7. BUILDING AND CONSTRUCTION LAW

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

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

[NB: Part A was contributed by Chow Kok Fong; and Part B was contributed by Philip Chan.]

PART A

Contract formation

Essential terms

7.1 Frequently, in order to fast track the delivery of construction work, parties overlook the importance of settling important terms of contract before commencing work. Not surprisingly, among the "essential terms" of a construction contract is the price for the works to be delivered, and the absence of an agreed price suggests that an agreement has not been reached.

7.2 This point was considered in *Stone World Sdn Bhd v Engareh (S) Pte Ltd* [2013] SGHC 22 ("*Stone World*"), which concerned a subcontract to supply and fabricate marble and granite work for the Marina Bay Sands Project ("MBS Project"). The plaintiff's claim was made on the basis that the subcontract was made partly orally and partly by a course of dealings premised on the actions and conduct of the parties. They submitted that the price for the work had been stated in the invoices. These invoices were partly paid by the defendant and this conduct constituted agreement with the price stated in the invoice. At the hearing, the plaintiff conceded that at the date when they alleged that the contract was made, the parties had not agreed the essential terms of the contract, *ie*, the rate to be charged.

7.3 In her judgment, Lai Siu Chiu J considered (at [28]) that this amounted to a "fatal flaw" in the plaintiff's case. She referred to the House of Lords decision in *May and Butcher, Ltd v The King* [1934] 2 KB 17 at 21, where Viscount Dunedin said that "undoubtedly price is one of

the essentials of sale, and if it is left still to be agreed between the parties, then there is no contract". Thus, without solid independent evidence showing that the parties had agreed to further terms, the plaintiff's case that the essential term relating to the rate to be charged was determined by the invoices failed "on the basis that there was an incomplete agreement": *Stone World* at [30].

Determining the scope of works

7.4 Another important term of a construction contract is the scope of works. One of the decisions affirms the general position that the absence of quantities and contract rates do not necessarily prevent the ascertainment of the scope of works. In *Qwik Built-Tech International Pte Ltd v Acmes-Kings Corp Pte Ltd* [2013] SGHC 278, one of the issues which had to be addressed by the High Court concerned the scope of works of a contract for the supply of a steel framing system. The contract was formed by way of a quotation. The contract was titled "Fabrication on Qwik Steel Framing Systems for Ex-Factory Only to the Building Works (Back of House) Project at Kuda Huraa Island, Male". It was argued that the scope was uncertain because on its terms, "infinite amounts of steel" could be supplied. In the High Court, Lionel Yee JC dismissed this argument. In his judgment, he referred to the letter of acceptance of the contract and noted that this expressly incorporated various correspondence and tender documents into the contract, including design drawings. The learned judicial commissioner said (at [24]):

> To the extent that the Main Contract did not specify the unit rate or the quantity of certain materials or items to be provided, the Plaintiff's obligation would be to supply such quantities as would be required for the purposes of the Project as defined by the contract … In other words, for these items, the Main Contract was a lump-sum contract in that the Plaintiff undertook to perform defined work (*viz*, fabrication of steel framing systems for the Project) at a fixed price.

Frustration and *force majeure*

7.5 The High Court recently revisited the subject of frustration and *force majeure*. In *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2013] SGHC 127 ("*Alliance Concrete*"), a contractor entered into three separate agreements with the same supplier for the supply of ready mixed concrete ("RMC") for three construction projects. A year later, Indonesia imposed a ban on the export of sand to Singapore ("the Sand Ban"). Sand is an essential ingredient for the production of RMC. To counter the Sand Ban, the Singapore Building and Construction Authority ("BCA") released sand from its stockpile to meet the needs of the industry. However, the price of sand rose because of, *inter alia*,

higher transportation costs. Following these events, the supplier wrote to the contractor that the previously agreed prices were no longer applicable and that they were only prepared to supply RMC if the contractor signed new agreements to allow for an increase in prices. Before the court, the supplier contended that it was no longer bound by the contracts because of frustration and, in respect of two of the contracts, by the application of the *force majeure* clauses.

7.6 Tan Lee Meng J observed firstly that there was no express or implied term in the contracts that the sand for the RMC had to come from Indonesia although "it was common knowledge that Indonesia was the cheapest source of sand at the material time": at [27]. Although the Sand Ban was unforeseen and unexpected, the learned judge considered (at [31]) that:

> … what matters is whether or not the Sand Ban radically altered the nature of [the supplier's] obligations under the Contracts or merely made it more expensive or onerous for it to fulfil its obligations to [the contractor].

On the facts, the supplier was in a position to fulfil its obligations under the contracts notwithstanding the Sand Ban as it had surplus stocks and, further, sand was readily available for the projects from the BCA stockpile. The supplier "had not been rendered incapable of performing its obligations under the Contracts at the material time and nothing had occurred that radically altered the obligations undertaken by it under the Contracts" although admittedly it had to incur higher costs if it continued to supply RMC to the contractor: at [40].

7.7 The court distinguished the facts in this case from that in *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2009] 2 SLR(R) 193 ("*Kwan Yong*") and *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106 ("*Precise Development*"). Tan J noted that in *Kwan Yong*, the contractor refused to assist the RMC supplier to apply for the release of sand from the BCA stockpile with the result that the supplier had no sand to produce RMC for the contractor: *Alliance Concrete* at [50]. The evidence before the court in *Precise Development* on the availability of sand from the BCA stockpile following the Sand Ban was quite different from the evidence presented in the present case: *Alliance Concrete* at [53].

Defects

Definition of defect

7.8 In *Longyuan-Arrk (Macao) Pte Ltd v Show and Tell Productions Pte Ltd* [2013] SGHC 160 ("*Longyuan-Arrk*") at [54], Belinda Ang Saw Ean J accepted the term "defective work" to mean:

> … work which fails to comply with the requirements of the contract and so is a breach of contract. For large construction or engineering contracts, this will mean work which does not conform to express descriptions or requirements, including any drawings or specifications, together with any implied terms as to its quality, workmanship, performance or design.

Defective goods and equipment

7.9 Defects in construction equipment are not immediately apparent and the courts have recognised that a buyer should be afforded a reasonable time period to test and use the equipment before acceptance. Within this period, the buyer is entitled to reject the equipment if it is found that the equipment is not of satisfactory quality. In *Sun Qi v Syscon Pte Ltd* [2013] SGHC 38 ("*Sun Qi*"), the subject agreements relate to the sale and installation of three 30-ton overhead travelling cranes and two 20-ton overhead travelling cranes. The cranes were delivered and installed. The buyer was in the business of manufacturing precast concrete slabs and bomb shelters for Housing and Development Board projects. Under each agreement, they paid a deposit equivalent to 20% of the purchase price. Two months after installation, various problems began with the cranes and these escalated over the next four to five months. In particular, there were defects in connection with the cranes' (a) electrical motors; (b) electrical wiring and control systems; and (c) the metal used in the gears, axles, shafts, and gear box assembly. The buyer claimed that the seller had not responded to their calls for service and repair. The seller disputed that they had any obligation of repair and accused the buyer of using the breakdowns as a means of delaying payment. The undisputed facts were the $263,700 owing under the agreements by the buyer to the seller and that the cranes were defective. The question remaining was whether the buyer was entitled to withhold that payment, reject the cranes and rescind the agreements.

7.10 In his judgment, Quentin Loh J considered that the right of rejection and rescission arises from the breach of the implied condition of satisfactory quality. Under s 14(2) of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("SGA"), this would give rise to a right of rejection, subject to the defence of acceptance by use. The general principle is that

if a buyer is deemed to have accepted the goods, he loses his right to reject for breach of conditions but can only claim for damages: *Eastern Supply Co v Kerr* [1971–1973] SLR(R) 834. In this case, the buyer had used the three 30-ton cranes under the first agreement for five months and the first crane for 11 months, and retained the two 20-ton cranes on its work site without installation or commissioning for seven months. The seller relied on s 35(4) of the SGA which provides that the buyer "is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them". On what constitutes a "reasonable time" for the purpose of s 35(4), Loh J said (*Sun Qi* at [32]):

> The length of time which constitutes 'a reasonable time' may vary, depending on the type of product involved and whether the defect can be readily discoverable or the cause of the defect readily made known. A reasonable opportunity of examining the goods could include conducting trials in relation to finding out the cause of the problem with the goods, and would not prejudice good faith efforts between the parties to come to an amicable resolution even if that were to extend the time between the initial delivery of the goods and their eventual rejection by the buyer.

Damages

Costs of rectification

7.11 The subject of damages was considered in *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2013] SGHC 41, the latest in a trilogy of cases between the same parties which had come before the High Court over the construction of a condominium called Kovan Primera. The 2007 case, *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2007] SGHC 194, concerned the scope of works of the project while the 2010 case, *Ho Pak Kim Realty Co Pte Ltd v Revitech Pte Ltd* [2010] SGHC 106, dealt with various claims as a result of alleged wrongful termination of contract. Following the 2010 case, both parties appeared before the assistant registrar for the assessment of damages relating to the counterclaim to be assessed and the case in 2013 was an appeal of the assistant registrar's decision. The judgment dealt with many issues but the holdings with respect to two matters may be of special interest to readers in the construction industry.

7.12 Damages were awarded for both costs of rectification and damages for the plaintiff's failure to honour the defects liability period ("DLP"). It was argued that this amounted to giving the defendant "double recovery". Lai Siu Chiu J held that this argument was misconceived. She noted (at [35]) that "the provision of a DLP was a requirement of the contract in particular and is a standard requirement

of the construction industry in general". She further considered in the same passage of the judgment that the cost of the DLP must have been factored in the plaintiff's tender and if the plaintiff failed to discharge this, the cost must have been paid for by the defendant. She, therefore, concluded that the "failure to honour the DLP was therefore a separate breach of contract from its failure to rectify defects".

