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

7.1 The year under review saw a number of cases which reiterated a number of well-established principles. These included the principles relating to contract formation, repudiation, extension of time, act of prevention and liquidated damages. It also ushered in an important development on the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

Contract formation

7.2 One of the decisions delivered during the year provided an interesting demonstration of a principled approach to the analysis of contract formation in relation to the placement of a subcontract. In *Fongsoon Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd* [2011] SGHC 82 ("*Fongsoon Engineering*"), a contractor on 24 January 2007 invited a subcontractor to quote for the fabrication and erection of the structure for a switchgear building, attaching the terms and conditions and the schedule of work. The subcontractor was specifically asked to review the terms and conditions and to revert with comments. On 30 January 2007, the subcontractor wrote to the main contractor quoting a total price of S$480,000 and requiring a deposit of 20%. On 9 February 2007, the contractor e-mailed a letter of intent to the subcontractor purporting to "award" the works to the subcontractor at a subcontract price of S$400,000, 10% of which was to be paid upon signature and the remainder by way of progress payments.

7.3 On 10 February 2007, the subcontractor replied accepting the contract subject to additional terms. These provided for 10% of the subcontract price to be paid upon signature and "20% fortnightly

progressive payments for the remaining Contract [*sic*] Sum". On 12 February 2007, the contractor wrote to the subcontractor:

> Please note my comments below in blue. Hope all clear and agreeable. Pls concur.

Among the text inserted "in blue" was an additional stipulation that progress payments were to depend on progress and that the earliest date for payment would be two weeks from invoices.

7.4 In her judgment, Belinda Ang Saw Ean J pointed out that the usage of letters of intent that give rise to some limited rights and liabilities is common in the construction business but that "the full effect of any letter of intent depends entirely on the objective meaning of the language used as well as the context in which it was given": *Fongsoon Engineering* at [12]. In reviewing the events relating to the formation of the subcontract, she decided that:

> (a) the contractor's offer was constituted by "the e-mail, Letter of Intent and the STC [standard terms of contract]": *Fongsoon Engineering* at [13]; and
>
> (b) the subcontractor's e-mail reply of 10 February 2007 was a counter-offer which was accepted by the contractor on 12 February 2007.

Her Honour also decided that the text in blue did not contain counter proposals, but rather the contractor's attempts at stating their understanding of the ambiguous and imprecisely worded terms put forward by the subcontractor and that, accordingly, a concluded and binding contract was therefore formed between the parties on 12 February 2007.

7.5 Consequently, when the subcontractor on 7 March 2007 signed the contract and altered the delivery time from "10 weeks end of April 2007" to "10 weeks from total receipt of raw materials", Ang J held that this was an attempt by the subcontractor to change the completion date unilaterally. In her view, this "was ineffective as it was inserted well after the contract had been concluded, and without the prior knowledge and consent of the defendant": *Fongsoon Engineering* at [21].

Repudiation of contract

7.6 In *Chua Tian Chu v Chin Bay Ching* [2011] SGHC 126 ("*Chua Tian Chu*"), one of the issues before the court was whether a party's failure to pay sums which fell due under the terms of the contract amounted to repudiation. In that case, the plaintiffs were the purchasers and the defendants were vendors as well as developers of a residential

property. Under the terms of the agreement, the defendants were required to *deliver vacant possession* of the property to the plaintiffs by *delivering a notice* to take possession and this was stipulated as being "not later than 31st December 2007". Vacant possession was not delivered until 6 January 2009. As at 15 January 2009, the plaintiffs had completed the payment of 20% of the purchase price in accordance with the schedule of progress payments. Under the agreement, a further 70% was payable after receipt by the plaintiff of the "notice to take possession" with a photographic copy of the temporary occupation permit issued by the Building and Construction Authority. On 30 January 2009, following receipt of the notice to take possession, the plaintiffs paid a sum representing 70% of the purchase price, but relying on the terms of the agreement, deducted therefrom a sum representing the amount which had allegedly accrued as liquidated damages for delay. On 2 February 2009, the defendants gave the plaintiffs notice to complete the sale and sought payment of a further S$418,000.00. The plaintiffs withheld this further sum on the basis that the property was not fit for occupation and demanded rectification works to be carried out immediately. The defendants elected to accept what they considered to be the plaintiffs' repudiation and rescinded the agreement.

7.7 Andrew Ang J held that the defendants had wrongfully rescinded the agreement by mischaracterising the plaintiffs' conduct as a repudiation of the agreement. Whilst the plaintiffs' decision to withhold the payments due gave rise to the defendants' election to rescind the agreement, this action on the part of the plaintiffs should not be viewed in isolation. The plaintiffs had evinced that they were willing to complete the sale and purchase of the property, albeit under protest. Since the plaintiffs were entitled under the agreement to deduct liquidated damages and rectification costs, the plaintiffs were merely exercising their right of set-off: *Chua Tian Chu* at [25].

Time at large

7.8 Several of the decisions delivered by the High Court during the year addressed the circumstances under which time may be set at large in a construction contract. The significance of time at large bears directly on a contractor's liability for liquidated damages. The decisions during the year affirmed the established principle that a contractor relying on this premise to avoid liability for liquidated damages must firstly prove the existence of an act of prevention and secondly show that this had resulted in a delay in completion of the works.

Act of prevention

7.9 The issue was considered by Andrew Ang J in *Chua Tian Chu*. The plaintiff-purchaser in that case had contributed to the delay as a result of amendments and alterations to the works ordered by them and the question was whether this had led to time being set at large. In determining this issue, Ang J reviewed the leading authorities on the subject and cited (*Chua Tian Chu* at [59]) with approval the following statement of principle by Lord Esher MR in *Dodd v Churton* [1897] 1 QB 562 at 566:

> … if the building owner has ordered extra work beyond that specified by the original contract which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided by the contract. The reason for that rule is that otherwise a most unreasonable burden would be imposed upon the contractor.

In the course of his judgment, the learned judge referred to authorities which suggested that an act of prevention which renders time at large may include events which may constitute "quite legitimate conduct" such as ordering of extra work as well as "failures or omissions on the part of the employer to fulfil certain express or implied obligations" including inadequate instructions or providing inadequate access to the site: *Chua Tian Chu* at [60]–[61]. It should be noted that the agreement in this case, unlike a normal construction contract based on one of the major standard forms of contract such as the Singapore Institute of Architect Standard Form, did not contain an extension of time clause which would have preserved the operation of the liquidated damages clause in the face of an act of prevention.

