SCL : newsletter

SOCIETY OF CONSTRUCTION LAW (SINGAPORE)

SINGAPORE CONSTRUCTION LAW NEWSLETTER

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Contents

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CHAIRMAN'S MESSAGE

Since the last issue of the Newsletter, the Report of the Commission of Inquiry into Nicholl Highway has been completed. As anticipated, the Commission's findings introduced important changes in the building control process, particularly in relation to the responsibility for the design and construction of temporary works. The Society's Immediate Past Chairman, Philip Jeyeratnam SC, will be presenting a review of this and other implications at this year's Annual Conference. Meanwhile, the Singapore Mediation Centre has accredited an initial cohort of approximately 80 construction adjudicators for the purpose of the Building and Construction Industry Security of Payment Act 2004. Many of these are members of the Society and several of these members have been appointed to the faculty of instructors for this program.

I thought it appropriate to record in this issue of the Newsletter that, arising from the inexhaustible industry of Karen Fletcher and Joseph Liow, the Society's events have now been provided the structure of a purposive calendar. This will pin down the two regular events – the Annual Conference and the SCL's Wine Evening – and ensure a spread of other meetings and events for the rest of the year. The year's meetings thus far have included presentations by John Marion QC and the seminar on Security of Payments led by George Tan, Jon Prudhoe, Christopher Nunns and myself. Last month, several of you participated in the engaging session on Witness Conferencing led by Michael Hwang SC.

We hope to shortly begin the posting of the materials presented in our programme of meetings and seminars on our website. This will be a substantial undertaking and we will need to spend some of the funds carefully husbanded by Christopher Nunns and Michael Symons for this project. While on this note, I should report that I had met with Professor Anthony Lavers, the current Chairman of the Society of Construction Law in the United Kingdom when he visited Singapore in early June. Coincidentally, I had some business in Hong Kong and while I was there, Karen arranged for me to meet up with Ken Sommerville, the Chairman of the Hong Kong Society of Construction Law. Both Anthony and Ken were generous with their offers of mutual assistance and had been forthcoming to extend the resources of their respective Societies to our members, notably through a dynamic link up of our websites.

I must thank Mohan Pillay, once again, for braving the task of bringing out this issue of the Newsletter.

Chow Kok Fong
Chairman, Society of Construction Law

Contributions

We welcome observations and comments from members on matters relevant to the construction industry. If you wish to submit such a contribution, please email it to the Chief Editor at mohan.pillay@wongpartnership.com.sg. The submission deadline for the next issue is **20 February 2006**. Contributions should not exceed 500 words in length. If you would like to submit an article for publication, please contact the Chief Editor to discuss the proposed subject and length of the article.

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 9:00am-12:30pm	***Security of Payment & Adjudication Workshop***
10 May Tuesday	The Executives' Club, OCBC Centre	***Expert Evidence on Delay & Disruption*** John Marrin QC, Keating Chambers
17 May Tuesday	The Executives' Club, OCBC Centre	***Joint seminar with SIArb & Law Society "Adjudication — what when, why, how"***
6 June Monday	NUS 8:30 am – 4:30 pm	***International Construction Law Seminar "Current Developments in Construction Law"*** Joint seminar with NUS, SCL (KL & Selangor)
5 July Tuesday	The Executives' Club, OCBC Centre 6:00pm for 6:15pm	***Mock Witness Conferencing***
18 July Monday	The Executives' Club, OCBC Centre 6:00pm for 6:15pm	***Update on economic loss*** Gordon Smith, Partner, DLA Piper
19 August Friday	Carlton Hotel 9:00am — 5:30pm	***Annual Construction Law Conference & AGM***
12 September Monday	Bacchus Boathouse 6:00pm — 9:00pm	***Members Networking Evening***
27 September Tuesday	The Executives' Club, OCBC Centre 6:00pm for 6:15pm	***Global Claims — Where are We Now?*** John Bishop, Managing Partner, Masons, Hong Kong

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 of you join after January 2005.

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

The Singapore Building and Construction Industry Security of Payment Act

PARALLEL OR MERGED PAYMENT PROCEDURES? The Relationship between the Procedures Defined by the Act and by the Contract

Setting the Scene

The Security of Payment Act, which came into force from April 2005, reflects a demand by Government for payment in the construction industry to be administered efficiently and fairly. The drafting of legislation and education of the affected parties has been a mammoth task for Building & Construction Authority ("BCA"). Why was such a drastic step necessary?

The core problem was the use by main contractors of their sub-contractors to finance work-in-progress. This was achieved, routinely, by deferring payment of sub-contractors for a longer period than would be justified by the certification and payment for that particular work under the main contract. This allowed main contractors to minimize their financing and even, by taking advantage of front-loaded mobilization payments, to have cash in hand to utilize on other cash-strapped projects.

