



SINGAPORE CONSTRUCTION LAW

SOCIETY OF CONSTRUCTION LAW (SINGAPORE) OFFICIAL NEWSLETTER

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Newsletter

Editors: Jenny Teo & David Shuttleworth

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Chairman's Message



As a mid-term report, I shall concentrate on two main areas - the Council and their work on the various committees and the 'areas of focus' I spoke about in my first message as Chairman in the SCL(S) Newsletter (Oct 2012, No.18).

THE COUNCIL'S WORK IN ITS FIRST YEAR

In Oct 2012, I introduced the core, backbone and "new blood" groups of individuals who stepped up with me to form the Council for the 2012-2014 term.

Several of the council members started off the term a little jittery getting up to speed with our well entrenched Society and coming to terms with the full extent of the work on each of the committees. We finally settled into the routine by early this year.

The reports by the respective chairs of the committees during the Annual General Meeting held on 21 August 2013 are evident of the great work of each member. I thank each of them and SCL(S) members that have been working tirelessly on these committees -- Uma Menon with the Publication and Alex Wong with the Website Research and Resources committees 2012-2013 -- and Lim Tat and Tan Kee Cheong as our honorary Auditors for the year.

AREAS OF FOCUS

Here too, as I had highlighted in my first message, sound training, engaging the younger generation and reaching out to the Construction Industry are the key focus areas.

I am pleased to report that we have achieved a considerable amount in terms of training (through the Professional Development programme) and engaging the Construction Industry by collaborating with various other construction industry related institutions and bodies, through joint and/or cross programmes. In this second half of our term, we intend to follow through on a couple of the professional development items canvassed in the first half of our term and focus on engaging the younger generation and implementing our corporate social responsibility initiatives.

On the international front, the number of SCLs across the world has steadily grown to about 14 across several continents including Europe and South America. Several initiatives both ongoing and upcoming will provide our membership with a greater reach internationally.

THE YEAR AHEAD 2013 – 2014

It has been said that the last 5 miles or so of a marathon are the hardest. The Council is only halfway through its term. Several programmes and initiatives are still in their infancy and we look forward to a fruitful second half of our term and hope more members can come onboard the committees.

Thank you,
Anil Changaroth

SCL(S) Annual Construction Law Conference 2013 - 11 September 2013

Dr Chris Vickery

Architects Team 3 Pte Ltd

The 2013 edition of the SCL(S) Annual Construction Law Conference was held at the M Hotel on 11 September. After an opening address by the Society's Chairman, Anil Changaroth, the keynote address was delivered by Mr Seah Choo Meng, Director of Langdon & Seah Singapore. Mr Seah considered the implications of the recent changes to the foreign labour policy on productivity in the construction industry. With a perspective shaped by more than forty years in the industry, Mr Seah traced the development of the foreign worker policy since the 1970's and suggested that, until recently, the policy was not conducive to productivity. The recent changes in which greater restrictions had been imposed would cause some temporary anguish but would have the eventual effect of increasing productivity and decreasing costs.



Visiting speaker Ms Rashda Rana, Barrister with Ground Floor Wentworth Chambers & Atkin Chambers, dwelt on the question of implied obligations in construction contracts. The paper centred on the issue of good faith and examined decisions from Australia in which the principle of good faith had been implied. Noting that the concept of good faith was not currently recognised in England, Ms Rashda considered the prospects for the emergence of the notion in the English courts.



Considering the matter of restraint on calls on performance bonds were Professor Michael Furmston from the Singapore Management University and Mr Edwin Lee, Partner with Eldan Law LLP. The former examined the limited circumstances under which an injunction may be sought to restrain demands under a performance bond, whilst Edwin Lee set out the position in Singapore.

Singapore construction industry, the use of Building Information Modelling ("BIM") was put under the microscope by Mr Paul Wong, Partner with Rodyk & Davidson LLP, who considered the legal implications attached to the use of this technology.

A particularly topical field of interest in the

Mr Christopher Chuah, Partner with WongPartnership LLP, launched the afternoon session with an analysis of the latest judicial pronouncement on frustration and force majeure in construction contracts, with reference to the recent decision in *Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2013] SGHC 127. A particular point of interest was Mr Chuah's analysis of the Singapore standard form contract provisions in relation to force majeure, wherein, it was noted, some forms lacked definition of the concept.

Ms Nerys Jefford, a visiting Queens Counsel from Keating Chambers, gave an update on international construction law from the UK perspective. In a presentation laced with anecdotes Ms Jefford led the delegates through issues relating to letters of intent, delay, professional negligence, arbitration and the NEC3 contract.



