

RECENT DEVELOPMENT IN THE LAW RELATING TO THE DUTY OF CARE OF PROFESSIONAL CONSULTANTS



presented by
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Introduction

- A duty of care will arise where the courts have held (or Parliament has enacted) that a duty of care exists.

Introduction

- In this regard, the law is clear as to the professional consultants' liability to third parties for personal injury or damage to property other than that for which the services were engaged and the court has in fact repeatedly held that a duty of care exists in such circumstances.

Introduction

- However, the law is unclear as to the professional consultants' liability for pure economic loss – i.e. monetary loss unrelated to the physical injury or damage to “other property” – and there has been considerable litigation and academic debates over this head of claim.

The starting point :

- *RSP Architects Planners & Engineers v Ocean Front Pte Ltd and anor appeal* [1996] 1 SLR 113, CA (“*Ocean Front*”)
 - Court of Appeal held developers owed a duty of care to the management corporation (“MC”)

Court's approach in Ocean Front

- In finding that the developers were under a duty of care to the MC, the CA applied a two-stage test.

Ocean Front – 1st stage

CA considered whether, in the circumstances of the facts of the case, there was a sufficient degree of proximity in the relationship between the parties which gave rise to a duty on the part of the developers to exercise reasonable care in the construction of the common property so as to safeguard the MC from sustaining the kind of damage complained of ?

Ocean Front – 1st stage

In finding that there was a sufficient proximity between the developers and the MC, the CA took into account the following factors:

- ✓ The developers were the party who built and developed the condominium including the common property, and undertook the obligations to construct it in a good and workmanlike manner and were alone responsible for such construction.

Ocean Front – 1st stage

In finding that there was a sufficient proximity between the developers and the MC, the CA took into account the following factors:

- ✓ After completion of the condominium, the developers were the party solely responsible for the maintenance and upkeep of the common property.

Ocean Front – 1st stage

In finding that there was a sufficient proximity between the developers and the MC, the CA took into account the following factors:

- ✓ The MC as the successor of the developers took over the control, management and administration of the common property and has the obligation of upkeep and maintaining the common property.

Ocean Front – 1st stage

In finding that there was a sufficient proximity between the developers and the MC, the CA took into account the following factors:

- ✓ The performance of these obligations is very much dependent on the developers having exercised reasonable care in the construction of the common property.

Ocean Front – 1st stage

In finding that there was a sufficient proximity between the developers and the MC, the CA took into account the following factors:

- ✓ The developers obviously knew or ought to have known that if they were negligent in their construction of the common property, the resulting defects would have to be made good by the MC.

Ocean Front – 2nd stage

Having found that such proximity exists in the circumstances before it, the CA then proceeded to consider whether there was any policy consideration which would negative the existence of a duty of care.

Ocean Front – 2nd stage

- CA found – no policy consideration to negative the imposition of a duty of care.
- There would not be liability in an indeterminate amount for an indeterminate time to an indeterminate class.

Ocean Front – 2nd stage

- The amount is limited to the cost of repair
- The class of persons to whom the duty is owed is definable
- The Limitation Act prescribes a limit on the duration in which the developers would be exposed to liability

Ocean Front – 2nd stage

- The recovery of claims for economic loss against the developers by the MC would not result in an indefinitely transmissible warranty as the common property has been and will continue to be under the control and management of the MC.

Few years after *Ocean Front*:

- *RSP Architects Planners & Engineers (Raglan Squire & Partners F.E.) v The MCST Plan No. 1075 & Ors* [1999] 2 SLR 449, CA (“*Eastern Lagoon*”)
 - Court of Appeal also applied the 2-stage test in *Ocean Front* and held that the architects were under a duty of care to the MC

Eastern Lagoon – The relevant facts

- Although the decision to construct a condominium was that of the developers and that the developers were the ones who brought the defendants (ie. architects) into the project, the defendants were the ones who bore the responsibility for the design of the condominium and undertook to supervise its construction in accordance with the general responsibilities of architects in Singapore.

Eastern Lagoon – The relevant facts

- It was the defendants who decided what the tower blocks should look like and chose the type of wall cladding to be used for its external walls.
- They undertook the obligation to design the condominium so as to ensure that it was a safe structure and were alone responsible for the design.

Eastern Lagoon – The relevant facts

- The defendants were involved in the project almost every step of the way up to completion of construction and issue of the certificate of fitness for occupation.
- They would have been aware that the developers had decided to apply for subdivision of the condominium and that, accordingly, each lot in the subdivided building would have a separate subsidiary strata certificate of title.

