5. BUILDING AND CONSTRUCTION LAW

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Introduction

5.1 The common law abhors a vacuum. Hence, if no proper remedy exists, the law will find some way to invent one. However, in the process there is always the danger that judge-made remedies designed to fill a gap in one area may have unintended consequences for other areas of the law. This is because judges act on the basis of legal principles or reasoned exceptions to those principles, and any adjustment of principle or exception cannot be limited purely to the situation at hand. There can be no such thing as law limited to management corporations or even construction contracts.

5.2 The legislative institution of management corporations greatly facilitated the development of condominiums. Management corporations hold and maintain the common property, and provide a democratic vehicle for the owners of individual units to decide on matters common to them all. Anyone who has lived in a leasehold building with management and maintenance vested in the reversionary owner will know how much easier life is in a condominium with a management corporation. But management corporations in law succeed the developer – and have no contract with the developer on which to sue for defects. This lacuna led to the courts holding that the management corporation had a remedy in the tort of negligence against the developer and others involved in the construction of the condominium. But subsequent efforts to make the developer subject to a non-delegable duty of care, by disallowing reliance on the generally applicable defence that any negligence was on the part of an apparently competent independent contractor, have been firmly rejected during the year under review, not least because it would be impossible to confine such an inroad into the general principle without consequences in other areas of economic activity. Nonetheless, the past year did see a developer being allowed to claim damages for breach of contract against the main contractor and architect for loss suffered in the form of defects occurring after the developer had transferred the property to the management corporation and

individual purchasers. What and where the limits are to this developing exception to the principle that a party to a contract is only entitled to recover substantial damages for his own loss is an open question.

5.3 The common law has been unable to find an effective solution to the difficulties faced by contractors in ensuring cash flow through the course of a project. Consequently, a new Act, the Building and Construction Industry Security of Payment Act 2004 (No 57 of 2004) was passed. This Act creates a statutory regime for the fast and effective adjudication of interim payment disputes (subject to eventual final resolution and adjustment of accounts in arbitration or in the courts). The effect of this Act is to consign to the bonfire many of the old chestnuts, such as the precise scope and ambit of "pay when paid" clauses and the circumstances when a contractor may stop work for non-payment. But as the bonfire is a slow-burning one, given the Act's transitional provisions, the interesting judicial analyses of some of these old chestnuts have been included in this review.

Contract formation

5.4 Time is a valuable commodity as much for those in the construction industry as those outside it. To avoid losing time while terms are negotiated, developers sometimes expect contractors to start work on the basis of the letter of award, even though the full contract has not been finalised and executed.

5.5 The case of *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd* [2004] 3 SLR 316 offers a useful reminder of how the period after the letter of award and before finalisation of contract terms will be analysed. The main issue concerns the interpretation of the words "subject to final terms and conditions being agreed" contained in the letter of award. The Court of Appeal had to consider whether this phrase should be construed in the same way as the expression "subject to contract" or as the trial judge had done, namely to mean that as "there were some final terms that the parties may agree upon, those terms (if agreed) would be included in the formal agreement to be signed". The appeal was allowed, and it was held that the phrase was not intended simply to be "a reservation of a right to add more terms if they could be agreed". Instead, the award of the contract was made conditional upon final terms and conditions being agreed. Hence, there was no concluded contract that could be enforced.

5.6 In coming to its decision, the Court of Appeal took the opportunity to set out some basic principles in construing a document (at [28]):

> There are a number of settled principles which ought to be borne in mind in construing a document. The first is that a document should be construed objectively without regard to the subjective intention of the parties. The trial judge did apply this principle. The second is that any subsequent statement or conduct of the parties should not be taken into account in the construction of a document, although the court would be entitled to look at the factual matrix … However, this principle does not apply to determine whether a document evidenced a contract, where such document is not the whole of the contract.

5.7 While acknowledging at [31] that there "are authorities which show that where the parties have acted upon the faith of a written document, the court would be inclined to assume that the document embodies a firm contract", the court held that this would not apply where there was a contrary intention. The court found that there was such a "contrary intention" indicated in the letter of award "which contemplated, pending the finalisation of the written agreement, an interim arrangement".

5.8 The issue whether there was a concluded contract was again central in *Econ Corp Ltd v So Say Cheong Pte Ltd* [2004] SGHC 234. On this occasion, the defendant main contractor raised the defence of set-off founded upon an alleged oral agreement. It was contended that there was an oral agreement by the plaintiff sub-contractor to pay the defendant main contractor a "2% commission on the final contract value to be determined at the end of the project when accounts are finalised". First, the court held (at [9]) that "[t]he burden of proof is on the defendant to establish that the parties intended to make a binding agreement to the effect as pleaded". Second, in considering whether the parties had actually formed the oral agreement the court considered it "permissible to look to the background circumstances from which it arose and the subsequent conduct of the parties" at [31]. On the evidence, the court found (at [32]) that the circumstances and the words used by the parties were "inconsistent with an intention to reach a concluded agreement" without "further negotiation leading to a written document". The court showed a natural wariness of allegations of oral agreements raised to support arguments of set-off.