Finally, Mr Chow Kok Fong, Managing Director of Equitas Corporation Pte Ltd, looked at the abuse of process in adjudication proceedings. He noted the frequent raising of this issue in Singapore since the Court of Appeal case of *Chua Say Eng v. Lee Wee Lick Terence* (2013). Mr Chow contrasted the situation in Singapore with that in UK and noted fundamental differences in approach.

To round off the evening, conference participants were treated to an evening of networking cocktails sponsored by Sweet & Maxwell Asia in support of the launch of "*Singapore SIA Form of Building Contract*" authored by Mr Chow Kok Fong and graced by Honourable Justice Belinda Ang. Thus ended a most agreeable day notable for the quality of the speakers as well as for the breadth of the presentations. The excellent turn-out for the event was clearly no coincidence.

Effects of Settlement Agreements on Payment Claims; The Repeated Subject of Repeat Claims; and the Need for Changes and Clarifications in the BCA SOP Act

– *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd [2013] SGHC 95*

Naresh Mahtani
Eldan Law LLP

An Adjudication Determination awarding a sum of \$326,614.29, interest and costs to sub-contractor Vivaldi (S) Pte Ltd (“Vivaldi”) against main contractor Admin Construction (“Admin”) was issued on 18 January 2012. Admin led an application to the High Court to set aside the Determination upon several grounds.

The main ground for Admin’s application to set aside the Determination was that prior to the payment claim in question, the parties had already arrived at a settlement agreement (“the Settlement Agreement”) which settled and extinguished the subject matter of the payment claims in question in the adjudication.

In addition, Admin submitted that the payment claims in question were really “repeat claims” (i.e. repeats or previously submitted claims) and hence were not valid claims for submission to adjudication; and furthermore were not properly issued as “payment claims” intended to come under the ambit of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“the SOP Act”).

THE ADJUDICATION

At the Adjudication, Admin contended that the payment claim which was submitted to adjudication was invalid as it was really a “repeat” of an earlier payment claim; and also that the parties had already settled the final account for works under the sub-contract by the Settlement Agreement of January 2011, whereby Vivaldi had agreed that its entitlements to payments were to be reduced by set-offs for certain rectification costs, leaving a full and final settlement sum of \$176,840.83 due to Vivaldi for all works done under the sub-contract. The Settlement Agreement in this case stated expressly that it was a “*full and final settlement for all the Works under the Sub-Contract*” and that “*all Final account [sic] issued earlier if any, shall be superseded by this Statement of Final Account*”.

However, Vivaldi claimed that its signatory was misled by Admin into signing the agreement in January 2011 as she was “Chinese-educated and did not understand English”; and therefore Vivaldi was entitled to make further payment claims, which it did in February 2011, October 2011 and November 2011 allegedly for works done under the sub-contract.

On the subject of “repeat claims”, the Adjudicator concluded that the prior payment claim was not really intended as a payment claim, so therefore he need not consider and decide if the payment claim before him was a repeat claim. The Adjudicator found that Admin’s alleged payment response was served outside the permitted time, therefore it was not a valid payment response; and he was consequently not permitted under s. 15(3)(a) of the SOP Act to consider the Settlement Agreement as a defence against the payment claim. The Adjudicator apparently accepted Vivaldi’s payment claim and awarded the sum of \$326,614.29 (including GST), interest and costs.

ADMIN’S APPLICATION TO SET-ASIDE

In the High Court, Admin raised several grounds in its submissions: that the payment claims were invalid because they had been settled by a prior Settlement Agreement; after which there were really no further construction works; and that in any event, the subsequent payment claims were invalid as “repeat claims”. Admin argued further that the claim submitted to adjudication was not really a “payment claim” under the SOP Act, as there was no indication on the claim that it was a claim under the Act.

HIGH COURT: ADJUDICATOR HAD NO JURISDICTION, AS PAYMENT CLAIMS HAD BEEN SETTLED BY PRIOR SETTLEMENT AGREEMENT

Loh J. set aside the Adjudication Application on the ground that the Adjudicator had no jurisdiction to hear the dispute, since all disputes between the parties in relation to payment for the sub-contract works had indeed been settled by a subsisting prior Settlement Agreement in January 2011 between the parties.

Therefore, at the date of Vivaldi’s adjudication application (i.e. 28 December 2011), there was no dispute in relation to the relevant payment claim capable of being referred to adjudication. It followed that the adjudicator had no authority or jurisdiction to deal with the adjudication application, and the Determination hence must be set aside.

There is now therefore authority from the High Court that upon a payment dispute being settled by a settlement agreement, it could not be the subject of a payment claim under the SOP Act and the adjudicator would not have jurisdiction to determine an adjudication application brought upon such a claim.

