

# REVIEW OF MAJOR DEVELOPMENTS IN CONSTRUCTION LAW

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## **A. Introduction**

The law reviewed in this paper is the law relating to construction in Singapore as at 2003 and the first half of 2004. For legislation, only parent Acts, not subsidiary legislation are dealt with. Legislation that is still in the pipeline yet to be promulgated is excluded.

Decisions of Singapore courts, in this paper, take priority over decisions from other jurisdictions. Whilst there are developments in other jurisdictions that may be of some interest, they are not dealt with in this paper so that the focus can be kept on Singapore construction law.

The period under review saw a number of decisions on familiar or recognizable topics. Some of them were handled in novel ways whilst others give some clarity to hitherto uncertain or disputed interpretations of principles or provisions of standard form contracts<sup>1</sup>.

## **B. Court decisions**

### ***a. Quality and fitness for purpose***

Along with an obligation by a contractor to supply equipment or materials, there is an implied term that the material supplied will be of good quality and be reasonably fit for its intended purpose.

The court in *Adventure Training Systems (Asia-Pacific) Pte Ltd v Signature Lifestyle Pte Ltd*<sup>2</sup> had to decide whether this familiar implied term was breached on the facts of that case. Rust found on metal parts of the equipment supplied, the court found, did not mean that the items were defective. Also, having confirmed at the time of delivery that the items were received in good order and condition, the court held that it was too late for the managers to assert otherwise at the trial.

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<sup>1</sup> Parts of this paper dealing with Singapore court decisions is adapted from a similar review in the Building and Construction section of the Singapore Academy of Law's Annual Review of Singapore Cases 2003 that I co-authored with Philip Jeyaretnam SC.

<sup>2</sup> [2003] SGHC 135

**b. Incorporation of terms**

The incorporation of the terms of another contract into the contract between the parties has always been a source of intractable problems. This is particularly the case for construction contracts where attempts to incorporate terms appear to be done as a matter of routine.

The case of *Hi-Amp Engineering Pte Ltd v Technicdelta Electrical Engineering Pte Ltd*<sup>3</sup> is a good illustration of what can go wrong. Both parties in the action were involved in the electrical engineering contracting business. The plaintiff was a sub-sub-contractor of the defendant. The contract between the parties was for the supply of labour for the completion of electrical services work at two Mass Rapid Transit stations. The plaintiff claimed that it had duly supplied labour and so discharged its obligations under the contract and that the defendant had breached its payment obligations. The defendant denied the plaintiff's claims and asserted that the plaintiff was in fact overpaid.

There are some issues of fact that need not be dealt with here. One of the main issues, whether the sub-sub-contract between the parties was "back to back" with the sub-contract entered into between the defendant and another party, has some wider practical significance.

The problem started, not unusually, with the hasty and somewhat shoddy contract assembly and documentation. The court refused to accept that the conditions to the sub-contract were incorporated as part of the sub-sub-contract because there was considerable doubt whether the plaintiff even had sight of the sub-contract at the time of contracting. Moreover, as the court observed, the contract documents were furnished in "drips and drabs".

In this case, the court noted the "ambiguous and not so precise phraseology" of the relevant provision, which contained the common phrase that "all terms and conditions of the main contract shall apply, *mutatis mutandis*, to the sub-contract".

What then is required to ensure incorporation? The trend of similar cases in the past shows the reluctance of the courts to accept that a clause of this kind has the effect of incorporating the provision of the main contract into the sub-contract, where it is unclear or ambiguous<sup>4</sup>. In the light of this decision, it is now clear that the presence of such a phrase may not be enough to ensure incorporation.

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<sup>3</sup> [2003] SGHC 316

<sup>4</sup> For example, *Kum Leng General Contractor v Hytech Builders Pte Ltd* [1996] 1 SLR 751.

It is, of course, not always the case that a party must actually have sight of the other contract or its terms before it can be incorporated as part of the contract in question. A common provision found in sub-contracts is a clause “deeming” that the relevant party has read or seen the main contract (or document that is supposed to be incorporated). There is, however, no indication that such a provision existed in the sub-sub-contract in this case.

The lesson to be drawn from this case is that someone should at least ensure that both parties have sight of the contract whose terms it is sought to incorporate.

