7. BUILDING AND CONSTRUCTION LAW

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PART A

Overview

7.1 The Court of Appeal delivered a number of decisions during the year under review which should be followed with considerable interest by the construction industry. In *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 ("*Chua Say Eng*"), the Court of Appeal considered the jurisdiction of an adjudicator appointed pursuant to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOP Act") and the construction of the timeline stipulations in both the SOP Act and the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("SOP Regulations"). In *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352 ("*BS Mount Sophia Pte Ltd*"), the Court of Appeal clarified the concept of unconscionability in relation to the operation of on-demand performance bonds and the evidential threshold required to support an application for injunctive relief on this ground.

7.2 In *Store+Deliver+Logistics Pte Ltd v Chin Siew Gim* [2012] SGHC 89 ("*Chin Siew Gim*"), the High Court examined, *inter alia*, the obligations of an architect in a design and build contract and in *Kosui Singapore Pte Ltd v Kamigumi Singapore Pte Ltd* [2012] SGHC 43 ("*Kosui Singapore Pte Ltd*"), an opportunity was taken by the court to re-visit the distinction between a lump contract and a measurement contract.

Architect: Liability for breach

7.3 An interesting decision was delivered which examined the basis on which damages may be determined in respect of a claim by an owner against an architect for breach in the discharge of his duties. In *Chin Siew Gim*, an architect was appointed to design and supervise the reconstruction of an existing warehouse into a new warehouse cum office. On the instruction of the owner and despite the protestations of the architect, the main contract was awarded a contractor at a price considered by the architect to be too low. Nevertheless, Works commenced and the architect certified that the Works were completed on 15 October 2003. The contractor was served with notice of a list of defects. On 27 December 2003, a fire broke out in the warehouse, causing extensive damage to the completed Works. The damage caused by the fire was undertaken by a third party and paid for by the insurers. Subsequently, disputes arose between the owner and the contractor in respect of the final account and these were referred to arbitration. The arbitrator awarded the contractor a net sum of $331,097.55 after allowing part of the amount counterclaimed by the owner. The action in the case was taken out by the owner against the architect on the ground that the architect had been in breach of contract and negligence in the performance of the contract.

7.4 Lee Seiu Kin J had to consider a number of heads of claims brought against the architect by the owner. First, he dismissed (at [24]) the owner's claim for the recovery of fees paid to the architect. He held that the warehouse was built and statutory approval had been obtained for it to be used as a warehouse. There was therefore no failure of consideration for the fees.

7.5 Lee J also rejected (at [26]) the owner's claim for $170,000 in respect of liquidated damages which they had failed to recover before the arbitrator. In the arbitration, the claim was made on the basis of delay certified by the architect. The learned judge observed that the arbitrator had determined that the contractor was entitled to an extension of time for the full period of delay and that as a result, the contractor was not liable for any liquidated damages. There was no evidence that the architect had caused this delay and the learned judge concluded that the architect could not be liable for losses due to the delayed completion. In any case, the liquidated damages clause was not a term of the contract between the owner and the architect; hence, even if the owner had suffered loss caused by the architect, he could only succeed if actual loss was proved.

7.6 The court allowed (at [30]) a claim of $95,000 in respect of the architect's failure to provide for a "superflat" floor in the design or the contract documents prepared by him. The "superflat" floor was

considered necessary to support the required racking system of the warehouse. Lee J found that the owner had made known this requirement to the architect and that at inception the use of the racking system was envisaged. While the learned judge considered that the inclusion of the "superflat" floor might have led the contractor to put in a higher price for the contract, the architect did not give evidence of this and he therefore allowed the owner the full amount claimed for this item.

7.7 The owner claimed a further sum on the basis that the architect failed to expressly insist on the installation "Parsec" radiant barrier in the building contract but, instead, had permitted the building contract to provide for both Parsec and "Sisalation" although the latter was not suitable for use in the particular warehouse. As a result, the arbitrator found that in installing the "Sisalation" radiant barrier, the contractor complied with the terms of the contract. Lee J held (at [36]) that the architect was in breach of his duty "to properly specify the correct material" for the roof insulation. However, as the owner failed to discharge his burden of proof of the quantum of damages, the court only awarded a nominal amount of $1 for this head of claim.

7.8 The court also found that the architect failed to deliver the as-built drawings and awarded the sum of $4,500 in respect of this breach. Finally, the court disallowed the owner's claim in respect of a sum of money which he had received following a call on the performance bond but which the arbitrator ordered to be re-paid to the contractor. This was because the arbitrator's order merely affirmed the correct position to be taken on the final account.

Lump sum or measurement contract

7.9 One of the decisions during the year under the review provides a useful instance of the matters to be considered in characterising a contract as a measurement contract. In *Kosui Singapore Pte Ltd* (above, para 7.2), the defendant main contractor secured a contract for the construction of a theme park consisting of eight attractions and employed the plaintiff subcontractor to supply the labour for the project. The subcontractor had quoted its price on the basis of a fax which set out in a spreadsheet the number and types of worker, the number of days' work for each part of the project, the number of man hours required for each category of worker and a multiple of 1.5 to adjust for the productivity difference between Japanese and Singapore workers. These particulars were subsequently captured in a bill of quantities and priced by the subcontractor. There were delays to the project and it was common ground that this was not attributable in any way to the subcontractor. However, because of this, there was a very low

take-up rate of man hours that had been catered for and unutilised labour in the first few months of the contract. This was followed by a subsequent need to accelerate Works to make up for lost time. The subcontractor put in more workers and its workers often worked overtime. The contract period overran the scheduled end date.

7.10 One of the issues before the court was whether the subcontract was a lump sum contract or a measurement contract. The main contractor argued that this was a true lump sum contract in the sense that a price for the construction and installation work for the eight attractions was fixed and agreed upon. The subcontractor contended that the contract was a measurement contract for the following reasons. First, payment was to be on a measurement basis. Secondly, if it was a lump sum contract, it would not have been necessary to make detailed calculations for the estimation of man-days. The main contractor countered by pointing out that since interim invoices were rendered on a milestone basis, this was a clear indication of a fixed price contract. No interim claims were made for additional man hours, and there was no mechanism for calculation of costs for the additional supply of labour and additional man hours incurred. The subcontractor disagreed, pointing out that it had no experience at all in such Works and was pricing its work on the main contractor's estimates. In these circumstances, they could hardly have agreed to a true lump sum basis which may have turned out to be quite inadequate to cover their costs.

7.11 Quentin Loh J noted (at [31]) that one of the terms in the subcontractor's quotation stated unambiguously that the main contractors "will be charged if there are changes which are more than your original [bill of quantities]". He considered that the meaning of these words is clear and unambiguous (at [31]):

> … This is clearly not the wording of a lump sum or fixed price contract where the contractor has promised to carry out and complete a set piece of work for a fixed sum agreed in advance.

7.12 In addition, the contract provided, *inter alia*, the man days required per category of worker for each attraction, their respective unit rates, the normal eight-hour day charge and a two-hour overtime charge per day, which details would not be consistent with the subcontract being a lump sum contract (at [31]). An interesting consideration which the learned judge considered pertinent in the context of the case was that a lump sum contract is normally used where the construction design is well developed and where the quantities can be estimated with some degree of accuracy. On the evidence, he found that this was not the situation in this case because the type of installations to which the subcontract related had not been erected before in Singapore.