7.13 The other head of damage awarded to the defendant was on account of the plaintiff's failure to provide warranties. The learned judge noted that the list of warranties to be provided was stipulated in the preliminaries. It could not be contended, therefore, that allowing this head of damage was tantamount to "double recovery": at [37].

Claim for prolongation costs – Expert evidence

7.14 A major item which features commonly in a claim for prolongation costs relates to additional site preliminaries. These are items of site overheads, and in advancing these claims, parties may rely on the evidence of their experts. However, where an expert takes an extreme position, such evidence may be of limited assistance to the court.

7.15 In *PPG Industries (Singapore) Pte Ltd v Compact Metal Industries Ltd* [2013] SGCA 23 ("*PPG Industries*"), the Court of Appeal had to consider, *inter alia*, a claim for damages arising from additional site preliminaries. The case concerned a subcontract between a façade contractor and a paint supplier. The trial judge had awarded damages under this head for 273 days of delay in the completion of a project caused by the supplier's failure to supply paint of a satisfactory quality. In the course of arriving at her decision, the trial judge had accepted the opinion of the subcontractor's delay expert that the entire 273 days of delay were caused by the supplier's breach of contract. The supplier's expert on the other hand expressed the view that not a single day of delay could be attributed to the supplier's breach.

7.16 Andrew Phang Boon Leong JA in delivering the judgment of the court rejected the evidence of both expert witnesses as "unreasonable and cannot, by any measure or logic or common sense, be accepted in their entirety": at [7]. He considered that it cannot be said that the supplier's breach caused absolutely no delay to the completion of the project since the parties had spent several months to achieve a satisfactory quality of the paint. On the other hand, the supplier could not have been solely liable for the full 273 days of delay because there were other delaying events "which in all likelihood contributed in some measure to the 273 days of delay in the completion of the project": at [8]. At least two of the delay events, namely, those arising from stop work orders and the adverse weather conditions, were clearly not attributable

to the supplier's breach. The architect's decision to grant extension of time to the main contractor in respect of both these events is "further acknowledgment that these two delaying events did cause delays in the completion of the project": at [9].

7.17 In the result, the Court of Appeal reduced the amount of damages awarded from $1,040,662.35 (computed by multiplying $3,811.95 by 273 days of delay) to $709,022.70 (being $3,811.95 multiplied by 186 days of delay).

Liquidated damages and Hadley v Baxendale

7.18 In *PPG Industries*, the Court of Appeal agreed with the trial judge that a subcontractor was entitled to claim from the paint supplier liquidated damages paid by the subcontractor to the main contractor because this flowed from the supplier's breach of contract. However, the Court of Appeal differed from the trial judge in the reasoning for arriving at this decision. The trial judge had held that the *second* limb of the rule in the celebrated English decision of *Hadley v Baxendale* (1854) 9 Exch 341; 156 ER 145 ("*Hadley*") applied and that the plaintiff had satisfied the requirement of actual knowledge on the part of the defendant under this limb: see *Compact Metal Industries Ltd v PPG Industries (Singapore) Pte Ltd* [2012] SGHC 91 at [105] and [114]. The rule in *Hadley* was affirmed by this court in *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd* [2008] 2 SLR(R) 623 ("*Robertson Quay*"); *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1 SLR 150; and *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363.

7.19 Phang JA in delivering the judgment of the court considered that the *second* limb of the rule in *Hadley* applies in the situation of *extraordinary or non-natural* damage. In order, therefore, to fix the defendant with liability for the damage or loss arising in this particular regard, *actual* knowledge on the part of the defendant must be shown. He referred to *Robertson Quay* where the Court of Appeal noted (*Robertson Quay* at [82]) that damage which falls under the second limb in *Hadley* does "*not*, by its *very nature*, [fall] within the reasonable contemplation of the contracting parties" [emphasis in original] and it would therefore "be both *unjust and unfair* to *impute* to them knowledge that such damage or loss would arise upon a breach of contract" [emphasis in original]: *PPG Industries* at [13] and [14]. In *PPG Industries*, however, the subject claim was for the liquidated damages that the subcontractor had incurred. The supplier must be imputed with the knowledge that if there is delay occasioned by his breach, the subcontractor would be liable to the main contractor in liquidated damages. This liability is found under the first limb of *Hadley*.

Final account of a contract

7.20 At the conclusion of a construction contract, parties may be expected to reach agreement on the final sum due to one party or the other and express this as a final account. The final account, therefore, operates as an agreement to settle the matters to which it purports to relate; usually this means all the matters arising from the contract.

7.21 The subject of a final account was considered in *Longyuan-Arrk* (above, para 7.8). The case related to a contract for the fabrication and installation of signage works for the Universal Studios Project at Sentosa. The work was undertaken in a rush to enable the theme park to open for the Lunar New Year in 2010 and it was not in dispute that short cuts were taken in the sense that some contractual terms were not observed. Thus, the standard written approvals for acceptance of fabricated signage were not obtained because of time constraints and, in the interest of expediency and practicality, the signage was installed first and defects, if any, rectified later. One of the items in dispute was that out of a few hundred signs installed, 11 signs did not adhere to the specification which required the steelwork for the contracted signage to be hot-dip galvanised. The plaintiff contended that it was entitled to deduct or set off the replacement costs from the final payment owed to the defendant, and after these deductions, the defendant still owed them money. The defendant argued that the parties had signed a Statement of Final Account dated 28 September 2010 ("the SFA") that settled all matters under the relevant contract and finalised the sum owed by the plaintiff at $489,681.03. The result, therefore, turned on the SFA. Initially, the plaintiff had alleged that the SFA was void for fraudulent misrepresentation but this ground was abandoned at the beginning of the trial.

7.22 In determining the SFA, Belinda Ang Saw Ean J referred to the principles of construction laid down by the Court of Appeal in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich Insurance*"). She noted that more recently, the Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 ("*Sembcorp Marine*") revisited the contextual approach to the interpretation of terms in a contract, and the observations made in *Zurich Insurance* were supplemented in *Sembcorp Marine*. Sundaresh Menon CJ, delivering the judgment of the court in *Sembcorp Marine*, reminded litigants that whenever a contextual approach to construction of a contract is sought, the relevant background facts relied on must be pleaded with specificity and extrinsic evidence limited to the matters pleaded must be disclosed.

7.23 In the case before the court, Ang J observed that the defendant had completed the installation of the signage in January 2010. To all

intents and purposes, there was practical completion of Universal Studios which opened on 14 February 2010. On 1 March 2010, the plaintiff was proposing to pay the defendant at least $500,000 in two instalments (mid-March and mid-April), and thereafter, the third instalment at the end of May 2010 for the remaining balance and value of variation works. The SFA expressly stated that the final amount was "based entirely on a commercial settlement": *Longyuan-Arrk* at [49].

7.24 Secondly, the word "final" in the SFA denoted the end of an accounting process between the parties in respect of the contract. Thus, the learned judge noted (*Longyuan-Arrk* at [50]):

> The Final Amount of $489,681.03 was an agreed figure in the SFA. The agreed final statement in the SFA had the effect that payment of the amount notified (*ie*, the Final Amount) was due to the Defendant. The expressions used by the parties, *viz* 'Final Sub-Contract Sum', 'Final Account Agreement', 'final account', and 'final statement of account' all have one thing in common: they were intended and would have been taken by a reasonable businessman as final.

7.25 Thirdly, the final account and statement was reached by agreement of the parties and was stated to be in "full and final settlement of all matters in connection with this Sub-Contract" except for the specific reservations in the SFA. The SFA also expressly stated that the defendant's acceptance of the "Final Account Agreement" (*ie*, the commercial settlement) would "discharge all liabilities in full between [the Plaintiff and Defendant] under this Sub-Contract" with the exception of the reservations stipulated: *Longyuan-Arrk* at [51].

7.26 However, the SFA did not preclude the plaintiff from raising claims against the defendant for defects because this right was contained in the express reservations in the SFA. The defendant remained obliged to rectify defective works during the DLP. In this case, the SFA did not settle the issue of non-compliant signs which was intended to be treated as defective work to be resolved during the DLP: *Longyuan-Arrk* at [60].

Qualified person: Release letter

7.27 Architects and professional engineers may on occasion seek to be released from their obligations under a consultancy contract with owners, particularly where the basic working relationships have broken down. The terms under which the release is sought were the subject of the decision in *Olivine Capital Pte Ltd v Lee Chiew Leong* [2013] SGHC 168 ("*Olivine Capital*"). In that case, an underground sewer pipe was damaged while piling works were carried out on a construction project. As a result, the developer had to bear the costs and expenses incurred in repairing the sewer pipe. The developer informed the piling

contractor and the professional engineer that they would be held liable for the repair costs. Meanwhile, the professional engineer was charged with a statutory offence for his role in the damage of the sewer. Shortly after that, he resigned from his roles as professional engineer, architect and project co-ordinator of the project. The resignation was effected by means of a "Compromise Letter" which stated, *inter alia*, that the parties agreed to "amicably terminate my role as Qualified Person (Architectural and Structural) and project coordinator … with no claim from either party". Lai Siu Chiu J considered that the principles to be applied in construing the Compromise Letter were those found in *Zurich Insurance*: *Olivine Capital* at [29]. The learned judge held that, on these principles, the phrase "with no claim" in the Compromise Letter should be given its plain meaning, *viz*, *all claims* for the duration of the project. In the circumstances, the Compromise Letter effectively compromised the developer's claim against the professional engineer: *Olivine Capital* at [44].

