

# COMMON PITFALLS IN CONTRACT FORMATION

A stylized graphic of a building with blue and white facades and windows, positioned behind the title and presenter text.

*presented by*

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## Some common myths

- There could never be a concluded contract by the mere provision of estimates
- A contract is made by the Contractor's submission of his tender
- Contract needs to be signed before there could be any concluded contract

## Some common myths

- There could never be a concluded contract by the issue a letter of intent
- Issue of a letter of award would invariably lead to a concluded contract
- Terms of main contract would become part of the sub-contract terms if the sub-contract is described as being “back to back” with the main contract



# Corrections of the myths

## *Contractor's estimates*

- Provision of estimates may lead to concluded contract
- *Crowshaw v Pritchard* (1899)  
16 TLR 45

## *Crowshaw v Pritchard*

- Architect asked defendant contractor if he would be willing to give a tender in competition for the works
- Contractor responded with letter headed “estimate” and providing “our estimate ... amounts to £1,230”

### Held:

- Contractor’s letter constituted an offer, and a contract was concluded when the employer accepted the contractor’s offer



# Corrections of the myths

## *Contractor's bid or tender*

- Employer's invitation to tender = invitation to treat - not an offer capable of acceptance
- Contractor's tender = offer
- Employer not obliged to accept lowest tender unless invitation expressly provides otherwise

# Corrections of the myths

## *Contractor's bid or tender*

- Employer also absolutely free to reject tender, either on its own intrinsic merits or on ground of some disqualifying factor personal to the tender
- However, employer may be contractually bound to open and consider the bid of the contractor who submits a conforming tender



# Corrections of the myths

## *Contractor's bid or tender*

- Similarly, contractor's tender can be withdrawn at any time before acceptance, unless there are express terms to the contrary
- Eg. of express terms to the contrary – where invitation to tender requires the tender to remain in effect for a certain period of time



# Corrections of the myths

## *Signing of formal contract*

- No need for a formal contract
- Contract may be formed by correspondence and may be contained in quotations or purchase orders
- May also be formed via emails

*Chwee Kin Keong & ors v Digilandmal.com Pte Ltd*  
[2004] 2 SLR 594

- Non-construction case

The facts:

- Plaintiffs were six friends and all graduates – they placed orders on the defendant's web site for 1,606 Hewlett Packard commercial laser printers priced at \$66 each
- Plaintiffs' orders were processed by defendant's automated order system and confirmation notes were automatically despatched to the plaintiffs within minutes



## The facts:

- Each of the automated confirmatory e-mail responses carried under “Availability” of the product the notation “call to enquire”
- The web page entitled “checkout – order confirmation” carried the following statement: “The earliest date on which we can deliver all the products to you is based on the longest estimated time of stock availability plus the delivery lead time”

## The facts:

- Though the actual price of the laser printer was \$3,854, the defendant had mistakenly posted the price at \$66 on its websites
- When the defendant learnt of the error, it promptly removed the advertisement from its websites, and informed the plaintiffs as well as 778 others who had placed orders for a total of 4,086 laser printers that the price posting was an unfortunate error, and that it would therefore not be meeting the orders



## The facts:

- Plaintiffs refuted that the error exonerated the defendant - they insisted that a concluded contract is sacrosanct and must be honoured

## Held:

- It was not really in issue that contracts could be effectively concluded over the Internet and that programmed computers sending out automated responses could bind the sender

## Held:

- The elements of an offer and acceptance are *ex facie* satisfied in every transaction asserted in the plaintiffs' claims
- It cannot also be seriously argued that there was no intention to enter into a legal relationship - the defendant even had its terms and conditions posted on its website
- Adopting an objective standard, executory contracts have in fact been entered into and concluded between the parties



# Corrections of the myths

## *Signing of formal contract*

- Depending on circumstances, the parties' signing of the contract may not be a pre-requisite to a concluded contract
- *Li Hwee Building Construction Pte Ltd v Advanced Construction & Engineering Pte Ltd* [2002] SGHC 287

## ***Li Hwee v Advanced***

### **The facts:**

- Defendant was the main contractor for a project. It signed two original sets of the sub-contract and forwarded one set to the plaintiff
- Plaintiff signed the sub-contract but kept it as its copy



## The facts:

- When sued by the plaintiff for wrongful repudiation of the sub-contract, defendant argued that there was no concluded contract as the plaintiff did not return the signed copy of the sub-contract to defendant

## Held:

- There was a concluded contract

## *Li Hwee v Advanced*

### Held:

- The defendant, in signing the sub-contract, signified an intention to be bound by the sub-contract
- It has handed the sub-contract to the plaintiff with the intention that it should constitute a binding contract
- The terms of the sub-contract were typical of a commercial agreement intended to be binding