7.10 The subject of an act of prevention was also raised before Judith Prakash J in *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2011] SGHC 162 ("*Lim Chin San*"). In the course of her judgment, her Honour referred to her earlier decision of *Yap Boon Keng Sonny v Pacific Prince International Pte Ltd* [2009] 1 SLR(R) 385 where at [34] she had adopted the description of the expression in Chow Kok Fong, *Law and Practice of Construction Contracts* (Sweet & Maxwell Asia, 3rd Ed, 2004) at p 401:

> An act of prevention operates to prevent, impede or otherwise make it more difficult for a contractor to complete the works by the date stipulated in the contract.

This definition of the expression was also cited with approval by Andrew Ang J in *Chua Tian Chu* at [62].

Delay in completion of the works

7.11 In *Lim Chin San*, it was emphasised that before an act of prevention had the effect of setting time at large it must be shown that the act had resulted in a delay to the completion of the works. In that case, under the terms of a subcontract, the subcontractor was required to complete the subcontract works by 2 August 2002. The works would be deemed to have been practically completed upon receipt of a "Temporary Occupation Permit". On 22 May 2002, both parties agreed to extend the period for completion by three months to 31 October 2002. Four days were awarded by the arbitrator for exceptionally adverse weather, therefore extending the completion date to 4 November 2002. On 12 May 2003, the main contractor terminated the subcontract on the basis of the subcontractor's failure to proceed regularly and diligently with the subcontract works. The main contractor eventually engaged other subcontractors to complete the works on 1 August 2003.

7.12 The arbitrator found that the subcontractor had been delayed by the main contractor because the latter had been slow in allocating and had under-allocated man-year entitlements which were necessary for the subcontractor to bring in foreign workers for the works. The arbitrator also found that there were late interim payments by the main contractor. However, he found that the subcontractor had failed to prove that these incidents caused a delay in completion of the works. As a result of this, he dismissed the subcontractor's argument that time for completion of the subcontract works was set at large.

7.13 Judith Prakash J agreed with the arbitrator's finding. In the course of her judgment she affirmed the common law principle that the consequence of time being set at large is that the date for completion originally stipulated in the contract ceases to be the operating date for the completion of the works. Liquidated damages for delay in completion should not be imposed where the person claiming those damages contributed to that delay. However, time is set at large only if there is delay in completion. It is not sufficient that the act of prevention merely caused delay during the progress of the works. Her Honour cited with approval the position on this point as laid down in a number of the leading English authorities on the subject including *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111 and *Percy Bilton Ltd v Greater London Council* [1982] 1WLR 79 and considered that "the distinction between, on the one hand, a delay in progress which does not constitute an act of prevention and therefore does not set time at large, and, on the other hand, a delay in completion which does constitute an act of prevention, is well-established": *Lim Chin San* at [32].

7.14 Interestingly, the learned judge also accepted the proposition that it is possible for a contract to expressly preserve the operation of a liquidated damages clause notwithstanding that the completion date of the works had been delayed by the employer. She said (*Lim Chin San* at [38]):

> The courts have adopted a common-sense approach and have *presumed* that the parties have intended that liquidated damages should not be available if the person claiming it has contributed to the delay in completion of the works. For this reason, it is well-settled that if a contract clearly provides that the date of completion will not be set at large even if the completion date of the works is delayed, this bargain will be upheld by the courts: *Jones v The President and Scholars of St John's College, Oxford* (1870) LR 6 QB 115; *Dodd v Churton* … at 568. This may occur, for instance, where the contract clearly obliges the contractor to complete the works within the stipulated time even if extras are ordered and no extension of time is granted. [emphasis in original]

Obligation to complete within a reasonable time

7.15 Where time is set at large, the general principle is that the contractor is obliged to complete the works within a reasonable period and if the contractor fails to do so, the employer is entitled to recover general damages from this breach. In *Fongsoon Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd* [2011] SGHC 82 ("*Fongsoon Engineering*"), pursuant to the terms of a subcontract, the contractor was obliged to supply steel for the subcontract works. The steel was supplied late and because there was no time extension clause, the court held that the time for completing the subcontract works was set at large and the subcontractor was not bound by the ten-week contract period. However, the court considered that in the circumstances the subcontractor would still be required to complete the subcontract works within a reasonable time, that is, around the end of May 2007. Instead the works were only completed on 11 August 2007. In the circumstances, the High Court held that the subcontractor was in breach of its obligation to complete the subcontract works within a reasonable time.

Time at large: Burden of proof

7.16 In the course of her judgment, Belinda Ang Saw Ean J emphasised that the burden in these cases is for the claimant to show that the other party's actions caused the delay in the completion of the works. She stated the position in the following terms (*Fongsoon Engineering* at [27]):

> Even if the employer's actions prevented the contractor from working on a certain part of the project, but the contractor was nevertheless still able to continue to work uninterrupted elsewhere, the courts

might not find that the employer had caused any delay to the contractor. To succeed, the contractor would have to prove that the works had to be completed in a sequential manner, and that no work could be done until the employer's default had abated or resolved.

Termination

Termination of a contract and termination of contractor's employment

7.17 The parties in *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2011] SGHC 162 also appeared before Judith Prakash J in respect of a second case concerning the same contract.

7.18 In *LW Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd* [2011] SGHC 163 ("*LW Infrastructure*"), Judith Prakash J distinguished between termination of a contract and termination of a contractor's employment under the contract. She said (*LW Infrastructure* at [51]):

> There is, however, a clear conceptual distinction between termination *of the contract* and termination *of one's employment* under the contract. This distinction was explained in *Chow Kok Fong* ([44] *supra* at p 598):
>
> > The activation of the termination proceedings usually operates to alter the employer's obligations for payments. These changes may occur at two levels. Firstly, where the termination provision provides for the contract to be terminated as opposed to the determination of the contractor's employment, it would seem that the effect is that *all the arrangements under the contract comes to an end*. In these circumstances, an architect or engineer becomes *functus officio* and he can no longer certify payments or administer the contract: *Engineering Construction Pte Ltd v Attorney General (No 2)* (1994). For this reason, *the wording used in the provisions of contracts like the JCT and the SIA standard forms distinguish carefully between the determination of a contractor's employment and the termination of a contract*. [emphasis added by the High Court in *LW Infrastructure*]
>
> [emphasis in original]

7.19 In the same paragraph she also cited with approval the following passage from *Chitty on Contracts* (Sweet & Maxwell, 30th Ed, 2011) vol 2 at para 37-242:

> *[Determination] refers to termination of the employment of the contractor under the contract, as opposed to bringing the contract itself to an end* … Both parties remain bound by terms of the contract which are to apply upon determination coming into effect … *The consequences of determination for default are broadly equivalent to the*

> *effect of acceptance of repudiatory breach of contract as terminating the contract. In the case of determination, however, the contract makes express provision for the consequences* … [emphasis added by the High Court in *LW Infrastructure*]

Operation of liquidated damages clause following termination

7.20 In *LW Infrastructure*, one of the principal issues raised before the court was whether the main contractor was entitled to liquidated damages in respect of delay for the period leading up to the termination of the subcontract by the main contractor. Judith Prakash J considered that it is well established that, in the absence of express contractual provision to the contrary, no liquidated damages accrued once a contract had been terminated. However, the termination of a contract did not affect rights which had accrued before termination: *LW Infrastructure* at [14] and [15]. She further held that the right to liquidated damages arose the moment the works had not been completed by the agreed completion date, and the total quantum of a claim in liquidated damages consequent on this right would increase with every day that actual completion was not achieved. However, the total quantum of liquidated damages that might be claimed was subject to extensions of time which would reduce the effective period of delay for which the contractor was liable.

Force majeure

Construction of force majeure *clauses*

7.21 An important decision on the subject of *force majeure* was delivered by the Court of Appeal in *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106 ("*Holcim*"). Where the contract contains a *force majeure* clause, this should be accorded effect on its terms. In *Holcim*, the Court of Appeal was invited to consider the effect of a *force majeure* clause in a contract for the supply of ready-mixed concrete. The clause provided as follows:

> The Purchaser must provide sufficient advance notice in confirming each order. The Supplier shall be under no obligation to supply the concrete if the said supply has been disrupted by virtue of inclement weather, strikes, labour disputes, machinery breakdowns, riots, and shortage of material, Acts of God or any other factors arising through circumstances beyond the control of the Supplier.

Sometime in 2007, the Indonesian government announced that it would impose a sand ban from 6 February 2007. The supplier immediately informed the contractor that the sand ban would lead to a shortage of materials for the production of the ready-mixed concrete. The Building

and Construction Authority ("BCA") was prepared to release sand from its stockpiles at S$60 per tonne, but the sand would be made available only to main contractors such as the respondent. It was undisputed that the supplier had no access to BCA's sand stockpile. The supplier wrote to inform the contractor that the prices for the ready-mixed concrete had to be raised as a result of the shortage of materials. The contractor did not agree to the increased prices. Shortly thereafter, the supplier stopped supply of the ready-mixed concrete. In a letter dated 1 March 2007 the supplier annexed a revised quotation of prices for ready-mixed concrete which were higher than those found in the contract. After several meetings, the parties were unable to agree to new terms for the supply and the contractor notified the supplier in a letter that the supplier was bound by the prices agreed under the contract. Nevertheless, the contractor stated that it was willing to accept, under protest, the prices stated in the 1 March quotation.

7.22 Andrew Phang JA, in delivering the judgment of the Court of Appeal, considered that the result turned on the operation of the *force majeure* clause in the contract. The operation of clause 3 itself depended on two sub-issues: first, it had to be shown that the events in the clause had disrupted the supply of the ready-mixed concrete and secondly, the event had to be shown to be beyond the control of the supplier: *Holcim* at [42]–[44].

"Hinder" and "disrupt"

7.23 On the first sub-issue, the learned judge considered that the words "hinder" and "disrupt" suggested a datum measure of difficulty that interfered with the successful performance of a contract. Both words, however, connoted a lower threshold of negativity compared to the word "prevent". Unlike a situation involving "prevention", situations involving "disruption" or "hindrance" did not render performance of the contract *impossible*. The difficulty presented by an increase in costs or prices was, in itself, insufficient to constitute a "disruption" or a "hindrance". However, events that did not prevent the performance of a contract but would render the continued performance of a contract commercially impracticable would generally constitute a "disruption" or "hindrance" within the meaning of the *force majeure* clause in question: *Holcim* at [56]. The court found that, in the circumstances, the supplier was indeed beset with considerable difficulties which together constituted a "disruption" within the meaning of the *force majeure* clause. Phang JA noted, in particular, the fact that the supplier had no access to BCA's sand stockpiles and that their own suppliers relied on *force majeure* clauses in their respective contracts. The learned judge also observed that from a practical standpoint, it was also impossible for the supplier to perform the delivery of more than 100m^3 of concrete within two days pursuant to the requirement of the contract: *Holcim* at [60]–[64].

Taking of reasonable steps to avoid force majeure *effects*

7.24 On the second sub-issue, the learned judge (*Holcim* at [66]), agreed with the view expressed by Ribeiro PJ in a leading Hong Kong decision, *Goldlion Properties Ltd v Regent National Enterprises Ltd* [2009] HKCFA 58, that there is no "free-standing legal principle" or "blanket principle" that, in order to avail itself of the benefit of a *force majeure* clause, the affected party must have taken all reasonable steps to avoid the *force majeure* effects. However, where the clause in question relates to events that must be beyond the control of the parties, then the party concerned ought to take reasonable steps to avoid the event or events stipulated in the clause. Phang JA said (*Holcim* at [67]):

> The rationale for this approach is a simple and commonsensical one: *to the extent that the party or parties concerned do not take reasonable steps to avoid the event or events in question, it cannot be said that the occurrence of the event or events was beyond the control of the party or parties concerned – in which case the clause would not apply*. In this regard, it is pertinent to note that in cases where it was held that the affected party was required to take reasonable steps to avoid the effects of the event in question before it could rely on the *force majeure* clause (see, for example, *RDC Concrete* … at [64]; *Channel Island Ferries Ltd v Sealink UK Ltd* [1987] 1 Lloyd's Rep 559 at 570; and the English Court of Appeal decision of *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] ICR 419), the legal issue that arose centred on *force majeure* clauses which related to events specified therein that were *beyond the control of the party concerned*. It should also be noted that these cases were also decided with respect to the precise factual matrix concerned in general and on the construction of the precise language of each *force majeure* clause in particular. [emphasis in original]

7.25 On the facts, the Court of Appeal was satisfied that the supplier did take reasonable steps to avoid the results of *force majeure* event and that it was not attempting to profiteer from the shortage of sand. In any case, the steps which could be taken by the supplier were limited because it was the contractor who had access to the BCA sand stockpile. His Honour observed (*Holcim* at [100]):

> The Appellant had done what it could in the difficult circumstances it found itself placed in: it had informed the Respondent of its inability to procure sand from the BCA and it had offered to credit back to the Respondent the price of sand at a price higher than the cost of procuring sand from the BCA. However, time and again, the Respondent had been unwilling to assist to procure sand from the BCA. In addition, the Respondent did not adduce any evidence that there were alternative supplies of concreting sand from local or overseas sources (apart from its failed contention with regard to manufactured sand). Since the Appellant's inability to perform the Contract was due largely to the Respondent's unwillingness to assist, it

follows that the triggering of cl 3 is not insubstantially due to the Respondent's own actions.