5.9 Subsequent conduct was rightly considered in *Econ Corp Ltd v So Say Cheong Pte Ltd*, while excluded in *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd*. The difference was that the question was whether an oral agreement had been made, as opposed to how particular words should be construed.

Scope of work and representations

5.10 It is quite common for employers to require contractors invited to bid for a contract to deliver in writing information concerning their ability to undertake the project that is the subject matter of the tender invitation. The information given is then included as part of the contract documents. What motivates such an approach is the perceived difficulty on the part of the employer or consultants to make their own investigations concerning the contractors, particularly, when there is a large number of them. In *Wishing Star Ltd v Jurong Town Corp (No 2)* [2005] 1 SLR 339, 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".

5.11 It was contended that the plaintiff contractor, in submitting information to meet the criteria, had made a number of representations that were false. It was also contended that the majority of the representations had become terms of the contract and that they were not merely statements made with the intention of inducing the defendant to award the contract to the plaintiff. The question before the court was "whether the representations were false or substantially false such that the defendant was entitled to terminate the contract". To address this, the court found that it must first ask whether the defendant's entry into the contract was induced by the plaintiff's representations. The court noted (at [11]) that the "distinction between the items in the 'Critical Criteria' and those in the 'Other Criteria' lay in the fact that a non-compliance with the former ended the prospect of further evaluation or review". The court accepted the plaintiff's argument that this meant "a failure to observe the items in the 'Other Criteria' would not rule out the plaintiff's chances entirely" (*ibid*).

5.12 The court drew a distinction between simple purchases, such as of a second-hand car, and the award of a massive and complex construction project. In the former, a simple statement such as, "this car is absolutely accident-free" might be more easily shown to have induced the purchase and so establish actionable misrepresentation if it proved to be false. As for the latter, however, it was much harder to connect the making of the award to one particular representation and the court felt (at [12]) that it would "require very clear evidence that a party would not have entered into the contract if he had known that one or more representations made to him was not true for the court to find misrepresentation in such cases". The court concluded that "in a contract of this size and nature, there are very few considerations that stand out to be the one article that clinches the deal". The

court was of the view (at [13]) that "proposals and counter proposals that are exchanged between the parties that become terms of the contract (such as those presently alleged) must be subject to the law relating to breach of contract and not misrepresentation".

5.13 The approach taken by the court is indeed sensible, and in accordance with the practice of the construction industry. Questions asked of tenderers seek answers and commitments that typically then became part of the contract. They define and detail contractual expectations. For a false representation to be actionable as such, the misrepresentation must have induced the contract that the defendants sought to terminate. The contentions of the developer would, if taken to their logical conclusion, turn every breach of contract that had been the subject of a question and answer into an actionable misrepresentation that would not merely be ground for termination but a basis for rescission.

5.14 The decision also accords with the legal position that there is no general duty of disclosure placed on the contractor, whether during negotiations or during performance. The contractor's duty is to perform the contractual terms.

Novation of contract

5.15 Novation agreements are used quite often in the construction industry whenever there is a change of contractors. They are useful to the employer in ensuring that the rights and obligations of the original contractor are assumed by the new contractor. There may be complicated issues of how responsibility for work done is to be demarcated, as well as how payment is to be effected. A written agreement ensures certainty and clarity. In *Schindler Lifts (Singapore) Pte Ltd v Paya Ubi Industrial Park Pte Ltd* [2004] SGHC 34, the court was invited to consider whether an implied novation was possible. In this case, the main contractor entered into a settlement agreement with the employer by which the main contractor was released from liability for all defects. The plaintiff was the nominated subcontractor for lift installation who continued to work although the main contractor had stopped work. Although the employer and main contractor intended the subcontract to be novated to the employer, no novation agreement was signed although there had been extensive negotiations. The subcontractor, in trying to recover amounts due for variations and outstanding works together with the balance of the retention moneys, contended that there was an implied novation of the subcontract to the

employer. Alternatively, it argued that the main contractor remained liable if there was no novation.

5.16 The court held that there was no implied novation of the subcontract and, therefore, the employer was not liable to the subcontractor. There ought to be clear evidence to establish the consent and agreement to the changes in obligations and rights of various parties. Usually, the consent was evidenced by a written novation agreement. The court was prepared to accept that a novation agreement could be made orally, but concluded that clear evidence was needed to establish it. This is the sensible and practical approach. The subcontractor and the employer never signed off on a direct contract, despite negotiating for one. Moreover, as the other issues in contention demonstrate, there typically are complicated questions over the transfer of rights and obligations, such as release of retention moneys, "pay when paid" provisions, the final certificate and defects. Some of the provisions dealing with these are found in the main contract while others are contained in the subcontract. Parties, could, of course, by agreement decide whether all or some of the rights and obligations ought to be novated. But in the absence of a written agreement to do so, what the implied position should be would be fraught with uncertainty.