## *Li Hwee v Advanced*

### Held:

- Even before the plaintiff signed it, the sub-contract as executed by the defendant was *prima facie* enforceable against the defendant as the party who has signed it

- But see *United Eng Contractors Pte Ltd v L&M Concrete Specialists Pte Ltd* [2000] 2 SLR 196
- Court held that there was no concluded contract as the plaintiff sub-contractor did not append their signature of acceptance to the letter of award



## *United Eng cf. Li Hwee*

- The difference is that, in the *United Engineers*, the letter of award and standard conditions were in such a form that required the parties to signify their agreement to all the terms by signing them

## Other factors affecting the court's decision in *United Eng:*

- Court found that there was already an oral contract concluded by the plaintiff's mobilisation and commencement of work on the site
- By the letter of award, the defendant was attempting to unilaterally impose onerous terms on the plaintiff – LAD & PB
- Although letter of award referred to defendant's standard conditions, they did not accompany the letter of award



# Corrections of the myths

## *Issue of letter of intent*

- May lead to a concluded contract, depending on facts and circumstances of each case
- Eg where the letter of intent contains terms in such details that it is treated, to all intent and purposes, by the parties as the complete and final contract

# Corrections of the myths

## *Issue of letter of intent*

- Or where there is a clear intention that the offer might be accepted by a letter of intent with liability being assumed
- *Turriff Construction Ltd and Turriff Ltd v Regalia Knitting Mills Ltd* (1971) 9 BLR 20
- Cf. *British Steel Corporation v Cleveland Bridge & Engineering Co Ltd* [1984] 1 All ER 50



## **Turriff Construction v Regalia**

### **The facts:**

- A design and build contractor offered to the employer that he would undertake certain urgent works of design necessary to obtain estimates and planning permission provided he would be paid for such work
- He indicated that he would regard receipt of a letter of intent as an acceptance of his offer

## The facts:

- Employer sent a letter of intent

## Held:

- Employer liable to pay contractor for the work carried out



## **Cf. British Steel**

### **The facts:**

- Defendants were sub-contractors engaged to build a bank in Saudi Arabia. They approached the plaintiffs with a view of engaging them to make some items that were required for the project
- The negotiations both as to the technical specifications and as to the terms of the contract were complex and lengthy
- The defendants eventually sent the plaintiffs a letter of intent

## The facts:

- Defendants' letter of intent proposed, *inter-alia*, that the contract be based on their standard terms
- Plaintiffs made it clear that they were not prepared to contract on the defendants' terms - Nevertheless, they went ahead with the construction of the items and sued for the value of the items
- Defendants counterclaimed for late delivery



## Held:

- On the facts, there was no contract since it was clear that the parties never agreed on such important questions as progress payments and liability for late delivery
- However, plaintiffs were entitled to recover payment on a *quantum meruit* basis since they had done work at the defendants' request and the defendants had accepted it

## Corrections of the myths

### *Sub-contract described as being “back-to-back” with main contract*

- Court has consistently held that such a clause does not operate to incorporate all the terms of the main contract into the sub-contract



*Spandeck Engineering (S) Pte Ltd v China  
Construction (South Pacific) Development Co Pte  
Ltd* [2005] SGCA 59

(affirming decision of *China Construction (South Pacific)  
Development Co Pte Ltd v Spandeck Engineering (S) Pte Ltd*  
[2005] SGHC 86)

The facts:

- ChinaCon was interested in tendering for a HDB project in Hougang
- However, it was not pre-qualified to tender for project of that value

## The facts:

- ChinaCon therefore approached Spandeck, who was so pre-qualified, to collaborate on the project
- The parties decided to co-operate in the tender exercise with Spandeck tendering for the project and ChinaCon working closely with it as the intended main sub-contractor
- The plan was for ChinaCon to carry out all the works, with Spandeck supplying and installing the pre-fab components as well as the Civil Defence shelter doors



## The facts:

- Spandeck was successful in the tender
- Prior to the submission of the tender, the parties entered into an agreement but this was superseded by subsequent 3 letters that transpired between the parties – 26 Jan, 27 Jan & 28 Jan

## The facts:

### 26 Jan letter

- Stated the “estimated contract sum” and referred to an Appendix I for the computation of the alleged lump sum
- Appendix I made it clear that the alleged lump sum was derived from deducting the costs of the items listed from the contract price in Spandeck’s agreement with HDB in the main contract



## The facts:

### 26 Jan letter

- Also emphasised that the values attributed to certain items were approximate only and would be subject to final measurement of actual cost or quantities

### 27 Jan letter

- Stated the “total contract sum” without reference to Appendix I

## The issue:

- One of the issues before the Court was whether the contract price payable to ChinaCon was to be calculated in accordance with Appendix 1 to the 26 Jan letter or a lump price fixed at \$31,966,375 only



