation criteria" on the contractors submitting

bids. There were two sub-sets of the evaluation criteria, called “Critical Criteria” and “Other Criteria”. It was contended that the contractor (the plaintiff), in submitting information to meet the criteria, had made a number of representations that were false.

5.20 The employer proceeded to bring the contract with the contractor to an end, both rescinding for misrepresentation and terminating for breach of contract. The contractor commenced an action against the employer for various heads of relief, including damages for wrongful termination.

5.21 The trial judge (see *Wishing Star Ltd v Jurong Town Corp (No 2)* [2005] 1 SLR 339) in hearing the issue of misrepresentation first decided that although the contractor was guilty of misrepresenting some facts, the employer had not relied on those misrepresentations to award the contract to the contractor (at [75]). The trial judge further found that the employer had affirmed the contract with the contractor after it had knowledge of the misrepresentations (at [120]).

5.22 The employer appealed against this decision. The rest of the trial was held in abeyance pending the outcome of the employer’s appeal. The Court of Appeal, in allowing the appeal held, among other things, the following:

(a) Eight of the ten representations made by the contractor were untrue and were made fraudulently (at [70]). At least six of the representations were calculated to induce the employer to award the contract to the contractor (at [118] and [119]).

(b) The trial judge was wrong in concluding that as the misrepresentations would have become part of the terms of the contract, the employer’s cause of action must be for breach of contract or that a stricter view should be taken before the representations became actionable (at [76] and [77]).

(c) Further, just because a construction contract was involved, it did not mean that a higher threshold had to be met before a finding of misrepresentation could be made (at [78]).

(d) The fact that the employer had made its own enquiry or evaluation did not exonerate the contractor. A person who had made a false representation could not escape its consequences just because the innocent party had made his own inquiry or due diligence, unless the innocent party had come to learn of the misrepresentation before entering into the contract or did not rely

on the misrepresentation when entering into the contract. It mattered not whether the inquiry or due diligence was conducted by the innocent party or his agents or both (at [107], [113] and [114]).

5.23 The Court of Appeal also dealt at some length with the question of affirmation raised in relation to the right to rescind on the ground of misrepresentation.

5.24 This was a rare instance in which misrepresentation was raised by the employer against the contractor and then relied upon as a ground to rescind the contract. One of the key findings made by the trial judge was that the employer was not induced by the misrepresentations (at [75]). On this, it is useful to note the Court of Appeal's endorsement (at [91]) of the High Court decision in *Lim Bio Hiong Roger v City Developments Ltd* [1999] 4 SLR 451, where "MPH Rubin J said that inducement may be inferred from the fact that the person to whom the representation was made entered into the contract unless the inducer proves that that person either knew that the representation was false or did not rely on it".

5.25 While the Court of Appeal accepted the distinction made by the trial judge between the items in the "Critical Criteria" and those in the "Other Criteria," it was of the view that "the requirements of the Other Criteria were still important although relatively less important than those of the Critical Criteria" (at [79]). It differed from the trial judge's evaluation of the relative importance of information provided by the contractor.

5.26 On the question of rescission, the Court of Appeal focused on the question of whether the employer had elected to affirm the contract and held that there was no affirmation.

Management corporations

5.27 It is an established rule of tort law that a person is not vicariously liable for the torts of an independent contractor. Such a defence was raised in *MCST Plan No 2297 v Seasons Park Ltd (No 2)* (*supra* para 5.1), in a claim by a management corporation against the developer for damages arising from defects to the common property as well as individual units of the subsidiary proprietors. One of the preliminary issues ordered to be tried was whether the developer's defence of independent contractor could defeat the management corporation's claim as it was pleaded. The trial judge held that the developer was entitled to rely on this defence of independent contractor.

5.28 On appeal, the Court of Appeal (*supra* para 5.1) recognised at [57] that “[t]he general principle is that an employer is not vicariously liable for the negligence of an independent contractor, his workmen or agents in the execution of his contract”. In the Court of Appeal, the management corporation argued that under the Housing Developers (Control and Licensing) Act (Cap 130, 1985 Rev Ed) (“the HD Act”) and the rules made thereunder, the respondent could not delegate to an independent contractor the duty of building the condominium in a good and workmanlike manner.