5.17 The issue of novation also arose in *Sun Fook Kong Construction Ltd v Housing and Development Board* [2004] SGHC 69, in connection with standing to complain about the employer's call on performance bonds. In this case, a subsidiary of the plaintiff took over three contracts for the construction of Housing and Development Board ("HDB") flats with the consent of the defendant. The defendant requested the execution of a novation deed. Following that, the security bonds, which were originally provided by the plaintiff for the three contracts, were amended by the issuer of the bonds so that the subsidiary's name was substituted as the name of the "Contractor" in place of the plaintiff. The subsidiary faced financial difficulties leading to its inability to fulfil the contracts and eventually ended up in judicial management. The defendant called for and received payments on the bonds. The plaintiff sued, *inter alia*, for a declaration that the defendant had not been entitled to call on the bonds.

5.18 The defendant raised issues of standing as preliminary issues. One of the questions was "whether the plaintiff, no longer being a party to the bonds, [had] a right to make any claim in respect of the defendant's call on the bonds". Thus, the plaintiff had to argue that it had standing notwithstanding that the construction contracts had been novated. It argued

that it continued to be jointly and severally liable with its subsidiary even after the execution of the novation deed.

5.19 The plaintiff contended that the endorsement made by the issuer was only a statement that the name of the contractor in the bond was amended. It did not amount to a novation at law but only added the name of the subsidiary as another "Contractor" to the bond and did not remove the plaintiff therefrom. It argued that the effect was to make the plaintiff and the subsidiary "jointly and severally liable to the defendant for the performance" of the contracts. In this argument, the plaintiff relied on cl 2 of the novation deed that provided that the plaintiff was to "continue to be fully responsible and liable for the complete due and proper performance of the contracts".

5.20 Responding to the argument, the defendant contended that the effect of the clause of the deed was not to retain the plaintiff as a joint contractor with its subsidiary. Rather, the clause meant that "notwithstanding the novation" of the contracts to the subsidiary, the defendant still held the plaintiff liable for the performance of the contracts in the capacity of an indemnifier.

5.21 The court rejected the plaintiff's argument that the endorsement by the issuer "only added" the subsidiary's name to, but did not remove the plaintiff's name from the bonds. The court noted that the plaintiff "had dropped out completely from the contractual scene once the contracts were novated" to the subsidiary. It held at [29] that "[n]either its consent nor its signature to the endorsements was required as it was no longer a party to either the ... contracts or bonds". The court went on to say that "the only consent required would be that of the defendant and which was obviously given" (*ibid*).

Claims in tort for negligence

Economic loss

5.22 A duty of care to avoid negligently causing economic loss to a management corporation has been imposed on the developer and the architect of condominium projects ever since two earlier decisions of the Court of Appeal, namely, *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. The reasoning in these cases followed the two-step test established by the House of Lords in *Anns v Merton London Borough Council* [1978] AC 728, proceeding to find a

sufficient degree of proximity, given that the management corporation was the inevitable successor of the developer, assuming the developer's obligations of maintenance of the common property, following completion of the development.

5.23 The question whether these decisions were limited to claims brought by a management corporation against entities involved in the development of the condominium had exercised lawyers in the field ever since the decisions were made. Of how general an application were they? Would they be extended to cover commercial properties as well? A related question was whether there was any limitation on the type of defect for which such a claim could be brought: could it be anything at all – paintwork which lasted four years instead of five, or window sills that were aesthetically unpleasing to new owners – or was there some threshold of seriousness that had to be crossed, perhaps that the defect had to affect the structure or pose some danger. It was generally recognised that the real problem was that the legislature had omitted from the Land Titles (Strata) Act (Cap 158, 1988 Rev Ed) any similar provision to those to be found in Australia, establishing a deemed contract between developer and management corporation.

5.24 Another opportunity was given to the Court of Appeal in *Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers* [2004] 2 SLR 300 to examine the issues arising from a claim for pure economic loss. But this time it had nothing to do with the construction of buildings and instead arose out of a shipbuilding dispute. Under a main contract, the shipbuilder agreed to build an oil tanker for the owner. The vessel was required by the owner to fulfil obligations under a long-term charter which it had entered into with the Indonesian oil company, Pertamina. The specifications of the engine were set out in the main contract. It was contemplated by the main contract that the shipbuilder would obtain the engine from a third party. The shipbuilder did so from MBS, a Singapore company which sold and serviced engines manufactured by its UK parent company, MBUK.

5.25 There was no direct contractual relationship between the owner and MBS or MBUK. The engine was delivered to MSE and the completed vessel with the engine was delivered to the owner. Within a few weeks, the engine gave trouble. Major repairs were required. After the engine finally broke down completely, the owner commenced action in tort against MBS and MBUK. The ground was that both MBS and MBUK had breached their duty of care which they allegedly owed to the owner. The owner claimed for its losses, including the cost of the engine and the loss of rental income which it would have earned from the charter.