Establishing liability for payment

7.13 In *Republic Airconditioning (S) Pte Ltd v Shinsung Eng Co Ltd (Singapore Branch)* [2012] 2 SLR 601 ("*Republic Airconditioning (S) Pte Ltd*") the plaintiff was a labour subcontractor employed by the defendant main contractor for the construction of a factory at the Seletar Aerospace Park. The subcontractor was paid on the basis of invoices issued during the course of the Works. When the main contractor failed to pay one of the invoices, the subcontractor removed their workers from the site and stopped work. Nevertheless, a few months after work stoppage, the main contractor acknowledged in an audit confirmation that it owed a sum to the subcontractor. The subcontractor managed to obtain summary judgment for this sum. The main contractor appealed.

7.14 Lai Siu Chiu J dismissed the appeal. In her judgment (at [11] and [12]), she considered that in exercising its summary jurisdiction, the court has to be wary of defendants who seek to evade summary liability by raising spurious allegations, assertions and afterthoughts as triable issues. Such defendants not only waste precious court resources but, more importantly, could potentially cause serious hardship and irreparable loss to plaintiffs, for some of whom time was of the essence. Courts should therefore take a robust approach in summary proceedings in order to resolve disputes at this stage. This was particularly so in commercial and construction cases where cash flow was the lifeblood. The main contractor's reliance on the "factual matrix" to argue that the contract encompassed more than the supply of labour was, in this case, wholly misguided and totally inconsistent with a plain reading of its terms. She said in her judgment (at [16]):

> … While it is accepted that the context in which the contract was made is relevant to the interpretation of that contract, what the defendant sought to do was to import an entire meaning to the contract, totally inconsistent with a plain reading of its terms, which clearly suggested that the contract was limited to the supply of labour. …

7.15 Lai J thought that the "audit confirmation" sent by the main contractor amounted to an effective admission by the contractor of the subcontractor's claim for the sum (at [24]). She affirmed the position that an audit confirmation – while not conclusive – constituted *prima facie* evidence of a debt: at [25], applying *Gobind Lalwani v Basco Enterprises Pte Ltd* [1998] 3 SLR(R) 1019 and *Capital Realty Pte Ltd v Chip Thye Enterprises (Pte) Ltd* [2000] 3 SLR(R) 419.

Non-payment and repudiation

7.16 In *Republic Airconditioning (S) Pte Ltd*, the learned judge also rejected the main contractor's argument that the subcontractor repudiated the contract when it withdrew its workers from the project and stopped work. The main contractor had relied on a passage from *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003) at para 30.310 and the decision in *Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd* [2004] 3 SLR(R) 288 to argue that in construction and building contracts, a failure to make payment was not a valid reason to abandon Works and such abandonment amounted to wrongful repudiation. She considered that this line of argument was misconceived. The two authorities stated clearly that while there was no general right to suspend Works, this was subject to the parties expressly providing for such a right in their contract. The contract clearly provided for such a right (at [21]). She also dismissed the main contractor's assertion that the subcontractor's labour charges incorporated "phantom" worker billings as vague and feeble and considered that it calls into question the *bona fides* of the defence.

Order quantity estimates in supply contracts

7.17 The facts in *Rotor Mix Pte Ltd v Feng Ming Construction Pte Ltd* [2012] SGHC 131, a contractor agreed to sublet a parcel of land to a ready mixed concrete supplier for the setting up of a concrete batching plant. The supplier claimed that the subletting agreement was entered into on the understanding that the contractor would purchase the bulk of the ready-mixed concrete required by the contractor for a contract which it had secured for the construction of a drainage system at Jurong Port. The agreement between the parties recorded that the quantity to be taken up by the contractor was *estimated* at 10,000m³. Disputes arose between the parties when the contractor stopped its purchase of ready-mixed concrete from the supplier, resulting in a shortfall of order quantity of 7,468m³. The supplier argued that this was because the contractor was able to purchase these supplies at a cheaper price elsewhere.

7.18 Lai Siu Chiu J held (at [35]) that on a simple interpretation of the supply agreement the contractor did not breach the contract by failing to place orders for the shortfall of 7,468m³ of ready-mixed concrete. The use of the word "estimated" should be given its literal meaning. The quantity of 10,000m³ was merely an approximation and not a strict quantity which the supplier was entitled to supply. Hence, the contractor's failure to purchase the estimated quantity of ready mixed concrete was not a breach of the supply agreement (at [38]).

Security of payment

Scheme of statutory adjudication

7.19 The scheme of adjudication provided under the SOP Act allows a party who had carried out construction work, provided services or supplied materials in relation to a construction project in Singapore to apply for a quick summary determination of a payment dispute by an adjudicator. 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. Both the SOP Act and the SOP Regulations, made by the Minister pursuant to powers under the SOP Act, stipulate strict timelines for the service of the payment response, the filing of the adjudication application and the adjudication response, and the issue of the adjudication determination itself by the adjudicator.

Effect of timeline compliance

7.20 In *Chua Say Eng* (above, para 7.1), the payment dispute arose from a construction contract for the reconstruction of a terrace house. Following the termination of the contract by the owner on 21 April 2010, the contractor served a payment claim on the owner on 2 June 2010 and, when the claimed amount was not paid, proceeded to file an adjudication application. The adjudicator awarded the contractor a sum of $125,450.40 but the owner applied to have the determination set aside. In the High Court (*Chua Say Eng Sylvia v Lee Wee Lick Terence* [2011] SGHC 109, discussed in (2011) 12 SAL Ann Rev), Tay Yong Kwang J considered the operation of s 10(2) of the SOP Act and reg 5(1) of the SOP Regulations in a situation where the contract does not provide for a time period for the service of a payment claim. Tay J held that these provisions create a limitation period which bars any payment claim made outside the prescribed period for payment claims to be made. Compliance with the prescribed timeline for the service of the payment claim thus goes to the validity of the payment claim.

7.21 The Court of Appeal considered that reg 5(1) should not be interpreted so narrowly as to restrict unduly the rights of claimants under the SOP Act. Instead, when reg 5(1) is read with s 10(1), the language of compulsion "is not in relation to the making of the payment claim but in relation to its service": *Chua Say Eng* at [89]. On this construction, if a claimant makes a payment claim, he must serve the claim by the last day of the month following the month in which the contract is made. The Court of Appeal further noted that there is no reference in reg 5(1) to work done: *Chua Say Eng* at [89]. While s 10(3) 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. Accordingly, there is nothing in the language of reg 5(1) to compel a claimant to make monthly payment claims for work done in the previous month, whether he wants to or not.

Repeat claims

7.22 The Court of Appeal in *Chua Say Eng* also addressed the issue with repeat claims. It arose when the court considered the effect of s 10(4) – the provision for "rolled up claims", discussed further below – and decided that the effect of this subsection is to widen the scope of s 10(1) by "providing an added option of including in a payment claim unpaid amounts made in earlier claims". On this point, Chan Sek Keong CJ considered that subject only to payment claims which had been adjudicated on, s 10(4) of the SOP Act may "roll up" any payment claim which had not been paid in full as well as any amount claimed in a payment claim which had not been made earlier. The Court of Appeal therefore took the view that the prohibition against repeat claims is confined to claims which had been adjudicated. It expressed a clear preference for the principle as stated by the New South Wales ("NSW") Court of Appeal in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 ("*Dualcorp*") and expressly disapproved of the finding of the assistant registrar in *Doo Ree Engineering & Trading Pte Ltd v Taisei Corp* [2009] SGHC 218 ("*Doo Ree*"). In *Doo Ree*, the learned assistant registrar had held that s 10(1) prohibits all repeat claims but the Court of Appeal noted that the claim in that case should not have been rejected because it was a "non-adjudicated premature claim": *Chua Say Eng* at [93].

