

SINGAPORE CONSTRUCTION LAW NEWSLETTER



2006-07 Management Committee

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CHAIRMAN'S MESSAGE & REPORT OF ACTIVITIES

The International Construction Conference 2006

We are pleased that the International Conference held on 15 to 17 October 2006, was an overwhelming success, as unanimously acknowledged by the speakers and delegates. For this, we congratulate and thank the Organizing Committee, chaired by Michael Hwang SC, and the event organizers, Intellitrain Pte Ltd, as well as the speakers and chairs for the well-researched and entertainingly-presented papers and engaging panel discussions, as well as all participants at the Conference.

I invite you to view some photographs of the Conference at the SCL website. Some photographs are also included in this Newsletter.

I would like in particular to acknowledge and thank my predecessor, Mr. Chow Kok Fong, for first coming up with the idea during one evening, in the third quarter of 2005, of having an international conference, and for suggesting an international federation of Societies of Construction Law, and then indeed getting the project going by making initial contacts with the leaders of the other SCLs in the United



SCL Chairman, Mr Naresh Mahtani with Mr Chow Kok Fong, Mr Michael Hwang SC, Chairman of the organizing committee, and organizing committee members



Conference delegates

... continued from page 1 (Chairman's message)

Kingdom and other jurisdictions.

Proposed International Federation of SCLs

The Conference was indeed a useful gathering of representatives of equivalent SCLs and related organizations from the United Kingdom, Hong Kong, Malaysia, the United Arab Emirates, India and New Zealand. The representatives have met and are in communication to set up an International Federation of Societies of Construction Law, with envisaged reciprocal benefits for members of the Federation societies, and we will keep Members informed of these developments as they take shape.

The Attorney-General's Keynote Speech

In particular also, we wish to record our profound appreciation to the Attorney-General of Singapore, the Honourable Mr. Chao Hick Tin, for gracing the Conference Opening and delivering his Key-Note Speech.

We invite all members to read the full text of the Attorney-General's Keynote Speech at the SCL website. A summary of the points made in his Speech is also in this Newsletter (see page 3).

In his Key-Note address, amongst other noteworthy points, the Attorney-General invited the Society to look into certain current concerns in the construction industry – such as reviewing current standard contracts so that they are clear, adequate, beneficial to the parties and reduce the number of disputes; standards of conduct and practice claims consultants and professionals in the industry; and reducing the cost involved in resolution of construction disputes.

Steering Sub-committee

The Society has taken up the Attorney-General's suggestions and invitation to form a working party on these concerns and has appointed a Steering Committee, chaired by Mohan Pillai, which has drafted proposed terms of reference for the proposed "Working Groups" to look into the matters suggested by the Attorney-General under three broad categories, namely: (1) Review of the Standard Forms of Contract (2) Cost of Dispute Resolution and (3) Codes of Practice.

We are also following up with the Attorney-General's Chambers on this, and in due course, we will keep Members informed of the formation of the Working Groups, and will be perhaps holding seminars with members on these issues in the course of the year.

SCL Secretariat

To assist the honorary Management Committee in organizing the increasing number of SCL events, the Management Committee has appointed Intellitrain Pte Ltd under an on-going professional services and management contract to serve as SCL's secretariat.



Singapore's SCL Chairman, Mr Naresh Mahtani with SCL representatives from UK, UAE, Malaysia, Hong Kong and New Zealand

Note the SCL's secretariat address and contact numbers in this Newsletter and at our website.

Events in 2007

The Management Committee met on 11 December 2006 to plan events for the year, including the following proposed projects:

- 8 February 2007: *NEC3; The Construction Contract of the Future*
Talk by Nicholas Gould, Partner Fenwick Elliott LLP & Chairman of the Society of Construction Law (UK)
- 21 Mar 2007: *What Makes a Good Expert Witness?*
by Michael Cohen, Chairman Emeritus, Academy of Experts
- 15 May 2007: *Cocktail Evening*
An informal social gathering providing an opportunity to mingle with fellow members.
- 17 Jul 2007: *Joint Annual Conference with the Law Society of Singapore*

In addition, we will be hosting other talks and events in the course of the year, and in this connection, we do invite all members to contact the management committee or the Secretariat if they have suggestions as to talks by visiting experts on any topic of construction law which is of current interest.

On behalf of the Management Committee, I wish all Members a happy and successful year.

Naresh Mahtani
Chairman

Contributions

We welcome observations and comments from members on matters relevant to the construction industry. If you wish to submit a contribution, please email it to the Chief Editor at annenetto@hotmail.com. The submission deadline for the next issue is **15 March 2007**. 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.

SUMMARY OF THE ATTORNEY-GENERAL'S KEY-NOTE ADDRESS AT THE OPENING CEREMONY OF THE INTERNATIONAL CONFERENCE 2006

The Attorney-General, Mr. Chao Hick Tin, graced the Opening Ceremony of the International Conference 2006 on 16 October 2006. A full copy of the Attorney-General's Key-Note Address can be found at the Society's website at www.scl.org.sg, but in this summary, we set out some of the main points in his speech.