This is even if it is alleged that the settlement agreement was induced by duress or misrepresentation. This is because,

as affirmed by the High Court, a challenged settlement agreement is not void *ab initio*: it is only a *voidable* contract and remains in force unless and until it is set aside. In this case, Vivaldi had not taken any steps to set aside the Settlement Agreement, even though it contended at the adjudication that the signatory did not understand English and was misled into signing the Agreement. In making the decision, Loh J cited and agreed with the decision and rationale in *Shepherd Construction Ltd v Mecright Ltd [2000] BLR 489* that a full and final Settlement Agreement superseded a contract and had the effect of thus cancelling all relevant claims under the contract.

In making this decision, Loh J also reinforced the decision of the Court of Appeal in *Lee Wee Lick Terence (alias Li Wili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering)* (the “*Terence Lee*” case) that when an adjudicator’s jurisdiction is challenged by any reason, he cannot then decide his own competency to act as an adjudicator; this is a matter for the courts; and in a case like this, the adjudicator’s determination is thus reviewable by the courts. In this case, if there is a valid and binding Settlement Agreement already settling the subject matter of the payment claim in question, then it is an issue arising in relation to the validity of the appointment of the adjudicator and this is a jurisdictional issue which can and must be reviewed by the court.

The judgment in *Vivaldi* also expresses that in a setting aside application, a court is not precluded by section 15(3) of the SOP Act nor by the principles of *estoppel* from considering any jurisdictional defence, even if the defence was not raised in a payment response or at the adjudication stage related to the jurisdiction of the adjudicator. This is because, as confirmed by the Court of Appeal in *Terence Lee*, challenges to the jurisdiction of an adjudicator were in the first place not matters for the adjudicator to decide, but rather were matters for the court to decide.

HIGH COURT’S “OBITER” COMMENTS ON THE SUBJECT OF ‘REPEAT CLAIMS’ AND OTHER ARGUMENTS RAISED BY ADMIN

The setting aside of the Adjudicator’s determination on jurisdictional grounds, in the words of the court “*disposes of the matter*”. However, as mentioned above, the parties had made various secondary submissions on the subject of allegedly “repeat claims” and the validity of the payment claim in question. Having set aside the Adjudication Determination, Loh J then proceeded, “for completeness” and on an obiter basis, to deal with these other issues argued by the parties.

NOT NECESSARY FOR A PAYMENT CLAIM TO STATE THAT IT IS “MADE UNDER THE ACT”.

Admin argued that the payment claim was invalid, as it was ambiguous, bearing no indication whatsoever that it was issued as a “payment claim” under the SOP Act, citing the judgment in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd [2010] 3 SLR 459*. Loh J. did not agree with Admin’s argument on this point; and reinforced the decision of the Court of Appeal in *Terence Lee* that (i) the SOP Act does not require a payment claim

to state expressly that it is made under the SOP Act; (ii) the emphasis under the SOP Act on the respondent being given notice of certain information about the claim, and the absence of such an express statement (ie that it is made under the SOP Act) cannot make it any less a payment claim if it otherwise satisfies all the formal requirements under the SOP Act and Regulations.

THE REPEAT CLAIMS

The High Court heard that Vivaldi had submitted payment claims in February 2011 (“the First PC”), October 2011 (“the 2nd PC”) and November 2011 (“the 3rd PC”) for works done under the sub-contract, with the 3rd one being completely identical to the 2nd PC. Loh J. agreed that the 3rd PC was a repeat of the 2nd PC. However, as declared by the Court of Appeal in *Terence Lee*, there was essentially no prohibition against repeated unpaid claims under the SOP Act, unless of course that claim had already been dismissed on its merits in a prior adjudication. Loh J therefore did not agree with Admin’s argument on this ground (but this, as mentioned above was obiter as the Adjudication Determination was already being set aside on jurisdictional grounds).

AREAS FOR REFORM

The High Court raised, on an *obiter basis*, several areas for possible reform:

- (i) **Very Late Payment Claims and “final” claims:** Firstly, whether it was permissible for a claimant to make a payment claim long after the work had been completed and the contract had ended (As in this case, where the works had ceased in January 2011, but in which the payment claim was made in October 2011 and adjudication process began in November 2011). In Loh J’s view, since the purpose of speedy adjudications under the SOP Act is to facilitate payment of progress payments and cash-flow for contractors, adjudications commenced long after the issue of payment claims could be an abuse of process under the SOP Act, especially if they involved complex issues which should proceed to arbitration or the courts, rather than as speedy SOP adjudications.
- (ii) **Repeat Claims:** Second, the notion of “repeat claim”, while now being a term which is commonly used in the industry, was not defined in the SOP Act itself. Some thought should be given to this, as there was a possibility that repeat claims could be abused, and tribunals could be at cross-purposes when dealing with the definitions and notions of “repeat claims”.
- (iii) **Procedures for Jurisdictional challenges:** Third, it might be necessary to consider how to deal with challenges to an adjudicator’s jurisdiction given the tight timelines under the SOP Act.

