CPG UNDERSTANDING BUILDING DEFECTS AND HOW TO AVOID IT

LEGAL IMPLICATIONS ARISING FROM BUILDING DEFECTS

presented by

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Generally

- Liabilities for building defects can arise either in contract or in tort
- Contractual liabilities
  - arise from the contractual relationship between the parties
  - enforceable only by the contracting parties – privity of contract

Generally

- Tortious liabilities
  - not dependent on existence of a contractual relationship
  - arise where court finds a duty of care exists – test of close proximity

Generally

- Liabilities in contract and in tort may co-exist
- BUT, one cannot avoid exemption or restrictions imposed in contract by pursuing action in tort

Common factors influencing choice between contract and tort

- Measure of damages
  - "innocent party is, as far as money can do it, to be placed in the same situation as if the contract had been performed" VS. "that sum of money which will put the party who has been injured in the same position as he would have been if he has not sustained the wrong"

Common factors influencing choice between contract and tort

- Limitation of action
  - date of breach VS. date of damage suffered

Responsibilities in Contract

- Governed by terms of the contract
  - Sale and purchase agreement between developer and original purchaser – prescribed forms under the Housing Developer Rules and Sale of Commercial Properties Rules

Responsibilities in Contract

- Governed by terms of the contract
  - Consultancy agreement between consultant and client – SIA standard conditions of appointment
  - Construction contract between the owner/developer and contractor – SIA standard form of contract, PSSCOC

- **Most standard form of contracts will contain the following express terms:**
  - Standard of work expected
  - Responsibility for defects during progress of the works
  - Responsibility for defects during the defects liability or maintenance period

Developer / original purchaser relationship

- Cl. 10.1 & 9.1, Form D & E of Housing Developer Rules and Cl. 10.1, Form D of Sale of Commercial Properties Rules - developer required to build the property "in a good and workmanlike manner according to the Specifications and the plans approved by the Building Authority and other relevant authorities"

Developer / original purchaser relationship

- Cl 17.1, Form D & E of Housing Developer Rules and Cl 18.1, Form D of Sale of Commercial Properties Rules - developer obliged to "make good at his own cost and expense any defect" that "becomes apparent within the defects liability period", failing which purchaser may carry out the necessary rectification works and deduct the cost of such rectification works from the stakeholder monies held by the Singapore Academy of Law

Client / consultant relationship

- Cl 1.1 SIA Conditions of Appointment – architect shall, in the provision of his services to the client, exercise a reasonable standard skill and care in conformity with the normal standards of the practice of the Architecture in Singapore

Owner / contractor relationship

PSSCOC 2005

10.1 **Plant, Materials, Goods and Workmanship**

All Plant, materials, goods and workmanship shall be:

(a) of the respective kinds described in the Contract and in accordance with the instructions of the Superintending Officer; and

(b) subjected from time to time to such tests as the Superintending Officer may by instruction require at the place of manufacture, fabrication or preparation, or on the Site or at such other place or places as may be specified in the Contract, or at all or any of such places.

Owner / contractor relationship

10.7 **Defects during the Progress of the Works**

If the Superintending Officer during the progress of the Works finds any Defect, he may instruct the Contractor in writing to do any or all of the following:

(a) To demolish and reconstruct any work so that it is in accordance with the Contract.

(b) To remove from or not to bring to the Site any materials or goods which in the opinion of the Superintending Officer are or may not be in accordance with the Contract and to replace such materials or goods with materials or goods which are in accordance with the Contract.

(c) To remove from the Site any Plant which in the opinion of the Superintending Officer is not or may not be in accordance with the Contract and to provide Plant which is in accordance with the Contract by the provision of new or alternative or repaired Plant.

The Superintending Officer's instruction may specify the time or times within which the Contractor is to comply with the instruction. If the Contractor disputes the instruction of the Superintending Officer, he shall nevertheless comply with it but he may take action in accordance with and subject to Clauses 14, 23, 32 or 34. If the Superintending Officer or an arbitrator should decide that the Superintending Officer was not justified either wholly or in part in giving the instruction then provided that the Contractor shall have complied with Clauses 14, 23 and 32 the Superintending Officer may certify (or the arbitrator may award) any Loss and Expense incurred by the Contractor and may grant an extension of time pursuant to Clause 14.

Owner / contractor relationship

10.8 **Default of Contractor in Compliance**

If the Contractor should fail or refuse to comply with an instruction of the Superintending Officer pursuant to Clause 10.7, the Employer shall be entitled without prejudice to any other rights and remedies to employ and pay others to carry out the subject-matter of the instruction and the amount of any loss, expense, costs or damages suffered or incurred by the Employer shall be recoverable from the Contractor.

Owner / contractor relationship

18.1 **Completion of Outstanding Works and Remedying Defects**

To the intent that the Works shall, at or before the expiration of the Defects Liability Period, be in the condition required by the Contract and shall meet all other requirements of the Contract, the Contractor:

(a) shall complete with due expedition and without delay any work outstanding at the Date or Dates of Substantial Completion (whether or not the subject of any undertaking to do so) and as may be instructed by the Superintending Officer; and

(b) shall execute all such works of amendment, reconstruction and remedying defects, shrinkages or such other faults of whatever nature as the Superintending Officer may at any time during the Defects Liability Period or within 14 days after its expiration instruct the Contractor to execute.