5.29 The argument that the statute imposed on the developer a non-delegable duty was rejected. The Court of Appeal commented that the HD Act is a piece of legislation that controls and licenses the business of housing developers. It has nothing to do with building standards. It then pointed out that the law that relates to building standards is the Building Control Act (Cap 29, 1999 Rev Ed) which regulates the design, supervision and construction of buildings. However, this Act too “does not contemplate that the design and erection of the building in a development would be undertaken by the owner or developer personally” (at [41]). It observed that the Act “expressly recognises that all those matters should be undertaken by competent professionals and contractors appointed by the developer” (*ibid*).

5.30 Moreover, the claim had not been pleaded as a breach of specific statutory duty, but as a general claim in negligence. The reference to the statute was to buttress the argument on the common law of negligence. If, however, the management corporation had pleaded and identified a statutory duty placed on the developer for the protection of purchasers, it might have been arguable that such a duty was not delegable. Other statutes (for example, the Buildings and Common Property (Maintenance and Management) Act (Cap 30, 2000 Rev Ed)) impose statutory obligations on the participants in the construction industry. There may be scope for developing civil remedies in relation to some of these statutory duties.

5.31 Although an action for breach of statutory duty has been described as an action for negligence (*Lochgelly Iron and Coal Company, Limited v M’Mullan* [1934] AC 1), it has also been clarified elsewhere that the action is not for “negligence in the strict or ordinary sense”, but “belongs to the category often described as that of cases of strict or absolute liability” (Lord Wright, *Caswell v Powell Duffryn Associated Collieries, Limited* [1940] AC 152 at 178). It appears to be generally accepted that if a statutory duty is broken, it will not be a defence that an independent contractor was employed, unless upon a true construction of the relevant statute, delegation can be regarded as a fulfilment of the obligation: *Gray and Wife v Pullen and*

Hubble (1864) 5 B & S 970; 122 ER 1091 and *Mulready v JH & W Bell Ltd* [1953] 2 QB 117.

The Singapore Institute of Architects form of contract

5.32 The operation of the Singapore Institute of Architects (“SIA”) form of contract in relation to set-offs had been considered in *Sintal Enterprise Pte Ltd v Multiplex Constructions Pty Ltd* [2004] 4 SLR 841 (HC), *Multiplex Constructions Pty Ltd v Sintal Enterprise Pte Ltd* [2005] 2 SLR 530 (CA) in the context of an application for stay in favour of arbitration. The issue in such an application was whether there was a dispute referable to arbitration. The form in question was the Conditions of Subcontract for use in conjunction with the Main Contract (2nd Ed, 2000), published by SIA. On appeal, two issues arose which are of interest to construction lawyers. First was the question of whether a main contractor could claim general damages for delay against its subcontractor, and was not limited to a claim for liquidated damages stipulated in the subcontract. Second was the question of how detailed and accurate the set-off notice had to be, in the light of the contractual requirement that the set-off must be quantified in detail with particulars and reasonable accuracy.

5.33 The Court of Appeal noted that whether the right to general damages for delay had been displaced by specific provision for liquidated damages was a matter of construction. Here, the letter of acceptance had provided for liquidated damages. The Court of Appeal accepted the proposition that greater weight should attach to terms which the contracting parties had chosen to include rather than to the pre-printed conditions (at [26]). However, for the purpose of the hearing before it, the Court of Appeal considered that it could not hold that there was no dispute concerning the interpretation of the contract (including the question of consistency between different contractual documents).

5.34 On the second question, the Court of Appeal held that one set-off notice was invalid, as it included amounts for damages that had not been incurred or sustained as at the date of the notice (at [32]). Set-off could only operate between debts that had already accrued. However, the remaining notices were held to be valid, and so raised disputes referable to arbitration (namely, whether the amounts set off were in fact justified). It was not necessary for the notices to set out the amounts exactly, so long as they were reasonably accurate (at [33]).

5.35 One of the impediments to the development of a distinct body of Singaporean jurisprudence in the field of construction law is that not only are most construction claims arbitrated but also that even for the domestic arbitration regime, there is very limited opportunity to appeal: Appeals lie only on questions of law for which the arbitrator's answer appears to the court granting leave to be obviously wrong, unless it is a point of law of general application, in which case the court need only consider it to be open to serious doubt. If the arbitrator makes an error of law, such as misapplying principles that were not in dispute between the parties, no appeal lies. But construction law is full of fine points of law, and even where the parties have not adopted a standard form, others may benefit from exegesis by the court.