## Spandeck's argument:

- In support of its arguments that the contract price payable was the fixed lump sum price, Spandeck argued, amongst others, that the 27 Jan letter provided that the subcontract was to be back to back with the HDB contract and since HDB contract was a firm price basis, the subcontract had to be on the same basis

## Held :

- The words “back to back” had to bear a narrower meaning than full incorporation of all the HDB terms and conditions – it noted that the 26 Jan letter also had a similar provision and yet, in that letter, the contract was expressly stated to be on a re-measurement basis



## Held :

- It also added that whatever had been incorporated from the main contract with HDB was qualified in any event by the clear terms of the 26 Jan letter which made it explicit that the contract sum was an estimated one subject to re-measurement, which could result of course in one or the other party having more money than originally anticipated

## Held :

- If the words “back to back” were taken absolutely literally, the subcontract would end up having the same contract sum as the main contract, an interpretation that the appellant no doubt would reject immediately



## But see *GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] SGHC 48

### The facts:

- Plaintiff was in the business of supplying, testing and commissioning a particular brand of fire detection and alarm system (“EST”)
- Defendant was also in the business of supplying fire protection systems

## The facts:

- In the action, plaintiff claimed for various works that it had carried out for the plaintiff in respect of a number of projects which included the Stage 1 Marina Line MRT project
- The LOA stated that the sub-contract for the Stage I Marina Line MRT project had been awarded on a back-to-back basis with respect to the main contract



## The issue:

- One of the issues before the Court was whether the plaintiff's right to be paid under the sub-contract for the Stage 1 Marina MRT project depended upon the payment arrangements under the main contract

## Held:

- While the use of the term “back-to-back” is common in construction *sub*-contracts in Singapore, it is not a term of art
- The construction to be placed upon such a clause will depend on the interpretation of the sub-contract document as a whole and in the light of the factual matrix known to the parties at the time they contracted



## Held:

- To the extent that the clause is intended to incorporate all the terms of some other contract into that containing the back-to-back stipulation, it may not always be successful and quite often the language may not have the effect of incorporating the main contract in its entirety

## Held:

- Just what is incorporated will depend in each case upon such things (among others) as what was objectively known to the parties at the time they entered into the contract, what specific references were made to the main contract document, and whether the terms of the main contract relevant to the back-to-back provision were of such a nature that they should have been and were specifically brought home to the sub-contractor or whether they were sufficiently general that they would fall within the general appreciation and knowledge of the parties



## Held:

- By way of example, it may be generally known to a sub-contractor that the main contractor would in due course make an application for payment to the employer in respect of works done by the subcontractor - On the other hand, it may not be generally known to the subcontractor that requests have to be in a very particular format

## Held:

- The commercial reality is that a party seeking to invoke the clause is usually an intermediate contractor who has undertaken certain obligations under a head contract and then attempts to pass on those obligations to a sub-contractor
- However, it would be overly simplistic to conclude that such a desire can always be so easily achieved



## Held:

- The fact is that the defendant had a certain scope of work under the head contract for which it stood to be paid a sum in excess of \$8.6m, whereas the contract between the parties in this case was for a consideration that was just a fraction of this
- The fact that the plaintiff might not even have seen the head contract may be a relevant factor in holding that the head contract had not been incorporated into the contract between the parties

## Held:

- However, the weight to be attached to the fact that a party has not seen the main contract must be considered in the light of the factual matrix as a whole
- It may not be decisive if the circumstances are such that the terms said to be affected by the back-to-back provision are matters that would fall within the general appreciation and knowledge of the parties to the sub-contract



## Held:

- On the other hand , if the terms are highly technical and particular, it may be more important
- Consideration should also be given to the sub-contractor's ability to ask for a copy of the main contract
- It may also be overcome with sufficiently explicit language making it clear that the head contract was being incorporated and that the sub-contractor was deemed to have acquainted itself with its terms

## Findings:

- Court rejected the plaintiff's contention that the back-to-back arrangement applied in relation only to the specifications, drawings and the completion schedule
- It was of the view that, having regard to the express terms of the LOA, the plaintiff's right to make a claim for variations or for loss and expenses due to revisions as well as its obligations as to performance and compliance with specifications were to be on a back-to-back basis



## Findings:

- Plaintiff would therefore be entitled to make such claims to the extent that the defendant had an entitlement to do so, and it would be liable for inadequate performance or non-compliance with the specification in question to the extent that it had done the work and the defendant was liable

## Findings:

- Plaintiff's right to payment was in fact to be on a back-to-back basis, in the sense that the plaintiff would be entitled to be paid within a reasonable time after the work it did had been accepted or certified for payment following an application for payment for such work having been made by the defendant under the main contract
- Clearly, the defendant would have been obliged to make such applications in good faith and in a timely manner, but this was not raised before the court