Increase in prices and force majeure

7.26 The judgment of Phang JA usefully contemplated an issue which should be of considerable interest within the construction industry. As a general principle, it is accepted that a *mere* increase in prices of source materials is generally insufficient in itself to constitute a "hindrance" or "prevention" that could invoke a *force majeure* clause. However, the question may be raised as to the legal position of a situation where the increase in prices was *astronomical*. Phang JA noted that where, as in *Brauer & Co Ltd v James Clark (Brush Materials) Ltd* [1952] 2 Lloyd's Rep 147, the price increase was *one hundred times* as much as the contract price, a "fundamental different situation" had unexpectedly emerged and the seller in that case would not be bound to perform the contract. He considered that the legal principle here mirrored that in relation to the common law doctrine of frustration, under which a mere increase in price would *not* constitute a frustrating event. There is some support in the views expressed by Lord Reid and Lord Hodson in the House of Lords decision of *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93 ("*Tsakiroglou*") for the suggestion that increased costs might constitute a possible ground for frustration where they were so extreme as to be "astronomical" (*Tsakiroglou* at 118 and 128–129, respectively). This proposition would appear to also find some support in the local context in the decision of this court in *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 1 SLR(R) 945.

Dispute adjudication boards

7.27 Dispute Adjudication Boards ("DABs") are rarely encountered with construction contracts in Singapore, not least because of the perception that much of the differences between parties to a construction contract are now more efficiently channelled through the statutory adjudication regime under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) considered below. However, DABs are now a standard and even a pivotal feature of the contractual arrangements in major international construction contracts. A particularly influential form of contract used in many international construction projects is the standard form published by the *Fédération Internationale des Ingénieurs-Conseils* or the International Federation of Consulting Engineers (more commonly referred to by its acronym "FIDIC"). Sub-clause 20.2 of the FIDIC Conditions of Contract for Construction 1999 – referred to as the "Red Book" – provides for disputes between parties to be adjudicated by a DAB and sub-clause 20.4 stipulates that the decisions of a DAB are to be binding

on both parties unless either party serves a notice of dissatisfaction within 28 days.

7.28 The subject of DABs came before the Court of Appeal in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*Perusahaan Gas*"). This is perhaps the first time that the subject is expounded at length. In this case, PGN – an Indonesian government gas company – contracted with CRW, a joint venture, to "design, procure, install, test and pre-commission" a 36-inch diameter pipeline and an optical fibre cable in Indonesia. The contract was based on the standard terms and conditions found in the Red Book, with certain modifications. A dispute arose between the parties relating to certain variation proposals issued by CRW and this was referred to a single member DAB. The adjudicator indicated that, based on the documentary evidence submitted as well as the witnesses' sworn statements, there was no need for an oral hearing. He decided that PGN owed the sum of US$17,298,834.57 to CRW, in excess of the US$13,955,634 claimed by CRW. Dissatisfied with the DAB decision, PGN submitted a notice of dissatisfaction ("NOD") while CRW issued an invoice to PGN for US$17,298,834.57. PGN rejected the invoice on the basis that the DAB decision was not final and binding under the Red Book as it had filed a NOD.

7.29 CRW commenced arbitration before an International Code Council appointed arbitral tribunal in Singapore. In so doing it invoked sub-clause 20.6 of the Red Book which reads:

> Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration.

Following a preliminary hearing, the majority members of the arbitral tribunal issued a final award ("Final Award"), deciding that PGN was required to make immediate payment to CRW of the sum decided by the DAB and that it was not entitled to request for a review of the DAB decision. However, the majority members reserved the right of PGN to commence subsequent arbitration to review the DAB decision. On the other hand, the dissenting member of the tribunal considered that a re-examination of the DAB decision was necessary and it was imperative to carry out a site visit to understand the actual condition of the construction project. PGN filed an application to set aside the Final Award. The High Court judge granted the application on the basis that the Final Award was contrary to Art 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law").

7.30 The Court of Appeal upheld the decision of the trial judge to set aside the Final Award of the arbitral tribunal. In delivering the judgment of the court, V K Rajah JA pointed out that under the Red Book, once

arbitration commenced in relation to a DAB decision for which a NOD had been validly served (so that the DAB decision is binding but not final), the proceedings must take the form of a rehearing so that the entirety of the parties' dispute could be finally resolved. Pending such final resolution, the arbitral tribunal could enforce the DAB decision by way of an interim or partial award: *Perusahaan Gas* at [61], [63] and [66]. Where a valid NOD had been served and one or both of the parties did not comply with the binding but non-final DAB decision, sub-clause 20.6 of the Red Book required the parties to finally settle their existing differences in the *same* arbitration. Therefore, the scope of the arbitration extended to both the non-compliance with the DAB decision and the merits of that decision. By issuing a *final* award which upheld the DAB decision without visiting the substantive merits of the dispute, the majority members ignored the clear provision of sub-clause 20.6 and "fundamentally altered the terrain of the entire proceedings as well as the arbitral award which would have been issued if they had reviewed the merits of the adjudicator's decision": *Perusahaan Gas* at [82]. Rajah JA therefore concluded (*Perusahaan Gas* at [100]):

> There appears to be a settled practice, in arbitration proceedings brought under sub-cl 20.6 of the 1999 FIDIC Conditions of Contract, for the arbitral tribunal to treat a binding but non-final DAB decision as immediately enforceable by way of either an interim or partial award pending the final resolution of the parties' dispute. What the Majority Members did in the Arbitration – *viz*, summarily enforcing a binding but non-final DAB decision by way of a *final* award without a hearing on the merits – was unprecedented and, more crucially, entirely unwarranted under the 1999 FIDIC Conditions of Contract. The Majority Members had neither the jurisdiction nor the power to make the Adjudicator's decision 'final' without following the prescribed procedure.