7.23 In *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 ("*JFC Builders*"), Woo Bih Li J appeared to depart from the Court of Appeal's views on repeat claims. Woo J had issued his oral judgment ahead of the publication of the Court of Appeal's written judgment but had given his oral judgment before that. In that case, the learned judge decided that a payment claim was invalid because it was a repeat claim notwithstanding that the claim items had not been the subject of an earlier adjudication. In the course of his judgment, Woo J referred to the NSW authorities on the subject, including the NSW Court of Appeal decision in *Dualcorp* and that of the NSW Supreme Court in *Watpac Constructions v Austin Corp* [2010] NSWSC 168. However, like the assistant registrar in *Doo Ree*, Woo J did not appear to consider that in these NSW cases, the prohibition against repeat claims was directed to those claim items which had been adjudicated. On the Court of Appeal's pronouncements on this issue, he thought they were obiter because *Chua Say Eng* did not involve a repeat claim and that it was not clear whether the Court of Appeal was referring to a repeat claim in the form which was before him: *JFC Builders* at [77] and [78].

In the foreword to a textbook on the subject, the learned former Chief Justice Chan Sek Keong, after reviewing the decision in *JFC Builders*, wrote that the comments of the Court of Appeal in *Chua Say Eng* would apply to the type of repeat claim which was before the court in *JFC Builders*: see Chan Sek Keong, "Foreword" in Chow Kok Fong, *Security of Payment and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 12, where he pointed out that the reason is found at *Chua Say Eng* at [89] and [90] and noted that the assistant registrar in *JFC Builders* in fact expressly noted that the subject progress claim was never adjudicated (see Grounds of Decision of OS 141/2012 at [7]).

Recourse to the review procedure

7.24 There was also an occasion during the year for the courts to consider the adjudication review procedure under the SOP Act. In *RN & Associates Pte Ltd v TPX Builders Pte Ltd* [2013] 1 SLR 848, Andrew Ang J decided that where a respondent challenges the validity of a payment claim on grounds which require the re-opening of the merits of the case, the legislative intention is that the respondent should invoke the adjudication review procedure pursuant to s 18 of the SOP Act rather than by way of a setting aside application to the courts. Citing the speech of the Minister in Parliament in the course of moving the bill (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1137 and 1138 (Cedric Foo Chee Keng, Minister of State for National Development), the learned judge pointed out that this route would have allowed the claimant to receive the adjudicated amount, consistent with the purpose of the statutory adjudication regime to "promote prompt payment". The following passage appears in his judgment (at [61]):

> The balance of justice has *already* been decided statutorily. RN could have appealed on the merits by asking for an adjudication review under s 18 of the SOP Act, but it had first to pay TPX the Adjudicated Sum pursuant to s 18(3). This would simultaneously promote prompt payment, which is the intention of the SOP Act, and also provide a safety net against errant adjudicators who make mistakes of law and fact within their jurisdiction. RN having chosen not to apply for an adjudication review, it is not for me to set aside the Adjudication Determination on grounds which properly belong to an adjudication review. Any mistake as to validity requires an examination of the evidence and an application of the law and is a substantive issue going to the merits, which the Adjudicator has the right to decide and which I cannot interfere with. [emphasis in original]

Amendment regulations 2012

7.25 The year under review saw the introduction of a number of amendments to the SOP Regulations with the promulgation of the

Building and Construction Industry Security of Payment (Amendment) Regulations 2012 (S 488/2012) ("SOP Amendment Regulations 2012") (which came into operation on 1 December 2012). Regulation 7(2A) provides that an adjudicator may at any time before the making of the determination allow amendments to be made to the adjudication application. In granting leave to amend, the adjudicator may impose such orders as to costs or otherwise as he thinks fit. Likewise, reg 8(1A) provides for the adjudicator to allow the adjudication response to be amended. It is considered that the matters which may be mended extend beyond errors of expression or arithmetical errors and may relate to the substantive issues. The hourly rate payable to an adjudicator was also raised from $250 to $300 (reg 12 amended by reg 4 of the SOP Amendment Regulations 2012).

Performance bonds

Nature of performance bonds

7.26 In *China Taiping Insurance (Singapore) Pte Ltd v Teoh Cheng Leong* [2012] 2 SLR 1 ("*China Taiping Insurance*"), a labour subcontractor procured an insurance company to furnish the Controller of Immigration ("the Controller") with 47 guarantees ("the Guarantees"). These Guarantees were furnished in place of cash deposits amounting to $910,000 which the subcontractor would otherwise be required to post with the Controller as "security bonds" for the employment of 182 foreign workers pursuant to the Immigration Regulations (Cap 133, Rg 1, 1998 Rev Ed). The Guarantees were on similar terms and provided for the plaintiff to "guarantee and undertake as principal debtors to pay to [the Controller] at any time forthwith, on demand" the security deposit originally required under the security bonds.

7.27 Chan Seng Onn J held (at [26]) that the Guarantees were in essence on-demand performance bonds and the issuer's liabilities under the Guarantees were independent and not circumscribed by the conditions in the security bonds. He observed in the course of his judgment (at [17]) that:

> … The nomenclature of 'on-demand guarantees' or 'performance guarantees' may be misleading because these undertakings are not in actual substance guarantees as the essential collateral nature of a guarantee is not present. The undertaking in an on-demand guarantee is unconditional and independent. …

7.28 In the same passage he referred to *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 2 SLR(R) 992 ("*American Home Assurance Co*") where the Court of Appeal observed that "performance bonds *are not guarantees in the true sense*, but have been described as a

particularly stringent form of contract of indemnity by which a primary liability, wholly independent of any liability which may arise as between the principal and the creditor, falls upon the surety" [emphasis added by the High Court]: *American Home Assurance Co* at [41]. This feature of the primary and independent obligation to indemnify characterises a performance bond and does not apply to contracts of indemnity.

7.29 In this case, the commercial purpose of the Guarantees was to provide the Controller with a third party payment obligation that was as good as the cash that would have been held otherwise by the Controller. Each of the Guarantees was thus in reality an on-demand performance bond that was similar in nature to a promissory note. Although the term "guarantee" was used in the Guarantees, it was clear that the insurance company was not undertaking to perform only upon the default of the subcontractor but as a "principal debtor" with a primary liability. There was no need for an actual default by the subcontractor under the security bonds (at [22]).

Unconscionability

7.30 It is settled law that in Singapore, an on-demand bond may be restrained on grounds of unconscionability. In the year under review, the Court of Appeal considered the evidential threshold required to support an application for injunctive relief on this ground. In *BS Mount Sophia Pte Ltd* (above, para 7.1), the dispute between the parties involve, *inter alia*, an allegation that the contractor was liable to the employer for liquidated damages. Before parties could proceed to arbitration pursuant to the contract, the employer called on a performance bond. The trial judge granted the contractor injunctive relief on the basis of an e-mail from the architect suggesting that there had been an understanding between the architect and the appellant to manipulate the time for completion so as to increase the amount of liquidated damages payable by the contractor. The judge held that this constituted a strong *prima facie* case of unconscionability on the part of the employer which justified the grant of the injunction.

7.31 Before the judge, the contractor had canvassed three other arguments. The first related to the parties' dispute on the time for completion; the second was that a progress payment due from the employer to the contractor remained outstanding at the time the bond was called on; and the third was that the employer had earlier demanded the contractor extend the validity of the bond failing which the employer would call on the bond, with which the contractor complied. The judge considered that these were "run of the mill construction disputes which were properly the subject of the arbitration" and thus did not make any findings on them, preferring to base his decision on the e-mail of 4 October 2010 (at [16]). The employer appealed.