For the avoidance of doubt, the obligation of the Contractor to comply with this Clause shall not in any way prejudice the Employer's rights under the provisions of any guarantee relating to the Works or any phase or part of the Works required by the Specifications or provided by any supplier or sub-contractor.

Owner / contractor relationship

18.3 **Diminution in Value of Works**

If any Defect which the Contractor would otherwise have been liable to rectify at his own cost is such that in the opinion of the Superintending Officer it will be impracticable or inconvenient to rectify, the Superintending Officer shall ascertain the diminution in the value of the Works to the Employer due to such Defect and the amount of the diminution shall be recoverable by the Employer.

Owner / contractor relationship

18.4 **Contractor to Search**

If any Defect, shrinkage or other fault in the Works appears at any time from the commencement of Works to the end of the Defects Liability Period, the Superintending Officer may instruct the Contractor to search under the direction of the Superintending Officer for the cause of the Defect, shrinkage or other fault. If such Defect, shrinkage or other fault is one for which the Contractor is liable under the Contract or the necessity for such a search is caused by the Contractor or arises from some default by the Contractor, the cost of the work carried out in searching as aforesaid shall be borne by the Contractor and the Contractor shall in such case remedy such Defect, shrinkage or other fault at his own cost.

Owner / contractor relationship

18.5 **Liability at Common Law**

The provisions of Clause 18.1 to 18.4 shall not derogate in any way whatsoever from the Contractor's liability under the Contract or otherwise for defective work at common law.

Owner / contractor relationship

SIA, 7th edition

11. (1) **Quality of works and materials**

Without prejudice to the Contractor's responsibilities under clause 3 of these Conditions, all materials, goods and workmanship comprised in the Works shall, save where otherwise expressly stated or required, be the best of their described kinds and shall in all cases be in exact conformity with any contractual description or specification and of good quality. Wherever it is practicable to do so the Contractor shall, at the request of the Architect, furnish him with any necessary supporting vouchers, evidence or information confirming that all materials and goods whether fixed or unfixed comply with the requirements of this sub-clause. Any unreasonable failure or refusal by the Contractor to furnish such vouchers, evidence or information shall entitle the Architect to give a direction for the removal of the materials or goods at the expense of the Contractor, and until replacement to deduct their value, if already paid, from the Contract Sum.

Owner / contractor relationship

11. (2) Investigation of Defects

Without prejudice to his powers under the next following sub-clause, the Architect may issue a direction or instruction for the opening up or inspection of any work covered up, or for carrying out tests or investigations of any goods, materials or executed work, and for the postponement of further work until the results of the tests or investigations are known. If such opening up or inspection or tests or investigations are the reasonable and prudent consequence of defective work by the Contractor or of any breach of contract or negligence or omission on his part or of any sub-contractor or supplier then in such event the Architect may give a direction and the Contractor shall comply with the same at his own expense, nor shall he be entitled to an extension of time, notwithstanding that no further defective work or breaches of contract are subsequently disclosed thereby; but in other cases the Contractor shall be entitled to an instruction and to compensation for any additional Expenditure or delay resulting from compliance with such instructions, and to an appropriate extension of time, unless and to the extent that defective work or other breaches of contract are disclosed thereby, in which event he shall not be entitled to such compensation or extension of time. For the avoidance of doubt, where it seems reasonable to do so in the light of the facts disclosed by any such opening up or inspection or tests or investigations or postponement the Architect may re-classify an earlier direction as an instruction or vice-versa.

Owner / contractor relationship

Removal of Defective Work or Reduction of Price

11. (3) Without prejudice to his power to vary the work under clause 1(3) of these Conditions, the Architect may give directions for the removal or demolition of any work, goods or materials, whether fixed or unfixed, which are not in accordance with the Contract, and for their reconstruction or replacement in exact accordance with the Contract. Provided that the Architect may, but shall not be bound to, accept any work containing defects unremedied and without removal or replacement, in which event the Contract Sum shall be reduced by any loss of value or otherwise suffered by the Employer, or by any saving in cost obtained by the Contractor in carrying out the defective work, whichever is greater.

Owner / contractor relationship

No duty of Architect or Employer

11. (5) No failure by the Architect to exercise any of the foregoing powers in this clause shall prejudice any subsequent claim by the Employer against the Contractor at any time in respect of work which is not in accordance with the Contract, nor shall the Architect be under any duty to the Contractor to exercise any of the foregoing powers for the benefit of or to assist the Contractor.

Owner / contractor relationship

27. (1) Subject to clause 26 of these Conditions in the case of an Occupied Part of the Works, the Maintenance Period stated in the Appendix hereto shall commence upon the issue of a Completion Certificate under clause 24(4) or 25 of these Conditions. During such period:

(a) the Contractor shall complete the outstanding work (if any) listed in and in accordance with the terms recorded in the Completion Certificate, and

(b) the Architect may at any time following the Completion Certificate give directions or instructions for the making good by the Contractor of any defects, omissions or other faults which may be or become apparent in the Works. If the cause of the same is due or found to be due to any breach by the Contractor of any of his obligations expressed or implied under the Contract or those of any sub-contractor or supplier, direct or indirect, and whether Designated, Nominated or privately engaged, then the Contractor shall be responsible for repairing and making good the same or making arrangements therefore at his own expense on the direction of the Architect. If the said defects have occurred despite compliance with the Contract in all respects by the Contractor or any such sub-contractors or suppliers he shall be entitled to payment on a reasonable price basis for compliance with any instruction of the Architect to make good the same.