Equally important, this tradition in the industry allowed main contractors to absorb the effects of under-certification by the employer without risking confrontation with the "paymaster". This, in turn, led to tardy valuation, particularly valuation of variations and claims, so that it became normal practice for any additional payment to be negotiated at the end of the job, rather than progressively. Had the main contractors not been able to take advantage of the aforementioned "ready credit", they would have had no option but to press for their right to comprehensive interim valuation of all entitlements.

This vicious circle was self-perpetuating and the only possible beneficiary was the employer who enjoyed highly competitive prices as a result of main contractors tendering on the assumption that liquidity would be provided by the unfortunate sub-contractors. Employers would no doubt argue, with some basis, that the only beneficiary was the inefficient main contractor who took advantage of the system to survive in the industry for longer than he deserved.

Learning from Others

We may think that the construction industry in Singapore is uniquely prone to this payment disease, encouraged by a culture of deference to all types of authority and wealth, but similar problems have been identified elsewhere and specific action has been taken by way of legislation in the UK, Australia and elsewhere.

In its search for a model for Singapore, BCA preferred the New South Wales approach which places emphasis on the interim payment regime rather the UK approach which introduces a fast-track dispute resolution process (adjudication) for all differences and disputes to be resolved progressively, regardless of whether or not these relate strictly to the valuation of work done.

It follows that commentators in Singapore have studied the case law arising from the introduction of legislation in New South Wales particularly closely. It is clear, for example, that failure to respond to a payment claim that is valid in form will be fatal, regardless of the detailed consideration of the quantification of the claim (see the New South Wales case of *Walter Construction*).[1] However, it is rather more difficult to find any precedent for the issue which currently troubles commentators in Singapore, as we wait for the Act to really "bite". This issue is the extent to which the provisions of the Act are intended to merge with the contractual payment regime or, alternatively, operate as a parallel system which is redundant unless the contractual system fails. It is this issue which EC Harris feels will be the subject of contention for the foreseeable future.

Terminology — Does it Matter?

The key phrases relating to payment procedure which have been introduced by the Act are "payment claim" and "payment response". Neither phrase was previously used in a standard form of contract in Singapore and we assume this divergence was deliberate. It avoided any pre-conception of equivalence between, say, a payment response and an "interim certificate".

Having established a clear distinction in terminology, the initiative moved from BCA to the bodies responsible for the drafting and updating of the standard forms of contract. Would they maintain a distinction in terminology (leading to a parallel procedure) or amend the standard forms to conform with the Act (merged procedure)?

Predictably, it was the Public Sector Conditions, published by BCA itself, which took the lead and adopted the terminology of the Act with the old "monthly statements" by the contractor becoming "payment claims". In the latest edition,[2] the term "certificate" is retained, though more formally as a "Payment Certificate" which is "deemed the Payment Response from the Employer". It is tolerably clear that BCA's intention is to merge the payment provisions of the standard form with the requirements of the Act whilst maintaining a role for the Superintending Officer as certifier. However, a default mechanism is provided, such that a Payment Response issued by the Employer within 14 days of a Payment Claim takes precedence over the Payment Certificate. Confusing? Yes, perhaps, but it seems that the intention is to maintain the certifier's role whilst confirming that responsibility for the vital Payment Response rests ultimately with the Employer.

With some reservations, we believe that the amendments to the Public Sector Conditions are clear and they provide a valuable insight into BCA's thinking — the intention is to encourage a merged payment process that will avoid any necessity for contractors to "opt-in" to the statutory process at the time they become dissatisfied with the operation of the contractual process. The task of amendment was simplified by the pre-existing requirement under Clause 32 of the Public Sector Conditions for the submission of "monthly statements" by the contractor.

Battle of the Architects

Whilst only insiders will know the full extent of the lively debate within SIA, it is clear that the amendment of the SIA Form[3] was more controversial and, arguably, remains so following publication.

1 *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* (2003).

2 Public Sector Standard Conditions of Contract For Construction Works 2005 (4th Edition, March 2005).

3 Articles and Conditions of Building Contract — 7th Edition April 2005.

The difficulty originates from the fundamental obligation upon the Architect, under the previous editions of the SIA form, to initiate interim valuations and to issue interim certificates without reliance upon the submission of any form of claim by the contractor. Consequently, amendment of the form of contract required more than mere tinkering with terminology. It required a complete review of the Architect's role in the certification process. One school of thought was that the fundamental roles and relationships could remain, with the submission of a Payment Claim by the contractor following receipt of the Architect's interim certificate (rather as the contractor submits a tax invoice following confirmation of the agreed amount of a particular claim). Whilst this approach would certainly have preserved the Architect's clear role as certifier, it would have conflicted with the Act by allowing circumstances to arise in which the contractor's right to apply for progress payment might be restricted, whether deliberately or not. No doubt SIA took note of the UK case of *John Mowlem v Hydra-Tight*[4] in which a term in the UK New Engineering Contract, which attempted to require differences to be referred to the Engineer prior to adjudication, was found to be inconsistent with the equivalent UK Act.