Something similar occurred in *Lam Hong Leong Aluminium Pte Ltd v Lian Teck Huat Construction Pte Ltd*<sup>5</sup>. The plaintiffs were engaged by the first defendants to be their sub-contractors by a letter of award. One of the issues that the court had to determine was whether the terms of the main contract were incorporated into the sub-contract. The court also made the observation (at [91]) that the evidence “clearly showed the plaintiffs were not even shown the main contract documents” and ruled that the plaintiffs were not bound by the terms of the main contract.

The defendants argued for incorporation, relying on a clause of doubtful relevance. The letter of award contained a provision requiring the plaintiffs to “enter into a subcontract with the first defendants on the same terms and conditions as those in the main contract”. Such a provision is not an adequate incorporation clause, and is directed more at establishing the terms of the intended contract when executed. As the court noted, “no subcontract ... was ever executed between the parties, let alone on the terms and conditions set out in the main contract”.

### **c. “Pay when paid” arrangement**

“Pay when paid” clauses<sup>6</sup> are a regular feature for some time in most sub-contracts used in Singapore. Its durability is now threatened by legislation in Singapore and common law jurisdictions. Meanwhile, pending legislation, disputes over the interpretation of such clauses will continue to come before the courts.

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<sup>5</sup> [2003] SGHC 53.

<sup>6</sup> Dealt with locally, for example, in *Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd* [1998] 1 SLR 694 and *Brightside Mechanical & Electrical Services Group Ltd v Hyundai Engineering & Construction Co Ltd* [1988] SLR 186.

The court in *Hi-Amp Engineering*<sup>7</sup> had to deal with such a clause advanced to defeat the plaintiff's claim for the retention sum and outstanding progress payments. The court dismissed as "poor reasoning" the defendant's argument that no payment could be made to the plaintiff until receipt of payments by the defendant itself.

The court, in rejecting the argument, found that the defendants "had not provided to the court any satisfactory evidence that payments had indeed been withheld by the main contractor on works completed thus far". The court further noted that "apart from some equivocal utterances, there was also no satisfactory evidence from the [defendant] to evince to the court that [it] had not been fully paid up" by the contractor that engaged it. The court therefore appears to be suggesting that the onus is on the contractor denying payment to its sub-contractor to prove that it has not received payment itself. In other words, the sub-contractor did not have to show that the contractor has received payment from the employer.

Although this appears to require the contractor to prove a negative, whether and to what extent payment has been received is very much within the contractor's knowledge. It therefore does not appear unreasonable that it should bear the onus of proving it has not received payment to bring the "pay when paid" clause into operation. Otherwise, the sub-contractor seeking payment from the contractor has to approach the employer for evidence of payment by it to the contractor. Not all employers will co-operate readily when approached.

**d. SIA standard form contract**

**i Direct payments to sub-contractors and schemes of arrangement**

Most traditional form of contracts allow the employer to select sub-contractors for the main contractor he engages by a process usually described as "nomination." Unfortunately, although selected by the employer the sub-contractor's contract is with the main contractor, not the employer. The sub-contractor therefore receives payment for the work he has done from the main contractor, although he may believe that he is actually doing work for the employer in the project. As a way of providing some relief to the sub-contractor in the event of the main contractor's failure to pay him, most of these forms of contract will also empower the employer or the contract

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<sup>7</sup> [2003] SGHC 316.

supervisor to arrange for direct payment from the employer to the sub-contractor.

A conundrum arises when the main contractor becomes insolvent. At present, it appears to be the law that the employer cannot rely on such a clause to make direct payment to a sub-contractor when the main contractor goes into liquidation. To allow otherwise may be to violate the *pari passu* principle whereby all unsecured creditors share rateably in the assets available for distribution to<sup>8</sup>.

Aside from liquidation, the court has an opportunity to examine another direct payment provision, this time for a scheme of arrangement in *Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd* [2003] 4 SLR 384. In this case, Eltraco had entered into a scheme of arrangement with its creditors, including nominated sub-contractors in one of its projects, Pine Springs. By this scheme of arrangement, which was sanctioned by the court under the appropriate provision of the Companies Act, an agreement was arrived at by which Eltraco's accounts receivables were to be distributed among its creditors. The nominated sub-contractors subsequently requested the architect of Pine Springs to certify direct payment in accordance with the main contract. The architect did so, and Eltraco applied to court to prevent this.