Owner / contractor relationship

27. (2) Not later than 14 days after the expiry of the Maintenance Period, the Architect shall deliver a Schedule of Defects specifying all remaining defects, omissions and other faults apparent at the date of delivery of the Schedule, and on receipt of directions or instructions to do so the Contractor shall forthwith repair and make good the same on the same terms as defects notified to the Contractor under sub-clause (1)(b) of this Condition.

Owner / contractor relationship

27. (3) When giving instructions or directions during or at the end of the Maintenance Period under sub-clauses (1) and (2) of this Condition in relation to defects then appearing the Architect shall in addition to the powers in those sub-clauses have the same special powers in relation to such defects as those conferred by clauses 11(2), (3) or (4) of these Conditions, which shall be exercisable by him at any time until the issue of the Maintenance Certificate under sub-clause (5) of this Condition.

27. (4) Provided that in lieu of requiring the Contractor to make good defects under sub-clause (1) or (2) or exercising the powers in sub-clause (3) hereof, the Architect may, in any case where the cause is a breach of contract by the Contractor or by any sub-contractor or supplier as aforesaid, give a direction that a defect be not remedied, and instead that there should be a reduction in the Contract Sum to be assessed by the Quantity Surveyor representing the reduced value of the work to the Employer, or any savings in cost obtained by the Contractor which the defective work may have involved, whichever is the greater. Such reduction may be effected in the certificate of the Architect releasing the second half of the Retention Monies under clause 31(10) of these Conditions, in a certificate issued under clause 31(6) of these Conditions or alternatively shall be taken into account by the Architect in his Final Certificate.

Typical questions relating to defects liability or maintenance period

1. Does the contractor have the right to be given the opportunity to rectify the defects falling within the DLP / maintenance clause ?
   - *Kaye Ltd v Hosier & Dickinson* [1972] 1 WLR 146 – benefit contractor and not employer

Typical questions relating to defects liability or maintenance period

2. What are the contractor's rights if the employer fails to give the contractor the opportunity to rectify during the DLP / maintenance period?
   - But, not where contract had come to an end pre-maturely (eg. termination)
   - cf. *MCST Plan No. 1166 v Chubb Singapore Pte Ltd* [1999] 3 SLR 540 – notice not required as existence of defects known to contractors at the time or at least soon after completion of the works

Typical questions relating to defects liability or maintenance period

3. Is the contractor discharged of his liability for defects which appear after the expiry of the DLP / maintenance period?
   - *Raymond Construction Pte Ltd v Low Yong Tang & AGF Insurance (Singapore) Pte Ltd*, [unreported] Suit No. 1715 of 1995

Responsibilities in Contract

- Apart from the express terms of the contract, the contractor's obligations may also be implied

Usual implied terms

- Carry out work in a good and workmanlike manner
- Use materials of good or merchantable quality

Warranty as to merchantability of materials

- Term as to merchantability will be implied notwithstanding that employer may have chosen the materials or nominated the supplier and the contractor has exercised proper care and skill – *Young & Marten v McManus Childs* [1969] 1 AC 454

Young & Marten

- The respondents (McManus Childs) were the developers of a housing estate.
- The appellants (Young & Marten) were a firm of roofing sub-contractors engaged by the main contractors for the supply and laying of certain roof tiles.

Young & Marten

- On a claim by the purchasers of the houses on the estate against the respondents for damages for defective roof tiles, the respondents joined the appellants as third parties to the action.
- Although there was in fact no contract between the appellants and the respondents, the main contractors were, on the facts, regarded as the respondents' agent who made the contract between them and the appellants.

Young & Marten

One of the issues before the Court was

- ***Whether there was implied in the sub-contract a term that the tiles (namely "Somerset 13" tiles) supplied should be reasonably fit for the purpose for which they were required or should be of merchantable quality.***

Young & Marten

House of Lords held :

- Unless the circumstances of a particular case suffice to exclude it, there will be implied into a contract for the supply of work and materials, a term that the materials used will be reasonably fit for the purpose for which they were used and a further term that the materials used will be of merchantable quality.

Young & Marten

House of Lords held :

- On the particular facts of the case, there were circumstances to exclude the term that the "Somerset 13" tiles would be reasonably fit for the purpose for which they were required.
- The implication of warranty as to fitness for purpose of the materials was excluded by the fact that the main contractors had relied on their own judgment and skill in the choice of the tiles.

Young & Marten

House of Lords held :

- However, on the particular facts of the case, the circumstances were not sufficient to exclude the term that the "Somerset 13" tiles were merchantable.
- The fact that the main contractors had relied on their own judgment and skill in the choice of the tiles did not exclude the implication of warranty on the part of the sub-contractors that the tiles were of good quality.

Young & Marten

House of Lords held :

- This warranty as to materials must be implied even though the sub-contractors did not have any choice in the selection of the tiles.

Conclusion :

- Sub-contractors were therefore held liable to the main contractors for the defective tiles.