7.32 The Court of Appeal dismissed the appeal. In delivering the judgment of the court, Andrew Phang Boon Leong JA stated (at [20]) that as settled law, the necessary threshold of unconscionability that had to be established before the court would exercise its discretion to grant an injunction was a high one. The applicant had to demonstrate a strong *prima facie* case of unconscionability. The high threshold for unconscionability was necessary to strike the appropriate balance between the conflicting positions of the obligor and beneficiary of a performance bond. The *raison d'être* of performance bonds – that they were to secure the performance of the obligor's obligations – would be undermined if injunctive relief was liberally granted (at [24]). There is a "perennial tension" between two considerations. Calls made in bad faith on performance bonds could damage the liquidity of the obligor but depriving the beneficiary of its right to call on the bond could be equally detrimental to its own liquidity. A balance needs to be struck between these considerations; hence, situations where an injunction is granted "should be kept within a very narrow compass" (at [31]).

7.33 On the definition of unconscionability, the learned judge said (at [36]):

> … [B]roadly speaking, unconscionability is a label applied to describe unsatisfactory conduct tainted by bad faith. A precise definition of the concept would not be useful, because the value of unconscionability is that it can capture a wide range of conduct demonstrating a lack of *bona fides*. The beneficiary of a performance bond is in a position of strength in relation to the obligor. From the beneficiary's point of view, its position is similar to having cash in hand, since the bank is compelled to pay the beneficiary upon the beneficiary's call. But from the obligor's point of view, the importance of liquidity to the construction industry and the spectre of an unexpected call on the performance bond would appear to leave it in an arguably more uncertain position than if it had given cash up front. Had the obligor given cash up front, it would be out of pocket, but it would not be faced with the insecurity of a call on the performance bond by the beneficiary at an unspecified time. Therefore it is particularly important that the concept of unconscionability be flexible enough to capture a range of conduct, all of which share the common undertones of bad faith. The beneficiary, notwithstanding that he had bargained for the performance bond, is uniquely placed to inflict economic harm on the obligor if acting in bad faith.

7.34 However, the learned judge considered that while unconscionability itself may not carry a precise definition, what constitutes unconscionable conduct should be reasonably apparent. He noted (at [37]):

> … If the beneficiary's call on the bond is motivated by improper purposes, or such a call cannot be justified with clear evidence; or in any other situation where the beneficiary is less than certain about his

> entitlement to call on the bond and for what amount, the beneficiary ought to take a step back and re-examine its entitlement and conduct prior to calling on the bond. Unfairness is also an element of unconscionability … and the question as to whether or not notice was afforded to the obligor of his alleged breach before the beneficiary's call on the bond would also be a relevant consideration.

7.35 Because of the *prima facie* nature of the inquiry, the court was not required to engage in a protracted consideration of the merits of the case. It was all the more important that the overall tenor and entire context of the conduct of the parties supported a strong *prima facie* case of unconscionability (at [40]).

7.36 The trial judge's decision was upheld, but on a different premise. The e-mail of 4 October 2010 *per se* was insufficient evidence; it was more important to read that e-mail in the context of the sequence of events at the time as well as in relation to the exchange of correspondence between the parties in order to ascertain whether a strong *prima facie* case of unconscionability existed. Whilst no single factor was conclusive, the entire chronology of the case, viewed in relation to all the relevant factors, led the court to the conclusion that a strong *prima facie* case of unconscionability had been established (at [40] and [47]–[53]).

Relevance of the underlying contract

7.37 The Court of Appeal also affirmed in another decision that where a bond is expressed to be payable upon the assertion of a breach, the bank is not obliged to inquire into the accuracy of the buyer's assertion. In *Master Marine AS v Labroy Offshore Ltd* [2012] 3 SLR 125 ("*Master Marine AS*"), the terms of a contract for the construction of an offshore rig required the rig builder to procure "refund guarantees" as security for certain instalment payments of the purchase price of the rig. The terms of the refund guarantees provide for the buyer to make three written demands: (a) an "Initial Demand" premised on the buyer's assertion of a valid rescission of the contract "which statement shall be final and conclusive"; (b) a "Deferred Demand" if the rescission was disputed, arbitrated and an award was granted in the buyer's favour; and (c) a "New Demand" if either there was delay in the delivery of the Rig ("the First Limb") or said arbitration could not reasonably be expected to conclude by a stipulated date before the expiry date of the subsisting refund guarantees ("the Second Limb"), *and* the rig builder failed to furnish a replacement or extended guarantee.

7.38 The Court of Appeal held that notwithstanding its label, the refund guarantees were in essence "first demand performance bonds", *ie*, they are promissory notes payable by the bank to the beneficiary on

the latter's demand. However, the terms of the refund guarantees made clear that the Banks were neither to investigate the accuracy of the buyer's assertion of breach nor wait for determination of whether the rescission was valid (through arbitration) before paying on service of a written demand. Such was the characteristic hallmark of a first demand performance bond: immediate payment eschewing any manner of delving into the merits of the underlying dispute (at [44] and [45]). Construing the refund guarantees as a whole, it was plain that the parties' intentions were to cover two different contingencies. The first, encompassing Initial Demands and Deferred Demands, was premised upon the continuing subsistence of valid refund guarantees without any lapse in their continuity and validity. Thus, payment did not have to be immediate if a reference to arbitration was made by the rig builder upon receipt of an Initial Demand from the buyer. The latter would have to await the outcome of that arbitration (in its favour) before any payment fell due under the refund guarantees. The second scenario was where the existence or continuance of the security was compromised by the failure to provide a replacement/extended guarantee punctually. Such a breach went to the heart of the security function that the refund guarantees were meant to uncompromisingly provide until the delivery of the vessel and/or the resolution of any disputes by arbitration. In such a scenario, the buyer was inadequately secured and the rig builder's failure to comply with its obligation entitled the buyer to demand and receive repayment of its advances immediately (at [47]).

Operation of the contractor's indemnity

7.39 In *China Taiping Insurance* (above, para 7.26), in consideration of the issue by the insurance company of the Guarantees – which, as noted in *Master Marine AS* above, were in fact performance bonds – the subcontractor concurrently executed 47 "Indemnities" in favour of the insurance company. Subsequently, the subcontractor failed in carrying out its obligations under the security bonds in the upkeep and maintenance of the foreign workers. However, instead of proceeding to forfeit the entire security deposit, the Ministry of Manpower ("MOM") called the insurance company to assist in resolving the problems of housing, meals, transport and unpaid wages for the 182 foreign workers, and in their repatriation. The plaintiff co-operated with MOM with the view to avoid the forfeiture of the entire $910,000 in security deposits. The insurance company, therefore, in good faith made payments pursuant to an agreement with MOM to mitigate the full extent of loss under the Guarantees. The insurance company claimed that they were entitled to do this under cl 2 of the Indemnities and in this action, they sought to be indemnified by the defendant for the payments made.

7.40 Chan Seng Onn J noted (at [28]) that although in the Indemnities the subcontractor was stated as "Guarantor", it was clear

from the main language of the obligations that the subcontractor's liabilities were that of an indemnifier and not a guarantor. The subcontractor could not reasonably be construed as a guarantor because there was no principal liability which his liabilities could be ancillary to. The subcontractor's promise was to indemnify the insurance company against any payments incurred "arising from or in connection with the … issue of the Bonds" under the Indemnities. Given the absolute discretion conferred on the insurance company to compromise in good faith all claims and demands as encapsulated in the compromise clause under the Indemnities, the insurance company was clearly entitled to be indemnified by the subcontractor under the Indemnities against any sum paid out by the insurance company to the Controller pursuant to the Guarantees (at [28]–[31]).

PART B

7.41 In this section, the case review is sub-divided into construction tort and dispute resolution for construction disputes.