Consequently, the 7th Edition of the SIA Form introduces a fundamental change, whereby the contractor initiates interim payment by the submission of a Payment Claim [Clause 31.(2)] and the employer **shall** respond to the Payment Claim by providing a Payment Response within 21 days [Clause 31.(15)], clearly following BCA's initiative to avoid parallel payment procedures. But what happened to the role of the Architect? Well, between sub-clauses (2) and (15) of Clause 31 lie 23 references to the Architect and his role in valuation and certification, most of which are adopted without amendment from the 6th Edition.

Nevertheless, in our view the role of the Architect has changed fundamentally, from independent certifier to that of contract administrator ensuring that the groundwork is in place for the employer to issue a valid Payment Response.

Where do the Contractors Stand?

Perhaps this is an impossible question. It presupposes that the contractor is always the "claimant". In fact, there is some evidence that main contractors and sub-contractors are now heading in different directions, according to whether they perceive themselves to be more frequently in the position of "claimant" or "respondent". This potential polarization was recently highlighted by the official publication of the first edition a domestic sub-contract form[5] published by the Singapore Contractors Association Ltd ("SCAL").

In short, SCAL has decided to swim against the prevailing tide. The sub-contract form deliberately avoids the use of compatible terminology, referring instead to "progress claims" and "interim payment certificates". Furthermore, the sub-contract form attempts to distance itself from the Act, as far as legally possible, by stating that "for the avoidance of doubt, the submission of a payment claim under the Act shall be separate and distinct from the progress claim under Clause 16".

The sub-contract form requires that if a sub-contractor serves a payment claim under the Act, "the payment claim shall state in the heading that it is a payment claim made under the Act". This requirement is potentially at odds with the Act itself which, unlike the New South Wales Act, does **not** require that a payment claim shall state that it is made pursuant to the Act. In this regard, the legislative intention was "political". The smaller contractors, for whose benefit the Act was introduced, would be the least likely to remember (or have the nerve?) to state that their claims are made under the Act.

Why should SCAL be in such state of denial? One possible reason is that the most influential members of SCAL are the companies who see themselves habitually as "respondents", the main contractors who may face the administration of 25 or more sub-contracts on each major project, ranging from values of $10k to $10m. These are the companies which face the biggest burden and risk under the new Act and may justifiably fear "ambush" under a merged payment procedure.

A Payment Claim? — I thought we were friends...

Despite the best efforts of BCA, we foresee serious problems ahead as all parties adjust to the new regime. These problems will relate to the interface between the Act and the various standard contract forms in use in Singapore. If the new SCAL domestic sub-contract becomes widely used, this will add further difficulties, due to its lack of compatibility (in terms of payment provisions) with the recently amended main contract forms.

We should not forget the significant cultural factors which apply in Singapore to a far greater extent than in the UK or Australia. In order to benefit from the Act in the way that was intended when BCA was first instructed to address the payment crisis in the industry, we believe it is vital for all contractors, however meek, to be placed in a position where they do not need to make a conscious decision to opt-in to the benefits and protection offered by the Act. Whilst the machinery of the Act does not penalize a "claimant" who makes a conforming payment claim only when a serious shortfall in valuation or payment occurs, in reality we expect to see main contractors treating the submission of a conforming payment claim by a domestic sub-contractor in the same manner as they would treat a notice of arbitration, in short a major slap in the face. Sub-contractors can only avoid this absurdity by making every claim conforming under the Act and requiring similar compliance by way of payment response.

Sub-contractors are entitled to benefit from the Act without fearing that full compliance with the new procedures will be interpreted as provocative. That is why we consider it so important for parallel payment procedures to be avoided. BCA has set a good example. The industry should take note.

— ***Christopher Nunns***
Partner, EC Harris

4 *John Mowlem & Co plc v Hydra-Tight Ltd* (2000).

5 SCAL Conditions of Sub-Contract for Domestic Sub-Contractors 2005.

Announcement

Dubai International Arbitration Centre ("DIAC") is looking for arbitrators to be placed on their Panel. Arbitrators with all kinds of experience are welcome. Presently, DIAC is particularly interested in arbitrators with experience of construction disputes. Interested applicants may download application forms from the DIAC website: www.DIAC.ae.

Recent Talks Organised by the Society of Construction Law

— Joseph Liow

From April to July 2005, the Society organized many talks concerning relevant topics that were well attended by its members. The following were the talks presented by SCL's members and notable guests.