The Court of Appeal agreed with Eltraco that under the scheme of arrangement, the nominated sub-contractors had lost their claim to direct payment from the developer. The Court, however, did not base its decision on the *pari passu* principle but on its interpretation of the scheme, its intention and the effect it would have in allowing direct payment. It first observed that the scheme dealt with all of Eltraco's accounts receivables. It considered that if part of the accounts receivables could be taken out and paid directly to the nominated sub-contractors, the pool of accounts receivables available to the scheme of arrangement would be reduced. Such a result was not the intention of the scheme and the scheme was binding on all creditors, including the nominated sub-contractors.

## ii Validity of certificates

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<sup>8</sup> *Joo Yee Construction Pte Ltd v Diethelm Industries Pte Ltd* [1990] SLR 278

By now the idea that interim certificates of payment issued under the SIA post-1980 family of standard form contracts carry “temporary finality” is reasonably well known<sup>9</sup>.

Every now and then, the issue that comes before the court is whether the interim certificate issued by the architect is valid. As the argument is usually framed, an invalid certificate does not confer any “temporary finality” and would be no use to the contractor seeking to rely on it for immediate payment.

In *Steel Industries Pte Ltd v Deenn Engineering Pte Ltd*<sup>10</sup>, the court was confronted with a dispute concerning clause 13 of the SIA Conditions of Sub-Contract which provides for the sub-contractor to be paid “within 14 days after payment or deemed payment of the Main Contractor by the Employer following certification by the Architect of the amounts paid or deemed to be paid to the Main Contractor”. Like the parent form for the main contract, the sub-contract provides that the architect’s decisions and certificates “shall be binding until final judgment or award in any dispute between the parties to this Sub-Contract”. An important difference, however, lies in the power provided to the architect to conclude any dispute between the sub-contractor and the main contractor whether or not the main contractor has received payment by deciding whether or not to issue a “Certificate of Payment of the Main Contractor.” Such a certificate is binding until final judgment or award.

In *Steel Industries*, the court had to decide whether the sub-contractor was entitled to summary judgment based on an interim certificate of the architect issued under the main contract some four and a half years after the previous interim certificate. This was also almost four years after arbitration proceedings had commenced between the main contractor and the employer, and just after the employer was placed under judicial management. The architect, also recently, proceeded to issue a Certificate of Payment of the Main Contractor. However, when the sub-contractor sued on this, the architect wrote to the sub-contractor stating that the Certificate of Payment had been issued on the explicit understanding that it only entitled the sub-contractor to payment in proportion to what the main contractor received when the arbitration proceedings were concluded. He then withdrew and cancelled his Certificate of Payment.

The sub-contractor argued that the Certificate of Payment was valid, but the challenged its cancellation. The main contractor did not accept that the sub-

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<sup>9</sup> The interim certificate is supposed to be binding until final judgment or award in any dispute between the parties. This means that any attempt to defeat an application for summary judgment by advancing a set-off or a counterclaim would usually fail: for further details, see *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] SLR 610.

<sup>10</sup> [2003] 3 SLR 377.

contractor was entitled to payment by first contending that since the Certificate of Payment had been withdrawn, it could no longer serve as a basis for the sub-contractor's claim. They next argued that even if that Certificate of Payment had not been withdrawn and cancelled, it was invalid.

The learned judge in agreeing with the main contractor, held, first of all, that the interim certificate was invalid because it was issued not during progress of the works but five years after completion. It could not properly be described as an interim certificate within the provisions of cl 31 of the SIA Conditions. In this she followed *Tropicon Contractors Pte Ltd v Lojan Properties Pte Ltd* [1989] SLR 610. The sub-contractor's argument that the interim certificate could then be regarded as a revision certificate was also rejected.

More importantly, the court held that the Certificate of Payment was itself invalid. This was because it was issued on the wrong basis as the employer had in fact not yet paid the main contractor and was now in judicial management. The architect was trying to help the sub-contractor for the future and this was not an appropriate use of the certification procedure. Further, the architect ceased to have the power to issue the certificate once the arbitration proceedings had commenced even though these were proceedings between the main contractor and the employer<sup>11</sup>.