Performance bond

7.28 In *Ryobi-Kiso (S) Pte Ltd v Lum Chang Building Contractors Pte Ltd* [2013] SGHC 86 ("*Ryobi-Kiso*"), a piling contractor furnished an unconditional performance bond in the sum of $1.88m to the main contractor in compliance with the requirements of a piling contract for the construction of a part of the Downtown Line MRT. The main contract works were delayed and the main contractor alleged that these were caused by the piling subcontractor. The causes of delay included the subcontractor's late submission of method statements and drawings, poor planning and mobilisation, delay in obtaining the necessary clearance for works and the piling contractor's use of less power and hence slower piling equipment. Eventually, the main contractor employed another piling contractor to undertake part of the subcontract works. When the time came for the execution of that part of the works referred to as the Stage 4 Works, the piling contractor told the main contractor that the Stage 4 Works would be considered a variation for which additional payment was required. The main contractor then proceeded to call on the performance bond. Before the High Court, the piling contractor contended that the call was unconscionable because there was a genuine dispute as to whether the main contractor had breached the subcontract by removing part of the works under the subcontract and hence the call was therefore not in good faith, clearly oppressive and properly construed as a bullying tactic.

7.29 In his judgment, Quentin Loh J referred (*Ryobi-Kiso* at [18]) to the decision of the Court of Appeal in *Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin*

Zayed Al Nahyan [2000] 1 SLR(R) 117 at [45] where unconscionability in the context of restraining calls on performance was said to involve:

> … unfairness, as distinct from dishonesty or fraud, or *conduct of a kind so reprehensible or lacking in good faith* that a court of conscience would either restrain the party or refuse to assist the party. *Mere breaches of contract by the party in question … would not by themselves be unconscionable* [emphasis in original].

The learned judge pointed out that on the authorities, the cases where the call of the bond was considered unconscionable was one where "either the beneficiary of the performance bond had by its own default contributed to the circumstances which founded the call, or both parties were wholly innocent": *Ryobi-Kiso* at [19]. In the case before him, he considered that there was no unconscionability on the part of the main contractor in making the call on the bond. He observed that there was evidence to support the main contractor's complaint that the piling contractor was in serious delay, arising from the use of inappropriate equipment, late submissions of method statements and drawings and over-boring.

Security of payment

Scheme of statutory adjudication

7.30 As mentioned in previous volumes of this series, the statutory adjudication regime provided under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOP Act") has changed extensively the dispute landscape in the construction industry. The SOP Act provides that a party who has carried out construction work or provided services or supplied materials in relation to a construction project in Singapore may make an adjudication application which enables a payment dispute to be decided summarily by an adjudicator appointed under its provisions. The determination of the adjudicator binds both parties and is enforceable until and unless the matter is determined otherwise by an arbitrator or the court.

Impact of the Chua Say Eng *decision*

7.31 In the 2012 SAL Ann Rev, attention was drawn to the first decision of the Court of Appeal on the statutory adjudication regime in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 ("*Chua Say Eng*"). This was an important decision because it cured problems presented by an unduly narrow construction of reg 5(1) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("SOP Regulations") and s 10(1) of the SOP Act, holding in particular that the mandatory language "is not in relation to the

making of the payment claim but in relation to its service": at [89]. In the judgment, Chan Sek Keong CJ drew attention to the fact that while s 10(3) of the SOP Act provides that the amount claimed must be calculated by reference to the period to which the payment claim relates, it leaves it to the claimant to determine the relevant period and the work done or supplies made. The learned Chief Justice also clarified the circumstances under which the court may set aside an adjudication determination and the conditions under which "repeat claims" may be properly challenged.

7.32 *Chua Say Eng* was delivered in the later part of 2012. The effect of this decision was extensively felt in 2013. The number of adjudication applications rose from 138 in the previous year to 252 in the year under review. In addition there were 14 adjudication review applications. This, in turn, explains the increase in the number of matters on the regime coming before the courts. These allowed the courts to address a number of important aspects of the subject which we now consider.

Whether the underlying contract is a "construction contract"

7.33 In *Associate Dynamic Builder Pte Ltd v Tactic Foundation Pte Ltd* [2013] SGHCR 16 ("*Associate Dynamic*"), the plaintiff contracted as a nominated subcontractor for earth retaining works with a general contractor. The plaintiff further subcontracted the subcontract to the defendant. On 23 November 2012, the defendant made an adjudication application in respect of one of its payment claims and was awarded the claimed amount in full because the plaintiff failed to lodge a payment response. In applying to set aside the adjudication determination, the plaintiff argued that the contract to which the subject adjudication determination related was not a "construction contract" for the purposes of the SOP Act because the plaintiff was only an intermediary to help the defendant secure the subcontract. The learned assistant registrar rejected this submission on the ground that the plaintiff in this case remained contractually bound to complete the works with the general contractor and the obligation was fulfilled by the defendant under a back-to-back arrangement: at [22].

Required particulars in a payment claim

7.34 It is not uncommon for a respondent to challenge the validity of a payment claim on the ground that the payment claim did not provide sufficient particulars of the claimed amount as required under reg 5(2)(*c*) of the SOP Regulations. During the year under review, this issue was raised in three cases.

7.35 In *Shin Khai Construction Pte Ltd v FL Wong Construction Pte Ltd* [2013] SGHCR 4 ("*Shin Khai Construction*"), a general contractor employed a subcontractor for the erection of an industrial and office building. The contract provided for the works to be carried out on bills of quantities which were subject to remeasurement. The subcontractor submitted a payment claim with an attachment containing a detailed breakdown of the work done in the month of September 2012 but only stated the sum claimed for each month from February to August 2012. The general contractor did not file any payment response and the matter proceeded to adjudication, arising from which the adjudication determination was issued in favour of the subcontractor. In applying to set aside the determination, the general contractor argued, *inter alia*, that pursuant to s 10(3) of the SOP Act and reg 5(2) of the SOP Regulations, the payment claim was defective because although it referred to the period "1.09.12 To 25.09.12", it sought to claim payment for works done outside of that period, in particular, February to August 2012. The contractor further contended that the payment claim was defective because it only provided a detailed breakdown for September 2012 but not for February to August 2012. On this objection, the learned assistant registrar decided that while the payment claim could have been better drafted, it was not defective. It did comply with s 10(3) of the SOP Act and reg 5(2) of the SOP Regulations. He considered that it was evident that the sum claimed was an *accumulated sum* as stated on the first page of the payment claim. This covered the period of February to August 2012 with the sum for September 2012 added to the outstanding sums. He rejected the contractor's contention that the subcontractor had to give a detailed breakdown for the other months *in addition* to the detailed breakdown for September 2012 because the details for the earlier months had been provided in previous payment claims: at [11]–[13].

7.36 In *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776 ("*Australian Timber*"), the adjudication determination related to a payment claim made by a subcontractor undertaking the supply and installation of parquet flooring for the construction of some Housing and Development Board flats and facilities. The payment claim which was the subject of the adjudication determination did not furnish two of the items stipulated in regs 5(2)(*c*)(iii) and 5(2)(*c*)(iv), namely, the quantities and rates relating to the work which formed the subject of the claim and the calculations showing how the claimed amount was derived. The respondent in that case argued that this invalidated the payment claim. Woo Bih Li J stated that following the decision in *Chua Say Eng* objections of this nature should be addressed through a two-step analysis (*Australian Timber* at [30]):

> In my view, therefore, the two-step analysis proceeds as follows. If a purported payment claim complies with s 10(3)(*a*) of the Act and

> reg 5(2) of the SOPR, it is a valid payment claim and no further question arises as to its validity, although an argument based on estoppel against the claimant can still be made (*Chua Say Eng* at [33], [73] and [78]). If, however, the purported payment claim does not comply with these statutory provisions, it is not necessarily rendered invalid and the adjudication determination is not automatically invalidated. The court should instead proceed to examine whether any of the provisions which were not complied with was so important that it was the legislative purpose that an act done in breach of the provision should be invalid, so that non-compliance with such a provision would invalidate the adjudication determination …

7.37 Applying this approach, the learned judge found that on the facts the subject progress claim was wanting in detail with respect to regs 5(2)(*c*)(iii) and 5(2)(*c*)(iv). However, despite this, the claim did fulfil the requirements in s 10(3)(*a*) of the SOP Act and reg 5(2) of the SOP Regulations. As the learned judge said (*Australian Timber* at [78]):

> Ordinarily, a respondent receiving a payment claim with some, but not all, of the details required under reg 5(2)(*c*) of the SOPR will have enough information at his disposal to decide on his next course of action. In this case, APCD could have issued a payment response denying that the Variation Works were done and/or stating that there was insufficient information relating to the Variation Works. Put in another way, the lack of detail here did not in itself prejudice APCD in that it did not preclude a response from APCD. It was under these circumstances that I did not think that it was the legislative purpose to invalidate Progress Claim No 9 for failing to comply with regs 5(2)(*c*)(iii)–5(2)(*c*)(iv) of the SOPR.

