

SINGAPORE CONSTRUCTION LAW NEWSLETTER



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CHAIRMAN'S MESSAGE

I am pleased to commend to you the Society's newsletter. It could not have been launched in at a more appropriate time, against the backdrop of two major developments.

The first of these is the Commission of Inquiry into the collapse of Nicholl Highway. At the time this newsletter enters into production, the written submissions of the various parties would have been made. From the preliminary report of the Commission and press reports, there are indications that the commission's eventual findings will affect the existing overlay of construction safety regulations. No doubt, these will invite deliberations on the current state of law relating to professional negligence and, in particular, the delegation of professional duties.

A second development which will be followed with equal interest will be the Building and Construction Industry Security of Payment Act 2004. The Act came into force on 1 April 2005 and promises to transform radically the payment processes in the industry. The adjudication machinery which buttressed the regime has been largely put in place. Some of you will be aware that the Singapore Mediation Centre has conducted the training and accreditation of the inaugural batch of construction adjudicators.

This newsletter will therefore serve as a vehicle through which our members can follow the momentum of these developments. I envisage that members of the Society will treat this as their forum to exchange their views and test the suite of conceivable propositions on the issues which will be inevitably generated in the months ahead.

Obviously, the newsletter is intended to be more than just tracking events in the industry, however momentous they are. Most of us will have a studied interest in also keeping up with case law and statutes and a special section of this newsletter is therefore devoted to this purpose. The newsletter will also feature news on the Society — many of you would have attended the Extension of Time Workshop which we organized on 12 March 2005 — and the newsletter can serve to record the highlights of these proceedings.

I want to congratulate Mohan Pillay for accepting my invitation to be the General Editor of the newsletter and I appeal to our membership to support him in this important endeavour.

Chow Kok Fong
Chairman, Society of Construction Law

Do Visit our Newly-launched Website: www.scl.org.sg

The Society of Construction Law (Singapore) has recently launched its own website: www.scl.org.sg. The website provides the latest news and information about the Society and its forthcoming activities, on-line articles on developments affecting the construction industry, Chairman's recent message to members and guests as well as details on how to join as member.

— **Brendon Chua**

SCL(S) CALENDER OF EVENTS 2005 — Karen Fletcher

DATE	VENUE	EVENT DETAILS
21 February Monday	Bacchus Boathouse 6:15pm – 9:00pm	Members Networking Evening
12 March Saturday	The Executives' Club, OCBC Centre 9:00am-12:30pm	Extension of Time Workshop
23 April Saturday	The Executives' Club, OCBC Centre	Security of Payment & Adjudication Workshop
31 May Tuesday	To be advised	Aspects of typical claims against Main Contractors by Sub Contractors. Dr Colin Ong, Ong Legal Service, Brunei
18 July	The Executives' Club, OCBC Centre 6pm	Update on economic loss Gordon Smith, Partner, DLA Piper
To be advised	To be advised	Nicoll Highway: Implications of the report of the Committee of Inquiry for the construction industry. Philip Jeyaretnam and Latiff Ibrahim
September	Marina Mandarin Hotel 6pm	Global Claims – Where Are We Now? John Bishop, Managing Partner, Masons, Hong Kong

RECENT EVENTS — Joseph Liow

The Society of Construction Law held its first ever **Members' Networking Night** at the Bacchus Boathouse recently on 21 February 2005. It was an opportunity for members to acquaint themselves better with one another in an informal setting. Over 70 members and guests enjoyed an evening of fellowship, wine and food. The event was also an opportunity to introduce guests to the many events planned by SCL and to promote membership in SCL.

The SCL also organized a Seminar cum workshop on 12 March 2005. The **Extension of Time Workshop** was held at the Executives Club, OCBC Centre. The Seminar was a success and SCL would like to thank its speakers, namely, Gordon Smith, Christopher Chuah and John Prudhoe for the time and effort taken to prepare and present their papers.

INVITATION TO JOIN AS MEMBER

If your work is directly or indirectly connected with the construction industry and the law relating to it and you have a serious and active interest in construction law, why not consider being a member of the Society of Construction Law (Singapore)?

Just fill up the Membership Form (available at our website: www.scl.org.sg or by fax/mail from SCL membership Administration) and mail it with your cheque for the Membership Administration Fee and First Subscription Fee (for year 2005) to:

SCL Membership Administration
Karen Fletcher
141 Cecil Street
#05-00 Tung Ann Association Building
Singapore 069541
Tel: 65-6226 4317
Fax: 65-6226 4231

For Full Membership, the Membership Administration Fee is S\$120.00. First Subscription Fee for year 2005 is S\$150.00 if you join in January 2005 or pro-rated @ S\$12.50 per month if you join after January 2005.

For Full-time Student Membership, the Membership Administration Fee is S\$60.00. First Subscription Fee is S\$72.00 if you join in January 2005 or pro-rated @ S\$6.00 per month if you join after January 2005.

Cheques are to be made payable to the "Society of Construction Law (Singapore)".

LATEST DEVELOPMENTS IN CONSTRUCTION LAW

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT 2004

The date 1 April 2005 is extremely significant for the construction industry as it is the date when the Building and Construction Industry Security of Payment Act 2004 comes into operation. The legislation has far-reaching impact on the practices of the construction industry and the amendments made to the Public Sector Standard Conditions of Contract to bring it in line with the legislation evidences this.