Loh J. stated in his judgment: “*It is timely for the Building and Construction Authority, the Singapore Mediation Centre (the authorized nominating body under the Act) and other stakeholders to discuss these issues and to see if the Act is fulfilling its functions and if not, to consider suitable amendments to the same.*”



Naresh Mahtani (FSiArb, FCiArb) has been in legal practice for three decades, with local, regional and international experience in commercial transactions, construction, engineering and infrastructure projects work, oil and gas construction projects, and dispute resolution.

He was a former Chairman of the Society of Construction Law, Singapore, and is currently Hon. Gen. Secretary of the Singapore Institute of Arbitrators. He has been appointed as Arbitrator and Arbitration Counsel in major construction and international arbitrations involving construction and commercial disputes in the building & construction industry and oil & gas industry in Singapore, Indonesia, Malaysia and the region, and is on the panel of arbitrators of various arbitral institutions.

As an accredited Adjudicator with the Singapore Mediation Centre, he has been appointed as adjudicator in substantial construction adjudications.

BCA Expands Accessibility Code for an Inclusive Society

The Building and Construction Authority (BCA) introduced its new Code on Accessibility for the Built Environment ("the Code") in August 2013. The Code is a comprehensive set of requirements mandating building owners and professionals to meet a minimum standard of accessibility in our buildings and public spaces. For the first time, the Code includes requirements catering to families and more requirements catering to the elderly and persons with disabilities, supporting the Singapore Government's efforts in building an inclusive society.

Comprising representatives from government agencies, industry associations and many voluntary welfare organisations, the tripartite Accessibility Code Review Committee first reviewed the Code at the end of 2010. They placed more emphasis on Universal Design concepts that benefit more Singaporeans, and considered the needs of parents with infants and young children. This is the fourth review of the Code since BCA introduced it in 1990.

New projects and existing buildings which will undergo additions and alterations will have to follow the new Code when they are submitted to BCA for regulatory approval from 1 April 2014. The seven-month grace period will give the industry, building professionals, developers and owners enough time to consider the new requirements when planning their projects.

FAMILY-FRIENDLY FACILITIES

For families, the Code specifies that public buildings and spaces frequented by families such as transport interchanges, supermarkets, sports complexes, public swimming pools, eating establishments, markets, hawker or food centres and shopping complexes must have nursing rooms, toilets that young children can use, and family car parking spaces.

ELDERLY-FRIENDLY FACILITIES

For the elderly and persons with mobility impairment,

the Code includes more toilet compartments with grab bars to give them additional support for themselves. The dimensions for water closet and urinal provision have also been refined.

ACCESSIBILITY FOR HEARING IMPAIRED

For the safety of persons with hearing disability, the Code specifies hearing enhancement system to be provided in buildings with function rooms, halls and auditoriums used for meetings, lectures, performances or films and in at least one of the public information/service counters for cinema, theatre, concert hall, stadium, museum, theme park, purpose built family amusement centre, transport station, interchange and passenger terminal.

ACCESSIBILITY FOR VISUALLY IMPAIRED

For the visually impaired, the Code mandates wider corridors, non-slip strips at staircases and tactile warning indicators at hazardous areas such as kerb ramps and road crossings. To help persons with visual impairment find their way in a building or public space, Braille information at staircases and toilets will be specified for publicly accessed buildings.

Requirements for residential and industrial buildings to improve accessibility and comfort for all were also introduced. For more information, please visit BCA's website at www.bca.gov.sg.

W Y Steel: Implications of Failure to Lodge Payment Responses

Christopher Chuah & Tay Peng Cheng

WongPartnership LLP

Where the respondent failed to file a payment response as required under the Building and Construction Industry Security of Payment Act, it was held that the adjudicator was correct in making a determination without recourse to submissions later put forward by the respondent. The case of *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] SGCA 32 (Singapore, Court of Appeal, 30 April 2013) considered whether a contractor that had failed to file a payment response to a payment claim by a sub-contractor could later, at the adjudication of the claim, make submissions as to counterclaims it was asserting against the sub-contractor. It also considered whether a stay of payment should be ordered where the sub-contractor was in financial difficulty.

FACTS

W Y Steel Construction Pte Ltd ("Contractor") was a registered contractor and licensed builder. It was appointed by the Singapore Turf Club as the main contractor to carry out alterations to the Club's grandstand. The Contractor then entered into a sub-contract with Osko Pte Ltd, a licensed builder but not a registered contractor ("Sub-Contractor"). The Sub-Contractor was to perform a substantial part of the work under the Singapore Turf Club contract.