5.36 The case of *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering and Construction Co Ltd* [2005] 2 SLR 270 ("*Permasteelisa*") illustrates how hard it can be to fit a party's dissatisfaction with an award through the hoops of leave to appeal. However, one question of law of general interest to the industry received leave. Under the SIA form of contract, the contract administrator may issue orders for work to be done. If the orders were classified as "instructions", the contractor would be able to claim for additional payment for variations, but would not be able to do so if the orders were classified as "directions". The SIA Conditions of the Main Contract provide that the main contractor must dispute the classification of an order as a direction within a period of 28 days, if it intends to seek additional payment, failing which it is conclusively deemed to have undertaken to comply with the direction without compensation. In *Permasteelisa*, the subcontract provided for a notice of dispute to be given from the subcontractor to the main contractor, but did not set out an equivalent deeming provision. Leave to appeal was given on the question of whether the subcontractor had to object to the classification of the architect's directions as such before the arbitrator would be entitled to review a claim made by the subcontractor for a variation arising from it. However, the industry will have to wait for the decision on the appeal proper before obtaining definitive guidance.

Recovery of damages

5.37 The decision in *Prosperland Pte Ltd v Civic Construction Pte Ltd* (*supra* para 5.1) allowed the developer of a condominium to claim substantial damages from the builder and architect for defects in the common property, notwithstanding that it had been transferred to the management corporation, and the developer had not been sued, nor had it carried out or paid for any repairs. The court had accepted that the developer

had the right to the full and proper performance of the contracts, and should be compensated for the breach of performance of these contracts, even though the property that was defective no longer belonged to the developer.

5.38 In the appeal (*Chia Kok Leong v Prosperland Pte Ltd* (*supra* para 5.1), the principal argument was that no exception should be made to the general rule that a plaintiff is entitled to recover damages only for its own loss resulting from a breach of contract because the management corporation could pursue a direct remedy against the builder and architect in the tort of negligence, as held in *RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113 and *RSP Architects Planners & Engineers v MCST Plan No 1075* [1999] 2 SLR 449. There was consequently no legal black hole that needed to be filled (at [32]).

5.39 The Court of Appeal rejected this argument and upheld the decision of the trial judge. It noted that a remedy in tort did not wholly fill the legal black hole. It was subject, not only to proximity and foreseeability being established, but also to the defence that the defects were the work of an apparently competent independent contractor. As for the concern that there might be double liability, in the event that the moneys paid to the developer, which was in its members' voluntary liquidation, were not used to rectify the defects and the management corporation had also subsequently brought its own claim in tort, the Court of Appeal considered this "more apparent than real" (at [46]), accepting the developer's statement in evidence that the moneys would indeed be used to rectify the defects and noting that there was no suggestion that the developer was insolvent.

5.40 In this part of its judgment, the Court of Appeal proceeded on what has been called the narrow ground: namely, that an exception will be made if without this, there will not be an effective remedy and so long as the moneys due will be applied to remedy the actual loss. These conditions were satisfied. However, it then proceeded to consider the case on what has been called the broad ground, which the trial judge had accepted, namely whether the developer was entitled to be compensated for the failure to perform regardless of whether or not a third party had a right to recover. The Court of Appeal accepted the broad ground as correct in principle, and held that the developer was entitled to protection of its performance interest, quite distinctly from ownership of the affected property, and an owner's right to claim for damage to his property.

Repudiatory breach of contract

5.41 A main contractor's management of work done by a subcontractor depends critically on first building into the contract clear and comprehensive obligations that operate in the course of the works. There may be a need to justify method statements to the owner's consultant, or the sequence of work may need to be rearranged. If the main contractor cannot secure the subcontractor's co-operation, then this will put its management of the project in difficulty.