Construction tort

7.42 In recent years, construction tort has been a major contributor to the law of tort. This would include the Court of Appeal decision in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") concerning the fate of a certifier of payment and the issue of pure economic loss resulting in the Singaporean formulation of a single test for negligence regardless of the nature of loss suffered. Further, in the areas of breach of statutory duty and occupiers' liability, the construction industry has contributed much to the development of these areas as the industry is heavily regulated by statutes and subsidiary legislation and the boom in the industry has resulted in the mushrooming of many construction sites that are commonly named as the premises in occupiers' liability cases. In this subsection, the cases are reviewed under the headings of multiple causes of action, negligence, breach of statutory duty and occupiers' liability.

Multiple causes of action in tort

7.43 The occurrence of accidents in a construction site is not uncommon. Since the industrial revolution, advances have been made in the management of safety on site as well as in providing compensation to injured workers through the statutorily imposed compulsory insurance requirements. However, the injured worker is entitled to reject the statutory compensation and pursue his common law remedies. One such case, *Manickam Sankar v Selvaraj Madhavan*

[2012] SGHC 99 ("*Manickam Sankar*"), highlights clearly the typical challenges faced by an injured worker in which the court had to consider three causes of action under negligence, occupiers' liability and breach of statutory duty.

7.44 Interestingly, a later case in *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2012] 3 SLR 227 ("*See Toh Siew Kee*") held (at [109]) that "an occupier does not have concurrent liabilities and his liability is part of the law of negligence". This case is now on appeal and if the Court of Appeal affirms the case, future claims by injured workers relating to occurrences of accidents on site concerning defective premises might be streamlined to one instead of two causes of action, *ie*, negligence. [Note: The Court of Appeal has since held that "occupiers' liability in Singapore is a mere subset of the general law of negligence": *See Toh Siew Kee v Ho Ah Lam Ferrocement (Pte) Ltd* [2013] SGCA 29 at [113] (see also [132] and [144]).]

7.45 Any further streamlining to only one cause of action, however, is not possible since the court had ruled in *Manickam Sankar* that "a distinction has to be drawn between, on the one hand, determining whether a duty of care is owed at common law, and, on the other hand, determining whether the breach of a statutory duty *per se* gives rise to a right of civil action": *Manickam Sankar* at [77].

7.46 In dismissing the plaintiff's claim for breach of statutory duty, the court held that the plaintiff "did not advance any arguments on Parliamentary intention which, as the Court of Appeal noted in *Animal Concerns* (at [24]), is the primary determinant of whether the breach of a statutory duty *per se* gives rise to a right of civil action": *Manickam Sankar* at [77]. The court, however, held that the defendant, who was the main contractor, was liable to the plaintiff, the employee of a subcontractor, in both negligence and occupiers' liability: *Manickam Sankar* at [88].

7.47 In reviewing the evidence before the court, various versions from the plaintiff, the site supervisor, the safety supervisor and the project engineer on site were considered to establish the relevant facts to determine: (a) whether the duty to provide a proper system of work and effective supervision and a safe work place was properly discharged to avoid liability under negligence; and (b) whether the duty of the contractor as an occupier was discharged to avoid liability under occupiers' liability.

7.48 The following were facts found to contribute to the breach of the duties required under the negligence action:

(a) inadequate safety briefing in that those present were not informed of the relevant safety method to be used in the given

situation, especially in respect of workers who were on their first day of work on site;

(b) failure to give specific information on how to work safely in the given environment of the workplace, including a specific path to take while executing safety methods and procedures to ensure safety while using the said path;

(c) failure to ensure through the adequate supervision of the safety supervisor that proper safety practices are complied with including provision of adequate demonstrations of the proper use of safety measures;

(d) the absence of the safety supervisor at the scene of the accident before it happened;

(e) total failure to communicate a warning of particular known danger to those who were on their first day of work;

(f) total failure in establishing a line of communication from the safety supervisor and project engineer to the immediate superior of the plaintiff to the plaintiff to inform the plaintiff of the danger that existed at the work place and safety measures to be taken in respect of the existing danger;

(g) failure to adapt applicable safety measures to the existing layout and design of the workplace;

(h) failure to ensure that adequate instruction was given to the plaintiff in the light of a workplace that was particularly difficult to navigate and which required safety measures that were suitable for the particular condition of the workplace; and

(i) insufficient lighting at the workplace.

7.49 The following were facts found to contribute to the breach of the duties required under the occupiers' liability action:

(a) failure on the occupier's part to give specific warning of the unusual danger at the workplace to the plaintiff although the occupier knew it was his first day working at the workplace;

(b) the lighting at the workplace was poor; and

(c) failure to give instruction on details of safety measure required for the situation in the given unusual danger.

7.50 The Workplace Safety and Health Council might wish to consider the findings of the court above in drafting guidelines for safety measures in the same or similar type of workplaces.

Negligence

7.51 Whilst the common law in Singapore for the law of negligence as decided by the Court of Appeal in the seminal case of *Spandeck* had departed from the English common law in that the Singapore court had applied a single test to determine whether a duty of care exists regardless of whether the outcome of the tort is pure economic loss, damage to property or physical injury or death, references to English cases are still not uncommon.

7.52 In *Sato Kogyo (S) Pte Ltd v Socomec SA* [2012] 2 SLR 1057, the defendant was sued for negligence in its capacity as a manufacturer and reference was made to *M'alister (Or Donoghue) (Pauper) v Stevenson* [1932] AC 562 where it was decided that "a manufacturer owes a duty of care to the ultimate user, at least where a defective product would cause damage to the ultimate user's property" (at [28]).

7.53 There are two issues that might be of interest to construction lawyers because of the facts in this case: first, whether a contractor is entitled to claim from a manufacturer for loss suffered through the manufacturer's negligence with the attendant sub-issues of: (a) the plaintiff's legal capacity to commence an action against the defendant; and (b) the nature of the damage claimed (at [36]); second, whether there was a causal link between the defendant's breach and the damage suffered by the plaintiff (at [54]).

7.54 In respect of the first issue, the court held (at [44]) that the plaintiff "as the main contractor and as bailee in possession of the Works, until the Works were completed and handed over to SingTel [*ie*, the owner], SKS retained possession and had the right to claim against any third party who negligently damaged the property in the Works. The law on the right of a bailee to sue in such circumstances is well settled". This decision affirms the contractor's legal position that it has the necessary legal capacity to recover losses suffered in respect of damage to the Works of which the contractor is not the owner before the Works' completion and handing over to the employer.

7.55 The second sub-issue was created by the plaintiff's poor drafting of the statement of claim not being clear that the damages claimed were in the nature of physical damage to the Works. This was noted by the court (at [36]): "The description in the statement of claim of the loss sustained by SKS was, however, somewhat ambiguous and gave the impression that SKS was making a claim for pure economic loss." This observation of the court should alert construction lawyers as to the need to be careful in the categorisation of physical damage to Works not owned by the contractor but where the Works are placed in its custody as bailee.

7.56 In respect of the second issue, the court had reminded the parties (at [56]) that "the burden of proof as to causation lies with the plaintiffs". The learned judge then added (at [56]): "It is well established that the trial judge may accept the explanation of either the plaintiffs or of the defendant; or, if both explanations are improbable the judge may decide that the action fails because the plaintiffs have failed to discharge their burden of proof." These explanations are usually supplied by expert witnesses.