After work on the contract had continued for almost a year, the Contractor purported to terminate the sub-contract. The Sub-Contractor continued working under the sub-contract for another two-and-a-half weeks, until the stipulated completion date set out in the sub-contract. It then served on the Contractor a payment claim under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOP Act") for about S\$1.76 million. However, contrary to section 11(1)(b) of the SOP Act, the Contractor failed to file a payment response within seven days.

The Sub-Contractor then filed an adjudication application for adjudication of its payment claim. Again the Contractor did not file a response. At an adjudication conference, the Contractor claimed that it was ignorant of the timelines mandated by the SOP Act but urged the adjudicator to nonetheless consider its submissions. The Contractor claimed that after taking into account its own claims against the Sub-Contractor, it was in fact the Sub-Contractor that owed it money.

The Sub-Contractor pointed to section 15(3) of the SOP Act. This provides that the respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including any cross-claim, counterclaim and set off, unless the reason was included in the relevant payment response provided by the respondent to the claimant. It submitted that the Contractor, having failed to file a payment response, was hence prevented from bringing to the notice of the adjudicator new matters that had not been raised in a timely payment response. Further, the adjudicator was not permitted to consider any such new material.

The Contractor subsequently emailed its submissions directly to the adjudicator, urging the adjudicator to consider its submissions. The adjudicator issued his adjudication determination ("Determination") ordering the Contractor to pay the Sub-Contractor the full sum ("Adjudicated Sum") claimed. The adjudicator agreed that he was precluded by section 15(3) of the Act from considering the Contractor's submissions as they were not included in any valid payment response.

The Contractor applied to court asking for the Determination to be set aside because the adjudicator had no jurisdiction to adjudicate the Sub-Contractor's payment claim, had contravened the rules of natural justice, and had erred in fact and law. It also sought a stay of the Determination on the basis that the Sub-Contractor was in financial difficulty.

The Singapore High Court denied its application, and the Contractor appealed to the Court of Appeal.

VALIDITY OF THE DETERMINATION

The Court considered section 15(3) of the SOP Act and held that it was Parliament's intention that a respondent should ventilate his reasons for withholding payment within the timelines prescribed by the Act or suffer the consequences, namely losing the opportunity to ventilate those reasons at all at the adjudication stage. It noted that although under section 16(3)(c) of the SOP Act, an adjudicator must comply with the principles of natural justice, including giving the parties an opportunity to be heard, such rules were always contextual. Where the SOP Act itself states that certain material is not to be considered in certain circumstances, this must have the effect of qualifying some other provision that imposes a general requirement that the principles of natural justice must be applied.

The Court therefore held that the natural construction of the SOP Act should not be strained to accommodate cases such as the present, where a respondent has failed through his own lack of diligence to file a payment response. The Court further held that even where no response has been filed, an adjudicator must make a determination, and in doing so, it is incumbent on him to consider the material that is properly before him and which he is permitted to

consider. The adjudicator had therefore had the jurisdiction to decide the matter before him. Accordingly, the Court affirmed the High Court's decision not to set aside the Determination and dismissed the appeal.

STAY OF THE DETERMINATION

With respect to its stay application, the Contractor claimed that there was evidence that the Sub-Contractor was in financial difficulty and therefore might not be able to repay the Adjudicated Sum if it subsequently failed to successfully defend the claim that the Contractor had brought against it.

The Court held that a stay of enforcement of an adjudication determination may ordinarily be justified where there was clear and objective evidence of the successful claimant's actual present insolvency, or where the court was satisfied on the balance of probabilities that the money would not ultimately be recovered if the dispute between the parties was resolved in the respondent's favour. Furthermore, a court may properly consider whether the claimant's financial distress was, to a significant degree, caused by

the respondent's failure to pay the adjudicated amount and, also, whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract. The Court further stated that while it was prepared to recognise the possibility of granting a stay of enforcement of an adjudication determination because of the possibility of a different outcome emerging eventually, a stay would not readily be granted having regard to the overall purpose of the SOP Act, which was precisely to avoid and guard against pushing building and construction companies over the financial precipice.

In this case, the Court noted that the Contractor was by far the biggest claimant against the Sub-Contractor. If the full Adjudicated Sum were to be released to the Sub-Contractor, it would settle in full most of the outstanding claims against it. In addition, there was no strong evidence showing that the Sub-Contractor was no longer in business. Accordingly, the Court denied the stay application and ordered that the Adjudicated Sum be released to the Sub-Contractor.