The primary objective of the legislation is to redress the difficulties faced by the construction industry in obtaining progress payments for work done and services rendered. The intention of the legislature is to unequivocally facilitate progress payments to contractors, sub-contractors and suppliers in the construction industry. In that regard, the Act not only categorically affirms the right to progress payments, it goes further and also provides a mechanism for obtaining payment through the speedy dispute resolution procedure of adjudication. Anticipating that efforts may be made to impede the right to payment, the Act prohibits any

attempt to hamper the right to payment with its anti-avoidance provisions. Interestingly, the anti-avoidance provisions appears to have captured attempts to make final and binding on parties and adjudicators appointed for their disputes, decisions of third parties. Practitioners should pay particular attention to the Building and Construction Industry Security of Payment Regulations 2005 (No. S2 of 2005) and other subsidiary legislation as the Act allows the Minister to make subsidiary legislation to modify the definitions of "construction work", "goods" or "services" in the Act and to exclude certain contracts from the application of the Act.

– Dr. Anne Netto & Goh Phai Cheng SC

RECENT CASES

Chia Kok Leong and Another v Prosperland Pte Ltd [2005] SGCA 12, 16 Mar 2005

The Court of Appeal upheld the decision of Judith Prakash J in *Prosperland Pte Ltd v Civic Construction Pte Ltd* [2004] 4 SLR 129, where she held that a developer who sold his interests in the project and was in voluntary liquidation was entitled to sue both the architects for failing to exercise due care in the design and supervision of the project and the contractor and supplier under a ten-year deed of warranty.

This was held to be the case even though the developer had not executed any repairs nor been sued by the MCST in respect of the defects. However, there was evidence that the MCST intended to carry out the repairs and that it was also looking towards Prosperland for relief in terms of rectification of the defects. In addition, there was also evidence that Prosperland, who are related to the present owners of the condominium, intended to use the damages recovered for that purpose.

As damages are compensatory in nature, the general rule provides that the innocent party can only recover his actual loss. Where the innocent party suffers no actual loss on account of the breach, he is only entitled to nominal damages. Therefore, since the developer no longer owned the condominium they should have been entitled to only nominal damages. However, the

developers successfully relied on an exception to the general rule which allows a contracting party to sue and recover substantial damages even though he had parted with the property or goods in cases where there was no contract between the third party who had acquired the goods and the party in breach. In that regard, both the High Court and Court of Appeal were of the view that the right to sue in the tort of negligence was a limited right and could not justify the taking away of contractual rights. In addition, the developer was also held to be entitled to claim substantial damages as he had not received what he bargained and paid for, his "expectation interest". In relation to the argument that the defaulting party may face double liability, the Court of Appeal was of the view that the third party procedure could be used in expedient or just cases.

– Dr. Anne Netto & Goh Phai Cheng SC

MCST v Seasons Park Ltd [2005] SGCA 16

The Court of Appeal ("the CA") recently clarified in *Season Park* the applicability of the independent contractor defence in management corporations ("MCs") claims for common property defects. Until this decision, there was some uncertainty as to whether such a defence would be available for common property defects. In *Eastern Lagoon*, the High Court found that the main contractor could rely on this defence in a claim by the Architect for contribution/indemnity but this point was not expressly dealt with by the CA in that case.

In *Seasons Park*, one of the preliminary issues before the Judge at trial, concerned the applicability of the independent contractor defence. On the facts, the Developer had delegated the construction of the development to an independent main contractor and the design to a registered architect. Choo Han Teck, J. upheld the independent contractor defence on the grounds that as a general principle, the employer is not vicariously liable for the negligence of an independent contractor and that none of the recognised exceptions applied.

On appeal, the MC contended for a non-delegable duty on the Developer on the ground that the Developer had a statutory duty

under the Housing Developers Act ("HDA") and the Rules to construct the development in a good workmanlike manner. The CA rejected this contention, noting that the HDA is not concerned with building standards. On the contrary, the Building Control Act which deals with the design, supervision and construction of buildings, contemplates that such work would be undertaken *not* by the developer personally but by competent professionals and contractors appointed by them.

This decision will have a bearing on procurement arrangements in the construction industry and the allocation of risks among the various players concerned.

– Christopher Chuah

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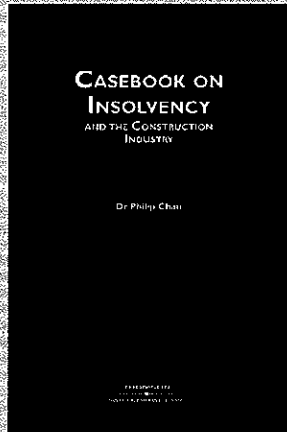
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The recent recession has led to the downfall of many. In the construction industry alone, the number of contractors registered with BCA has dropped by about 200 between 2000 and 2004 as construction demand slumped and many descended into insolvency. Businesses are therefore well advised to acquire the legal knowledge necessary to help them put strategies in place and keep from ending up on the wrong side of the law. *Casebook on Insolvency and the Construction Industry* highlights principles from reported and unreported court cases which are in effect real life examples of business ventures gone wrong.

The Casebook contains chapters on

- Defining Insolvency
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- Judicial Management
- Winding Up
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- Bankrupts
- Building-Related Issues
- Garnishee Orders
- Other Matters Relating to Insolvency



About the Author

Dr Philip Chan is an Associate Professor with the Department of Building, School of Design and Environment, National University of Singapore. He is the Deputy Head (Finance and Administration) and as of 1st December 2004, he is the Programme Director (Designate) of the joint KCL-NUS MSc (Construction Law and Arbitration) programme. He teaches in the MSc (Project Management) programme as well as the MArch programme.

Aside from his teaching commitments, Dr Chan has been appointed Deputy President by the Minister of Law under the Land Titles (Strata) Act to sit on the Strata Titles Board. He is also a Fellow and Council member of the Singapore Institute of Arbitrators (SIArb) and is in the Singapore International Arbitration Centre (SIAC) Regional Panel of Arbitrators and the Singapore Institute of Architects (SIA) Panel of Arbitrators.

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