7.57 In particular, the court held (at [64]) that "the plaintiffs must show that the battery room fire was caused by the failure of UPS 7-8". However, it noted (at [64]) that "even in the statement of claim, the plaintiffs do not explain the causal nexus between the UPS failure and the battery room fire". Further, the court had also found (at [63]) that "the plaintiffs have not shown that the fires were more likely caused by a failure at UPS 7-8". This second issue highlights the critical role of the expert witness in the discharge of the burden of proof as to causation as well as assisting lawyers to draft the statement of claim by providing their expert opinions of the factual causal nexus. Therefore, there appears to be a serious need to provide for the proper training and regulation by peers of experts at the national level so that they are aware of their precise role not only in their expert domain but also the role in assisting the lawyers.

7.58 In the next case, *Moh Seng Cranes Pte Ltd v Hup Hin Transport Co Pte Ltd* [2013] 2 SLR 1, the owner of a crane that was damaged on a construction site by collapsing into a concealed manhole had pursued their claim in negligence against the main management contractor ("JPW"), a major subcontractor ("MA")] and the crane supplier ("Hup Hin") who had arranged for the use of the crane on the site from the plaintiffs. It was accepted by all the parties (at [17]) that "the Plaintiff's crane and the crane operator were to be deployed for lifting work under the supervision and direction of JPW. There was nothing on the facts in this case which required Hup Hin to supervise the deployment or lifting works on JPW's Worksite".

7.59 Accordingly, the court held (at [17]) that there is no basis for any duty of care to have arisen on the part of the crane supplier, Hup Hin, as they were not required to supervise the deployment of the crane nor the lifting Works on the site. The court also found (at [47]) that the major subcontractor, MA, did not contribute to the proximate cause of the damage to the crane after noting (at [28]) the evidence before the court "which confirms that the existence of the manhole was then and subsequently unknown to MA [*ie*, the major subcontractor]".

7.60 Thus, the focus on determining liability under negligence was on the main management contractor, JPW. First, the court held (at [18])

that "[i]t is beyond debate and confirmed by the subpoenaed Ministry of Manpower officer Koh Chin Chin that JPW [*ie*, the main management contractor] had principal responsibility for the Worksite under the Workplace and Safety Health Act (Cap 354A, 2009 Rev Ed)" ("WSHA"). The court noted (at [24]) that "[i]t is undisputed that the proximate cause of the damage to the crane was the manhole which was concealed at the time of the lifting operations" and that the main management contractor was already aware of the existence of the said manhole before the collapse of the crane into the said manhole.

7.61 Having decided (at [25]) that "the two-stage test in establishing a duty of care set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 is satisfied", the court (at [26]) adopted "the Singapore Standard SS 536 2008 Code of Practice for the safe use of mobile cranes" as the standard of reasonable care, the breach of which the plaintiff had to prove.

7.62 Having reviewed the evidence before the court, the learned judge held (at [31]) that "JPW did not take reasonable care, once the exposed manhole had been discovered on 12 August 2008, to properly mark and cordon off the manhole until it was removed, to direct that appropriate action be taken by the subcontractors, or to ensure that no heavy vehicles would be parked or undertake lifting operations in the vicinity of the manhole".

Breach of statutory duty

7.63 In *Tan Juay Pah v Kimly Construction Pte Ltd* [2012] 2 SLR 549, one of the issues before the Court of Appeal concerning breach of statutory duty was "whether a particular statutory duty gives rise to a concomitant common law duty of care" (at [50] and [53]). The court had examined the issue under the principle laid down by the same court in *Spandeck*.

7.64 Whilst the court had observed (at [54]) that "several general principles inform the law in this area", it added a word of caution (at [54]) that this is a "complex area of the law" and that "formulas are not helpful". Indeed, "they are mere guidelines and will not yield answers as to whether a common law duty of care exists alongside a statutory duty in a particular case" [emphasis in original omitted] (at [54]). This would effectively mean that in every case of breach of statutory duty, the statutory regime has to be closely examined in the light of the defendant's prescribed role in a given statutory framework.

7.65 The approach to be taken as noted by the court (at [54]) is to treat "[e]ach statute … contextually, and precedents will illuminate only infrequently the right legal path to be taken". Ultimately, the court held

(at [56]) that "we will need to decide whether the imposition of such a common law duty of care is consistent with the statutory scheme". The approach taken by the Court of Appeal must certainly be of interest to the professionals in the construction industry who, in carrying out their professional work, are inundated with numerous rules and regulations which Parliament has enacted as well as through subsidiary legislation.

7.66 However, as the appellant had (at [62]) relied on s 60 of the WSHA to advance his case that the WSHA contemplates that there is no civil liability for a breach of statutory duties under the WSHA Regime, the court held (at [63]) that "s 60 of the WSHA neither confers nor takes away any right to bring a private claim in respect of a breach of statutory duty under the WSHA Regime". The court continued its holding, stating (at [63]), "More importantly for present purposes, s 60 does not answer the question of whether there is an independent or a pre-existing private right of action for such a breach."

7.67 Having reviewed the applicable principles of law, the court held that:

> (a) "the first limb of the *Spandeck* test is not satisfied in the present case and, thus, TJP did not owe Kimly any *prima facie* duty of care at common law" (at [73]); This was the conclusion after considering the following:
>
> > (i) "the statutory objective is not to protect contractors and/or subcontractors as they have primary responsibility for all aspects of safety at a workplace" (at [73]);
> >
> > (ii) "the objective of the WSH Regime is to guard against safety lapses at workplaces by contractors and those to whom they have delegated operational control of their work" (at [73]);
> >
> > (iii) "the office of the AE is designed as a safety net, as an additional layer of protection to catch any safety hazards present in tower cranes used at workplaces that may have slipped past the notice of contractors and/or that may arise if contractors cut corners. … [T]he office of the AE is not intended to protect either the contractor and/or the sub-contractor from risk, but is instead intended to protect workers and members of the public present at workplaces" (at [73]); and
> >
> > (iv) "Kimly, as the ultimate user of the Tower Crane and the occupier of the Project Site, is clearly not within the class of people intended to be protected by the statutory purpose behind an AE's duties" [emphasis in original omitted] (at [73]).

(b) "even if TJP did indeed owe Kimly a *prima facie* duty of care at common law under the first limb of the *Spandeck* test, we find that policy considerations ought to negate this duty of care under the second limb of that test" (at [90]). This was the conclusion after considering the following:

(i) "A finding that TJP is liable to indemnify Rango would be tantamount to converting a statutory regime meant to ensure workplace safety into an insurance regime for the other private parties involved in the operational aspects of a workplace regardless of their individual responsibility for any safety lapses. This goes against considerations of corrective justice, which includes an element of 'proportionality between the wrongdoing and the loss suffered thereby' (see *McFarlane and Another v Tayside Health Board* [2000] 2 AC 59 ("*McFarlane*") *per* Lord Clyde at 106A)" [emphasis in original omitted] (at [84]); and

(ii) "we find that the imposition of a common law duty of care on TJP would also go against considerations of distributive justice. … One of the factors to be taken into account in the matrix of distributive justice is that of risk allocation and the availability of protection through insurance" (at [85]). "[W]e do not think that the WSHA has made AEs insurers for such parties, and certainly not to an *unlimited* degree. This is particularly so given that: (a) insurance arrangements can be made by the parties; and (b) the fee for TJP's services was only $716 (see above at [8]), which appears from the record before us to be the going rate for similar services" [emphasis in original] (at [89]).

7.68 It must surely interest professional engineers and construction lawyers that the Court of Appeal noted at (a)(iii) above that "the office of the AE is not intended to protect either the contractor and/or the sub-contractor from risk, *but is instead intended to protect workers and members of the public present at workplaces*" [emphasis added] (at [73]). It certainly begs the question whether had the plaintiff been a worker at the workplace or a member of the public affected by the undertaking of the employer of the worker, the defendant professional engineer would have been found liable.