Security of payment

7.31 There was an important decision on security of payment during the year which underscored the strict approach the courts will take in construing the timeline requirements imposed by the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("BCISP). As noted in previous volumes of this series, the scheme of adjudication provided under the BCISP allows a party who had carried out construction work or provided services or supplied materials in relation to a construction project in Singapore to obtain a quick, interim decision by an adjudicator on a payment dispute. The determination of the adjudicator binds both parties until the matter is resolved by an arbitrator or the courts.

7.32 It was settled by the High Court in *Chua Say Eng Sylvia v Lee Wee Lick Terence* [2011] SGHC 109 ("*Chua Say Eng*") that compliance

with the prescribed timelines goes to the validity of the payment claim. The court in this case cited with approval the position taken by Spigelman CJ in a decision of the New South Wales Court of Appeal, *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 ("*Chase Oyster*"), where the learned Chief Justice said (*Chase Oyster* at [47]):

> This detailed series of time provisions is carefully calibrated to ensure expeditious resolution of any dispute with respect to payments in the building industry. The time limits are a critical aspect of the scheme's purpose to ensure prompt resolution of disputes about payment. It is commercially important that each party knows precisely where they stand at any point of time. Such certainty is of considerable commercial value.

7.33 In *Chua Say Eng*, the adjudication application was made in relation to a construction contract for the conversion of a two-storey house into a three-storey house. The owner had terminated the contract on 21 April 2010. On 2 June 2010, the contractor served a payment claim on the owner and after serving the requisite notice on 22 June 2010, proceeded to file an adjudication application. The adjudicator awarded the contractor a sum of S$125,450.40, but the owner applied to have the determination set aside. On appeal from the decision of the assistant registrar, Tay Yong Kwang J considered the operation of s 10(2) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) and reg 5(1) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("BCISPR") in a situation where the contract does not provide for a time period for the service of a payment claim. He read reg 5(1) to mean that "following the month in which the contract is made, payment claims must be served at monthly intervals by the last day of each month": *Chua Say Eng* at [42]–[45]. Therefore in the case before him, the learned judge held that "for work done in April 2010, the last day for serving a payment claim was 31 May 2010": *Chua Say Eng* at [56].

7.34 In the course of his judgment, Tay Yong Kwang J had to examine the relationship between the limitation period which is read into s 10(2) of the BCISPR with the provision for a rolled up claim under s 10(4) of the BCISPR. The subsection states as follows:

> Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim relates was last carried out.

The learned judge considered that the effect of s 10(4) is that a claimant can only include in a payment claim amounts which were the subject of

earlier payment claims. In support of this construction, he cited with approval the view expressed by Dr Philip Chan at para 3.2.8 of *Statutory Adjudication in Singapore* (Sweet & Maxwell Asia, 2008). Tay J conceded that there will be situations where, notwithstanding that a respondent fails to pay a claimant or serve a payment response, a claimant may not wish to antagonise the respondent by proceeding with an adjudication application: *Chua Say Eng* at [54]. However, if the claimant does nothing, he will soon be out of time to make the adjudication application. This is because the claimant has a time limit of seven days within which to make the adjudication application once he is entitled to make it. He suggested (*Chua Say Eng* at [55]) that this is a situation where s 10(4) of the BCISPR comes into play by allowing the claimant to bundle the earlier claim with a subsequent claim and thereafter apply for adjudication in respect of the aggregate sum:

> Section 10(4) allows him to bundle the amount from the earlier payment claim (for which the claimant might have decided not to make an adjudication application) into a subsequent one (subject to the stipulated six year time limit) and then later submit an adjudication application for the total sum claimed. Thus, the claimant's right to adjudication under the SOPA is preserved even if he decides not to follow through with the adjudication process early on in the construction contract.

Variations

7.35 The facts of *Fongsoon Engineering (S) Pte Ltd v Kensteel Engineering Pte Ltd* [2011] SGHC 82 ("*Fongsoon Engineering*") were considered at the opening of this part of the review in relation to the formation of the particular subcontract. In the action, the subcontractor sought to recover, *inter alia*, a sum of S$403,072.74 for variation works. The contractor resisted this claim on the ground that they did not issue any variation order and that the items of work claimed as variations were within the scope of works for which the subcontractor had agreed to execute under the lump sum subcontract. Clause 5 of the conditions of contract provided as follows:

> In the event of delaying the completion of the aforesaid work, the Sub-Contractor shall ensure it shall bear its own cost in the execution of the aforesaid work. In the event there are variations to the aforesaid work, the Contractor shall issue new variation order to the Sub Contractor and the Sub Contractor shall comply with the new variation order in an appropriate and diligent manner.

7.36 The learned judge dismissed the claim for variations. Belinda Ang Saw Ean J held that on a plain reading of the contract provisions, a variation order is required to be in writing and a written variation order is a condition precedent for any claim or payment for variation work. The learned judge said (*Fongsoon Engineering* at [54]):

> Clause 5 as a matter of construction also contemplates, from the use of the word 'issue', the existence of a written variation order from the defendant. The plaintiff has not produced any written variation order issued by the defendant. A written variation order is a condition precedent for any claim by the plaintiff for payment of any additional or varied work done. The plaintiff is not entitled to payment of any of its claims for variation works since there were no written instructions from the defendant. As an aside, the plaintiff did not establish any verbal instructions for variation works in any case.

PART B

Quality issues

7.37 In this section, there are two cases of interest selected for review. Both are on defects, one concerns paint and the other concerns machinery. In the former, it relates to an express term of the contract and the latter, an implied term.

Defective paint

7.38 In building works, usually a defect is manifested by a departure from the agreed specification. In *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd* [2012] 1 SLR 427 ("*Anti-Corrosion*"), the agreed specification was itself in dispute. Accordingly, the Court of Appeal held that the agreed specification was that the, "paint would be fit for application on the internal surfaces ..., without the need for a sealer coat": *Anti-Corrosion* at [27]. As it turned out, the paint was discoloured and the issue before the court was that of causation.

7.39 The court noted (*Anti-Corrosion* at [28]), that, "[i]t was common ground that there were only three possible causes of the paint discolouration, that is to say: defects in the paint's formulation, the condition of the internal surfaces being painted and/or poor workmanship in applying the paint".

7.40 As usual in most cases concerning defects, expert evidence was necessary to guide the court to its final decision. In this case, the court preferred the evidence of the expert acting for the subcontractor as against that of the paint supplier. After rejecting two of the three common grounds of causation, the court held that even though the subcontractor's expert, "did not *irrefutably* prove scientifically that there were defects in the paint, she convincingly established that the discolouration was not caused by poor workmanship or the surface conditions and therefore *logically* proved by the process of elimination

that defects in the paint or its unfitness were the root causes of the discolouration": *Anti-Corrosion* at [36].