5.26 The Court of Appeal considered decisions from other jurisdictions. First, it noted that *Anns v Merton London Borough Council* (*supra* para 5.22) had been overruled in England by a specially constituted seven member bench of the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398. Then it considered the position in Australia, and noted (at [24]) the emphasis placed by the High Court of Australia in *Bryan v Maloney* (1995) 128 ALR 163 "on the fact that the building was a permanent residence, not a commercial building, and this distinction seems to be a critical ingredient of their reasoning" and that there were cases in Australia where the courts there declined to extend the decision to commercial buildings. The court noted the Australian emphasis on the vulnerable position of residential purchasers. Somewhat cryptically, the court did not reject this approach but simply said (at [26]) that it did "not think that it would be beneficial, nor necessary, to pursue this distinction to its logical conclusion".

5.27 The court noted that the previous decisions in Singapore were concerned with real property and that similar decisions in England, Australia, New Zealand and Canada dealt with economic losses suffered on account of damage to homes. It then posed the question "[S]hould the principle of duty of care enunciated in [*Donoghue v Stevenson* [1932] AC 562] be further extended to cover economic losses arising from the supply of chattels?"

5.28 The court pointed out that the relationship between the developer and the management corporation in *Ocean Front* was "as close to a contract as could reasonably be". This meant it should be treated as "a special case in the context of the statutory scheme of things under the Strata Act or at least be confined to defects in buildings". Tantalisingly, the court has left open whether it is a principle limited only to management corporations constituted under the Land Titles (Strata) Act, (Cap 158, 1999 Rev Ed) or one applicable to all buildings. No doubt, this will fall to be determined in another case in the next few years.

5.29 Nor did the court indicate whether the *Donoghue v Stevenson* principle should not be extended at all to a claim for economic loss in respect of chattels. Instead, the court decided the case on the narrower ground that to find a duty of care owed to the shipowner would conflict with the contractual scheme, and in particular the limitations on liability contained in the main contract. The court noted that the shipowner could have readily structured the contract to make MBS or MBUK assume responsibility. Instead, it had chosen to distance itself from all the subcontractors, including

MBS and MBUK. The court then declined to extend what was decided in *Ocean Front* to this case with the following words (at [50]):

> We would moreover add that the ground for denying Bumi's claim for the economic losses becomes even stronger when we take into account the fact that in the main contract Bumi had agreed to limit their recourse should the vessel, including its engine, fail to meet the specifications. As this court observed in Ocean Front ... what was involved in this regard was a delicate balancing exercise in which consideration should be given to all the conflicting claims of the plaintiffs and the defendants as viewed in a wider context of society. Should the court stretch the Donoghue principle and afford Bumi a remedy which would be wholly in conflict with Bumi's express contractual commitment? Is it fair, in such circumstances, that Bumi be accorded a separate remedy in tort? Should the court condone Bumi's breach of an agreement which it had solemnly entered into with MSE? Should the court help a party to better a bargain it has made?

Claim by main contractor in tort against consultants

5.30 In the earlier High Court case of *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Company Pte Ltd* [2000] SGHC 131, it had been contemplated that a main contractor might potentially have a direct claim in negligence against a person charged with a certifying duty (there an architect) who failed to exercise due care and skill in certification. In *Hyundai Engineering & Construction Co Ltd v Rankine & Hill (Singapore) Pte Ltd* [2004] 4 SLR 227, the main contractor brought an action against the mechanical and electrical consultant for a project. The consultant was engaged by the developer. The main contractor disputed the valuation of work done by the consultant, which was to be forwarded to the quantity surveyor for determination under the contract. Without opining whether or not a certifier is indeed under a duty of care to the main contractor, the court dismissed the claim on the narrower ground that in any case the consultant was not in fact charged with a certifying duty, and was merely making a recommendation to the quantity surveyor. It was the quantity surveyor who was charged with this duty of valuation. Further, it noted that until the quantity surveyor in fact adopted the consultant's recommendation, the main contractor had not suffered damage, and so no cause of action in the tort of negligence could yet have arisen. The court also pointed out that if an authoritative determination of the applicable formula under the main contract was to be made, the developer, as a party to the contract, must be party to the proceedings.

Defence of independent contractor

5.31 It is a general rule of tort law that a person is not vicariously liable for the negligence of an independent contractor. Such a defence was raised in *MCST Plan No 2297 v Seasons Park Ltd (No 2)* [2004] SGHC 160 in a claim by a management corporation against the developers 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 plaintiff's claim as it was pleaded.

5.32 As the court noted, the plaintiff's claim was pleaded on the basis that the defendant was negligent in failing to exercise reasonable care and skill "in designing and/or building the [Seasons Park condominium] and/or supervising the construction and rectification works". The court ruled against the plaintiff with the following words (at [8]):

> The defendant cannot be expected to adduce evidence to prove or disprove the handiwork of his independent contractor, architect or engineer, all of whom the plaintiff had for unexplained "strategic reasons" declined to sue. All that is required of the defendant to prove is that he used reasonable care and skill in employing his independent contractor … the defendant is sued, not for failing to exercise skill and care in selecting his independent contractors, but for a *direct and personal failure in the design and construction of the condominium itself*. If that can be proved, it will be a shattering development in the building industry. This innovative attempt may prove more heroic than realistic, especially on the pleadings as they stand, which are significantly deficient in particulars.