Eastern Lagoon – The relevant facts

- The defendants would have been aware also that the consequence of the developers' decision to apply for subdivision of the condominium was that, in due course, a management corporation would be formed comprising the various subsidiary strata title proprietors and that this management corporation would succeed the developers as the person responsible for the control, management and administration of the common property and having the obligations of upkeep and maintaining the common property.

Eastern Lagoon – The relevant facts

- The MC's performance of its obligations would be affected by whether there had been reasonable care in the design and supervision of the project.
- The defendants knew or ought to have known that if they were negligent in their design and/or supervision, the resulting defects would have to be made good by the MC.

Eastern Lagoon – The relevant facts

- It was obviously foreseeable by the defendants that if they were negligent in the design of the condominium, this could result in the expensive rectification work and therefore economic loss for either or both the subsidiary proprietors and the MC.

Eastern Lagoon

For the same reasons as it gave in *Ocean Front*, the CA also held that the amount recoverable was determinate, the persons to whom the architects were liable was definable and the time span was not indeterminate.

Implication of *Eastern Lagoon* :

- *Eastern Lagoon* dealt with the case of architects – principles should be applicable to engineers as well, as they occupy similar positions as architects.

Implication of *Eastern Lagoon* :

- But, both *Ocean Front* and *Eastern Lagoon* were claims brought by the MCST and decided on their own facts.
- So, what is the position if claims were brought by subsequent purchasers of the property?

Implication of *Eastern Lagoon* :

- See Malaysian case of *Chin Sin Motor Works Sdn Bhd & Anor v Arosa Development Sdn Bhd & Anor* [1992] 1 MLR 23
 - Malaysian courts found project architect under a duty of care to the purchaser of a property in the former's certification of progress payments under the building contractor

Implication of *Eastern Lagoon* :

- See also Malaysian case of *Steven Phoa Cheng Loon v Highland Properties Sdn Bhd* [2000] 4 MLR 2000
 - Malaysian courts found engineers under a duty of care to the subsequent purchaser of property sold by the developers who engaged the engineers

Implication of *Eastern Lagoon* :

- How about the case of a developer who did not engage the engineers directly?
- Does the engineers owe this developer a duty of care ?

Implication of *Eastern Lagoon* :

- See *Surrey (District) v Carroll-Hatch & Associates* (1979) 101 DLR (3d) 218, CA (British Columbia)
 - structural engineer engaged by the architect was found to be under a duty of care to the employer to warn the latter of the need for a deep soil report and of the risks in proceeding with the construction with such a report – this is notwithstanding that there was no contract between him and the employer

Implication of *Eastern Lagoon* :

- *But, see Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] SGCA 36
 - CA held architect not under a duty of care to the owner under a design and build arrangement with the contractor
 - complaint related to architect's failure to supervise the contractors' works

Implication of *Eastern Lagoon* :

- See also *P.T. Bumi International Tankers (formerly known as P. T. Bumi Indonesia Tankers) v Man B&W Diesel S.E. Asia Pte Ltd (formerly known as Mirrlees Blackstone (S.E. Asia) Pte Ltd and Mirrless Blackstone Ltd* [2004] 2 SLR 300 (the “*Bumi*”)

The *Bumi* – the facts

- Shipowner (PT Bumi) engaged builder to build oil tanker
- Engine supplied by Man B&W Diesel (supplier) 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

The *Bumi* – decisions of the lower courts

- Court adopted approach taken by CA in *Ocean Front* and *Eastern Lagoon* – the 2 stage test .
- Held principles laid down by the CA in *Ocean Front* and *Eastern Lagoon* are capable of application in a wide variety of circumstances.
- They are not confined to the types of factual situations that were seen in those two cases.

The *Bumi* – decisions of the lower courts

- The fact that there were substantial differences between the facts of the *Bumi* case and that of those two cases, was not, by itself, decisive of the issue.
- The differences must be examined in the context of an investigation into whether the application of the principles to the existing facts provided a sound basis for the imposition of a tortious duty on the defendants.

The *Bumi* – decisions of the lower courts

- One could not simply brush aside any suggestion of the existence of a duty by saying airily “*the facts are different*”.
- Concluded, as regards the claim against the manufacturer, that there was a sufficient relationship of proximity between the owner and the manufacturer so as to give rise to a duty of care on the part of the manufacturer to the owner.

The *Bumi* – decisions of the lower courts

- The manufacturer knew that the vessel was being custom built to meet a specific owner's requirements and that the owner had discussions with its sole agent and was relying on the manufacturer's expertise as a specialist manufacturer of engines to produce an engine that was suitable for the vessel.