Christopher CHUAH heads the Infrastructure, Construction & Engineering Practice and is a Partner in the China Practice. His main areas of practice encompass both front-end drafting/advice and construction disputes, both litigation and arbitration. Christopher has acted as leading counsel in numerous reported landmark cases on construction law and also for subcontractors, main contractors and developers in numerous arbitration disputes both domestic and international. Christopher is a legal advisor to the Singapore Contractors Association Limited, as well as a member of the Committee for International Construction and Building Contracts. He has also been appointed to the Singapore International Arbitration Centre's Main Panel of Arbitrators and is also on the Panel of Arbitrators of the Kuala Lumpur Regional Centre for Arbitration (KLRC). Christopher is an accredited adjudicator under the Building & Construction Industry Security of Payment Act (Cap 30B), who is

part of the first group of such appointments. He is a member of the Construction Adjudicator Accreditation Committee which was formed by the Singapore Mediation Centre to assist with the training and accreditation of adjudicators. He is admitted to the English Bar and to the Singapore Bar.



TAY Peng Cheng heads the Energy & Projects Practice and is the Deputy Head of the Infrastructure, Construction & Engineering Practice. His main areas of practice are litigation and arbitration, with focus on construction and engineering projects, civil and commercial disputes and property disputes. Peng Cheng has appeared in Court and arbitrations on numerous matters, including acting for and advising developers, contractors and consultants in disputes arising out of construction and engineering contracts, and supply agreements. In addition to the contentious aspect of construction and engineering contracts, Peng Cheng is also involved in the drafting and review of contracts for commercial plants and installations, project documentation and construction-related documents, as well as the management of construction claims. He is admitted to the Singapore Bar and is an accredited

adjudicator appointed under the Building and Construction Industry Security of Payment Act (Cap 30B).

SCL(S) Annual General Meeting cum 5th Annual Dinner - 21 August 2013

Zoe Stollard

Honorary Secretary 2012 – 2014



As befitting tradition, SCL(S)'s Annual Dinner, now into its 5th year, was held in the same premises of Amarone Restaurant, located at 168 Robinson Road #01-08, Capital Tower, Singapore.

After the close of the Annual General Meeting earlier that evening, the Chairman Anil Changaroth (on behalf of the Social and Outreach Committee Chair, Sunny Sim, who was away on official business) warmed up the dinner by welcoming all members and guests. He thanked the sponsors: GS Engineering & Construction Corporation (for the Contractors), Rider Levett Bucknall (for the Consultants), and Straits Law Practice LLC (for the Law Firms) for their generous sponsorship.

Both Anil and later David Shuttleworth (the co-chair of the Publications committee) introduced the after dinner light-hearted speech. The speaker is annually alternated between the past chairs of the SCL(S) and our collaboration partners from the construction industry. This year, we welcomed Dr. Quah Lee Kiang as our speaker: She is a member of the Royal Institution of Chartered Surveyors (RICS) Asia, Singapore and Asia Pacific Sustainability Boards.

With that, more than 70 members, guests and partners were treated to the evening's unique 4-course wine-pairing dinner in the New York-styled Italian restaurant. Chef-cum-Architect Silvio Morelli (who took over the reins of this 170 - seater beautifully appointed restaurant in April 2013) rolled out a classic Italian dinner accompanied with generous free flow of sparkling and red wine selections. The quality of food was matched by the staff's friendly and responsive commitment to service.



Amongst the friendly chatter and networking in the warm ambience of the cosy restaurant, Dr. Quah delivered her talk on "CONSTRUCTION: Prequel & Sequel". With graphic and animated slides, Dr. Quah's topic was informative, entertaining and thought-provoking.

Vice chairman Paul Sandosham wrapped up the late evening by thanking all in attendance with a reminder to all to look forward to upcoming events, including the SCL(S) Annual Construction Law Conference on 11th September 2013.

Conditions Precedent: A Lesson Learned

Steven Yip

Minter Ellison Hong Kong

While the term 'conditions precedent' has become a standard feature of construction contracts today, parties do not always realise the full implications of its use. Exemplifying this, the 2012 Hong Kong Court of First Instance judgment of *Newell Curtain Wall & Engineering Co Ltd v Sunyards Engineering Ltd* casts significant light on the potential consequences that can arise from the use of such clauses.

The case itself involved a fairly typical sub-contract situation in Hong Kong. Newell was a nominated sub-contractor working on the Po Lin Monastery restoration project on Lantau Island. Sunyards was a sub-sub-contractor specialising in the production and supply of Glass Reinforced Plastic (GRP) for Newell.

Sunyards' quotation, as accepted by Newell, was subject to a number of terms and conditions (Contract), including the following clause (Condition): *'The contract will [be] effective upon mock up approval by the Architect and Po Lin Monastery.'*

The judge effectively accepted the totality of Newell's factual evidence. In summary, Newell made several advance payments to Sunyards and prepared the required shop drawings to facilitate Sunyards' work. Another Chinese architectural specialist further provided Sunyards with wooden moulds, used as visual representations of the final products.