7.38 Woo J concluded that to hold the subject progress claim invalid for breaching regs 5(2)(*c*)(iii)–5(2)(*c*)(iv) of the SOP Regulations would not appear to be consonant with the ideals and purpose of the SOP Act. He observed (*Australian Timber* at [80]):

> It would be all too easy to invalidate a payment claim for a lack of detail. In my view, the requirement to provide details in a payment claim is to facilitate the implementation of the adjudication scheme in the Act, but not to trip up claimants. It seems to me that the requirements to state the quantity of each item claimed and the calculations showing how the claimed amount is derived are only a guide for the claimant, since there are conceivably *other* important details to be submitted in a payment claim which are not expressly stated in reg 5(2)(*c*) of the SOPR … [It] would seem incongruous that an omission to state, say, the quantity of the items claimed is fatal to the validity of a payment claim, whereas an omission to state the location where the work was done would not be fatal …

7.39 The decision in *Australian Timber* was followed by the assistant registrar subsequently in *Associate Dynamic* (above, para 7.33). In that case, one of the plaintiff's arguments was that the payment claim

contained insufficient particulars and this was a breach of s 10(3) of the SOP Act and reg 5(2)(*c*) of the SOP Regulations. The learned assistant registrar dismissed this objection because the payment claim in this case did contain "the description of the work done, the quantity, the contract rate and the contract amount" and also "computed the amount payable for actual work done based on the contract rate": *Associate Dynamic* at [49]. She considered these particulars to be sufficient for the purpose of the SOP Act. However, she pointed out that even if she was wrong on this point, the High Court had in *Australian Timber* ruled that the insufficiency of the particulars accompanying a payment claim is not necessarily fatal to a payment claim under the SOP Act.

Validity of an adjudication application filed out of time

7.40 *Chua Say Eng* (above, para 7.31) left unresolved whether s 13(3)(*a*) of the SOP Act (which provides for the filing of an adjudication application within the prescribed seven-day period) operates as a mandatory condition so that the effect of any non-compliance must necessarily invalidate the adjudication application: *Chua Say Eng* at [61]. This issue surfaced before the assistant registrar in *Shin Khai Construction* (above, para 7.35). One of the arguments relied on by the unsuccessful respondent to challenge the adjudication application in that case was that it was lodged out of time. The argument was framed along the following lines. The payment claim was served on 25 September 2012. In the absence of a contractually agreed timeline for service of the payment response, s 11(1)(*b*) of the SOP Act prescribed a default seven days and s 12(5) prescribed another additional seven days as the dispute settlement period. The combined 14-day period after 25 September 2012 ended on 9 October 2012. Therefore, the seven-day window to lodge the adjudication application which began immediately after that period was from 10–16 October 2012. However, the subcontractor lodged the adjudication application on 18 October 2012 and the contractor alleged that this was out of time.

7.41 The learned assistant registrar considered that if s 13(3)(*a*) was treated as only a directory and not a mandatory requirement, "an intolerable uncertainty which would considerably compromise the regime under the Act would be introduced". He noted (*Shin Kai Construction* at [27]):

> The adjudicator would be called upon to decide when an application is late but forgivable so as to accept the adjudication application, and late and unforgivable so as to reject it. In the continuum of time, apart from the extreme cases, there would be little predictability and considerable uncertainty as to where such a distinction will lie.

7.42 Accordingly, he concluded from this analysis that an adjudication determination may be set aside if there has been a breach of s 13(3)(*a*), *however slight the breach*.

7.43 In relation to the case before him, cl 49 of the subject contract provided for interim progress claims to be submitted on every 25th of the month. It further provided for the contractor to issue a payment certificate to be issued within ten days from the date of the claim. The contractor argued that in the absence of "an express clause which provides that a payment certificate is to be deemed as a payment response" the significance of cl 49 only applied to a payment certificate and nothing more: *Shin Kai Construction* at [31]. The learned assistant registrar conceded that the presence of such a clause as that mentioned by the contractor makes it clear that "the contractual provision is not limited in its reference to a payment certificate but also refers to a payment response": *Shin Kai Construction* at [32]. However, he ruled that the absence of such a clause does not lead to the conclusion that the contractual provision therefore does not refer as well to a payment response. Ultimately, it was a matter of the *construction* of the contract.

Repeat claims

7.44 In the previous volume, it was pointed out that the pronouncement of the Court of Appeal that a repeat claim is not necessarily prohibited under the SOP Act was considered *obiter* by the learned judge in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 ("*JFC Builders*") who thereupon proceeded to rule that repeat claims are prohibited under the SOP Act. During the year under review, the observations made by the Court of Appeal in *Chua Say Eng* and the ruling in *JFC Builders* on the subject were considered at some length by the High Court in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 ("*Vivaldi*").

7.45 In *Vivaldi*, one of the grounds for the setting aside of an adjudication determination under the SOP Act was that the subject payment claim was identical with an earlier payment claim in several respects, including the claimed amount, the particulars of claim as well as the supporting documents. The third payment claim was dated 24 November 2011 and it contained claims for work done and completed as early as January 2011. Following a searching examination of the authorities, Quentin Loh J considered that the position on repeat claims should be settled on the views expressed by the Court of Appeal in *Chua Say Eng* (above, para 7.31). Arising from his analysis, he considered the principles to be as follows (*Vivaldi* at [52]):

> (a) First, a subsequent payment claim can include a sum which has been previously claimed (and therefore in one sense a

> "repeat" claim), but has not been paid. Section 10(4) of the Act specifically deals with this.
>
> (b) Secondly, where a payment claim has been made, but has not been adjudicated upon, *eg*, because no adjudication application was made, it still remains an "unpaid" claim and could be the subject matter of a later payment claim and adjudication: *Chua Say Eng* at [92].
>
> (c) Thirdly, a payment claim that has been dismissed by an adjudicator for being served prematurely or as an untimely claim under reg 5(1) or a premature adjudication application may be the valid subject of a subsequent adjudication.
>
> (d) Fourthly, a payment claim or any part thereof which has been validly brought to adjudication and dismissed on its merits cannot be the subject of a subsequent payment claim or subsequent adjudication.

7.46 On these principles, there is no prohibition that a repeat claim is prohibited unless it falls within the fourth of these principles.

7.47 In *Associate Dynamic* (above, para 7.33), an alternative ground in the plaintiff's application was that the payment claim was invalid because it was a repeat claim. The learned assistant registrar considered the decision in *JFC Builders* which ruled that the SOP Act prohibits these claims against the observations of the Court of Appeal in *Chua Say Eng* and that of the High Court subsequently in *Vivaldi* (admittedly *obiter*) which considered that on a purposive construction of the statutory regime, a repeat claim is not necessarily prohibited unless it relates to a claim on which the merits have been adjudicated. In deciding to follow *Chua Say Eng* and *Vivaldi* that the payment claim should not be held to be invalid merely because it amounted to a repeat claim, the learned assistant registrar said (*Associate Dynamic* at [36]):

> As long as a previous payment claim has not been paid or partially paid and has not been the subject of an adjudication determination, it is an unpaid claim and can be rolled up pursuant to s 10(4) in subsequent payment claims.

Operation of s 15(3)

7.48 During the year under review, another case which concerned a major aspect of the SOP Act reached the Court of Appeal. Section 15(3) of the SOP Act is particularly important because it demands that the respondent to a payment claim should answer or pay up the claimed amount stated in the payment claim. The provision reads:

> The Respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any

> amount, including but not limited to any cross-claim, counterclaim and set-off, unless –
>
> > (*a*) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; or ….

7.49 The decision of the Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") settled many of the interpretative issues on the operation of the provision and is particularly valuable for its extensive inquiry into the policy considerations for its insertion in the SOP Act. For this reason, this case is discussed in some detail here.

7.50 In *W Y Steel*, the respondent steel contractor ("the contractor") failed to file a payment response within the time stipulated by the SOP Act. The claimant subcontractor filed an adjudication application for a claimed amount of $1,767,069.80 to which the contractor again failed to respond. At the adjudication conference, pursuant to s 15(3) of the SOP Act, the adjudicator refused to allow the contractor to raise certain deductions and contra charges amounting to $158,301. The adjudicator issued his adjudication determination ordering the respondent to pay the claimant the full claimed amount. Both the assistant registrar and the High Court refused to set aside the adjudication determination. Before the Court of Appeal, the contractor had submitted that s 15(3) should be narrowly construed and that its strictures should be confined only "to situations where a valid payment response had in fact been filed but had omitted certain reasons for withholding payment that otherwise might have been relevant": at [15].

Purpose and guiding philosophy of the Act

7.51 Sundaresh Menon CJ, delivering the grounds of decision of the court, stated (at [18]) that the starting point in determining the true interpretation of the provision is to consider the SOP Act as a whole. The learned Chief Justice considered (at [20]) that the essence of the statutory regime is that parties to a construction contract should "pay now, argue later" (*per* Ward LJ in *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] 1 WLR 2344 at [1]). In the same passage, he said of this philosophy:

> … payments, and therefore cash flow, should not be held up by counterclaims and claims for set-offs that may prove to be specious at the end of lengthy and expensive proceedings that have to be undertaken in order to disentangle the knot of disputed claims and cross-claims …

Position in local jurisprudence

7.52 On s 15(3), the Chief Justice pointed out that "local jurisprudence has spoken with one voice on its construction". It applies even in cases where a respondent has not filed a payment response or an adjudication response: *W Y Steel* at [26]. He rejected the contractor's argument that the provision should be confined only to situations where a valid payment response had in fact been filed. He approved the reasoning of the learned assistant registrar in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 ("*Chip Hup Hup Kee*") that the disapplication of s 15(3) to cases where no payment response was submitted "would frustrate the apparent purpose of the legislation": *W Y Steel* at [27]. He pointed out that "[it] is for good reason that not a single authority" has taken the position urged upon the Court of Appeal by the contractor: *W Y Steel* at [33].