The Attorney-General congratulated the Society for taking the initiative in organising the inaugural international conference and for assembling a highly distinguished group of speakers from around the world and an impressive list of topics.

The participation of the Society of Construction Law in the construction industry was welcomed by the AG, who viewed the improvement of the quality of legal service to the construction industry as the Society's primary objective, as "enhanced legal services, efficiently and competently delivered, will translate into greater efficiency, higher quality and lower costs for the industry as a whole".

The AG's Chambers received mention in the context of the work they have been doing in the area of Construction Law, especially in terms of their contribution to the drafting of the widely used Public Sector Standard Conditions for Construction Contracts, or PSSCOC. The corporatisation of the Public Works Department and the establishment of more statutory boards to whom various aspects of governmental functions are outsourced were cited as events which impacted on the Construction Law work carried out by the Chambers. The Chambers are still involved in construction law work where the Government is a client in various construction projects. The AG affirmed that his Chambers will continue to work with other relevant bodies to make the necessary modifications to the standard term contract to reduce the incidence of disputes in the construction industry. In that regard, he supported the participation of the members of his Chambers in the Society's events to keep them alive to current and contemporary issues in the area of construction law.

The following three broad areas were identified by the AG as areas in the construction industry which could be improved, and he tasked to the Society to look into these areas:

- Reduction in the number of disputes — Citing the guidance given in the recent Court of Appeal decision of *MAE Engineering Services v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379, that the words in a contract should be accorded

their plain and ordinary meanings, the Attorney-General stated that perhaps this may be an opportune time for the society to take the lead in re-looking at the standard contracts to see, in the light of experience, how they could be further refined in order to reduce the incidence of disputes..

- Legal costs in dispute resolution — The Society could investigate the widespread perception that legal costs involved in construction dispute resolution had become prohibitive, and to make appropriate recommendations to remedy the situation.
- Standards of conduct — The Society could consider and draw up codes of practice reflecting appropriate standards of professional and ethical conduct for construction industry professionals.

The Attorney-General recognized that while the current objectives of the Society are enhancing professional knowledge and skills in construction law, the Society was also well placed to be a force in raising standards in the broadest sense.



Guest of Honour, Singapore's Attorney-General, the Honourable Mr Chao Hick Tin with some delegates

CASE NOTE

MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd [2005] 1 SLR 379

In most disputes arising out of building and construction contracts, the construction of the relevant contractual provisions is often the first step towards resolving the disputes. In *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR 379, the Singapore Court of Appeal touched upon the principles of construction in relation to building and construction contracts in Singapore. This case serves as a useful guidance for practitioners faced with the task of having to interpret contractual provisions in the future.

The Sub-Contract

The underlying dispute in the case arose from a sub-contract for air-conditioning, mechanical and ventilation ("ACMV") between the parties. The appellant, who was the ACMV sub-contractor for The Esplanade - Theatres on the Bay, invited the respondent to tender for the supply and installation of fire-rated board cladding to the ACMV ducting for the project. The respondent initially

quoted a price of \$95 per m² for the supply and installation of two-hour fire-rated board cladding which, at the request of the appellant, was revised to \$85 per m² and subsequently to \$80 per m².

... continued from page 3

The relevant sub-contract between the parties provides for the "Supply, Delivery, Installation, Warranty & Endorsement of 2 Hours Fire Rated Board Cladding to 5,000M² of ACMV Ductwork (sic)" for the "agreed Lump Sum price of S\$400,000.00 (sic)" (emphasis added).

The parties had also prepared certain pre-contract documents, viz. forms T/007 and T/008, which state that "the final lump sum offer price to [the appellant] is S\$400,000/- (Singapore Dollars Four Hundred Thousand Only) (5,000m² x \$80/m²) (sic)" and that "the supply, delivery, installation, warranty and endorsement of 2 Hours Fire-Rated Board Cladding to ACMV Duct with 'Cape' Monolux 40 Board System for a lump sum price of \$400,000/- (sic)" (emphasis added).

During the course of the project, the appellant paid to the respondent interim payments in the amount of S\$687,779.80, based on delivery orders verified by the appellant's representatives. The respondent, by an action in the High Court, claimed from the appellant the balance interim payment in the sum of S\$310,305.61. The appellant, on the other hand, counterclaimed for the sum of S\$168,664.29, which it claimed it had overpaid the respondent. The High Court gave judgment in favour of the respondent and the appellant appealed the High Court's decision.

The Issue

The issue before the Court of Appeal was whether, on the true and proper construction of the sub-contract, payment to the respondent should be based on the uncladded or cladded area of the ACMV duct. If payment is calculated based on the former, the respondent's entitlement would be limited to the lump sum price of S\$400,000.00 and the appellant would be entitled to recover the sum of S\$168,664.29 from the respondent as excess payment. If, however, payment is calculated based on the latter, the respondent would be entitled to payment of the balance sum of S\$310,305.61.