Pursuant to the Contract, Sunyards was required to prepare fabrication drawings for individual components. However, the Court found that only a number of such drawings were in fact produced. In addition, the factory where production was to take place (which a Sunyards' director had incorrectly claimed to own) was very disorganised, with inadequate or non-existent inspection or quality control measures in place and the testing that was required by the Buildings Department had not been carried out. The Chinese architectural specialist also rejected Sunyards' mock up on the basis that Sunyards had failed to provide sufficient facilities, manpower, measures of quality control and supervision for the production of the GRP works.

Accordingly, Newell did not proceed with Sunyards' appointment and claimed for the refund of advance payments while Sunyards counterclaimed for loss and expense caused by what it alleged were Newell's repudiatory breaches.

At issue here was whether this was a conditional contract and, if so, whether the condition in question was a condition precedent, and whether it had been complied with.

Drawing from the authoritative discussion of the issues in the leading textbook *Chitty on Contracts*, the judge observed that a condition is a condition precedent if it provides that

the contract is not to be binding until the specified event occurs. A party may undertake to use reasonable efforts to bring about the specified event, where for example the contract is said to become effective upon a particular party obtaining a certain licence or where the approval of a third party is required. In these situations, the failure to use reasonable efforts to comply with the condition precedent may result in the party becoming liable for damages and the judge found that this was the situation here.

Relying on established principles of contract interpretation, the judge emphatically rejected Sunyards' submission that the contract was ambiguous.

He held that the Condition was in fact a condition precedent, that this had not been complied with due to the absence of approval as required and that this failure was primarily due to Sunyards' failure to take the action reasonably necessary to enable the condition precedent which the parties had agreed should be met. Sunyards had also failed to claim a quantum meruit, having relied entirely on its argument that a contract had come into existence. Accordingly the court adopted what it described as a restitutional approach to avoid unjust enrichment on either side. The court therefore ordered Sunyards to refund all advance payments to Newell (after deducting certain items paid by Sunyards).

PRACTICAL IMPLICATIONS

This case stands as a timely reminder for parties entering into contracts that due regard must be paid to requirements such as conditions precedent which if clearly drafted will be applied by the court. Failure to satisfy a condition precedent can expose a party to the risk of being unable to recover losses and expenditure incurred in its attempt to satisfy that condition where a dispute does arise.

Another point for the future: Sunyards' damages claim was also poorly pleaded and this may have affected the outcome as far as quantum if not liability was concerned.

The condition precedent in this case (which required Sunyards to incur expenditure prior to contract award) might have been seen by a court in different circumstances as unduly harsh. The judge found however that it was a reasonable commercial risk for Sunyards to have taken. Finally, he was also clearly influenced by the misleading nature of much of Sunyards' evidence, a further salutary lesson for would-be litigants.



Steven is one of the partners in the Construction Engineering and Infrastructure group in the Hong Kong office of Minter Ellison. He has extensive experience advising on construction project issues and dispute resolution in Hong Kong and the Asian region. He first qualified as a solicitor in Australia and then moved to Hong Kong, where he was admitted in 1998. Before joining Minter Ellison, he worked for a number of years in the Hong Kong construction group of a major UK law firm with a strong construction practice and a particular emphasis on handling construction disputes involving government and public sector works. Steven has handled a number of major arbitration and litigation proceedings involving major construction and civil engineering projects. He has handled a number of mediations and has been instrumental in settling a number of major disputes. He has also been assisting a number of foreign investors and clients in major projects in China as well as Chinese investors and contractors working outside China.

Minter Ellison has one of the strongest construction teams in Asia. The knowledge and experience are drawn from their involvement in a wide range of projects across the region spanning over twenty years.

Case Note: Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd [2013] SGHC 56

Australian Timber Products Pte Ltd ("ATP") was a sub-contractor on a construction project, and A Pacific Construction & Development Pte Ltd ("APCD") was the main contractor. On 23 December 2011, ATP sent a progress claim for \$427,373.61 ("Progress Claim no. 9") to APCD's representatives. APCD did not make a payment response as required by the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOP Act"). ATP then served a notice of intention to apply for adjudication on APCD on 16 January 2012. The next day, ATP served an adjudication application on APCD.

The adjudicator found that Progress Claim no. 9 had been a valid payment claim for the purposes of the SOP Act and APCD was liable to pay the sum claimed, plus costs and fees. APCD did not pay. APCD argued that Progress Claim no. 9 was not a valid payment claim as, among other things, it did not provide a breakdown of the quantity supplied and rate charged of the items for which payment was demanded.

The Court made reference to a number of Australian cases, in which the Courts had considered whether a payment claim was a nullity for its failure to comply with the relevant legislation. In some Australian states, where the relevant statute sets out a general requirement that the payment claim should identify the construction work to which the progress payment relates, the courts appeared to have imposed a test to determine compliance with this formal condition which was not overly demanding of claimants: i.e., whether, on an objective (but not unduly technical or

critical) view, the payment claim was sufficiently detailed to enable the respondent to understand the basis of the claim.