The *Bumi* – decisions of the lower courts

- Manufacturer could also foresee that if the engine was defective and continually broke down or required excessive maintenance and repair work, the owner would suffer economic loss from disruptions in the use of an income producing chattel.

The *Bumi* – decisions of the lower courts

- Court also found that a sufficient proximity existed between the owner and the supplier thereby giving rise to a duty of care in that the supplier had, in asserting that the engine was reliable and actively marketing it through the various tenders that they sent to the shipbuilder and the various meetings with the owner and the builder, assumed responsibility for the delivery of an engine that would meet the owner's requirements.

The *Bumi* – decisions on appeal

- However, on appeal, CA found that no duty of care was owed by manufacturer and supplier to the shipowner.

The *Bumi* – decisions on appeal

- CA considered the question whether it intended in *Ocean Front* to lay down a general proposition that, applying the two-step test and whatever might be the subject matter, whenever economic losses were suffered by a party and those losses were attributable to a lack of care on the part of another party, the first party might claim the losses from the second party.

The *Bumi* – decisions on appeal

- It decided 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 decision in *Ocean Front* to new situations, particularly to a scenario which was essentially contractual.

The *Bumi* – decisions on appeal

- And further reiterated that, in *Ocean Front*, it was of the view that the relationship between the developer and the MC was as close to a contract as could reasonably be and held that that case 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*.

Conclusion on position viz-a-viz developer :

- Engineer would owe a duty of care to MCST
- Duty to subsequent purchasers - position in S'pore not resolved – most probably not – opening floodgate

Conclusion on position viz-a-viz developer :

- Engineer would generally be under a duty to warn owner but does not owe any duty to the owner to supervise the contractor's works
- But, how about its own design – would engineer owe any duty to the owner for error in the design ?
– probably no based on *Bumi*

Implication of *Eastern Lagoon* :

- How about the case of the contractor – would an engineer owe a duty of care to the contractor with whom the former does not contract ?

Case of contractor - certification cases

- *Hong Huat Development Co (Pte) Ltd
v Hiap Hong & Company Pte Ltd*
[2000] SGHC 131

Hong Huat – the parties

- Hong Huat – Developer
- Hiap Hong - Main Contractor

Hong Huat – the claim

- 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

Hong Huat – the claim

- Dispute determined in arbitration in favour of Main Contractor
- Developer applied for 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 SLA Conditions?

Hong Huat – Court's decisions

(Woo Bih Li JC)

- 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 – Court's decisions

- 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 – this would be so even if Employers were aware of such defaults.

Hong Huat – Court's decisions

- Employers are therefore not liable for interest if Contractors received various sums of moneys late by reason of the architect's default.

Hong Huat – Court's decisions

Woo JC also went on to consider the question,

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

Woo JC considered:

- the position in Singapore as being more generous in finding a duty of care for pure economic loss

Hong Huat – Court's decisions

“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 – Court's decisions

“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 – Court's decisions

- 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

Case of contractor - certification cases

- *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Company Pte Ltd*
[2000] SGHC 131 - maybe
- *Hyundai Engineering & Construction Co Ltd v Rankine & Hill (Singapore) Pte Ltd* [2004] 4 SLR 227

Hyundai – the parties

- Hyundai – Main Contractor
- Rankine – M&E Consultant

Hyundai – the facts

- Consultant gave instructions that resulted in cost savings to be credited by Contractor to Developer
- Contractor applied to court for an order that :
 - on a true and proper construction of the main contract, the savings should be valued according to the contractor's formula

Hyundai – the facts

- Contractor also sought for the court's determination :
 - whether, in calculating the savings in the way it did, the defendant was “in breach of a duty of care in the tort of negligence”

Hyundai – the facts

- Contractor relied on High Court's decision in *Hong Huat* for the proposition that a person who was charged with a duty to certify was bound to discharge his duty with care and skill and owes a duty of care not to cause economic loss to the Contractor
- It did not claim against Developer for incorrect certification by Consultant

Hyundai – Court's decisions

Choo Han Teck J

- The *Hong Huat* decision on this point was not dealt with on appeal
- The facts here were also significantly different – Consultant was not contractually bound to certify the savings or reimbursement & could not be likened to the architect who was contractually bound to certify the satisfactory completion of work