Principles of Construction of Contract

In the course of deciding the dispute, the Court of Appeal laid down the following principles in relation to the construction of contracts:

- (1) the object of the construction exercise is to determine the mutual intention of the parties as expressed in the words of the document. The task of ascertaining the intention of the parties must be approached objectively;
- (2) the words used by the parties should be construed in their ordinary and natural meaning, unless the context requires otherwise;
- (3) every contract should be construed as a whole and no words should be ignored, omitted or glossed over;
- (4) when construing a contract, the court must also look at the factual matrix in which the agreement was made. In this regard, evidence of an antecedent agreement is an objective fact that the court should take into account as part of the relevant "factual matrix"; and
- (5) the perceived "commercial sense" of the court cannot be allowed to override the words of a contract where they are clear and unambiguous.

Application of the Principles

Based on the above principles, the Court of Appeal held that the language of the sub-contract was plain and unequivocal and on

a plain and ordinary reading of the sub-contract, "5,000m²" must have referred to the area of 5,000 m² of the uncladded duct since the cladding was to be installed "to 5,000m² of ACMV Ductwork" under the sub-contract.

In this regard, the fact that the quoted area of 5,000m² was only an estimate did not mean that it carried no weight. Reading the sub-contract as a whole, the area of 5,000m², taken together with the lump sum price of \$400,000, was an indication of the basis of payment in the sub-contract. Since the parties had explicitly agreed that the appellant would pay the respondent \$400,000.00 for cladding 5,000m² of the uncladded duct, this would suggest that the revised rate of \$80 per m² should apply to the uncladded duct.

Further, the Court of Appeal held that the pre-contract documents clearly provided that the respondent would be paid "S\$400,000... (5,000m² x \$80/m²)" for the cladding work. Thus, the above formula was obviously a vital component of the basis of payment under the sub-contract. In the present case, the Court of Appeal was of the view that even if the respondent could prove the existence of any oral agreement to the contrary, the parol evidence rule excluded any extrinsic evidence being introduced to contradict or vary the terms of the written agreement.

The Court of Appeal further held that even if the court below was of the view that the respondent had entered into an improvident bargain, the plain meaning of the words used in the sub-contract cannot be overridden by what the trial judge perceived to be a more commercially sensible arrangement. The court's task, in any case, is to ascertain what the parties mean by the words they use in a contract and enforce it according to its terms, and not to rewrite the contract.

Estoppel by Convention

In any event, the fact that the appellant had paid S\$687,779.80 to the respondent (in excess of the lump sum price of S\$400,000.00 under the sub-contract) should not, in the Court of Appeal's view, be taken into account when construing the sub-contract, as it is well established law that the court may not look at the subsequent conduct of the parties to interpret a written agreement, except when variation or estoppel is in issue. However, in the present case, the respondent had failed to establish that the appellant's payments were made based on a shared assumption that the contract price should be derived from the area of the cladded duct. Hence, no estoppel by convention was found in this case.

Based on the Court of Appeal's analysis and application of the principles of construction as stated above, the appeal was allowed. The respondent was, consequently, ordered to refund the judgment sum to the appellant and pay the appellant S\$168,664.29 on the counterclaim.

Comments

The principles applied by the court on the construction of the contract documents are generally well established in most common law jurisdictions. However, their application by the court serves as a convenient reminder to parties to construction contracts of the need for careful drafting to ensure that the parties agreement on scope of work and associated prices is clearly and precisely set out in the contract.

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).

It is no hassle to join. Just fill up your Application for Membership Form (downloadable from our website: www.scl.org.sg) with your particulars and mail it with your cheque for the Membership Administration Fee and First Subscription Fee (for year 2006) to:

Secretariat
Society of Construction Law (Singapore)
11 Collyer Quay, #06-02 The Arcade
Singapore 049317
Tel: 65-62261060
Fax: 65-65572751
Email: membership@scl.org.sg

For Full Membership, the Membership Administration Fee is S\$120.00. First Subscription Fee for year 2007 is S\$150.00 if

you join in January 2007 or pro-rated @ S\$12.50 per month if you join after January 2007.

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 2007 or pro-rated @ S\$6.00 per month if you join after January 2007.

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

You may download our Application for Membership Form from our website: www.scl.org.sg <<http://www.scl.org.sg>> or call SCL Secretariat to fax or mail our Application for Membership Form to you.



Pre-Conference cocktails



Conference dinner



Mr Michael Hwang SC, Chairman of the organizing committee, during the Q&A session of the Conference



Mr Joseph Liow during the Q&A session of the Conference

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NEW
TITLE

First published glossary of construction contract terms in Asia!

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- The Honourable Justice Andrew Ang
Judge of the Supreme Court of Singapore

*C*onstruction Contracts Dictionary offers a working definition of contractual and related technical terms commonly encountered in the administration of a construction contract.

The entries, listed alphabetically, fall under three main heads:

- Terms and expressions used in the relevant statutes, standard forms and contract documents such as drawings and specifications.
- Terms which feature in the law relating to contract and tort which apply to the construction industry and disputes resolution.
- Technical and general terms and expressions which are frequently featured in construction arbitration and negotiations.

In addition, footnotes have been added for many of the entries to facilitate reference to statutes, case law, source documents and other reference materials.



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