5.33 This was ultimately a simple application of trite law. That the availability of this defence to a developer was the subject of argument is again the result of the omission in the Land Titles (Strata) Act of any deemed contractual remedy for the management corporation against the developer. While it must seem unfair for a management corporation to be faced with this defence when suing the developer, the answer could not have been to make inroads on the defence of independent contractor. The court rejected this attempt, rightly it is submitted, based on the pleaded issues.

Estoppel and waiver

5.34 There are circumstances where the innocent party may be prohibited from insisting on his strict contractual rights to terminate the contract. In *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR 288 ("*Jia Min Building Construction*"), a subcontractor commenced

action to claim outstanding payment for its work. The main contractor made a counterclaim for damages occasioned by the subcontractor's non-completion of works. It also purported to deduct the then current outstanding costs of materials from the progress payment due to the plaintiff. The plaintiff argued that as progress payments had stopped, it could no longer ensure regular progress of the works. It also argued that on the basis of past practice, this deduction was "premature and improper". The court found that although there was a waiver concerning the timing of payments, there was no waiver of the entire clause dealing with payments that conferred on the main contractor a right to deduct the price of materials supplied by it.

5.35 In making this finding the court took the opportunity to review the doctrines of estoppel and waiver. It asked the question, "are estoppel and waiver distinct doctrines?" The court suggested (at [28]) that it might be "more convenient to classify situations, similar to that under consideration, as being embraced under the doctrine of estoppel rather than the more amorphous concept of waiver". The court found, in the alternative, that the main contractor "had an implied right of set-off which it exercised in good faith". It ruled (at [43]) that "[i]t is hornbook law that the common law and/or equitable right to exercise set-off in diminution of a claim can only be removed by clear and unequivocal words". In this case, the court found (at [44]) that "[t]he parties' previous conduct was not unequivocal" and no issue of estoppel arose to rebut the presumption.

5.36 The issue of waiver emerged again in *Johnson Controls (S) Pte Ltd v Ho Air-Conditioning and Engineering Pte Ltd* [2004] SGHC 86. To resist a claim for payment by the plaintiff, the defendant contended that the plaintiff had substituted or failed to deliver some of the equipment referred to in the plaintiff's quotation. In response, the plaintiff contended that they had supplied the defendant with newer models of the equipment at no extra cost even though these were worth more. The court noted (at [6]) that as a general principle, "[t]he promisor, in the absence of waiver or subsequent variation by agreement, cannot substitute for the agreed performance anything different, even though the substituted performance might appear to be better than, or at least equivalent to, the agreed performance". However, on the facts, it was clear to the court that the defendant had clearly accepted the plaintiff's "varied performance of their contractual obligations".

5.37 If it is right that the plaintiff were to supply only the equipment referred to in the quotation, the court found that the defendant had waived this requirement when they accepted the newer models of equipment delivered by the plaintiff. The court found that one significant fact was that

"the project was completed quite some time ago" and the consultants had accepted the air-conditioning work and all the equipment supplied by the plaintiff. Moreover, the defects liability period of one year was also over. The defendant "did not allege that they were penalised in any way for supplying different equipment for the building project". There was also no attempt made during the construction stage to deduct any amount from the contract sum for missing or substituted equipment.

Liquidated damages

5.38 In *Johnson Controls (S) Pte Ltd v Ho Air-Conditioning and Engineering Pte Ltd* (*supra* para 5.36), a counterclaim for liquidated damages was considered by the court. The defendant had rested its claim for the liquidated damages paid by it to the main contractor on the following term in its purchase order issued to the plaintiff:

> All [jobs] must complete on 1/6/2001. If you fail to complete the above, you shall be liable for liquidated damages at the rate per day by PWD.

5.39 The court found that, in the first place, the provision "was not the type of liquidated damages clause that was enforced by the House of Lords in *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79". A liquidated damages clause may be regarded as an unenforceable penalty unless it can be shown to be a genuine pre-estimate of the damage which seems likely to be caused if a breach occurs. In the present case, the court noted that there was no "PWD rate per day" that was applicable to the plaintiff. The main contractors had apportioned the sum payable by them to the employer for delayed completion of the building project between the defendant and their many other subcontractors. The court observed that the defendant "then took the easy way out" by demanding from the plaintiff the entire sum apportioned to them by the main contractor even though they had many subcontractors who might also have been responsible for the delayed completion.

5.40 The court held (at [12]) that the defendant had "failed to discharge [its] burden of establishing in the first place" that the plaintiff was "in breach of contract by failing to complete [its] work on the specified dates". From the facts, it is reasonably clear that there was no contract supervisor to administer any extension of time. In fact, there is no evidence or mention of any extension of time clause that is usually necessary to ensure that the liquidated damages clause is workable (see for example, *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 114). In such circumstances, it appears correct that the defendant should be required to

first establish, at least, that the plaintiff was responsible for the delay before the court could consider whether liquidated damages were payable.