Young & Marten

"It is frequent for builders to fit baths, sanitary equipment, central heating and the like, encouraging their clients to choose from the wholesaler's display rooms which they prefer. It would, I think, surprise the average householder if it were suggested that simply by exercising a choice he had lost all right of recourse in respect of the quality of the fittings against the builder who normally has a better knowledge of these matters."

Warranty as to merchantability of materials

- Term as to merchantability will not be excluded by express provision in the contract for sampling and testing of materials by the architect – *Rotherham MBC v Frank Haslam Milan* [1996] 78 BLR 1, CA

Rotherham

- Rotherham were employers for the re-development of a site.
- Haslam were one of the contractors engaged for construction of works.
- Contract was in the JCT 1963 standard form.
- Clause 6(1) of the JCT standard form provides that "all materials, goods and workmanship shall so far as procurable be of the respective kinds and standards described in the Contract Bills.

Rotherham

- The Bills provided for granular fill material to be used for the cellars and for samples to be given to the architect for approval and retained by him, and for testing to be carried out by the architect and for the architect to reject materials after delivery.
- In the circumstances, the contractors used steel slag as the granular fill material for the cellars.
- Due to expansion of the steel slag, the reinforced concrete slabs cracked.

Rotherham

- The developers (Rotherham) claimed against the contractors for the defects, alleging that the contractors were in breach of the implied terms of the contract that (a) the steel slag should be fit for the purpose of fill materials, and (b) the steel slag should be of merchantable quality.

Rotherham

On the question of fitness of purpose, the Court of Appeal held that :

- No warranty as to fitness of purpose could be implied

In so holding, the Court of Appeal noted that:

- The contract provisions specified the use of hardcore, which included "slag, and the hardcore used had to be of such quality to the reasonable satisfaction of the architect.

Rotherham

- Although the purpose for which the fill was required was made known to the contractors, the freedom to choose had been accorded not in order to enable the contractors to exercise some supposed skill and judgment but because the architect believed that no further stipulations were necessary.
- That is, the employer did not rely on the contractors on the choice of the materials.

Rotherham

On the question of merchantability, the Court of Appeal held that :

- Such a warranty should be implied and there is nothing in the contract to exclude the implication of such a term.
- The provision for sampling and testing of materials by the architect did not exclude the warranty.

Rotherham

- On the contrary, the very fact that the architect is entitled to reject materials and require the contractor to pay for the tests that disclosed the defects shows that the contractor bears the risk of the materials not being of good quality.
- The warranty of merchantability was satisfied if the material was fit for some of the purposes within the description under which it was sold and saleable under that description without abatement of price. It did not have to be fit for all purposes for which materials under that description were used.

Rotherham

- On the facts of the case, the steel slag was found to be perfectly good steel slag for use as hardcore in road building or any other situation where it was not confined, and could have been sold as such without abatement of price. Therefore, it was merchantable.

Warranty as to merchantability of materials

- However, term as to merchantability may be excluded where the contractor was only able to purchase from manufacturer on terms which exclude or limit the manufacturer's liability and this fact is known to the employer – *Gloucester County Council v Richardson* [1969] AC 480

Gloucester County Council

- The contractor was directed to enter into a contract for the supply of concrete columns at a price and upon terms which had been fixed by the employer.
- Under a term of the main contract, the main contractor could object to the nomination of any sub-contractors on (a) any reasonable grounds; and/or (b) on the ground that the sub-contractors would not indemnify the main contractor against liability arising from sub-contractor's obligations under the sub-contract.

Gloucester County Council

- However, there was no similar right of objections in the case of nominated suppliers.
- In the present case, the nominated supplier for the concrete columns only agreed to supply on terms, which limited their liability for defective goods to free replacement and excluded their liability for any consequential loss.

Gloucester County Council

- When the columns began to be erected, serious cracks were observed which required works under the main contract to be suspended.
- Employer sued the main contractor for the defects.
- The issue before the Court was whether the main contractor was liable for these defects.

Gloucester County Council

- The House of Lords decided in favour of the main contractor and held that the main contractor was not liable for the defects.
- However, it is to be noted that each of the Lords had based his decision on a different reasoning.

Gloucester County Council

- One of the Lord's view was that the difference between the terms in the main contract relating to nominated sub-contractors and nominated suppliers indicated that the parties intended to exclude the warranty of quality and fitness for purpose and that this view was fortified by the nominated supplier's exclusion of his liability.

Gloucester County Council

- Another Lord felt that the difference in terms of the main contract did not per se exclude liability but the restriction of liability of the supplier did.
- Yet another Lord considered that the absence of the main contractor's right to object to the nomination of supplier and the imposition on the main contractor of special conditions in the sub-contract restricting his right of recourse were strongly against the implication of the warranty as to quality and fitness for purpose.

Warranty of fitness of purpose of completed works

- Generally, such a warranty would not be implied
- But, this warranty may be implied where the contract expressly or by implication imposes design obligations upon the contractor
  - *IBA v EMI* [1980] 14 BLR 1
  - *Viking Grain Storage Ltd v T.H. White Installations Ltd & Anor* [1985] 33 BLR 1

IBA v EMI

- Contract was for the design, supply and installation of a 1,250 ft high television mast at Yorkshire.
- Contract was awarded by IBA as employers to EMI as the main contractors who sub-contracted the work to BICC as nominated sub-contractors on terms which were virtually identical to that under the main contract.