"Any reason for withholding any amount"

7.53 A related issue is the meaning of the expression "any reason for withholding any amount" in s 15(3) of the SOP Act. Menon CJ cited with approval the decision of Palmer J on a corresponding provision in the New South Wales SOP Act in *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [68]. Palmer J had said that the phrase "withholding payment"

> … should not be construed only to mean 'withholding payment only by reason of a set-off or cross claim' because this would put a gloss on the words which their plain meaning cannot justify.

Agreeing with this construction, Menon CJ said (*W Y Steel* at [38]):

> The words 'any reason for withholding any amount' in s 15(3) of the Act are wide enough in themselves to cover any type of situation where a respondent does not meet a payment claim. Moreover, these words are immediately followed by the words 'including but not limited to', which are self-evidently expansive rather than restrictive in intent.

7.54 He held that the purpose of these provisions and of s 15(3) of the SOP Act in particular, is to prevent a respondent from ambushing a claimant by raising any grounds for withholding payment which have not already been set out in his payment response, whether or not these amount to reasons entitling him to withhold payment by way of a cross-claim, set-off or counterclaim.

Whether the adjudicator has to take the payment claim at face value

7.55 In *W Y Steel*, the Court of Appeal considered that the operation of s 15(3) does not mean that in the absence of any reason tendered in

the payment response, an adjudicator is entitled to simply take the payment claim at face value. This had been suggested by the learned assistant registrar in *Chip Hup Hup Kee* at [93]–[94]. The Court of Appeal, while agreeing with the general approach and the result in that case, expressly took exception with this point in the decision. Menon CJ said (*W Y Steel* at [51]):

> In our judgment, under s 17(3) of the Act, even where no response has been filed, an adjudicator must make a determination, and in doing so, it is incumbent on him to consider the material which is *properly* before him and which he is permitted and, indeed, obliged to consider. In such circumstances, there is nothing to stop a respondent who has failed to file any payment response or adjudication response from raising patent errors on the face of the material *properly* before the adjudicator to contend that the payment claim should not be allowed in part or at all. [emphasis in original]

7.56 The adjudication, therefore, does not become a mere formality and this is because the adjudicator remains "obliged to adjudicate, and in discharging his obligation, he must consider the material properly before him and make an independent and impartial determination in a timely manner": *W Y Steel* at [52].

Staying enforcement of adjudication determination

7.57 In *W Y Steel*, the respondent contractor had submitted that even if the Court of Appeal was minded to dismiss its appeal, the court should, nonetheless, stay the enforcement of the adjudication determination and direct, instead, that the adjudicated sum be retained in court pending the disposal of separate proceedings that it had brought against the subcontractor to recover the amount that the contractor contended was properly due to it.

7.58 The Court of Appeal held that the basic premise remains that a claimant "who succeeds in his adjudication application is entitled to receive the adjudicated amount quickly and cannot be denied payment without very good reason": *W Y Steel* at [59]. Nevertheless, it follows from the provisional nature of an adjudication determination (*W Y Steel* at [60]):

> … that the court retains the discretion to order a stay of enforcement of an adjudication determination where it is necessary to do so in order to secure the ends of justice.

Consistent with this, the provisions of the SOP Act "underscore the idea of an unsuccessful respondent having the right to try to reverse (either in whole or in part) the temporarily final adjudication determination": *W Y Steel* at [63]. Menon CJ said (*W Y Steel* at [64]):

> For this right not to be nugatory, a respondent who is initially unsuccessful must have an avenue open to him that will enable him finally to achieve effective justice. This avenue must extend to the right to recover whatever sums have been paid pursuant to an adjudication determination, but which are eventually and finally shown not to have been owed to the (initially successful) claimant. Where the adjudicated amount is paid to a claimant in serious financial distress, there is a chance that the money may not be recoverable by the time the rights of each of the parties are finally determined.

7.59 He agreed with the approach taken in *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2001] CLC 927 where, after dismissing the main contractor's appeal against summary judgment, the English Court of Appeal granted a stay of enforcement on the grounds that the subcontractor was already in insolvent liquidation at the time of its application for summary judgment. His holding may be summarised as follows (*W Y Steel* at [70]):

> (a) A stay of enforcement may be justified where there is clear and objective evidence of the successful claimant's actual present insolvency, or where the court is satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour.
>
> (b) The court may properly consider whether the claimant's financial distress was, to a significant degree, caused by the respondent's failure to pay the adjudicated amount and, also, whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract.

7.60 In *W Y Steel*, the Chief Justice noted (at [72]) that the evidence adduced by the contractor to support its allegation that the subcontractor was no longer in business was weak. The period within which it was alleged that the subcontractor was in financial distress was the very period in which "Osko signed on as a sub-contractor to W Y Steel": *W Y Steel* at [72]. He concluded that the facts in this case "fall comfortably within the precedents that were cited to us where no stay of enforcement was granted" and dismissed the contractor's application for a stay of enforcement.

Dual tracks of payment claim

7.61 A decision delivered by Woo Bih Li J during the year under review should attract considerable interest among contractors and subcontractors. The decision affirmed the existence of dual tracks for

payment claims following the enactment of the SOP Act. In *Choi Peng Kum v Tan Poh Eng Construction Pte Ltd* [2014] 1 SLR 1210 ("*Choi Peng Kum*"), the contract related to the construction of a dwelling house and its terms incorporated the Singapore Institute of Architects ("SIA") Conditions of Contract. The claimant contractor issued a Payment Claim No 9 on 31 January 2013. The respondent employer did not respond to this claim because it was not supported by any valuation from its quantity surveyor and also because it did not have any supporting documents. On 7 February 2013, the employer terminated the underlying contract with the contractor. The contractor lodged an adjudication application in respect of Payment Claim No 9 with the Singapore Mediation Centre ("SMC") on 7 March 2013 and this was served on the employer on 8 March 2013. The employer lodged its adjudication response at 5.20pm on 15 March 2013. Under s 15(1) of the SOP Act, the employer had seven days to lodge the adjudication response but cl 2.2 of the SMC's Adjudication Procedure Rules provides that all documents lodged later than 4.30pm shall be treated as being lodged the next working day. As the adjudication response in this case was lodged at 5.20pm, the adjudicator had no choice but to reject it. Following his scrutiny of the adjudication application, the adjudicator determined that the employer was to pay the contractor the full claimed amount of $480,109.97.

7.62 Before the High Court, the employer's case was advanced on the basis of the construction of ss 2, 5 and 6 of the SOP Act. Section 2 defines "progress payment" as "a payment to which a person is entitled for the carrying out of construction work … under a contract". Section 5 provides that "a person who has carried out construction work … is entitled to a progress payment". Section 6 refers to the amount of a progress payment "to which a person is entitled under a contract". Accordingly, the employer submitted that the term "entitled" in these provisions denotes a clear intention of Parliament that only a party who is entitled to a progress payment may have recourse to the fast and low cost adjudication procedure under the SOP Act. It follows that since the contractor's right to payment is found in the contract and not in the SOP Act, the contractor is not entitled to submit a progress payment unless it was supported by the quantity surveyor's valuation.

7.63 Woo J dismissed this argument. In his view, the employer had "conflated a claim for payment with a progress payment and also overlooked the fact that there are dual tracks for a contractor to claim payment". He explained (at [25]):

> The Defendant is entitled under the Contract to be paid the amount certified but it is also entitled under SOPA to lodge an AA for the difference. Previously, before SOPA was enacted, the Defendant would have had to claim the difference in arbitration or court proceedings if

> the Contract did not preclude it from doing so before the final completion of the Contract.

7.64 This is logical because if the contractor can only lodge an adjudication application when a valuation is done by the quantity surveyor, "it will be a simple matter for the [employer] to stymie the [contractor's] recourse to the adjudication process by instructing the PQS not to issue any valuation": at [27].

Payment provisions under the termination clause of a contract

7.65 The respondent employer in *Choi Peng Kum* also relied on cl 32(8)(a) of the SIA Conditions of Contract which provides that "in the event of the termination of the employment of the Contractor under sub-clause (2), or (6) or (7), no further sum shall be certified as due to the Contractor until the issue by the Architect of the Cost of Termination Certificate". In this case, neither sub-cll (2), (6) or (7) applied but the employer relied on cl 32(1) which states as follows:

> In the event of the Employer being entitled and electing to treat the Contract as repudiated by the Contractor under the general law … the powers, remedies and damages conferred by sub-clause (8) shall be exercisable … as if a valid Notice of Termination had been given.

7.66 The employer's termination letter was sent on the basis that they were treating the contract as having been repudiated by the contractor. The employer's case, therefore, was that cl 32(8)(a) precluded the contractor from engaging the adjudication process under the SOP Act. Woo J agreed with the assistant registrar that cl 32(8)(a) only operates to preclude certificates from being issued under the contract and not to defeat the adjudication process under the SOP Act. In any case, the learned judge further held (at [40]) that if cl 32(8)(a) had the effect contended by the employer, it would in any case be rendered void by ss 36(1), 36(2)(*a*) and 36(2)(*b*) of the SOP Act.

PART B

Introduction

7.67 The Court of Appeal's judgment in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] 3 SLR 284 ("*See Toh Siew Kee*") expanded the application of the *Spandeck* test (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*")). Another case that is breaking new ground is *Resource Piling Pte Ltd v Geospecs Pte Ltd* [2014] 1 SLR 485 which determined whether a qualified person under the Building Control Act (Cap 29,

1999 Rev Ed) owes a duty of care to a contractor. The construction tort case review is followed by selected cases that cast light on the performance of expert witnesses in the Singapore courts as expert evidence is used in many construction cases that appear before the courts. Hopefully, this review of cases on expert witnesses' performance in court will set the construction lawyers thinking about how expert witnesses could be better managed in terms of their performance in court. The remaining three cases are an assortment of infringement of copyright, electronic discovery and costs.