7.41 Accordingly, it would be instructive to both the experts and counsel to note the approach taken by the Court of Appeal in its assessment of expert evidence on the issue of causation where several causes are agreed by the parties.

Defective machinery

7.42 *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd* [2012] 1 SLR 152 ("*Chai Cher Watt*") which concerns defects is based on the breach of the term implied by s 13 of the Sale of Goods Act (Cap 393, 1999 Rev Ed) ("Act"). The defect was in the form of a drilling machine that was 2.5 metres longer than described. The seller of the machine had relied on two grounds to defeat the buyer's claim for the return of deposits already paid to the seller; damages for breach and interest.

7.43 On the first ground, the court held (*Chai Cher Watt* at [26]), that the difference in length of 2.5 metres "was by no means a discrepancy that was merely *de minimis* in nature" under *de minimis* as provided by s 15A of the Act. On the second ground of waiver as provided by s 11(1) of the Act, the court held (*Chai Cher Watt* at [40]), that the seller had not been able to discharge its burden of proof by furnishing, "clear and objective evidence to demonstrate that the Appellant did, in fact, have knowledge that the Drilling Machine was 13.5 metres instead of 11 metres".

7.44 On the issue of waiver, buyers must always be wary about receiving information from the seller which might subsequently be used as evidence to establish that the buyer has the necessary knowledge to effect a waiver of their rights to reject goods delivered that are not in accordance with the contractual description of the goods. In this case, the seller alleged that the buyer had the necessary knowledge when the buyer had a chance to view a drawing of the drilling machine which "clearly illustrated the actual length of the Drilling Machine": *Chai Cher Watt* at [35].

7.45 Fortunately for the buyer, the court held that "[t]he drawing in itself was not at all clear … Indeed, the Appellant would have had to study the drawing in some detail and analyse the various distances with reference to a table in order to work out the actual length of the Drilling Machine. This is a far cry from the drawing itself stating clearly what the length of the Drilling Machine is": *Chai Cher Watt* at [35].

Insurance

7.46 In this section, two cases are selected for review. Both concern the construction of terms in insurance policies. Both cases involved the issue of using extrinsic evidence to give meaning to the terms whose meaning is in dispute. In the first case, the Court of Appeal applied the literal meaning in the context of the insurance policy while in the second case, the High Court allowed the use of extrinsic evidence.

Scope of insurance policy

7.47 In the construction industry where construction activities carry with them the inherent risks and dangers of damages to property and injuries to those working on the site, an adequate insurance cover is vital to the survival of the businesses of the contractors and subcontractors. Therefore, the approach taken by the Court of Appeal in a recent case concerning the interpretation of insurance policies must have been a welcome relief especially when the principles of construction of the terms of the policy are now clearly reaffirmed.

7.48 In *Lim Keenly Builders Pte Ltd v Tokio Marine Insurance Singapore Ltd* [2011] 4 SLR 286 ("*Lim Keenly Builders*"), the Court of Appeal reiterated a very important guide in the interpretation of insurance policies. The court said (*Lim Keenly Builders* at [37]):

> … insurance contracts are invariably drafted and/or vetted by experts to protect the interests of the insurers, and the insured generally have little choice but to accept the terms thereof. In such a context, it does not lie in the mouth of the Respondent to assert that it intended a material clause to read differently from the actual words used, much less to argue that this ought to be the meaning to be ascribed to the clause.

7.49 The court had earlier held that (*Lim Keenly Builders* at [28]):

> … [i]f the meaning of the clause is clear from the language of the clause itself, having regard to the context of the contract (see generally the seminal decision of this court on the principles of contractual interpretation set out in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029), all other specific arguments purporting to aid its interpretation are unnecessary, *except* where they may demonstrate that the meaning of the clause is not so clear as it appears at first blush. [emphasis in original]

7.50 The court added (*Lim Keenly Builders* at [37]), that, "in interpreting the terms of a written contract, a party's *subjective* assertion that a drafting error was made is irrelevant in the face of the *objective* meaning of the terms concerned" when it rejected the insurance

company's arguments that it made an error in drafting those included in the "Name of Insured" thereby resulting in a wider literal meaning of those covered by the insurance policy.

7.51 This case would certainly serve as a reminder to those involved in the drafting of insurance policies that there is hardly any room for errors in drafting.

Issue of double insurance

7.52 In the construction industry, it is not uncommon for a company or a group of companies to provide insurance coverage for two sets of people under employment, namely, the permanent staff who would usually work at the head office and the project staff who are employed whenever the company wins a project. In *Lonpac Insurance Bhd v American Home Assurance Co* [2012] 1 SLR 781 ("*Lonpac*"), the plaintiff insurance company appealed against the decision of the assistant commissioner of labour ("ACL") who required them to pay 50% of the compensation sum assessed by the MOM to be payable to an injured crane and hoist operator under the Work Injury Compensation Act (Cap 354, 2009 Rev Ed) under the doctrine of double insurance: *Lonpac* at [6].

7.53 At the heart of the issue was whether extrinsic evidence is admissible to construe the insurance policies in order to prove what Lonpac Insurance ("LI") had alleged, *ie*, the insurance policy issued by LI covered a different group of people from those covered by the defendant insurance company. The extrinsic evidence comprised affidavits from the employees of the insured company and its insurance broker to show the same.

7.54 The learned judge set aside the decision of the ACL and remitted the matter back to him for his rehearing and consideration of the extrinsic evidence. It would appear that this is the first case to decide on the admission of extrinsic evidence in a proceeding between strangers to assist in the construction of the terms in a written document.

7.55 The learned judge held (*Lonpac* at [22]), that "s 93 is about proving the terms of a contract which has been put into documentary form. Section 93 bars the proof of the terms of a document otherwise than by the production of the document itself. It is s 94 that addresses the question of how, having proven the terms of a written document, these terms are to be construed". However, the learned added (*Lonpac* at [26]):

> It therefore appears to me that there is no legal restriction on the admission of oral evidence to explain or even vary or contradict the written terms of a contract when the issue is between persons who are essentially strangers to the contract. In this case, AHA is a stranger to the contract/policy which Lonpac had with REL. There is nothing therefore to stop Lonpac from introducing extrinsic evidence to explain what risks that policy was intended, as between Lonpac and REL, to cover.