### iii Powers and duty of architect to grant extension of time

When there is delay and the delay is not due to the contractor's fault, he often assumes that he is entitled to an extension of time. The court in *Liew Ter Kwang v Hurry General Contractor Pte Ltd*<sup>12</sup>, however, held that the architect's powers were derived from and circumscribed by cl 23 of the SIA Contract. He could therefore only grant an extension of time if the event justifying the extension fell within one of the applicable sub-paragraphs of cl 23(1).

It was also held in *Liew Ter Kwang*<sup>13</sup> that in making any determination under a building contract, an architect has a duty to act fairly and on a rational basis. The court held that architect should have carried out a detailed and methodical analysis of the evidence in support of the application for an extension of time, and not merely based the extension on estimates. It would be wrong for an arbitrator to agree that estimates only would be sufficient and that detailed analysis was not required.

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<sup>11</sup> *Engineering Construction Pte Ltd v Attorney-General* [1994] 1 SLR 687 followed.

<sup>12</sup> [2004] SGHC 97, affirmed on appeal by the Court of Appeal.

<sup>13</sup> *Ibid.*



#### iv Arbitrator's powers on review

A question also arose in *Liew Ter Kwang*<sup>14</sup> whether cl 37(3) of the SIA Contract permits the arbitrator to review the decisions of the architect only if there is clear evidence that the architect had failed to act professionally, independently or fairly in reaching such decision.

The Court held that cl 37(3) grants an arbitrator wide powers in the making of his final award as follows<sup>15</sup>:

He is not bound by any ruling or decision of the architect. He is free to discard that decision and substitute his own on the basis of the evidence adduced in the arbitration and the findings of fact he has made thereon and in accordance with the true meaning of the contract. Nothing in cl 37(3) indicates that the arbitrator has to accept the architect's decision as long as he is satisfied that the architect had not acted unprofessionally or unfairly. On the contrary, the wording seems to indicate that the arbitrator should review the decision of the architect and if it does not accord with the facts as found by him or the true meaning of the contract as determined by him, then the arbitrator can disregard that decision even though the architect might not have acted unprofessionally or unfairly.

#### e. ***Management corporations and defence of independent contractor***

It is often raised, but somehow hitherto never clearly ruled upon, whether the developer or the contractor sued by a management corporation, is entitled to raise the defence that he is not liable in negligence as he has employed an independent contractor and that the damage was caused by the negligence of that contractor.

Such a question came before the Court in *Management Corporation Strata Title Plan No 2297 v Seasons Park Ltd (No 2)*<sup>16</sup> which confirmed that the developer was entitled to raise such a defence and held that "the plaintiff is only entitled to proceed to trial to determine the very narrow issue of fact in negligence as to whether the defects were caused by the defendant personally and, if so, whether it was an actionable wrong."

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<sup>14</sup> Ibid.

<sup>15</sup> At Ibid, para. 20, p. 14.

<sup>16</sup> [2004] SGHC 160.

**f. Performance guarantees**

There is a vague feeling that the doctrine of unconscionability, having crept into construction jurisprudence recently in Singapore, has not managed to secure a firm footing. However, any news of its demise is clearly exaggerated as the decision in *Newtech Engineering Construction Pte Ltd v BKB Engineering Constructions Pte Ltd*<sup>17</sup> demonstrates.

The court in this case granted the injunction sought on the ground that there was cogent evidence of unconscionability as the main contractor which had sought to call on the bond appeared to have done so to solve its own cash flow problems. The court, however, did make the comment that “a commercial dispute arising out of a building contract should not be unjustifiably elevated to the level of fraud or unconscionability.”

**g. Cross-claims from different projects**

In claims for payment, it is often the case that the value of work done is indisputable (particularly, where it has been certified). Payment is, however, withheld because of a cross-claim or set off. Sometimes, if the parties have dealt with each other across several projects under separate contracts, the cross-claims or set off can be asserted across different transactions from different projects. For example, the contractor may refuse payment to the sub-contractor in one project because of alleged defective work in another project. Such a situation is hardly new and had been addressed previously in *OCWS Logistics Pte Ltd v Soon Meng Construction Pte Ltd*<sup>18</sup> and *Hargreaves v Action*<sup>19</sup>.