Occupiers' liability

7.68 The Singapore courts appear to be forging a new paradigm for a group of torts that historically grew in piecemeal in a very tangential manner by spreading a tort umbrella over the tort of negligence, occupiers' liability and breach of statutory duty. On a worldwide basis, that is the world of the common law jurisdictions, construction disputes have contributed significantly to the growth of tort law.

7.69 In the landmark case of *See Toh Siew Kee*, V K Rajah JA, in delivering his judgment in the Court of Appeal, held (at [76]) that:

> A comparative survey of the various common law jurisdictions clearly indicates that the vast majority of them have, at the bare minimum, eliminated the invitee-licensee dichotomy (whether by evolution of the common law or by statute). This is not a mere *argumentum ad verecundiam*: the foregoing fortifies my belief that *as a matter of logic*, the principles governing occupiers' liability are a proper subset of the general principles of the law of negligence. The law in Singapore on occupiers' liability can and should be subsumed under the tort of negligence. I now apply the *Spandeck* test to occupiers to demonstrate this. [emphasis in original]

7.70 With this decision, Singapore has entered into a new chapter in the law of occupiers' liability and the *Spandeck* test becomes the prevailing test of another tort. Nevertheless, this decision does not change certain fundamental features of the tort of occupiers' liability as one is reminded by the learned judge in *Neo Siong Chew v Cheng Guan Seng* [2013] SGHC 93 ("*Neo Siong Chew*") (at [49]):

> An occupier owes a duty of care to prevent injury to an invitee from unusual dangers which the occupier knows or ought to have known about *(Mohd bin Sapri v Soil-Build (Pte) Ltd and another appeal* [1996] 2 SLR(R) 223 at [47] ("*Sapri*")). Critically, this duty only pertains to the physical condition of the premises and not the operations at the site (*Sapri* at [47]).

Breach of statutory duty

7.71 The court in *Neo Siong Chew* applied the principles laid down by the Court of Appeal in *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 ("*Animal Concerns*") and *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549 ("*Tan Juay Pah*").

7.72 The plaintiff had alleged that the first defendant and the second defendant were in breach of their respective statutory duties under the Workplace Safety and Health Act (Cap 354A, 2009 Rev Ed) ("WSHA") and the court agreed. However, the court held (*Neo Siong Chew* at [34]) that:

> [A] breach of statutory duty *per se* does not automatically give rise to a right of private action (*Manickam Sankar v Selvaraj Madhavan (trading as MKN Construction & Engineering*) and another [2012] SGHC 99 at [77]; *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [24]). The plaintiff also has to prove that Parliament had intended to confer on the plaintiff (as a member of a limited class) a private right of action for breach of the duty (*Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549 ('*Tan Juay Pah*') at [54]).

However, the court then noted that there was no submission on "whether Parliament intended to provide a right of private action for a breach of statutory duty in the present circumstances": *Neo Siong Chew* at [35] and [44].

7.73 As the court had already held that the first defendant was negligent, it was not necessary for the court to consider whether the claim for breach of statutory duty had been made out. As for the second defendant, the court held that "Parliament did not intend to confer such a right of action for breach of statutory duty" after considering "the WSHA and the relevant parliamentary materials" and dismissed the claim: *Neo Siong Chew* at [45] and [48]. The court noted (*Neo Siong Chew* at [47]) that:

> Although Parliament intended to protect workers at the workplace through the imposition of a more direct liability regime (*Singapore Parliamentary Debates* vol 80 at col 2209), this alone is insufficient to establish that Parliament intended to confer a private right of action (*Tan Juay Pah* at [54]).

As for the third defendant, the court held that the breach of statutory duty allegation was not made out: *Neo Siong Chew* at [58].

7.74 This case effectively raised the bar to success in claims for breach of statutory duty in respect of breaches under the WSHA. However, it is useful to note that in the cases decided so far, parties have

not raised arguments on whether Parliament did intend to confer a right of action for breach of statutory duty under the WSHA and that those who have failed have not been employees claiming against employers.

Negligence

7.75 The construction site might be said to be fertile ground for challenging the minds of construction lawyers with regards to whether their knowledge of the law is sound. There are many parties on site ranging from the main contractor to the many levels of subcontractors, and the individuals who work on site could be either: (a) an employee of the main contractor or of the many subcontractors; or (b) an independent contractor. Some basic rules have been gathered together in the recent case of *Neo Siong Chew*.

7.76 The court recalled (*Neo Siong Chew* at [37]) that:

> It is established that a main contractor owes a workman a duty of care even if the workman was not employed by him but by a subcontractor if the main contractor exercised or had the right to exercise control over the workman in respect of the work which he was engaged to perform (*Awang bin Dollah v Shun Shing Construction & Engineering Co Ltd and other appeals* [1997] 2 SLR(R) 746 at [20]; *Ma HongFei v U-Hin Manufacturing Pte Ltd and another* [2009] 4 SLR(R) 336 at [48]–[49]).

However, the court found that "the second defendant did not owe a duty of care to the plaintiff because it did not exercise nor had the right to exercise control over the plaintiff": *Neo Siong Chew* at [38]. Accordingly, "the plaintiff's claim against the second defendant in negligence fails": *Neo Siong Chew* at [40].

7.77 The court further recalled that "whether a person who appointed a subcontractor could be liable in negligence to the subcontractor's employees" depends on the working conditions of the said employees: *Neo Siong Chew* at [53]. The court then referred to the decision of the Court of Appeal in *Mohd bin Sapri v Soil-Build (Pte) Ltd* [1996] 2 SLR(R) 223 and noted that it was decided in that case that "where the working conditions are inherently dangerous, … a significant degree of supervision and control over the employees" needs to be exercised. However, in respect of this point, the court held (*Neo Siong Chew* at [54])that:

> … there was nothing inherently dangerous about the landscaping work carried out by the plaintiff that required a significant degree of supervision and control from the third defendant.

7.78 In any event, the court made a factual finding that the plaintiff was not an employee of the third defendant but an independent contractor: *Neo Siong Chew* at [51]. It also held that "the accident was caused by the plaintiff's own negligence": *Neo Siong Chew* at [51].

7.79 On the issue of the status of the plaintiff *vis-à-vis* the third defendant, the court considered the following facts (*Neo Siong Chew* at [52]):

> (a) The plaintiff's name [was] conspicuously absent from the CPF's list of employees who [had] received CPF contributions from the third defendant;
>
> (b) Contrary to the plaintiff's claims in his affidavit, the third defendant did not submit the plaintiff's income tax returns on his behalf;
>
> (c) One of the third defendant's employees, Sukri, testified that he had a letter of appointment. The plaintiff was unable to produce a similar letter of appointment.

7.80 *Resource Piling Pte Ltd v Geospecs Pte Ltd* [2014] 1 SLR 485 ("*Resource Piling*"), when read with the Court of Appeal case of *Tan Juay Pah*, illustrates the slight difficulty in deciding whether to frame the action in negligence or breach of statutory duty. In *Tan Juay Pah* (above, para 7.80), the action was based on breach of statutory duty while in *Resource Piling* it was based on negligence even though the performance of the alleged negligent act was a requirement within a statutory framework. Nevertheless, in both cases, the approach required the examination of the landmark case of *Spandeck* (above, para 7.67).

7.81 Like *Spandeck*, this court did not need to go further than the issue of whether a duty of care existed. However, this case is of interest because essentially the negligence issue concerned a qualified person who was an engineer while carrying out his duty under the Building Control Regulations 2003 (S 666/2003). The court held that the qualified person did not know owe a duty of care to a piling contractor after applying the *Spandeck* test. The learned judge in this case gave a very thorough dissection of the meticulous process of applying the *Spandeck* test in a new situation.

7.82 The court started by examining the threshold condition of factual foreseeability in the *Spandeck* test. It set out two reminders (*Resource Piling* at [23]):

> (a) "factual foreseeability is a threshold condition that is readily satisfied in most cases as the foreseeability threshold merely requires that the defendant ought to broadly know that persons in the position of the plaintiff would suffer harm or damage from the defendant's carelessness"; and

(b) it "does not require the defendant to foresee the precise harm or manner in which the loss was suffered".

7.83 After examining the relevant facts, the court concluded that piling and building contractors "would clearly be most interested in the soil substrata" and that "[t]heir contract work, method of work or construction and the temporary works will be materially affected if the information and data is incorrect or misleading": *Resource Piling* at [23].

7.84 Accordingly, the court stated (*Resource Piling* at [24]) that:

> A soil investigator would therefore expect that inaccuracies in his borehole logs could cause some form of economic loss – either in terms of loss of potential profit or actual losses from the performance of the contract – to contractors in so far as the contractors would be calculating their tender prices based on an incorrect premise.

It held that "the threshold requirement of factual foreseeability is evidently satisfied on the present facts".

7.85 The court then proceeded to apply the first limb of the *Spandeck* test and noted (*Resource Piling* at [26]) that while the said test had:

> … enunciated a number of broad proximity considerations … the factors to be considered in ascertaining whether the requisite proximity exists depend on the precise factual circumstances, including the type of harm.

The court decided to apply the approach used in *Spandeck*, an economic loss case like its own case, "which emphasised the traditional test of assumption of responsibility and reliance … but with reference to other considerations where relevant": *Resource Piling* at [26].