IBA v EMI

- After completion, the mast, which was of a novel cylindrical design, collapsed due to vortex shedding (induced by wind) and asymmetric ice loading.
- The employer sued for damages (a) against the main contractors for breach of contract and negligence, and (b) against the nominated sub-contractors for negligence, breach of warranty and negligent mis-statement.

IBA v EMI

On appeal, the House of Lords held that :

- The main contractor was under contractual liability to the employer for the design of the mast and that, at the very least, they must be taken to have warranted that the design would not be negligent.
- Since the design of the mast was negligent, the main contractor was liable to the employer and the nominated sub-contractor was, in turn, liable to the main contractor.

IBA v EMI

- As a result of their findings that the design was negligent, the House of Lords did not decide whether there was to be a term implied in law that the television mast should be fit for its purpose.
- However, their Lordships have made some interesting comments on the fitness for purpose issue.

IBA v EMI

Lord Scarman said :

"For the purpose of the argument, I will assume (contrary to my view) that there was no negligence in the design of the mast, in that the profession was at that time unaware of the danger. However, I do not accept that the design obligation of the supplier of an article is to be equated with the obligation of a professional man in the practice of his profession. In Samuels v. Davis [1943] KB 526, the Court of Appeal held that, where a dentist undertakes for reward to make a denture for a patient, it is an implied term of the contract that the denture will be reasonably fit for its intended purpose."

IBA v EMI

His Lordship then proceeded to quote two passages from the judgment of *Samuels v Davis*, namely:

"...if someone goes to a professional man ... and says: Will you make me something which will fit a particular part of my body? ... and the professional gentleman says 'Yes' without qualification, he is then warranting that when he has made the article, it will fit the part of the body in question."

And :"If a dentist takes out a tooth or a surgeon removes an appendix, he is bound to take reasonable care and to show such skill as may be expected from a qualified practitioner. The case is entirely different where a chattel is ultimately to be delivered."

IBA v EMI

After quoting the above passages, Lord Scarman then proceeded to say:

"I believe the distinction drawn [in the judgment of Samuels v Davis] to be sound one. In the absence of any term (express or to be implied) negativing the obligation, one who contracts to design an article for a purpose made known to him undertakes that the design is reasonably fit for the purpose."

IBA v EMI

- Thus, their Lordships were of the opinion that a contractor who had undertaken the design of the whole or part of the structure which he intended to erect would normally be taken to have accepted an unqualified liability in respect of design.

Viking Grain

- Viking engaged design consultants to prepare tender documents for the construction of a large grain drying and storage facility.
- White submitted a tender proposing a package deal of design, execution and management by a skilled specialist contractor.
- Viking accepted White's tender "as per your design".
- After installation, defects appeared in the works.

Viking Grain

- Viking commenced proceedings alleging that the storage facility was unfit for its purpose in that White had impliedly warranted that the facility would be safe for its purpose.
- White however maintained that no such term should be implied and that their responsibility for design specifications and supervision of the works was limited to the exercise of all reasonable skill and care.

Viking Grain

- The Court held that as Viking had relied upon White in all aspects including design skill and judgment, it was an implied term of the contract that the completed works would be reasonably fit for their purpose as a grain drying and storage facility.

Viking Grain

Judge John Davies QC held that :

"The virtue of an implied term of fitness for purpose is that it prescribes a relatively simple and certain standard of liability based on the 'reasonable' fitness of the finished product, irrespective of considerations of fault and of whether its unfitness derived from the quality of work or materials or design. In my view, such a term is to be implied in this case. The purpose of the contract was so obvious as not to need stating. It was equally obvious that Viking needed a granary which would be reasonably fit to handle 10,000 tons by one man operation. …

Viking Grain

… Did they rely on White's skill and judgment to do so? Of course they did. They could hardly rely on their own; they had none; nor did they, as White knew, hire any. The whole point of engaging White was to rely on White's expertise and experience in the field of designing and constructing granaries. I find it impossible to differentiate between the reliance placed by Viking on White with regard to the quality of the materials and their design, the design and specification of the functional parts of the installation as a whole, and the condition of the ground. All these things were integral and interdependent parts of the whole. The quality of the materials would have been of little avail if their design was at fault."

But see *Norta Wallpaers (Ireland) Ltd v Sisk & Sons (Dublin) Ltd* [1978] 14 BLR 49

- Roof of a factory was supplied and erected by a specialist sub-contractor nominated by the employer.
- Main contractor had no option but to accept the nomination and to adopt the nominated sub-contractor's design.

Norta Wallpapers

Held :

- **No warranty of fitness for the purpose could be implied into the main contract.**
- **The fact that the main contractor was given no option but to use the nominated sub-contractor, his design and his price strongly suggested that the employer had not relied on the main contractor in respect of the design.**

- Warranty of fitness of purpose may also be implied where there is a duty to warn the employer of design defects that the contractor knows about
  - *Sanson Floor Company v Forst's Ltd* [1942] 1 W.W.R. 553

Sanson Floor

- Architect engaged to produce drawings and a specification only, but not to supervise the construction of a building.
- Employer's decided to change architect's flooring specification to have asphalt tiles laid in place of previously specified material.
- Employer consulted specialist tiling contractor and his flooring contractor on the surface required to lay the tiles.