5.42 The case of *Lim Chin San Contractors Pte Ltd v Sanchoon Builders Pte Ltd* [2005] SGHC 227 illustrates this difficulty in the context of an attempted termination based on perceived repudiation. It concerned a subcontract for construction of a coast guard base, involving among other things, construction of a jetty and two piers. The main contractor had no experience of this and so subcontracted this part of the work. The subcontractor's proposal required temporary works in the form of a bund for each of the intended permanent structures. Following the award of the tender, the subcontractor submitted its method statement for construction of the bund. This was supported by a report from a professional engineer, that in cross-examination was conceded to have been "inadequate" (at [18]). This report was not accepted by the consultant, and consequently the main contractor engaged another professional engineer who varied the original design and provided the necessary calculations to achieve acceptance. The court, however, noted that the subcontract had not included any express obligation on the subcontractor to justify its temporary works proposals with a report from a professional engineer. Its obligation was only to comply with the directions and instructions of the architect (at [24]). The court considered that the subcontractor had attempted to answer questions directed to it, and that the main contractor should have first identified the deficiencies in the method statement and required their correction by a certain date, before proceeding to engage its own professional engineer. The main contractor's other complaint concerned the subcontractor's progress. The court again did not accept that the subcontractor was in breach of its express obligation to proceed with due diligence and expedition, because the main contractor judged that progress against a revised programme that brought forward the start of the subcontractor's works compared to the original programme. The court held that the main contractor could only revise the original programme if it had good reason to do so, or if the change was necessitated by the subcontractor's delay, and so long as the revised timelines remained reasonable for the subcontractor. The court held that the main contractor failed to show a good reason for the revision in the

programme. The court also criticised the main contractor's failure to consult the subcontractor during the process of revision (at [50] to [52]).

5.43 While the decision turns on its facts and on the court's view that the main contractor had acted reasonably, the rights and obligations of the main contractor and subcontractor as set out make it difficult for a main contractor to fulfil its obligation to the owner to co-ordinate the works and achieve completion in accordance with the owner's requirements. The main contractor is often under vigorous pressure from the owner, and may not have the luxury of employing an entirely consultative and step-by-step method of managing subcontractors.

Limitation of actions

5.44 The case of *Chia Kok Leong v Prosperland Pte Ltd* (*supra* para 5.1) also raised an issue concerning limitation of actions, namely, who bears the burden of proof in relation to the postponed commencement of the limitation period under s 24A of the Limitation Act (Cap 163, 1996 Rev Ed). This section postpones the commencement of the limitation period, for actions in respect of latent injury or damage, to the date on which the injured party had knowledge of his rights to bring a claim for the injury or damage, and provides a three-year period for the institution of an action following that date. The question of law arose as to whether the developer bore the burden of proof to show that it had acquired the requisite knowledge only within the three years prior to action, or whether the defendant bore the burden of proof of showing that the developer had acquired this knowledge more than three years before. The Court of Appeal held that the burden of proof was on the developer, but that as this was in a sense a negative assertion (no earlier knowledge), the defendant had to show that the knowledge had been acquired earlier. The case illustrates a common problem in construction cases, namely, that one may learn of a defect gradually. The Court of Appeal endorsed the trial judge's approach in principle, in dating knowledge not from the occurrence of the first de-bonding of a tile, which was at the time considered an isolated event, but from the time when a few more tiles had de-bonded such that a reasonable person should have been alerted that there was something seriously amiss.

Expert determination

5.45 There are often technical issues involved in construction matters that construction professionals, such as quantity surveyors, may be better equipped to determine than lawyers. This is especially true of details of

quantity and rates. The case of *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR 634 demonstrates the robust approach of the court to a situation where the parties agreed to refer their differences to an eminent quantity surveyor to determine liability and quantum as an expert, and subsequently, one party failed to co-operate with the expert, and later challenged the determination. The court held that in the absence of fraud or collusion, it was not open to the parties to challenge the expert's determination. An expert could adopt an inquisitorial and investigative approach. He had a contractual mandate to make his determination, and so long as he kept within that contractual mandate, the court must not interfere. This decision flowed from established legal principles, and was fortified by the apparent indifference of the challenging party during the period when the expert had sought its input. This led the court to make the further point that the challenging party could not rely on its own failure to co-operate with the expert to claim that the expert had failed to assess its claim and defences. It had exhibited conscious and calculated indifference to the assessment process and could not rely on this "wrong" (at [43]). This part of the judgment, however, was not necessary for the decision upholding the expert's determination, and depended in turn on the court's view that any failure on the expert's part to assess the claim and defences flowed directly from that party's own indifference to the assessment, in breach of its implied duty to co-operate.

5.46 Another case illustrates the importance of expert witnesses maintaining their objectivity and independence, a duty which they can only discharge if they first know of and understand the requirements of O 40A of the Rules of Court (Cap 322, R 5, 1997 Rev Ed). In *Soon Li Heng Civil Engineering Pte Ltd v Woon Contractors Pte Ltd* [2005] SGHC 34, an eminently qualified geologist had not been told of the requirements of O 40A of the Rules of Court, and appeared to the court to have acted on the party's instructions rather than independently. His evidence was rejected.