Occupiers' liability

7.69 The days of occupiers' liability as a separate tort that is distinct from negligence may be numbered if the Court of Appeal affirms the judgment in *See Toh Siew Kee* (above, para 7.44). Having traced the law

on occupiers' liability in Singapore to the English common law prior to 1957 (at [96]), the learned judge held (at [109]) that "an occupier does not have concurrent liabilities and his liability is part of the law of negligence". As the plaintiff in this case was a trespasser, the court had also decided (at [123] and [124]) to adopt the standard of reasonable care instead of the lower duty of common humanity towards a trespasser so as to "align occupiers' liability closer to the rest of the law of negligence". In an apparent anticipation of a review by the Court of Appeal on whether occupiers' liability should be part of the law of negligence, the court had asked (at [135]), "Is there then any distinction in the standard of the duty of care between the static condition of the land and activities conducted on it?" It then answered that "I am inclined to think that there should be no distinction" but then swiftly added that, "it is not necessary for me to reach a conclusion on this point".

7.70 In this case, the court had to deal with situations that are commonly found not only at shipyards but also at construction sites, as well as where contractors and subcontractors are occupying the same construction site. The issue of the liability of occupiers, co-occupiers and non-occupiers were considered by the court.

7.71 The court held (at [61]) that "the power of permitting or prohibiting the entry of other persons into the premises" would amount to an instance where a party would be considered as having the necessary sufficient degree of control to make the party an occupier of the premises. However, the court added (at [62]) that "the absence of immediate supervision and control does not necessarily lead to the cessation of duty as an occupier in law" and noted (at [65]) that "some form of general control over the premises coupled with an interest in the activity that is taking place at the accident site is sufficient to make the party an 'occupier' for the purposes of determining occupiers' liability".

7.72 In the case itself, the court held (at [65] and [66]) that the lessees of the premises where the accident occurred, who were shipbuilders and repairers, had some form of general control over the premises as regards who could enter the premises as well as the activities on the premises. They were therefore co-occupiers with a contractor engaged by the lessees to construct certain parts of an oil rig and who had immediate supervision and control of the said premises. As for non-occupiers like another contractor engaged to transport the completed part from the shipyard to the oil rig, the court held (at [134]) that the duty of care arises in the same way as for occupiers. Whilst this case factually involved shipbuilders, it would be helpful to know that the early cases used by construction law books (or building contract books as the term construction law was of a recent usage, as recent as

the mid-1980s) were cases from the shipbuilding industry which were freely cited.

7.73 In another case concerning occupiers' liability, the court in *Mohammad Nazeem Bin Mustafah Kamal v Management Corporation Strata Title Plan No 3023* [2012] SGHC 205 was invited to decide on whether a Management Corporation Strata Title ("MCST") is liable as an occupier to an invitee, an employee of a company engaged by the MCST, "to provide quarterly engineering smoke control system maintenance and servicing for one year" when "the plaintiff fell through what was described as gypsum flooring onto the basement one floor below and sustained injuries" (at [1] and [2]).

7.74 The court had relied (at [14]) on *Mohd bin Sapri v Soil-Build (Pte) Ltd* [1996] 2 SLR(R) 223 to define the applicable duty of an occupier towards an invitee. The Court of Appeal held in that case that:

> The only duty [the defendant], as an occupier, owed to the plaintiff was to use reasonable care to prevent damage from unusual dangers which the former knew or ought to have known about. This relates to the physical condition of the premises, as opposed to current operations at the site. [emphasis added by the High Court omitted]

7.75 In determining whether this duty was breached, the court referred to *Industrial Commercial Bank v Tan Swa Eng* [1995] 2 SLR(R) 385 (applying *Roe v Minister of Health* [1954] 2 QB 66) where the Court of Appeal held (at [23]) that "in assessing whether the appellant had breached its duty by risking the dangers that were known or ought to have been known to it, one must examine the dangers within the state of knowledge at the time". The court then added (at [23]), "It is clear from the decision that any temptation to view evidence on liability with hindsight must be avoided." Accordingly, "[t]he key issue in dispute was whether the defendant was aware of the gypsum flooring in the Riser before the accident" (at [30]).

7.76 Interestingly, it was the expert witness testifying for the plaintiff who had provided the grounds for the court to conclude (at [44]) that "the defendant, as the management corporation of the Property, would not have known from its occupation of the common areas of the Property of the design flaw or from the as-built drawings themselves about the design flaw in the Riser, including the fact that gypsum plasterboard was used to cover the internal open space in the Riser". This was because the unusual danger was created by a design flaw as testified by the said expert witness and which the defendant, not being the original developer or the original party that actually contracted with the consultants involved in the construction of the property, would not have known about. Thus, the defendant was not liable to the plaintiff.

7.77 An interesting side note which the court picked up was the reference to the poor state of the as-built drawings as observed by the expert witness who had commented that there were "several other flaws in the as-built drawings and opined that he did not have 'great faith' in the as-built drawings". The expert witness then added (at [41]) that "as-built drawings were supposed to serve the important purpose of recording accurately what was built, and that they were 'a very critical part of the process of handing over the building from the contractor to the owner' and would be relied on by 'future owners who may want to make a change'".

7.78 Following the comment by the expert witness and the introduction of Building Information Modelling ("BIM") by the Building and Construction Authority ("BCA"), the BCA might wish to consider imposing either as part of the statutory or administrative framework some form of adequate monitoring and enforcement procedures to ensure the submission of accurately recorded as-built drawings.

Dispute resolution for construction disputes

7.79 One of the challenges faced by construction lawyers would be the sheer voluminous issues of dispute that might be present in a single action. Indeed, having knowledge of the various methods of dispute resolution, whether statutory or contractual in origin, would be necessary especially in situations where parties have incorporated such methods in the contract. In this review, cases on a few methods of dispute resolution and their related consequences are examined.

Dispute resolution clause

7.80 In *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738, the issue before the Court of Appeal was whether a clause which provided that parties "shall in good faith endeavour to agree" (at [6]) is enforceable. Having disposed of the principle that such clauses are unenforceable because of the lack of certainty as laid down in *Walford v Miles* [1992] 2 AC 128, by categorising what the court had to determine (at [44]) as whether one party had breached its duty to "*in good faith agree*" on the new rent and if there was a breach of this duty, what the consequence would be, the court held (at [55] and [57]) that there was an initial breach of this duty by one party but it was remedied and that the initial breach did not make the good faith clause inoperable.

7.81 It would appear that there cannot be a more noble method of dispute resolution since the Court of Appeal had (at [45]) identified the

core meaning of *good faith* as encompassing "the threshold subjective requirement of acting honestly, as well as the objective requirement of observing accepted commercial standards of fair dealing in the performance of the identified obligations. This encompasses a duty to act fairly, having regard to the legitimate interests of the other party" [emphasis in original omitted]. Indeed, the court had earlier taken pains to explain (at [39]): "The parties are, of course, certainly not disentitled from having regard to their own commercial self-interests in the course of the negotiations so long as their conduct does not involve bad faith."

7.82 The court made an important observation (at [45]) that "'negotiate in good faith' agreements do serve a useful commercial purpose in seeking to promote consensus and conciliation in lieu of adversarial dispute resolution. These are values that our legal system should promote". If such values are promoted at the construction industry level, it might be said that the greatest commercial return that could be derived from adopting such values must necessarily be the potential in containing, if not minimising, the cost of dispute, especially in construction activities, which arguably relies on "inexact" science to construct and complete construction Works that are often open to disputes.