The Court of Appeal in *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd*<sup>20</sup> had another opportunity to examine this issue. In this case, the main contractors of a building project appointed a sub-contractor in respect of the entire project. The main contractor agreed to pay to the sub-contractor all sums received from the employer (in accordance with certificates issued by the architect) less 5% retention and 5% profit for itself. The two companies were involved together in other projects as well. The sub-contractor claimed a sum of \$1,147,740 and obtained summary judgment for

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<sup>17</sup> [2003] 4 SLR 73.  
<sup>18</sup> [1999] 2 SLR 376.  
<sup>19</sup> 2000 (1992) 62 BLR 72.  
<sup>20</sup> [2003] 2 SLR 170.

an amount of \$565,958 with leave to defend for the balance in view of a counterclaim in relation to the same project. But the judge in chambers ordered that the enforcement of the summary judgment be stayed pending counterclaims in relation to other projects as well. The Court of Appeal removed the stay and held that judgment obtained on a claim should only be stayed if there is a counterclaim arising from or connected with the same contract, unless there are special circumstances.

#### ***h. Economic loss***

The right to claim economic losses flowing from tortious acts has been affirmed in two earlier decisions of the Court of Appeal, namely, *RSP Architects rPlanners & Engineers v Ocean Front Pte Ltd*<sup>21</sup> (“Ocean Front”) and *RSP Architects Planners & Engineers (Raglan Squire & Partners FE) v Management Corporation Strata Title Plan No 1075*<sup>22</sup> (“Eastern Lagoon”) that are by now reasonably well-known.

Another opportunity was given to the Court of Appeal in *Man B&W Diesel S E Asia Pte and Another v PT Bumi International Tankers and Another Appeal*<sup>23</sup> to once again examine the issues arising from a claim for pure economic loss.

This case has nothing to do with the construction of buildings but instead arose out of a shipbuilding dispute. Under a main contract, the shipbuilder agreed to build an oil tanker for the owner. The vessel was required by the owner to fulfil obligations under a long-term charter which it had entered into with the Indonesian oil company, Pertamina. The specifications of the engine was set out in the main contract. It was contemplated by the main contract that the shipbuilder would be sourcing the engine from a third party. The shipbuilder thus obtained the engine from MBS, a Singapore company which sold and serviced engines manufactured by its UK parent company, MBUK.

There was no direct contractual relationship between the owner and MBS or MBUK. The engine was delivered to MSE and the completed vessel with the engine was delivered to the owner. Within a few weeks, the engine gave trouble requiring major repairs later. After the engine finally broke down completely, the owner commenced action in tort against MBS and MBUK on the ground that both MBS and MBUK had breached their duty of care which they allegedly owed to the owner. The owner claimed for its losses, including

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<sup>21</sup> [1996] 1 SLR 113.

<sup>22</sup> [1999] 2 SLR 449.

<sup>23</sup> [2004] SGCA 8

the cost of the engine and the loss of rental income which it would have earned from the charter.

In reviewing the developments in this area of the law, the Court made the following comments:

“First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise: see *Doset Yacht case* [1970] AC 1004, per Lord Reid at p 1027. “

The Court, among other observations, noted the emphasis placed by the Court in *Bryan v Maloney*<sup>24</sup> “on the fact that the building was a permanent residence, not a commercial building, and this distinction seems to be a critical ingredient of their reasoning” and that there were cases in Australia where the Courts there declined to extend the decision to commercial buildings<sup>25</sup>. The Court did not wish to endorse this approach, commenting as follows:

Of course, we see that there will be difficulties in maintaining a clear distinction between purchasers according to the type of building they buy. The majority decision in *Bryan v Maloney* rests very much on the vulnerability of members of the public in acquiring homes. We do not think it would be beneficial, nor necessary, to pursue this distinction to its logical conclusion for the purposes of determining its soundness.

The Court noted that the previous decisions in Singapore on the point was concerned with real property and that similar decisions in England, Australia, New Zealand and Canada dealt with economic losses suffered on account of damage to homes. It then posed the question whether “should the principle of duty of care enunciated in *Donoghue* be further extended to cover economic losses arising from the supply of chattels”?