Sanson Floor

- Tiling sub-contractor recommended three-ply sheeting on top of sanded laminated wood, which the flooring contractor was accordingly requested to provide.
- Neither tiling contractor nor flooring contractor told employer, though both knew or should have known, that waterproofing was necessary.

Sanson Floor

Held :

- **It was the duty of the tiling contractor to advise the employer as to the proper surface to be provided for the tiles and not to attempt the work unless a proper installation had been provided.**

Liabilities in Tort

- The loss or damage that usually arise from defects are generally of two types:
  - Physical damage to property or injury
  - Costs and expenses incurred in the rectification of the defects – pure economic loss claim

Claim for economic loss

- *RSP Architects & Engineers v Ocean Front Pte Ltd and anor appeal* [1996] 1 SLR 113 ("Ocean Front") – found developer does owe a duty of care to the management corporation to avoid pure economic loss
- *RSP Architects Planners & Engineers (Raglan Squire & Partners F.E) v The MCST Plan No. 1075 & Ors* [1999] 2 SLR 449 ("Eastern Lagoon") – found architects owed a duty of care to the management corporation to avoid pure economic loss

Claim for economic loss

- *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] SGHC 131
- *Man B&W Diesel S.E. Asia Pte Ltd v P. T. Bumi International Tankers* CA [2004] 2 SLR 300, in appeal from [2003] 3 SLR 239

Hong Huat

- Contract was under the SIA Conditions
- Architect was late in issuing Interim Certificates of Payment and Final Certificate
- Main Contractor claimed against Developer for damages incurred due to delay on part of Architect in issuing interim and final certificates
- Dispute determined in arbitration in favour of Main Contractor
- Developer obtained leave to appeal against the arbitrator's award

Hong Huat

Issue to be determined :

What is the nature or extent of the term to be implied as regards the duties of (Hong Huat Development Co Pte Ltd) as employers in relation to the certifying functions of the architect under the SIA Conditions?

Hong Huat

Decision of Woo Bih Li JC (as he then was) :

- **Employers have an implied duty not to interfere with the discharge of the architect's duty.**
- **Employers have an implied duty to do all things reasonably necessary to enable the architect to discharge his duty properly. However, such an implied duty does not require Employers to order or tell the architect what to do.**

Hong Huat

Decision of Woo Bih Li JC (as he then was) :

- **Consequently, even if the architect had failed to issue various certificates on time, or over-certified the retention sums, Employers are not liable for the architect's default, if any, even if Employers were aware of such defaults.**
- **Therefore, Employers are not liable for interest if Contractors received various sums of moneys late by reason of the architect's default.**

Hong Huat

Woo JC then went on to consider the question,

Does an architect, as certifier, owe a duty of care to the contractor?"

Hong Huat

Woo JC (as he then was) :

- **Considered the position in Singapore as being more generous in finding a duty of care for pure economic loss – reviewed Ocean Front & Eastern Lagoon**
- **And opined that a "strong argument" for recognising that the consultant as certifier owes a duty to the contractor to avoid pure economic loss**

Hong Huat

"I think that a strong argument can be made that an architect/certifier does owe a duty of care not only to the owner but also to the contractor to avoid pure economic loss. An architect must know that both intend to rely on his fairness as well as his skill and judgment as a certifier, … … The architect must also know that if he is negligent in issuing certificates he might cause loss to one of these parties."

Hong Huat

"On the other hand, it may be argued that because an architect as certifier is often considered as exercising a quasi-arbitral or quasi-judicial function, he should owe no duty of care to the contractor when he exercises that function. …

I need say no more on this point as it is not necessary for me to decide whether an architect, as certifier, owes a duty of care to the contractor."

Hong Huat

Decision of High Court upheld by Court of Appeal, but:

- **CA did not comment on Woo JC's remarks in respect of architect's duties to contractors**

Bumi

- Shipowner (PT Bumi) engaged builder to build oil tanker
- Engine supplied by Man B&W Diesel broke down
- Shipowner contracted with builder but not Supplier
- Claim by Shipowner against Supplier for breach of duty of care in design and/or manufacture of engine

Bumi

Court of Appeal commented:

"While in Ocean Front this court allowed a claim in economic loss in relation to real property, it must be reiterated that there the court was of the view that the relationship between the developer and the management corporation was as close to a contract as could reasonably be. It seems to us that Ocean Front should 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."

Joint and several liability

- Concurrent tortfeasor vs. independent consecutive torts
- *Chuang Uming (Pte) Ltd v Setron Limited & Lee Sian Teck Chartered Architects* [2000] 1 SLR 166 - considered the joint and several liability of contractors and architects for construction defects

Chuang Uming

- Defendants (Setron Ltd) were owner-developers of Haw Par Technocentre project.
- Plaintiffs (Chuang Uming) were main contractors of the Project.
- Third parties (Lee Sian Teck Chartered Architects) were appointed the architect of the Project.

Chuang Uming

- In action, Plaintiffs claimed for payment under an interim certificate issued by the third parties.
- Defendants counterclaimed against the plaintiffs (both in contract and tort) for damages of S$2,046,893.86 for debonded tiles to the external façade of the building.
- Defendants joined the third parties for the purpose of indemnity as well as their share of liability for the defective tile facade

Chuang Uming

At the Court of first instance, it was held :

- The contractor's poor workmanship was 20% responsible for the defective tile façade and the architect's defective design and failure to exercise proper supervision of the tiling works was 80% responsible.
- However, the contractors and architects were held to be jointly liable for the defective tiling works and damages was awarded against both of them in the sum of S$1,979,526.18, with the parties having recourse against each other for contribution to the extent of their respective liabilities.