7.83 If "good faith" clauses are as good as what the Court of Appeal had observed them to be, then the BCA, the Singapore Institute of Architects ("SIA") and the Real Estate Developers Association of Singapore ought to consider adopting such good faith clauses in their respective standard forms of building contracts by incorporating the good faith requirement in dispute resolution clauses.

Arbitration clause

7.84 In *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd* [2012] 3 SLR 1088, the Court of Appeal was invited, *inter alia*, to rule on the meaning of "best endeavours" in a clause requiring the parties to use their best endeavours to perform a prescribed act. The issue before the court was identified (at [27]) as "Whether the judge erred in her finding of fact that the Appellant had breached cl 9 of the Option by failing to use his best endeavours to obtain the HDB's approval" and the court held (at [46]) that the appellant had not used his best endeavours as required by cl 9.

7.85 The court acknowledged (at [35]) that the relevant test to determine whether a party has exercised its best endeavours "is now well-established in the local legal landscape". It had adopted the test laid down by the Court of Appeal in *Travista Development Pte Ltd v Tan Kim Swee Augustine* [2008] 2 SLR(R) 474.

7.86 In that case, the court had held (at [34]) that:

> The test to determine whether a party has exercised its best endeavours is an objective one. But, it is also a composite test in that the covenantor may also take into account its own interests. While the covenantor has a duty to use its best endeavours to perform its contractual undertaking within the agreed time, the duty is discharged upon the covenantor 'doing everything reasonable in good faith with a view to obtaining the required result within the time allowed' (*per* Kan J in *Ong Khim Heng Daniel* at [42]). This test also involves a question of fact.

7.87 On the issue of facts, the court emphasised (at [35]) that "the actual decision arrived at by the court … depends, in the final analysis, upon the precise factual matrix in question" and issued a caution: "Indeed, this is inherent in the very nature of the test itself. Put simply, whilst the test is relatively easy to state, the actual decision itself is anchored heavily in the sphere of application".

7.88 Construction lawyers might wish to take note of this case as the term "best endeavours" is found in cl 37(8) of SIA's *Articles and Conditions of Building Contract* (9th Ed, 2010) for both Lump Sum Contract and Measurement Contract, where cl 37(8) provides that "*the Employer and Contractor will use their* ***best endeavours*** *to ensure that the same arbitrator shall hear the dispute or part of a dispute under this Contract and the dispute or part of a dispute under such sub-contract*" [emphasis added in italics and bold italics].

Mediation clause and negotiation

7.89 The objective of mediation and negotiation is to achieve, wherever possible, a settlement agreement in respect of all disputes so as to avoid having to fight the remaining disputes in court or arbitration. Any prolongation of outstanding disputes, whether by failure to resolve the dispute *per se* or by failure to obtain a "global" settlement, would keep the cost of disputes alive and escalating upwards. The case of *Ter Yin Wei v Lim Leet Fang* [2012] 3 SLR 172 is instructive as it involves an insurance claim and the scheme to settle them is well established in the insurance industry from which the construction industry could learn about the management of dispute.

7.90 In particular, what was at issue was the meaning of the words used in the settlement agreement, "*in full and final settlement of all claims we/I have or may have*" [emphasis in original] (at [9]). The court had noted (at [17]) that "[t]he practice of insurers recording a full and final settlement and obtaining a full discharge and indemnity on the terms set out in the first two paragraphs of the DV [*ie*, discharge voucher] or on terms very similar to that has been around for at least

half a century". Accordingly, the court held (at [18]) that "[t]his long standing use of certain words or phrases in documents of this nature has also acquired a certain legitimacy over the years as they have been endorsed by the courts".

7.91 The court addressed, in particular, the issue of potential claims and adopted the text given by David Foskett, *The Law and Practice of Compromise* (Sweet & Maxwell, 7th Ed, 2010) at para 2-08 which stated that "[p]arties frequently seek to compromise 'potential' issues between them even if those issues have not yet been elevated to the status of an actual dispute". Reference was made to the words "*in full and final settlement of all claims which he has or may have* arising from [the specified incident] or other state of affairs" [emphasis added]. Furthermore, the comment made (at [18]) was: "The intention of wording of this nature is plain. It is intended that the payment should discharge finally all claims that have not merely already been advanced, but also those which might subsequently be advanced in connection with whatever incident or state of affairs had brought the parties into dispute."

7.92 Accordingly, the court held (at [29]) that the respondent is bound by the plain and unambiguous terms agreed and effectively the respondent is not able to launch any further claims.

Litigation

7.93 Whilst many main building contracts and even subcontracts have an arbitration clause contained therein, there are many other cases relating to construction disputes that end up in the courts. *Chia Kim Huay v Saw Shu Mawa Min Min* [2012] 4 SLR 1096 is not a case concerning construction disputes but is nevertheless instructive to construction lawyers whose cases are resolved by litigation on two counts.

7.94 First, at the general level, the case reminds lawyers who are engaged in the process of settlement to bear in mind that under O 22A of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), there is a statutory mechanism to offer to settle the ongoing dispute which is distinct from the mechanism to settle disputes based on the ordinary principles of contract law. Dire consequences might follow from failing to appreciate the same. Second, at a more specific level, the postal rule applicable to the acceptance of offers under the common law principles has no place in the statutory scheme prescribed by the said O 22A.

7.95 The case might also be a good reminder to those using statutory schemes that have a parallel contractual background. The court had noted that the common law principles applicable in a contractual

context under the law of contract must not be blindly applied to a statutory scheme which might provide for a modification of the said common law principle as in the postal rule.

7.96 As an illustration, the statutory payment scheme provided by the SOP Act which provides for a claimant to serve a payment claim under the SOP Act operates under the rules of the SOP Act and not under the common law principles of contract law.

Welcoming BIM – Discovery procedure

7.97 The next case does not involve any construction dispute. However, the lesson that could be learned from *Invenpro (M) Sdn Bhd v JCS Automation Pte Ltd* [2012] SGHCR 19 comes from the issue concerning an application for electronic discovery ("e-discovery") under Pt IVA of the Supreme Court Practice Directions ("the e-discovery PD") (at [1]).

7.98 With the introduction of BIM by the BCA to the construction industry which requires online submission of drawings in a three dimensional form and beyond, including the use of BIM in project management and facilities management after the completion of the Works, presumably including the possibility of requiring the submission of as-built drawings electronically, the importance of the reliance on e-discovery should not be understated.

7.99 At the moment, the court noted (at [12]) that "[t]he *raison d'être* of e-discovery is to provide an efficient and cost-effective method of conducting discovery, particularly where documents are voluminous and in electronic form" and that "[t]he e-discovery PD is meant only to supplement the discovery framework established by the Rules and not change the law on discovery" (at [16]).

7.100 An important consideration on whether e-discovery would be ordered is the issue of cost. The court had cited an earlier decision of *Sanae Achar v Sci-Gen Ltd* [2011] 3 SLR 967 wherein the judge in that case observed (at [14]) that:

> At the same time, the e-Discovery PD also acknowledges that the costs of e-discovery could potentially be disproportionate to the value of the claims and the significance of the issues in dispute. Accordingly, the e-Discovery PD also introduced mechanisms in anticipation of this problem. For instance, the e-Discovery PD contemplates the conduct of general discovery in stages – see para 43B of the e-Discovery PD and also *Goodale v The Ministry of Justice* [2010] EWHC B40 (QB), at [22]–[23]. It also sets out rules which require limits to be imposed on the scope of requests for discovery by keyword searches.

7.101 The concerns mentioned above are valid and considering the onslaught in the diverse use of BIM in the construction industry, it begs the question whether the courts and arbitral tribunals are prepared for this new wave of development and whether appropriate discovery provisions would be in place when the need arises.