Statutory duty

7.86 Before looking at whether the defendant had assumed responsibility and whether the plaintiff had relied on the defendant, the court looked at whether the breach of the defendant's statutory duty would attract a concurrent common law duty of care. Thus, in relation to the fact that the negligent act complained of was in the form of a statutory duty, the court noted the following:

> (a) "[i]t is well-established that the existence of a statutory duty does not *ipso facto* give rise to a common law duty of care in negligence, although it may form part of the contextual backdrop or be a relevant factor in favour of or militating against the imposition of a duty of care (see *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 ("*Animal Concerns*") at [22])" (*Resource Piling* at [28]);

(b) "[a]part from this broad statement of purpose, the BCAA 2007 was silent on the duties of a soil investigator, although the constant reference to the Church Street incident suggests that it perhaps formed part of the catalyst for the BCAA 2007" (*Resource Piling* at [32]);

(c) there is nothing "to suggest that the changes introduced by the BCAA 2007, or indeed the building regulatory regime as a whole under the Building Control Act, additionally have the statutory objective of protecting the *economic interests* of the various participants in the construction industry or to define the scope of their responsibilities *vis-à-vis* each other. The financial risks potentially incurred by contractors who rely on work done by other contractors in the same project are not regulated under the Building Control Act" [emphasis in original] (*Resource Piling* at [32]);

(d) "there is nothing that can plausibly support a suggestion that Parliament intended for this duty of competence to extend equally to contractors who rely on geological information provided by site investigators to price their tenders" (*Resource Piling* at [32]); and

(e) "[c]ontractors are not within the class of persons intended to be protected by the statutory duty to carry out adequate and proper site investigation works, and that reg 31 of the BCR is of minimal assistance to Resource Piling in establishing that the parties were brought into a close and direct relationship or that Geospecs had assumed any responsibility, as part of its statutory duty, towards Resource Piling in relation to the accuracy of its soil investigation logs": *Resource Piling* at [33].

Assumption of responsibility

7.87 As a preliminary consideration for the principle of assumption of responsibility, the court issued a reminder that "[a]ssumption of responsibility is to be understood in a legal rather than factual sense" (*Resource Piling* at [38]) and that "[t]he basis of liability for negligent misstatements, … is that one party may owe a duty of care to another not to provide information negligently" and should not be "dependent on whether such information may be classified under the semantic categories of 'facts' or 'advice'": *Resource Piling* at [39].

7.88 As required by the *Spandeck* test, the court had to refer to case precedents for guidance. The court noted that the case before it was a novel one and there was no precedent to assist the court. Thus, complying with the "incremental approach of reasoning by analogy

endorsed by the Court of Appeal in *Spandeck* (at [82])", the court considered (*Resource Piling* at [40]):

> … earlier cases where the courts have answered this broader question: does a professional owe a duty of care to a contractor where the contractor tenders for a contract on the faith of information prepared by the professional who does so under a separate contract with the contractor's employer, but with whom the contractor has no contractual relationship?

7.89 From the analysis of the cases, the court concluded that, firstly, the mere giving of statements or information by consultants to contractors are not, without more, treated as "*Hedley Byrne* [*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465] type statements, information or advice leading to liability": *Resource Piling* at [52]. Therefore, "there is no imputation of any assumption of responsibility by the consultants": *Resource Piling* at [52].

7.90 Secondly (*Resource Piling* at [52]):

> … the manner in which the various contracts are structured and how risk has been allocated between the various parties forms the indispensable context and is an important factor in analysing whether the contractual relationships show or support intentions regarding the assumption or allocation of risk or responsibility inconsistent with the claimed duty in tort.

However, the court added (*Resource Piling* at [67]) that:

> … the overall contractual and commercial context – as the two general threads running through all the factors above – explicitly and implicitly evinces the parties' intentions to allocate the entire risk of any economic loss arising from inaccuracies in the information provided in the Geospecs Logs to the contractor tendering for the piling work on the Site. This undermines any direct assumption of responsibility by Geospecs to Resource Piling. It was Resource Piling that failed to adequately price for the risk that it undertook.

7.91 Indeed, the court held (*Resource Piling* at [76]) that:

> … when separate and independent contracts are involved, absent special circumstances, an assumption of responsibility in relation to economic loss is not readily found between parties who are brought into a relationship only because they are interposed by a mutual third party.

Reliance

7.92 On the issue of reliance, the court made the following observations:

(a) "there is no mathematical correlation (as compared to assumptions, extrapolation and estimation) between the pricing methods used by piling contractors and the borehole logs" (*Resource Piling* at [57]);

(b) "although … Resource Piling was not practically able to ascertain the accuracy of the Geospecs Logs and that Geospecs had knowledge that the information contained in the Geospecs Logs would be conveyed to and relied upon by Resource Piling to price their tenders, these *per se* are not sufficient to establish proximity" (*Resource Piling* at [60]);

(c) the defendant was engaged by the developer to provide data for the developer and its consultants for the purpose of pile design; "[t]his was expressly stated in the scope of works in the Soil Investigation Contract and the articulated purposes of the investigation" (*Resource Piling* at [61]);

(d) "the Soil Investigation Report was *not* primarily for tendering purposes and neither was it for any express purpose of enabling the piling tenderer *to calculate* his price" [emphasis in original] (*Resource Piling* at [62]);

(e) "there was no evidence before me that there was any immediate contact between Geospecs or Resource Piling right up to the time that the writ of summons was filed" (*Resource Piling* at [62]);

(f) "only a small part of the entire Report was made available to Resource Piling, namely, the Geospecs Logs. Clause 1.6 of the General Specifications stated that 'an *extract* of the Soil Investigation Report [was] enclosed … for information' [emphasis added by the High Court], and it was thus clear that the full Report was not included" (*Resource Piling* at [63]);

(g) "[i]t has to be remembered that soil investigation bore logs are by their very nature limited in number across a much larger site and do not necessarily accurately profile the subsoil at a site; that is why employers and their consultants in Singapore always provide that the risk of different or adverse soil conditions is on the piling or superstructure contractor" (*Resource Piling* at [63]);

(h) "[t]herefore, while it was reasonable for Resource Piling to have relied on the Geospecs Logs as one of the considerations in preparing their tender, [it cannot] be said with equal strength that it was reasonable to rely on the Geospecs Logs as enabling them to determine with accuracy that only 18% of the piles would hit rock. There was an element of risk that is inherent in extrapolating the overall soil profile of the Site based on 11 data

points, and I believe that Resource Piling must have been aware of that" (*Resource Piling* at [64]);

(i) "there are different ways in which piling contractors price their works and Geospecs would not know which pricing structure would be adopted as between the Developer and Resource Piling" (*Resource Piling* at [65]);

(j) the defendant "had not participated in the drawing up of the tender documents or specifications or prepared the Geospecs Logs with the intention that it be used by Resource Piling" (*Resource Piling* at [65]); and

(k) "in the context of the Singapore building and construction industry, the risk of adverse subsoil conditions is variably borne by the contractor. None of the standard building contract forms commonly in use in Singapore provide otherwise. This is the well-known and accepted commercial environment of long standing that both Geospecs and Resource Piling operated within": *Resource Piling* at [66].

7.93 The court then concluded (*Resource Piling* at [67]) that:

> There was no physical proximity in terms of immediacy of relationship, nor was there circumstantial proximity in the sense of Geospecs performing the soil investigation on behalf of the Developer for the *immediate purpose* of conferring some benefit on Resource Piling or to assist Resource Piling.

Expert evidence

7.94 In many construction dispute cases, expert evidence underpins each party's approach to the case. The quality of a party's expert evidence is likely to form a party's undoubtedly strongest point or become understandably its weakness link. Lawyers might wish to consider the points revealed in the two cases reviewed to formulate a check list as regards what a good expert witness ought not to do and conversely what an expert witness ought to do.

7.95 A lawyer would profit from constantly recalling the reminder issued by the Court of Appeal in *PPG Industries* (above, para 7.15) at [10] that:

> … the opinions of experts will always remain as opinions and do not bind the court concerned. This is particularly the case where the expert's opinion relates to an issue of mixed fact and law, as is the case here (*ie*, the issue of causation).

7.96 The court held (at [6]) that the expert evidence of both parties' expert witnesses "cannot, by any measure of logic and common sense,

be accepted". Indeed, the court concluded that the positions taken by both experts were unreasonable. It was added that one of the two experts' positions was also untenable and unrealistic.

7.97 As an example of expert evidence which the court felt did not sit well with common sense, it noted (at [9]) that:

> In particular, in so far as the adverse weather conditions were concerned, Pickavance's explanation that it could only have reduced the degree of acceleration works done and could not have caused delays is plainly contrary to the ordinary course of nature and common sense. If inclement weather could have caused acceleration works to be delayed, then, *a fortiori*, it should naturally follow that the works for the project would have been delayed as well.

7.98 In the other case, *JBE Properties Pte Ltd v Handy Investments Pte Ltd* [2013] SGHC 184, the opinion of the learned judge together with the many cases that have been reported concerning the conduct of expert witnesses that appear before the Singapore courts have left an indelible adverse mark. Consequently, this does not speak well of the fact that there is still no professional body based in Singapore that provides training and guidance to those who aspire to assist the courts and arbitration tribunals as expert witnesses in their respective fields of expertise. The learned judge had said (at [117]), likely with disappointment, that:

> Although each and every one of the experts deposed in their AEICs that their duty was to the court and they had complied with that duty, they merely paid lip service to O 40A r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), which states:
>
> > **Expert's duty to the Court (O. 40A, r. 2)**
> >
> > **2.**–(1) It is the duty of an expert to assist the Court on the matters within his expertise.
> >
> > (2) This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid.