Chuang Uming

On appeal, the Court of Appeal held :

- A joint judgment (as opposed to a separate judgment) was appropriate given that both the defective workmanship and defective design contributed to the debonding of the tiles.
- However, the apportionment of liability between the contractors and architects was to be on an equal basis, i.e. 50% to each.

Chuang Uming

"44. …, we find that both the contractors and the architects were equally to blame for the debonding of the tiles and in our opinion a just and equitable apportionment of the liability between them would be on an equal basis, i.e. 50% to each. We therefore substitute this apportionment for that ordered by the learned judge. The orders relating to the amounts recoverable between the contractors and the architects inter se, as well as the proportion of interest and the owners' costs which each party is to bear are to be varied accordingly."

Chuang Uming

"51 In cases, such as this, where the damage or injury was occasioned by more than one party, the question whether there should be a joint judgment or separate judgments depends essentially on the facts and in particular on the damage caused. Where the damage caused can be so identified and isolated as to be attributable to the negligent act or the breach of contract of each party, then a separate judgment in respect of that damage can be entered against each of the parties. Where, however, the damage caused by the parties cannot be so identified and isolated, …

Chuang Uming

… and in reality forms indivisible parts of the entire damage, we do not see how separate judgments can be entered against them separately. Reverting to the facts in this case, clearly both the defective workmanship and the defective design contributed to the debonding of the tiles. We are in agreement with the learned judge that the breaches of the contractors and the architects 'indisputably overlap and interweave' and both contributed to the same damage. In such a case, a joint judgment is the natural result as there is no reason, in principle, to limit the owner to …

Chuang Uming

… recovering only part of the loss from one party and the remaining part from the other. The apportionment of the liability between the contractors and the architects in percentage terms is not a logical corollary of the separate breaches of contract, but a device to ensure that justice is done as between the contractors and the architects inter se."

Defence of independent contractors

- This defence was considered in *Eastern Lagoon* but not subject of appeal before the Court of Appeal
- It was only confirmed a few years later in *MCST Plan No. 2297 v Seasons Park Ltd* [2005] SGCA 16, on appeal from [2004] SGCA 16

Eastern Lagoon

At the Court of first instance,

- The management corporation argued in support of its contention that the architects do owe them a duty of care, that there is a good policy reason to impose such a duty of care on the architects, as the management corporation's right to sue the developer in tort for negligence would not avail them in these circumstances since the developer would be able to escape liability on the basis that it had relied on its professional consultant to provide a proper design and exercise reasonable care in the design and that, having chosen a reputable architect, there had been no negligence on its part contributing to the defective design.

Eastern Lagoon

In accepting the management corporation's argument, the Court of first instance (Judith Prakash J.) held:

"18. I also accept the submission of the plaintiffs that once the principle of tortious liability for economic loss is accepted, there is a good policy reason to impose a duty of care on an architect in a situation like the present. This reason is that if the architect is not to be made responsible for negligence in design resulting in economic loss, then there will be no one else responsible for such loss. This is because the management corporation's right to sue the developer in tort for negligence would not avail it in these circumstances since the developer would be able to…

Eastern Lagoon

… escape liability on the basis that it had relied on its professional consultant to provide a proper design and exercise reasonable care in the design and that, having chosen a reputable architect, there had been no negligence on its part contributing to the defective design. I do not think it unfair to make the real culprit in such a case responsible for his mistakes once the proximity test has been satisfied. The defendants in this case criticised the plaintiffs for leapfrogging over the developers and suing the defendants instead. That is not a fair criticism as regards the complaint of negligent design for the reason given earlier. Although the plaintiffs could have sued the developers on an allegation of negligent construction, this in itself…

Eastern Lagoon

… cannot be an argument to stop them from suing the defendants in respect of an issue which the defendants alone were responsible for and for which the plaintiffs would not be able to hold the developers responsible. I note here that the principle that the employer of an independent contractor such as an architect is in general not liable for the negligence of that contractor in the course of carrying out the work has been described as trite law by Lord Bridge in D.&F. Estates Ltd v Church Commissioners [1989] 1 AC 177 at p 208."

Seasons Park

- Appellants were the management corporation of Seasons Park Condominium.
- The respondents were the developers of the Condominium.
- The appellants brought the claim against the respondents both in tort and in contract on behalf of the subsidiary proprietors.

Seasons Park

At the Court below, the respondents sought the trial judge's determination of certain preliminary questions of law, namely, amongst others,

- *the question whether, in relation to the claim in tort, the respondents could avail itself of the defence of "independent contractors" against the appellants' claim.*

Seasons Park

- The Court of first instance decided the question in favour of the respondents – i.e. the respondents could avail itself of the defence of independent contractors in relation to the appellants' claim in tort.
- On appeal, the Court's decision below was upheld by the Court of Appeal.

Limitation of action

- Limitation Act
- All claims for breach of contract, negligence and nuisance must be brought within 6 years from date of accrual of the claim

Limitation of action

- What constitutes date of accrual of the claim?
  - Contract – date of breach
  - Trot - date of damage (not date of discovery of damage

Limitation of action

- Limitation period extended in the event of latent defects – action must be brought within 3 years from the date of knowledge of the damage

What constitutes knowledge?