5.41 Liquidated damages were again in issue in *Nylect Engineering Pte Ltd v BKB Engineering Constructions Pte Ltd* [2004] SGHC 245. In allowing the main contractor's counterclaim against its subcontractor for liquidated damages imposed on it by the employer, the court took into account all possible delays by the subcontractor and other third-party subcontractors. The court took into account the fact that the subcontractor submitted a belated application for extension of time, that the extension of time granted by the employer in any event did not relate to the subcontractor's scope of work, and that the delays had a "knock-on effect" on the progress of the works of other subcontractors. The court also examined the information extracted from the superintending officer's monthly reports and graphs and concluded that the subcontractor was not following closely to the main contractor's schedule.

5.42 The court therefore essentially made an assessment as to whether the subcontractor had caused the delay and of the extent it was responsible for the liquidated damages imposed on the main contractor.

Set-off and abatement

5.43 In *Jia Min Building Construction* (*supra* para 5.34), before dealing with the issues relating to deductions and set-off, the court took the opportunity to clarify (at [29]) what it considers a "misapprehension in some circles of the building industry and the legal profession that the court will be inclined to interpret construction contracts *sui generis* and/or that it will take a more benign approach in invoking and applying equitable principles to achieve a favourable result for sub-contractors or contractors". The court then gave the reminder (at [29]) that "parties in construction contracts should not expect the court to rewrite or fill in lacunae in contracts to reach an equitable result".

5.44 The court is certainly right in its observation about the assumption in the construction industry that a subcontractor is in a "weaker commercial or bargaining position". There is always a vague belief that the court should render them some form of equitable assistance as if subcontractors are (as the court described it) "beneficiaries in a fiduciary relationship". It was emphasised (at [30]) that "the relationship between contractors and sub-contractors (or their employers as the case may be) is a matter of pure contract". Although this is axiomatic, it may be surprising how often the

contrary assumption is made by participants of the industry in the making of the contracts and by counsel in arguments before a tribunal.

5.45 In *Sintal Enterprise Pte Ltd v Multiplex Constructions Pty Ltd* [2004] 4 SLR 841, the plaintiff supplied stonework to the defendant. There was also another contract for the supply of labour and materials for the installation of the stonework. The supply contract incorporated the Singapore Institute of Architects ("SIA") Conditions of Sub-contract (2nd Ed, August 1999). The letter of acceptance which formed part of the contractual documents, provided that liquidated damages would be payable by the plaintiff for delay.

5.46 Proceedings were commenced by the plaintiff against the defendant claiming payment, *inter alia*, for stonework supplied based on interim certificates issued. The plaintiff also claimed damages for the defendant's breach of the supply contract by delaying the plaintiff's completion. The defendant sought a stay of all further proceedings under the arbitration clause. The defence was of set-off for the plaintiff's alleged delay in supplying the stone materials in relation to the plaintiff's claim under four interim certificates. The defendant had issued four notices to the plaintiff indicating its intention to set off "site overheads" and "running costs" from the certified sum.

5.47 The court, applying cl 11.4 of the SIA subcontract conditions, found that to be able to exercise the right of set-off, the defendant must "provide a detailed and reasonably accurate quantification of the amount to be set off". However, the alleged breakdown of expenses provided by the defendant indicated that the figures were not actual but were estimates. In actual fact, the court found, the defendant was thus claiming general damages. On the other hand, the letter of acceptance provided for only liquidated damages.

5.48 The courts also found that the defendant in a separate action with someone else had also counterclaimed a sum that was imposed on it by the employer. However, the defendant's notices were premised on the plaintiff being entirely responsible for the delay in completion. The court therefore ruled (at [5]) that the defendant "had failed to comply with the requirements of the SIA sub-contract conditions in its intention to set off the certified sum under the Interim Certificates against the liquidated damages, allegedly for delay under the supply contract".

5.49 This decision provides another illustration of the operation of the payment mechanisms of the SIA family of contracts. In this instance, the provisions of the subcontract were construed. By now, it is well established

that the "temporary finality" conferred on interim certificates of payment alters the right of set-off that is usually available to the party with the obligation to make payment. The onus is placed on him to satisfy the court why he should be entitled to withhold or make deductions from payment due.

Non-payment of claims and suspension of performance

5.50 Prior to the enactment of the Building and Construction Industry Security of Payment Act 2004, which came into force on 1 April 2005, the ability of the performing party to enforce interim payment was always beset with obstacles. The new statutory regime gives the performing party the right to suspend work when an adjudicated amount is not paid. Previously, whether and in what circumstances any right to suspend work arose was difficult to determine, and for the building professional very hard to advise on.

5.51 The question of whether there was a right to suspend work when interim payments are not made arose in *Jia Min Building Construction* (*supra* para 5.34). The defendant main contractor relied on the plaintiff subcontractor having stopped work as a ground for terminating the subcontract. The plaintiff subcontractor claimed to have stopped work only because of non-payment. However, this contention was raised belatedly and apparently only in response to difficulties emerging in its primary case, which was that it had not stopped work at all.

5.52 The court followed established authority in holding that in the absence of agreement there is no right to suspend work. The spectre was raised of "chaos within the building industry" if such a right were recognised. In principle, moreover, such a right did not fit readily with the performing party's entire obligation to complete the works for which it would be paid a lump sum by instalments.