The wording of the Singapore provisions was unlike that of the equivalent sections elsewhere. The most striking difference was reg. 5(2)(c) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed.) ("SOPR"), which actually spells out the type and extent of detail a payment claim under the SOP Act should include. Whilst Progress Claim no. 9 was lacking in detail with respect to regs. 5(2)(c)(iii)-5(2)(c)(iv) of the SOPR, it did fulfil the requirements in section 10(3)(a) of the SOP Act and regs. 5(2)(a), 5(2)(b) and 5(2)(c)(i)-5(2)(c)(ii) of the SOPR. APCD could have issued a payment response denying that the Variation Works were done and/or stating that there was insufficient information relating to the Variation Works; the lack of detail here did not in itself prejudice APCD in that it did not preclude a response from them. APCD could also have sought clarification during the dispute settlement period. The requirement to provide details in a payment claim was to facilitate the implementation of the adjudication scheme in the SOP Act, but not to trip up claimants.

In the circumstances of this case, the Court held that the failure of ATP to include in Progress Claim no. 9 the details required in regs. 5(2)(c)(iii)-5(2)(c)(iv) of the SOPR did not render the payment claim invalid, and the adjudication determination should not therefore be set aside.

SINGAPORE CONSTRUCTION INDUSTRY & LAW UPDATES

Technical: On 29 July 2013 the SEF Group Ltd announced their successful award by public tender from the Building & Construction Authority (“BCA”) to develop their first Integrated Construction and Precast Hub (ICPH) at Kaki Bukit. This is part of BCA’s initiative to introduce highly productive technology and mechanism into the construction industry. It will be the first time in Singapore that a multi-tiered fully automated storage system has been used.

The new ICPH will include a state of the art automated production line utilising European technology and have an annual capacity of over 100,000m³ of concrete components which is considerably more than traditional open precast yards. Much higher quality control of the precast products will be an added advantage. The ICPH will have a capacity to produce over 25 types of precast components. In addition, the ICPH will make very efficient use of land by housing dormitories for workers and utilizing of ceiling space within the building.

It is BCA’s intention to roll out several more tenders for ICPHs over the coming year to boost capability and capacity in this area. *[David Shuttleworth | Foremost Consultants Pte Ltd | Co-Chair of Publications]*

Case Law: The Singapore High Court decision of *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 revisited issues concerning the entitlement to make adjudication applications, repeat claims and jurisdictional challenges arising from the Building and Construction Industry Security of Payment Act (Cap. 30B, 2006 Rev Ed) (the “Act”). The Court held that once a dispute over payment had been made the subject of a settlement agreement, a payment claim could not be made on it under the Act. The Court also took the opportunity to raise areas for reform in respect of the Act. First, in light of the authoritative construction in the Court of Appeal in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 on the issue of when a payment claim should be made, the Court questioned whether it was consistent with the overall scheme of building contracts and their dispute resolution processes for a claimant to make a payment claim long after work had been completed. Second, given that the concept of a “repeat claim” does not feature in the Act but has made inroads into local case law from Australian cases, a definitive definition of a “repeat claim” in the Act will be timely. Lastly, the Court also opined that some thought should be given to how challenges to an adjudicator’s jurisdiction should be dealt with within the tight timelines of the adjudication framework given that only the courts can hear jurisdictional challenges. *[Danna Er | Senior Associate | MPillay]*

A full article on this case can be found at pages 3 to 5 of this newsletter.

CALENDAR OF EVENTS

UPCOMING EVENTS

No.	Date	Event
1	October 2013	SCL(S) Site Visit
2	5, 7, 13, 15 November 2013 (rescheduled)	Engineering 101 [5th run]
3	November 2013	SCL(S) Networking Cocktail
4	January 2014	Updates & Developments in Construction Law 2014

For information on past events, please refer to the Post Event Updates on our website: www.scl.org.sg

LIST OF NEW MEMBERS WHO JOINED SCL (SINGAPORE) BETWEEN JUNE AND AUGUST IN 2013

1. Clarence Chung Say Ban
2. Ngiam Shih Ern
3. Shaun Darby
4. Michael Johnson de Venecia
5. Sean Hardy
6. Bee Lan Ho
7. Dawn Noeline Tan
8. Jiun Nian Kang
9. Gerlando Butera
10. Samantha Koh
11. Peter Megens



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THE SINGAPORE SIA BUILDING CONTRACT

A COMMENTARY ON THE 9th EDITION OF THE SINGAPORE INSTITUTE OF ARCHITECTS STANDARD FORM OF BUILDING CONTRACT



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