The Court felt that while it “would not say that for every subsequent case to fall within the scope of the decision in *Ocean Front* the facts must be identical or the same, extreme caution must be exercised in extending the *Donoghue*

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<sup>24</sup> (1995) 128 ALR 163.

<sup>25</sup> See *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236, a decision of the Queensland Court of Appeal and *Woollahra Municipal Council v Sved* (1996) 40 NSWLR 101, a New South Wales Court of Appeal decision.

principle, or the decision in *Ocean Front*, to new situations, particularly to a scenario which is essentially contractual.”

The Court pointed out that the relationship between the developer and the management corporation in *Ocean Front* was “as close to a contract as could reasonably be.” This gives it reason to be treated as “a special case in the context of the statutory scheme of things under the Strata Act or at least be confined to defects in buildings.”

On the other hand, the Court noted that the shipowner could have readily in structuring the contract made MBS or MBUK assume responsibility. Instead, it has elected to distance itself from all the sub-contractors, including MBS and MBUK. The Court then declined to extend what was decided in *Ocean Front* to this case with the following words:

We would moreover add that the ground for denying Bumi’s claim for the economic losses becomes even stronger when we take into account the fact that in the main contract Bumi had agreed to limit their recourse should the vessel, including its engine, fail to meet the specifications. As this court observed in *Ocean Front* .. what was involved in this regard was a delicate balancing exercise in which consideration should be given to all the conflicting claims of the plaintiffs and the defendants as viewed in a wider context of society. Should the court stretch the Donoghue principle and afford Bumi a remedy which would be wholly in conflict with Bumi’s express contractual commitment? Is it fair, in such circumstances, that Bumi be accorded a separate remedy in tort? Should the court condone Bumi’s breach of an agreement which it had solemnly entered into with MSE? Should the court help a party to better a bargain it has made?

What then is the relevance of this case for us? There are a few lessons to be drawn. First, we know (although what the Court’s comments are essentially dicta), that it is unlikely that the distinction between commercial and residential properties will receive serious consideration if the argument is brought up in future. Second, we should expect the Court to be cautious about extending the principle to other type of situations. It is reasonably clear that claims in economic loss arising from the supply of chattels will be scrutinized closely and probably rejected. Other questions include the familiar one whether a subsequent purchaser of a building can make such a claim in tort against say a sub-contractor of the main contractor engaged by the original developer to construct the building. It is doubtful whether the Court will be willing to extend the *Ocean Front* principle to allow recovery in such a situation.

**i. Experts and evidence**

Experts are often called upon to give opinion evidence in construction disputes, both in court and in arbitration. Where proceedings are governed by the Evidence Act, there have been arguments raised as to what an expert's testimony or part thereof should be disregarded.

Courts have generally taken a practical approach where admissibility is concerned. For example, the court in *Tan Chiang Brother's Marble (S) Pte Ltd v Permasteelisa Pacific Holdings Ltd*<sup>26</sup>, the words "science or art" appearing in s 47 of the Evidence Act (Cap 97, 1997 Rev Ed) were given a broad interpretation so as to allow opinion evidence to be given by a quantity surveyor assessing variation works relating to curtain wall and granite cladding.

More recently in *Gema Metal Ceilings (Far East) Pte Ltd v Iwatani Techno Construction (M) Sdn Bhd*<sup>27</sup>, the High Court affirmed the principle that, while expert opinion must be based on facts which are admissible, the expert, in coming to his conclusion, may need to rely on external information or knowledge.

Again, in *Lim Guan Cheng v JSD Construction Pte Ltd* [2004] 1 SLR 318, an objection was made to a building surveyor testifying on the cost of rectification work on the ground that this was outside his area of expertise was rejected. Further, the court allowed the expert to rely on three quotations obtained from contractors as evidence of the range of prices obtainable upon a competitive tender despite an objection that this amounted to hearsay evidence.