5.53 Nonetheless, while there was no general right to suspend work, the court noted that, if the stoppage were in fact directly and effectively caused by the non-payment, this would mean that the defendant could not rely on the stoppage as a ground for termination. However, the pleadings did not set out nor did the evidence prove the requisite direct causal nexus.

Singapore Institute of Architects' Conditions of Contract

Extension of time

5.54 The Singapore Institute of Architects' Articles and Conditions of Building Contract are widely used. Consequently, questions of interpretation of these conditions are likely to be of general importance. Consequently, when an arbitrator has decided such a question, leave to appeal will ordinarily be granted under the Arbitration Act (Cap 10, 2002 Rev Ed) so long as the court accepts that the correctness of the decision is in serious doubt (previously, under the Arbitration Act (Cap 10, 1985 Rev Ed), a higher threshold was required, namely that a strong *prima facie* case had been made out that the arbitrator had gone wrong in law). This contrasts with interpretation of one-off contracts, where leave to appeal will only be given if the court is satisfied that the arbitrator was obviously wrong in his construction.

5.55 In *Liew Ter Kwang v Hurry General Contractor Pte Ltd* [2004] 3 SLR 59, SGHC 97, the applicant who had applied for leave to appeal under the Arbitration Act (Cap 10, 1985 Rev Ed) had engaged the respondent to reconstruct his house. The form of contract adopted was the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) 5th Ed, 1997 ("SIA Conditions"). It was the applicant, as owner, who quarrelled with the architect's certificates extending time, and the respondent, as contractor, who defended them. The applicant raised three questions of law arising from the arbitrator's interpretation of the SIA Conditions. First was the question of whether the architect could grant an extension of time on a ground not specified in cl 23. It appeared that the arbitrator had not considered whether the architect's extension of time had been on a ground so specified. *Prima face*, there was a strong case that this was wrong. Second was the question whether the arbitrator should have accepted the architect's "empirical assessment" of the extension, instead of any detailed, logical or methodical analysis of the extension of time. Again, a strong *prima facie* case was made out that this was wrong. A reasonable and fair assessment of extension of time requires a logical and methodical analysis of the impact of the events relied on by the contractor on the delay to the project. Third was the question whether the arbitrator should review the architect's decisions even in the absence of evidence that the architect failed to act professionally, independently or fairly. The arbitrator had held that he should not do so. Again, a strong *prima facie* case was made out that this was wrong. Clause 37(3) of the SIA Conditions empowers the arbitrator

to disregard the architect's certificates and substitute his own decision based on the facts found by him.

5.56 Given that the inquiry on the application for leave to appeal was not whether the decisions were ultimately right or wrong but only whether on their face a strong case had been made out that they were wrong, the views expressed by the court were not the last word. Certainly, the court's view that the architect should only extend time following a logical and methodical analysis of the impact of the event relied upon on the progress of the works is in principle correct. But the implication of this must be properly understood. The onus should be on the contractor to analyse the impact, and establish how the event has directly caused delay, rather than burdening the architect with an obligation to engage in sophisticated detailed analysis of what may be a vague and unsubstantiated assertion of delay made by the contractor.

Pay when paid

5.57 Another source of dispute that the Building and Construction Industry Security of Payment Act will remove is the "pay when paid" provisions in the standard forms of subcontract within the old SIA regimen. Indeed, the forms will themselves be revised to fit the new statutory regime. However, for the next year or two there will still be disputes requiring resolution under the law and forms existing prior to the new Act.

5.58 In *Schindler Lifts (Singapore) Pte Ltd v Paya Ubi Industrial Park Pte Ltd* (*supra* para 5.15), the question arose whether the "pay when paid" provisions in the SIA form of subcontract applied to the retention moneys following the entry by the main contractor and owner into a settlement agreement which extinguished the main contractor's maintenance obligations under the main contract. The subcontractor contended that as a result the architect would not be called upon to certify the release of retention moneys at the end of the maintenance period, and so payment to the subcontractor should not be held back once the maintenance period expired. The court however held that certification was nonetheless contemplated, and until that occurred, the subcontractor's entitlement to payment did not accrue.

Damages

Measure of damages following a supervening event

5.59 One of the chestnuts of academic debate is the apportionment of damages between two successive tortfeasors (or contract-breakers). Does the first tortfeasor remain responsible for loss caused by it, if what has been injured or damaged is then destroyed by a second tortfeasor? If so, how is that loss to be measured? These issues were raised squarely in the case of *Salcon Ltd v United Cement Pte Ltd* [2004] 4 SLR 353. Serious defects appeared in a cement silo a few years after construction. The owner of the silo appointed a consulting engineer to investigate these defects. However, in the course of investigation into the defects, and upon a loading of the silo for the purpose of monitoring the behaviour of the silo, further collapse occurred. This meant that the silo would have to be demolished and reconstructed. The owner of the silo sued the design engineer and the builder for breach of contract in design and construction. The consulting engineer was not a party to the suit, although he gave evidence. The case was referred to arbitration under the former s 22 of the Arbitration Act (Cap 10, 1985 Rev Ed). Thus, the decision of the arbitral tribunal stood as a High Court judgment, and was subject to appeal to the Court of Appeal. Although the arbitral tribunal held that the engineer and builder were in breach of contract, it also held that the advice of the consulting engineer was negligent, and so operated as a supervening event to break the chain of causation. Consequently, damages fell to be assessed for the loss caused to the owner of the silo prior to the supervening event.