7.56 This decision which is said to be a first would certainly help to clear the air as regards the virtue of arranging insurance covers that would be intended to avoid double insurance thereby resulting in savings for the insured companies. An immediate beneficiary in *Lonpac* would be the plaintiff as otherwise it would have to make a 50% contribution without receiving premiums to undertake the risk involving the project staff.

Negligence

7.57 In this section, two cases have been reviewed. The first case concerns the role of a clerk of works in respect of the tort of breach of statutory duty and negligence. In the second case, the issue was negligent design on the part of an engineer.

Role of clerk of works

7.58 There is a significant level of delegation of work in the construction industry. In the case of *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 ("*Animal Concerns*"), the Court of Appeal decided, for the first time in Singapore, on the scope of tortious liability of the residential technical officer, who was traditionally called the clerk-of-works ("COW"), the employment of which is prescribed by the Building Control Act (Cap 29, 1999 Rev Ed): *Animal Concerns* at [2].

7.59 The Court of Appeal was able to quickly dispose of the issue of whether the tort of breach of statutory duty existed (*Animal Concerns* at [28]), stating that "the Act imposed no statutory duty on the Respondent". It was also noted that even if there had been a statutory duty imposed on the respondent (*Animal Concerns* at [29]):

> (a) there is no common law tort of "careless performance of a statutory duty" (see the House of Lords decision of *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 ("*X v Bedfordshire CC*") at 732–735): *Animal Concerns* at [21];
>
> (b) a statutory duty does not *ipso facto* impose a concomitant duty of care at common law. A statutory duty may,

of course, form the backdrop to and inform the existence (or lack thereof) of a common law duty of care (see, for example, *X v Bedfordshire CC* at 739), but that does not mean the statutory duty *per se* is a duty of care: *Animal Concerns* at [22]; and

(c) the construction of s 10(5)(*b*) of the Building Control Act is not determinative of the issue of the respondent's common law duty of care and, it is therefore necessary to determine whether, under the *Spandeck* test (see *Spandeck Engineering v Defence Science Technology Agency* [2007] 1 SLR(R) 720), the respondent owes a duty of care to the appellant at common law.

The above principles are a helpful guide to those who are interested in the state of law in this area.

7.60 In relation to the legal position of COWs, the Court of Appeal held as follows:

(a) both as a matter of industry practice and judicial observation, a COW is regarded as being, by virtue of his functions and responsibilities at the building site, in fairly close proximity to *the client*, regardless of whether they are in a formal employer-employee relationship: *Animal Concerns* at [51];

(b) a more important point, however, is that, in the *tortious* context, *COWs might not even be liable to the client in the first instance: Animal Concerns* at [52];

(c) it is important to acknowledge the very real fact that *the qualifications of COW can vary enormously*. There are at least two legal consequences that arise from this variation in qualifications of COWs: *Animal Concerns* at [53]:

(i) first, the *scope* of any duty of care owed by a COW will *vary* from case to case and, depending on the fact situation, the scope of the duty of care may not include the acts or omissions complained of. If so, there is no duty that can be *breached*, even assuming that a duty of care exists in the first instance: *Animal Concerns* at [54];

(ii) secondly, at a *threshold* level, *there might not even be a duty of care to begin with* (and, on the *overlap* between duty and breach, see below at para 7.61). We are, of course, assuming a situation in which there is *no contractual nexus* between the COW concerned and the client to begin with: *Animal Concerns* at [55].

7.61 Whilst the Court of Appeal, as usual, have laid down detailed guidelines for the law, it also noted (*Animal Concerns* at [52]), an important practical aspect of cases involving negligence of the COW, *ie*, "if a problem arises, the client would not generally sue the clerk of works concerned in either contract and/or tort. This is not surprising as clerks of works are not generally substantial litigants in their own right".

Negligent design

7.62 *Management Corporation Strata Title Plan No 2757 v Lee Mow Woo (practising under the firm of Engineers Partnership)* [2011] SGHC 112 ("*Lee Mow Woo*") involved an engineer being sued for negligence. It was alleged that his design of the building was negligent and this resulted in defects which required rectification: *Lee Mow Woo* at [2]. It was alleged that the engineer's design was not in compliance with the requirements of a British code of practice ("Code").

7.63 The court held that (*Lee Mow Woo* at [7]):

(a) non-compliance with the Code does not, in itself, mean that the design is inadequate;

(b) even though there is no strict requirement to comply with the Code, nevertheless, a design that is in compliance with it can generally be assumed to be safe; and

(c) if a design does not comply with the Code, the designer would have to satisfy himself that it was safe by applying accepted principles of engineering.

7.64 It is pertinent to note that it was alleged by the engineer that the said Code was only for guidance. However, the issue as regards whether the said British standard would be applicable in Singapore and especially whether an equivalent Singapore standard existed appeared not to have been raised. Had it been raised and answered, the decision of the court might have been different.

Evidence

7.65 In this section, three cases are reviewed. The first case concerns whether a person who acts as an engineering expert must be registered. The second case examines the acceptable conduct of a quantity surveyor acting as an expert. The third case shows how a court would proceed with a case when the material evidence had been destroyed.

Evidence of engineer expert

7.66 In *Kimly Construction Pte Ltd v Lee Tong Boon (trading as Rango Machinery Services) (Tan Juay Pah third party; Feng Tianming fourth parties)* [2011] SGHC 26 ("*Kimly Construction*"), an engineer who acted as expert witness was not registered under the Professional Engineers Act (Cap 253, 1992 Rev Ed). The expert witness had applied to practise as an engineer in Singapore but was turned down by the profession's governing body: *Kimly Construction* at [42]. This fact was raised as a challenge to the status of the said engineer as an expert.

7.67 The learned judge held that (*Kimly Construction* at [44]):

> … it was not unlawful for him to testify as an engineering expert in this case even though he was not registered as a professional engineer in Singapore. In my view, the Professional Engineers Act does not prohibit a non-registered engineer from testifying as an engineering expert in a court here, in the same way that it does not forbid an engineer without a practising certificate from conducting classes on engineering. In neither of these cases could the engineer in question be considered as 'engag[ing] in any of the prescribed branches of professional engineering work in Singapore'. They would be merely giving an opinion on someone's engineering work and teaching about engineering work rather than engaging in engineering work itself.