7.99 The court then noted the following points (at [118]):

> (a) "none of the five experts who testified were objective or unbiased";
>
> (b) "[i]t was clear from their testimonies that they were beholden to the party who had engaged and paid for their services. On this observation alone, I would have hesitated greatly to accept the testimony of all the experts";

> (c) "a far more serious shortcoming of the experts' testimony was the fact that none of their reports was based on concrete or reliable data"; and
>
> (d) "[t]here were too many assumptions or unknown parameters in the experts' reports rendering it unsafe for the court to accept many of the conclusions proffered in those reports."

7.100 The court had earlier disregarded the expert evidence from both sides. In disregarding one of the plaintiff's expert evidence, the court held that (at [100]) the expert concerned had:

> … lost all credibility as an expert witness … [i]n view of his failure or inability to explain why he had obviously and blatantly copied entire passages from Patterson-Kane's report.

Correspondingly, the court also disregarded the defendant's expert evidence, a soil expert, who did not simulate the conditions of rainfall in arriving at his expert opinion which was an important fact required to ascertain the cause of the flooding that damaged the property which was the subject matter of the claim: at [103].

7.101 An important development in the use of expert evidence is recorded in this decision: at [115]. The use of "hot-tubbing" sessions in arbitration is becoming popular but in court, we are beginning to see its adoption. One of the challenges would be the lack of clear rules on its conduct. Perhaps rules of court could incorporate express provisions for the same. The court concluded its evaluation of the expert evidence (at [119]) noting that: "At best, I found the experts' reports inconclusive, and at worst they were unhelpful to the court's difficult task of arriving at its findings."

7.102 Accordingly, much was left to the evaluation of facts and the laws of physics. Thus, the learned judge said (at [128]) that in her view:

> … it does not take rocket science to know that rain/run-off falling on the (steep) slope at Mount Sophia/Adis Road will make its way down to Handy Road by taking the path of least resistance where channels for its discharge are inadequate.

7.103 The learned judge added (at [129]) that: "The laws of physics dictate that if rain or run-off has debris in its path on its way down the slope, such debris would be carried down with the rain or run-off."

Statutory offences

Copyright infringement

7.104 The case of *Alterm Consortech Pte Ltd v Public Prosecutor* [2013] SGHC 189 is instructive to those involved in the area of infringement of copyright in the construction industry. The subject matter of this copyright infringement case was (at [3]):

> …'the Termi-mesh specification and markings on construction drawings for the proposed installation of the Termi-mesh Barrier System'. The system was a physical barrier created by TSPL to prevent termites from passing through.

7.105 The three appellants were charged with offences under ss 136(2)(*b*), 136(3)(*a*) and 136(3A) of the Copyright Act (Cap 63, 2006 Rev Ed). For ease of convenience, the relevant subsections are reproduced below.

> (2) A person who at a time when copyright subsists in a work has in his possession or imports into Singapore any article which he *knows, or ought reasonably to know*, to be an infringing copy of the work for the purpose of –
>
> (*a*) …;
>
> (*b*) distributing the article for the purpose of trade, or for any other purpose to an extent that will affect prejudicially the owner of the copyright in the work; or
>
> (*c*) …,
>
> shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 for the article or for each article in respect of which the offence was committed or $100,000, whichever is the lower, or to imprisonment for a term not exceeding 5 years or to both.
>
> (3) Any person who, at a time when copyright subsists in a work, distributes, either –
>
> (*a*) for purposes of trade; or
>
> (*b*) …,
>
> articles which he *knows, or ought reasonably to know*, to be infringing copies of the work, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $50,000 or to imprisonment for a term not exceeding 3 years or to both.
>
> (3A) Where, at any time when copyright subsists in a work –
>
> (*a*) a person does any act that constitutes an infringement of the copyright in a work other than an act referred to in subsection (1), (2), (3) or (6);

> (*b*) the infringement of the copyright in the work by the person is wilful; and
>
> (*c*) either or both of the following apply:
>
> (i) the extent of the infringement is significant;
>
> (ii) the person does the act to obtain a commercial advantage,
>
> the person shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $20,000 or to imprisonment for a term not exceeding 6 months or to both and, in the case of a second or subsequent offence, to a fine not exceeding $50,000 or to imprisonment for a term not exceeding 3 years or to both.
>
> [emphasis added]

7.106 In this case, the appellants were successful and the convictions were dismissed and fines refunded: at [11]. This decision was made based on, *inter alia*:

> (a) the fact that "the charges were defective because important particulars of the charges were missing" (at [7]);
>
> (b) the fact that the "specifications that were alleged to be the subject of infringement" did not "correspond to the evidence in the trial". The document containing the specification was a 2004 document that was intended to prove the "offences that were meant to have been committed in 2002" (at [7]);
>
> (c) the fact that the appellants did not know that the other subject matter of infringement, the drawings, were subject to copyright protection of the complainant would mean that one of the ingredients of the charge was not satisfied, *ie*, the appellants "know[s], or ought reasonably to know" that what the appellants allegedly did was infringing copyright (at [8]); and
>
> (d) in any event, the fact that the alleged act of infringement of the appellants was the tracing over of another tracing of an unknown copier by the complainant cannot be an infringement of an artistic work of the complainant.

7.107 The above excursion appears to be a list of what to avoid doing as a lawyer. There were several other noteworthy reminders.

> (a) "drawings can have artistic value and that there was no need to mark © on a document to lay claim to copyright protection" (at [8]);
>
> (b) "a document with commercial value is not the same as a document with artistic value in the copyright sense" (at [8]); and

(c) "[i]t is a fundamental principle of copyright law that no claim for copyright may be made in respect of ideas and information": at [8].

Procedure

E-discovery

7.108 In the drive to promote the use of e-communication in the construction industry, especially in the use of Building Information Modelling ("BIM") as well as the international nature of this industry when materials from one part of the world are used in another part in an age of world famous designers peddling their expertise worldwide, the attraction and convenience of e-communication would inevitably bring in issues of e-discovery concerning evidence "which are or have been in [the] possession, custody or power" of any of the parties in a proceeding.

7.109 In *Dirak Asia Pte Ltd v Chew Hua Kok* [2013] SGHCR 1, the assistant registrar had to interpret whether e-mails and e-mail attachments were subject matter of discovery when the communication was used via a service provider under the commercial name of "cloud". For convenience of reference, O 24 r (1) of the Rules of Court is reproduced below:

> Subject to this Rule and Rules 2 and 7, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

7.110 The issue before the court was "whether the defendants have possession, custody and power over the e-mails in their e-mail accounts": at [10]. It was noted by the court (at [12]) that "the e-mail user does not technically have possession and custody over the e-mails, as the e-mails are stored on mail servers and data centres sited in remote locations". However, "the user may still download and save a copy of the e-mails in his computer, hard disk, smart phone, tablet device, or some other compound document": at [12].

7.111 The court concluded (at [12]) that:

> [U]nless the user has saved his e-mails in his computer or in similar devices, what the user has in his possession is not the e-mail itself, but the username and password *to access* the e-mails in the possession of the e-mail provider. To this end, the e-mail provider is in effect a

> custodian of the electronically stored information in the user's e-mail account. [emphasis in original]

7.112 The court held (at [35]) that where the party required to produce the e-mails had:

> … *practical ability* to access or obtain documents held in the possession of the third party, and *having regard to the context* in which that practical ability is found, the producing party may indeed be found to have the *sufficient degree of control* that falls within the conception of 'power' as contemplated under O 24 of the Singapore Rules of Court. [emphasis in original]

However, the court noted (at [37]) that a party with practical ability to access or obtain documents may:

> … not *necessarily* have power over the documents, especially if the third party has the real say over whether to confer consent or not, and when it can be shown that such consent may no longer be granted. [emphasis in original]

7.113 Accordingly, the court (at [37]) preferred the:

> … broader contextual approach used by the court in *Re NTL Securities Litigation* 244 FRD 179 (SD NY 2007), which takes into consideration both the legal right and practical ability to obtain documents, while examining the whole relationship between the producing party and the third party in possession of the documents.

Costs

7.114 *Neo Siong Chew* (above, para 7.79) would be of interest to the construction lawyer who inevitably will be involved in multi-party cases which are not uncommon. At the end of every case, when liability is determined, the next big issue would be the issue of costs. In *Neo Siong Chew*, the plaintiff had sued the three defendants. The court concluded (at [61]) that "the plaintiff is liable for the accident to the extent of 30%, with the first defendant bearing 70% liability".

7.115 In this case, the plaintiff was successful against the first defendant in one claim, the negligence claim (at [30]) but the court did not proceed (at [35]) with the other claim for breach of statutory duty. Against the second defendant, the plaintiff's three claims under negligence (at [40]), breach of statutory duty (at [48]) and occupier's liability (at [50]) had failed while his two claims against the third defendant for negligence (at [55]) and breach of statutory duty (at [58]) similarly failed.

7.116 The court held (at [65]) that:

> The plaintiff shall be entitled to recover from the first defendant the costs he has to pay (to be taxed or otherwise agreed) to the second and third defendants. In addition, the first defendant shall pay the plaintiff's own costs (either taxed or agreed).

This in essence is a *Bullock* order (see *Bullock v The London General Omnibus Co* [1907] 1 KB 264). This was contrasted by the court with a *Sanderson* order (see *Sanderson v Blyth Theatre Co* [1903] 2 KB 533). In this order, "the plaintiff will recover his own costs from the unsuccessful defendant who will also have to pay the plaintiff's costs payable to the successful defendant directly".