5.60 The arbitral tribunal was requested to determine as a preliminary point of law whether such damages could be assessed as the diminution in value of the silo, and not limited to the notional cost of repairs for the defects as they were prior to the supervening event. Had the supervening event not occurred, the owner would have been entitled to recover from the engineer and builder not just the cost of repairing the defects but also the loss of profit on lost production during the period of downtime. If the silo were valued in its defective state prior to the supervening event, the diminution in value would be greater than just the cost of repair, because any prospective purchaser would take into account not just how much it would cost to repair the silo but also how long it would be shut down for repairs and not earning income.

5.61 The arbitral tribunal accepted that diminution in value could be claimed, and that the owner was not limited to the notional cost of repair. The builder appealed.

5.62 The Court of Appeal allowed the appeal, holding that upon the break in the chain of causation the builder was no longer liable for consequential losses during the period of notional repairs. Although the Court of Appeal agreed that there was no legal impediment to allowing the alternative claim of diminution in value prior to the supervening event, it held that any damages recoverable would be limited to the notional amount that it would have cost to repair the silo had the supervening event not occurred, and so the parties ought not to take further steps to assess damages on this alternative basis.

Recovery of damages

5.63 It is a general principle of law that a party is only entitled to recover substantial damages arising from a breach of a contractual duty to that party, if he himself suffers that loss.

5.64 Upon development of a condominium, the common property is transferred by the developer to the management corporation. Often, the developer assigns to the management corporation warranties that it may have obtained from the main contractor or specialist contractors. But there is no legal obligation for this assignment to be done.

5.65 If defects manifest themselves only after the common property has been transferred to the management corporation, then it will be the management corporation that suffers the loss. If the management corporation does not sue the developer, then the developer on the face of it has lost nothing.

5.66 In *Prosperland Pte Ltd v Civic Construction Pte Ltd* [2004] 4 SLR 129, the developer claimed against the builder and the architect damages for defects in the external facades. These were part of the common property and had been transferred to the management corporation. While the management corporation had written to the developer, it had not sued the developer, nor had the developer in fact carried out or paid for any repairs.

5.67 The court nonetheless held that the developer could claim substantial damages against the builder and architect. The developer had confirmed its intention to account to the estate managers for damages

awarded, and evidence was led that the estate managers intended to use such moneys to rectify the defects.

5.68 In allowing the developer's claim, the court followed the *dicta* of Lord Diplock in *The Albazero* [1977] AC 774 at 847, where he endorsed the rule in *Dunlop v Lambert* (1839) 6 Cl & Fin 600; 7 ER 824 that a consignor might sue for damages in respect of goods title to which had already passed to the consignee. He rationalised this exception to the general rule on three grounds. First, at the time when *Dunlop v Lambert* was decided, there was no established method in law for transferring rights of action under an executory contract other than by novation. Second, the original party to the contract of carriage could be said to have entered into the contract for the benefit of the consignee. Third, there was no other adequate remedy, and in particular the law of negligence despite its development did not provide a complete substitute remedy for one in contract.

5.69 These *dicta* had found fertile ground in two subsequent decisions of the House of Lords in the context of construction law. These were *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 and *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 ("*Panatown*"). In both decisions, the majority accepted that a developer could claim substantial damages against the builder, notwithstanding that it had assigned the building contract to a sister company (in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*) or that the land in fact belonged to a third party (in *Panatown*) so long as there was no adequate direct remedy (which in *Panatown* there was, in the form of a duty of care deed). The minority went further, opining that the right to claim substantial damages did not depend on the absence of an alternative remedy. Instead, substantial damages were claimable on the basis that the developer had a right to performance of the contract, the value of which is capable of being measured by the cost of obtaining substituted performance from a third party. Thus, what is claimed is not compensation for damage to property but compensation for the breach of the contract to perform.

5.70 The court in *Prosperland Pte Ltd v Civic Construction Pte Ltd* preferred this broader ground, noting that the developer "had the right to full and proper performance of the respective contracts that it had made with these parties and the value of that performance is eminently capable of measurement by the cost of the rectification works that need to be done" (at [64]).

5.71 Does this decision mean that so long as the developer can be persuaded to co-operate with purchasers, the developer can sue all those with whom it contracted and recover substantial damages for the benefit of the purchasers? If so, this would seem a case of the exception swallowing the rule. But even if this is so, it remains sensible for the legislature to consider providing an appropriate remedy to the management corporation in contract against the developer by statute, as if the management corporation were a party to the individual sale and purchase contracts. Such a remedy would give subsidiary proprietors, via the management corporation, exactly what they paid for: common property in accordance with contractual specifications and expectations.