DATE	SUMMARY OF TALKS
23 April 2005	***Building & Construction Industry Security of Payment Act*** A paper was presented by George Tan to discuss the background and objective of the Act and its key provisions relating to the right of parties to receive progress payments, the new payment claim and payment response procedure and the outlawing of the "paid when paid" clauses. John Prudhoe presented on the topic of, "The Adjudicator and the Adjudication Process" where he discussed the challenges that have arisen in the UK in relation to the adjudication process and the future of adjudication in Singapore. Christopher Nunns then considered how the administration of building and construction contracts will be affected by the introduction of the Act in his presentation, "Contract Administration to Conform to the Act".
10 May 2005	***Expert Evidence in Delay and Disruption*** John Marrin, QC outlined the views, judicial or otherwise, of the use of dedicated computer software for the use of analyzing critical path required for delay analysis. The approach to such evidence which Judges and Arbitrators are likely to adopt was also discussed. The evening's talk ended with John Marrin offering some suggestions as to how best to assist the Tribunal.
30 June 2005	***Witness Conferencing — "Hot-tubbing" of factual and expert evidence in construction disputes*** Michael Hwang SC took an innovative approach in introducing the concept of "Witness Conferencing" by having several SCL members and guests participating in role-playing to demonstrate how a Tribunal and parties may save precious time and costs by witness conferencing to crystallize and define issues in a construction dispute.
18 July 2005	***Gordon Smith presented his paper on "Update on Recovery of Economic Loss for Defective Buildings"*** Gordon introduced the common law rationale for limiting the recovery of damages for economic loss and also considered the recent Singapore decisions in *MCST 2297 v Seasons' Park* and *Chia Kok Leong & Anors v Prosperland Pte Ltd.*

Recent Cases

— Dr Anne Netto

MCST Plan No 2297 v Seasons Park Ltd [2005] SGCA 16

The Court of Appeal dealt with two important issues.

First, whether the MCST was entitled to sue, on behalf of all the subsidiary proprietors, the developer *in contract* for damages in relation to defects in the common property. The MCST represented subsidiary proprietors of 390 units, 319 belonged to original purchasers and the remaining 71 to sub-purchasers.

Section 116 of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("LTSA") empowered the MCST to sue and be sued. The Court of Appeal held that that section did not confer a cause of action upon the MCST. They held that the MCST could claim *in contract* on behalf of subsidiary proprietors who had a sale and purchase contract with the developer. Hence, only original purchasers could have the benefit of such a claim by the MCST as the sale and purchase agreement gave them the necessary cause of action.

Subsequent purchasers were third parties *vis-à-vis* the sale and purchase contract. As third parties, the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) ("CRTPA") would only be available if the contracts they are relying on were entered into after the legislation came into force. On the facts, the contracts were entered into before the Act came into force.

The Court of Appeal also explained the significance of ***RSP Architects Planners & Engineers v. Ocean Front Pte Ltd*** [1996] 1 SLR 113 ("***Ocean Front***") in this regard. By virtue of the LTSA vesting the administration of the common property with the MCST, it was entitled to sue *in tort* with respect to the common property, in its own right.

Therefore, the rights of subsequent purchasers of condominium units for defects in the common property may be asserted through the MCST by relying on the MCST's own entitlement to sue in tort. Additionally, the MCST may be able to assert the rights of subsequent purchasers in cases where the rights under the original sale and purchase agreements for their units were assigned to them or were entered into after the CRTPA came into force on 1 July 2002.

The second issue was in relation to the claim in tort, whether the developer could avail itself of the defence of "independent contractor" against the MCSTs' claim in tort for damages for defects in the common property. The Court of Appeal affirmed the general rule and its application in the local cases of ***Ocean Front*** that the employer *is not liable* for an independent contractor's negligence in the execution of his contract.

Acknowledging that there are exceptions to the general rule, they found none of them relevant to the case. The MCST relied on the Housing Developers (Control and Licensing) Act (Cap 130, 1985 Rev Ed) and the relevant rules to assert that the developer could not delegate to an independent contractor the duty of building the condominium in a good and workmanlike manner. The Court of Appeal found that there was nothing in the legislation or the rules to support the MCST's assertion. In the Court's view, even the Building Control Act does not contemplate that the design and erection of the building in a development would be undertaken by the owner or developer personally. They also acknowledged that the legislature is far better equipped than the courts to deal with policy matters in the field of consumer protection as such matters may require limitations or safeguards.

Therefore, the application of the defence of "independent contractor" meant that the developers could only be liable if they failed to exercise proper care *in appointing* an independent contractor.

This newsletter is a biannual publication of the Society of Construction Law (Singapore). The views expressed by the contributors are their personal views and do not necessarily represent those of the Society.

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