Evidence of quantity surveyor expert

7.68 The role of expert evidence in most construction disputes might be said to be almost indispensable. Hence when the expert evidence is critically challenged and rejected by the court, the party relying on the rejected expert evidence might be said to be totally vulnerable in proving or refuting a claim. *Zac T Engineering Pte Ltd v GTMS Construction Pte Ltd* [2011] SGHC 62 ("*Zac T Engineering*") is one of a few cases where a court gave detailed reasons for the rejection of evidence from a quantity surveyor acting as an expert.

7.69 The learned judge noted the following conduct of the expert witness:

> (a) he was not objective and impartial as an expert should be: *Zac T Engineering* at [37(a)];
>
> (b) he was not at all familiar and uncomfortable with some of the evidence he presented: *Zac T Engineering* at [37(a)];
>
> (c) he did not do any measurement himself: *Zac T Engineering* at [37(c)];
>
> (d) he generally applied quantities and rates which the defendant gave him: *Zac T Engineering* at [37(c)];

(e) he would not know, except for what the defendant told him, whether any particular piece of finished work was carried out by the defendant or some other party: *Zac T Engineering* at [37(c)];

(f) he admitted that he was not in a position to know whether the quantities in his report were true quantities and did not go down to site to see: *Zac T Engineering* at [37(c)];

(g) he did not include any HDB or JTC unit rates as comparison in his report: *Zac T Engineering* at [37(d)];

(h) that during cross-examination he retracted fairly major conclusions and assessments made by him; *eg*, on a visual inspection of a photograph: *Zac T Engineering* at [37(e)]; and

(i) he conceded after an embarrassingly long pause that his assessment of 100%, *ie*, that a particular piece of work had been completed, was wrong: *Zac T Engineering* at [37(e)].

7.70 The learned judge also noted (*Zac T Engineering* at [37(b)]), that, "he was only instructed sometime in March 2010 and by this time all the Plaintiff's subcontract works had long been completed. He worked off photographs supplied by the Plaintiff and two site inspections which were '… solely to appreciate a superficial view of the constructed works as compared with the Progress Photos …' with the Plaintiff".

7.71 This case ought to be instructive to both the expert witnesses and those who use their services. Expert witnesses should realise that their expertise is being put on trial in a sense and they should not feel compelled to undertake a case if the clients do not supply them with sufficient information to do a proper job. They should realise that an expert's first duty is to the courts and not the clients. Users of expert witnesses should realise that inducing a certain opinion from the expert by supplying him/her with inadequate information would inevitably produce unsound opinions from the expert leading to rejection by the court.

Destruction of evidence

7.72 The case of *Tang Da-Yan v Bar None (S) Pte Ltd (Refine Construction Pte Ltd third party)* [2011] SGHC 49 ("*Tang Da-Yan*") provides a good lesson to parties who might wittingly or unwittingly destroy material evidence before the case is commenced. Whilst building materials have each a life span and would deteriorate, decompose or disintegrate through time, the issue of destruction of evidence in relation to defective works is not altogether uncommon since a usual reaction to defective works is to have them repaired as soon as possible

especially when they pose a danger to the safety and health of those who are potentially affected.

7.73 The court held (*Tang Da-Yan* at [12]), that "there is no general duty on a party to preserve evidence when litigation is not ongoing or anticipated".

7.74 However, the court held that (*Tang Da-Yan* at [11]):

> … [i]t is established law that where a party has deliberately destroyed relevant evidence to prevent another party from using it against him at trial, the court may make such order as it thinks just, including an order that the defaulting party's action be dismissed or, as the case may be, an order that his defence be struck out and judgment entered accordingly: see *Alliance Management SA v Pendleton Lane P* [2008] 4 SLR(R) 1; *K Solutions Pte Ltd v National University of Singapore* [2009] 4 SLR(R) 254.

7.75 This would be guided by what the court called (*Tang Da-Yan* at [13]), a "balancing exercise where the court will consider both the culpability of the party who destroyed the evidence, and the prejudice caused by such destruction to the other party".

Safety

Specific discovery of Ministry of Manpower's report

7.76 The case of *Chiu Teng Enterprises Pte Ltd v Attorney-General* [2011] SGHC 77 is an interesting one because the resistance to disclosure was based on the official communications privilege found in s 126(1) of the Evidence Act (Cap 97, 1997 Rev Ed) and the subject matter was a report relating to tests conducted on a steel wire rope that snapped thereby causing the metal frame that was being raised by the said rope to collapse on to a worker who was crushed to death by the falling metal frame. It was stated in the judgment that the steel wire rope was seized by the Workplace Health and Safety Inspectorate of the Ministry of Manpower.

7.77 What was not stated in the judgment was whether the seized steel wire rope was subsequently released for the interested parties to carry out their own tests on the said rope. This fact should have been raised as a matter for consideration by the court.

Civil procedure

Striking out application

7.78 The main challenge in a case concerning construction disputes is usually managing the multiple claims of varying complexities based on factual situations that took place not in the recent past. Drafting pleadings that need to be sufficiently clear to disclose a cause of action is a minimum requirement in order to avoid a successful application for striking out. Hence, *TTJ Design and Engineering Pte Ltd v Chip Eng Seng Contractors (1988) Pte Ltd* [2012] 2 SLR 877 ("*TTJ Design*") was selected to highlight some useful lessons for the lawyer.

7.79 *TTJ Design* concerns a late application to strike out 33 paragraphs from the statement of claim. It was filed after the close of pleadings: *TTJ Design* at [5]. However, the lateness of the application does not act as a bar to the application since O 18 r 19(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) provides that the court may order any pleading to be struck out at any stage of the proceedings: *TTJ Design* at [11].

7.80 The court held (*TTJ Design* at [12]), that "[w]hether a striking out application should be entertained after close of pleadings is a matter of discretion to be decided on a variety of factors such as proximity of the trial dates, alteration of position by the parties and the merits of the application". The court added that the list was not intended to be exhaustive.

7.81 A unique relevant fact in this case was that the application was made to strike out parts of the pleading, *ie*, 33 out of 223 paragraphs in the statement of claim which contained only one cause of action: *TTJ Design* at [13]. The court held that "it is wholly inappropriate to strike out some paragraphs of the Statement of Claim ostensibly on the ground that they do not disclose a reasonable cause of action in the context where there is only one pleaded cause of action". This is because "[i]mplicit in the defendant's application is its recognition that the other 190 paragraphs in the Statement of Claim do give rise to a reasonable cause of action": *TTJ Design* at [13].

7.82 It would appear that an application to strike out a part of the pleading where the pleading discloses only one cause of action could be labelled as doomed from the start.