Hyundai – Court's decisions

- The QS or architect was the person who had to certify the savings
- No evidence to show that the QS or architect would definitely accept the defendant's valuation
- Even if QS or architect adopted the defendant's valuation, the proper course would be for the Contractor to dispute it as a matter of contract between itself and the Developer

Hyundai – Court's decisions

- In that event, it would be questionable whether any cause of action would lie against the defendant

In Conclusion :

- Court did not make any order on the questions sought to be determined although it ordered costs against the Contractor
- Position therefore remains unclear

Case of contractor - certification cases

- *Yee Hong Pte Ltd v Tan Chye Hee Andrew (Ho Bee Development Pte Ltd, Third Party) [2005] 4 SLR 398*

Yee Hong

- Contractor claimed against Architect for the latter's breach of duty in wrongfully issuing a delay certificate that was backdated and in failing to certify variations
- Architect joined Developer as Third Party to the action

Yee Hong

- Issue concerned Developer's application to stay the proceedings where dispute between Contractor and Developer had already been referred to arbitration
- Issue of whether a consultant/certifier owes a duty of care to the contractor not substantially dealt with

Yee Hong

- However, court noted that it was “wrong for the [contractor] to rely on Woo JC’s decision [in *Hong Huat*] as authority for the proposition that [it] could sue the [architect] for economic loss”

Case of contractor - certification cases

- *Yee Hong Pte Ltd v Tan Chye Hee Andrew (Ho Bee Development Pte Ltd, Third Party)* [2005] 4 SLR 398
- issue not dealt with – position not settled
- *Goodwill Building Resource Pte Ltd v Yuen Cheong Kuan t/a Ben Design Architects and Anor* [2006] SGDC 240 – decisions of Sub Courts

Goodwill – the parties

- Goodwill – Main Contractor
- Ben Design - Architect

Goodwill – the facts

- Architect had not issued Completion, Maintenance and Final Certificates at the time the action was commenced
- Contractor claimed that delay by Architect in issuing certificates resulted in Contractor having to utilize overdraft facilities, thereby incurring loss and expense

Goodwill – the facts

- Accordingly, it claimed against the Architect for the loss and expense that it has suffered

Issue to be determined :

Does an architect performing the role of a certifier owe a duty of care to the contractor with whom he has no contractual relationship ?

Goodwill – Court's decisions

- Nature of Contractor's claim in present case similar to that in *Hong Huat*
- Based on decisions in *Hong Huat*, Contractor would not have any recourse against the Developer for the loss and expense it suffered

Goodwill – Court's decisions

- Architect must know that if he is negligent in his duty of issuing the relevant certificates he is likely to cause loss to the contractor
- There is therefore a sufficient proximity between the parties as to give rise to a duty of care – ie. Architect owes Contractor a duty of care in the performance of its certification duties – but on facts, duty not breached

Case of contractor - certification cases

- But, see *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2006] SGHC 229 – Court found no duty owed by SO – decision upheld on appeal in [2007] SGCA 37

Spandeck – the parties

- Spandeck – Main Contractor
- DSTA – Superintending Officer (“SO”)

Spandeck – the facts

- Project for construction of medical facility for Mindef under PSSCOC
- During construction, Contractor faced financial difficulties resulting in novation of Project to another contractor

Spandeck – the facts

- Contractor's claim related to under-certification of 3 interim certificates, under-payment under a VO and loss of profit on novated works
- Contractor claimed that SO failed to accurately value and certify the Contractor's works resulting in inadequate and/or delayed payment to the Contractor

Spandeck – preliminary issue to be determined

*Was there a duty of care
owed by the SO to the
Contractor ?*

Spandeck – CA's decisions

- CA confirmed the 2-stage test –i.e. that of proximity and policy considerations
- This 2-stage test is to be approached with reference to the facts of decided case although the absence of such cases is not an absolute bar against a finding of duty

Spandeck – CA's decisions

- On the facts, CA held SO did not owe a duty of care to the Contractor
- There was no direct contractual relationship between the Contractor and the SO
- Contractor had recourse against Developer in contract to claim the additional payments for variation works

Spandeck – CA's decisions

- It would not be just or reasonable to impose a duty of care on the SO in view of the contractual framework to which the Contractor had agreed

Case of contractor - supervision cases

- *Clayton v Woodman & Son (Builders) Ltd [1962] 2 QB 533* – Engineer engaged by the employer did not owe any duty to the contractor to supervise the latter or correct any erroneous way of working – but would be liable to the employer who engaged him

*How about engineer's
error in his own design ?*

*Does he owe any duty of
care to the contractor in
respect of its design ?*

THE END

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"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