- The injury or damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty
- The identity of the defendant

What constitutes knowledge?

- The identity of person other than the defendant and the additional facts supporting the bringing of an action against the defendant in cases where it is alleged that the act or omission was that of the person other than the defendant

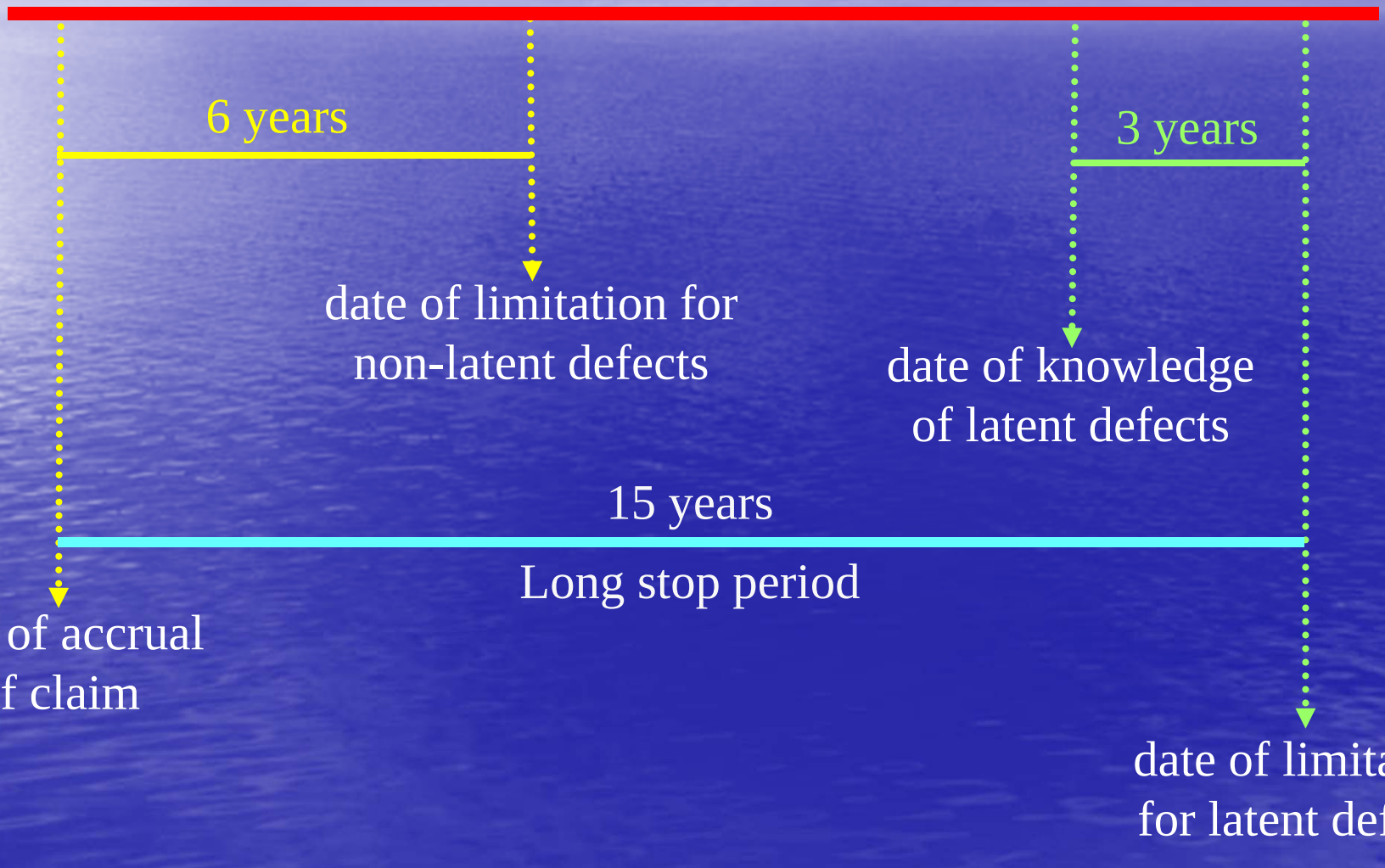
What constitutes knowledge?

- The material facts about the injury or damage which would lead a reasonable person who had suffered such injury to consider it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment

Limitation of action

- The extended limitation period of 3 years is, however, subject to the long stop of 15 years

Limitation of action




THE END

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Advocate & Solicitor, Supreme Court of the Republic of Singapore (since Jan 1993)
Member of the Civil Practice Committee, Law Society of Singapore (2002)
Member, Reserve Panel, Singapore International Arbitration Centre (since May 2003)
Fellow Member, Singapore Institute of Arbitrators (since Oct 2004)
Member, Chartered Institute of Arbitrators (since Nov 2004)
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Major Publications (author or co-author):

"The Singapore Court Forms"
"The Singapore Standard Form of Building Contract – An Annotation"
"Construction Defects: Your Rights and Remedies" title of the Sweet & Maxwell's Law for Layman Series
Singapore Civil Procedure 2003 (White Book)
Real Estate Developers' Association of Singapore's (REDAS) Design and Build Standard form contract