**j. Damages**

The principles concerning measure of damages do not usually come into question in a construction dispute. However, in *Salcon Ltd v United Cement Pte Ltd*<sup>28</sup>, the facts are somewhat unusual. In this case, the main contractor, Salcon was engaged by the employer, United Cement to construct a concrete silo. The dispute was dealt with in arbitration and it was found that the silo was defective because of Salcon's negligence and breach of contract. United Cement appointed a firm of engineers, TEPP as its consultants for repairs. TEPP ordered one of the cells of the silo to be loaded to full capacity on 24 June 1999 and as a result of the loading, the silo collapsed the next day. TEPP's actions were held to be a novus actus interveniens which broke the

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<sup>26</sup> [2001] SGHC 386.

<sup>27</sup> [2000] SGHC 37.

<sup>28</sup> [2004] SGCA 40, CA.

chain of causation. It was not in dispute that Salcon was liable to compensate United Cement for expenses incurred on or before 24 June 1999 and the cost of rectifying the defects in the silo in its state prior to 24 June 1999. However, United Cement also claimed for losses that would have arisen during the “notional period” of repair after the silo’s collapse. The term “notional” was used because the repairs could no longer be carried out after the silo’s collapse, as it had to be demolished and entirely reconstructed. The Court of Appeal held that TEPP’s actions intervened and necessitated the complete reconstruction of the silo. The repairs would necessarily be subsumed within the much larger enterprise of reconstruction. The chain of causation was therefore broken by TEPP, so Salcon was no longer liable for consequential losses during the period of notional repairs.

An alternative claim for diminution in the value of the silo was also rejected by the Court. While not ruling out the possibility that there may be occasions where a diminution in market value may merit some compensation in addition to the cost of repairs, the Court held that the present case did not warrant such an award. This is because what United Cement eventually had was not a repaired silo with a lower value due to defects but a totally new silo that had to be built because of the *novus actus interveniens*. UCL could not be allowed to claim for a loss that it has not suffered and will not suffer.

### **C. Legislation**

There are some legislative changes for the period under review. A brief description of the changes is given below.

This paper leaves out two important legislative initiatives, ie. the Building Maintenance and Strata Management Bill and Building and Construction Industry Security of Payment Bill, as they are not yet in force at the time of writing. Besides, in view of their far-reaching implications, they are better dealt with separately, where their intricacies can be fully explored.

#### **a. *Building Control (Amendment) Act 2003***

Amendments were made to this Act together with related amendments to the Architects Act (Cap 12, 2000 revised ed) and the Professional Engineers Act (Cap 253, 1992 revised ed). The amendments were passed in Parliament on 2 September 2003 and were effective with effect from 1 January 2004.

The purpose of the amendments was to facilitate “design and build” arrangements by multi-disciplinary firms providing architectural, engineering

and construction services. The role of qualified persons is defined and clarified.

***b. Fire Safety (Amendment) Act 2004***

This Act was amended, among other purposes, to introduce a performance-based approach in the preparation and approval of fire safety plans and to regulate fire safety engineers who will be solely authorized to prepare and review fire safety plans prepared with this approach.

***c. Planning (Amendment) Act 2003***

Amendments were made to this Act by Parliament on 11 November 2003 and they came into effect on 10 December 2003 (except for s. 12).

The aspects dealt with include matters relating to “material change in the use of building,” the list of “conditions” to which the grant of planning permission or conservation permission may be subject, grant of written permission on the basis of “certification or declaration” of a qualified person, the provision of security to secure compliance with the Act and so forth.



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Advocate & Solicitor, Supreme Court of Singapore (1981)

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LLB (Hons), University of Singapore (1980)

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Member, Regional Panel, Singapore International Arbitration Centre

Member, Disputes and Commercial Resolution Panel, Singapore Wholesale Electricity Market (2003)

Legal Adviser, Singapore Contractors' Association

General Secretary, Singapore Institute of Arbitrators (1994-1996)

Member of the Standing Committee, Commission on Post-Construction

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### Publications (author or co-author)

Building and Construction title of Halsbury Laws of Singapore

“Construction Law in Singapore and Malaysia” “

Singapore Court Forms and Precedents.”Singapore Civil Procedure 2003 (White Book)

### Involvement in the following journals/periodicals:

Annual Review of Building and Construction Law, Singapore Academy of Law Journal

Construction Law Column, Law Gazette (1994-1996)