## Findings:

- The point, simply, is that any other approach would mean that the plaintiff would be entitled to payment regardless of whether the party for whom and to whose standards the work was ultimately being done accepted it as such

## Findings:

- If this were so, then the defendant would have taken a significant risk in that it would be obliged to pay the plaintiff regardless of whether the works were acceptable to the employer, having regard to the plaintiff's obligation to comply with the employer's requirements, and, therefore, regardless of whether the defendant was going to be paid by the employer



**See also Soon Li Heng Civil Engineering Pte Ltd  
v Woon Contractors Pte Ltd [2005] SGHC 34**

**The facts:**

- Defendant was main contractor for a HDB civil engineering works
- It sub-contracted the earthworks to the plaintiff
- Plaintiff's claim was for balance sum for the earthworks that it had carried out

## The facts:

- In denying payment to the plaintiff, the defendant argued, amongst others, that the plaintiff had wrongfully backfilled the site with the wrong type of fill materials
- Evidence was indeed adduced from soil expert that the fill materials were of the wrong materials



## Held :

- Defendant not entitled to deny plaintiff's claim on the basis that the plaintiff had failed to backfill the site in accordance with the defendant's own interpretation of the requirement of the sub-contract
- Court noted that the sub-contract provided that it was on a back-to-back basis with the main contract

## Held :

- It also noted that HDB had expressed satisfaction with the plaintiff's performance of the sub-contract and the defendant had been paid in full by HDB for the earthworks
- It would therefore be inequitable and an anomaly for the defendant to retain the payment it received in full from the HDB for the earthworks done by the plaintiff and yet be allowed to deny the plaintiff its claim



## **Kum Leng General Contractor v Hytech Builders Pte Ltd** [1996] 1 SLR 751

### **The facts:**

- A clause in the sub-contract provided that “The sub-contractor shall observe, perform and comply with all the provisions of the main contract on the part of the contractor to be observed, performed and complied with so far as they relate and apply to the sub-contract works...”

It was said at p. 759:

**“Although I have set out some of the provisions from the main contract I have done so only in order to show the interlock between the two contracts. The sub-contractor is not a party to the main contract and except in so far as the sub-contract incorporates any of the provisions in the main contract, the terms of the main contract would be relevant in construing the sub-contract only when there is ambiguity in the sub-contract.”**



## *Hi-Amp Engineering Pte Ltd v Technicdelta Electrical Engineering Pte Ltd [2003] SGHC 316*

### The facts:

- 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 facts:

- 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
- Defendant denied plaintiff's claims and asserted that plaintiff was in fact overpaid



## The issue:

- One of the main issues before the court was whether the sub-sub-contract between the parties was “back to back” with the sub-contract entered into between the defendant and another party

## Held:

- 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
- It accepted the plaintiff's evidence that the defendants did not furnish the plaintiffs with the main contract documents except for some "in dribs and drabs"



## Held:

- The relevant provision, which contained the common phrase that “all terms and conditions of the main contract shall apply, mutatis mutandis, to the sub-contact”, was held to be ambiguous and not so precise in incorporating the terms of the main contract as part of the sub-contract

*Lam Hong Leong Aluminium Pte Ltd v Lian Teck  
Huat Construction Pte Ltd* [2003] SGHC 53

The facts:

- Defendant argued for incorporation, relying on a clause in the letter of award, which required the plaintiff to “enter into a subcontract with the first defendants on the same terms and conditions as those in the main contract”



## Held:

- Such a provision was not an adequate incorporation clause, but merely a clause that was directed more at establishing the terms of the intended contract when executed
- Court also noted that “no subcontract ... was ever executed between the parties, let alone on the terms and conditions set out in the main contract”

# Corrections of the myths

## *Issue of letter of award*

- Does not invariably lead to a concluded contract
- Eg where the issue of a letter of award would not lead to a concluded contract – where letter of award is expressed to be “subject to formal contract”



## *Compaq Computer Asia Pte Ltd v Computer Interface (S) Pte Ltd* [2004] 3 SLR 316

### The facts:

- Compaq was awarded the contract for the installation, servicing and maintenance of hardware and software (“field services”)
- It signed a non-binding MOU with CIS stipulating that CIS would provide the field services as a sub-contractor

## The facts:

- MOU envisaged a formal sub-contract to be signed within 30 days – but it was not signed
- Compaq then issued a letter of award (“LOA”) to CIS to confirm the agreement
- LOA was expressed to be “subject to final terms and conditions being agreed”



## The facts:

- Under the LOA, parties also agreed to sign a formal contract by 14 July or some other target date – but no formal contract was ever signed
- Some 18 mths after CIS commenced on the provision of the field services, Compaq terminated the arrangement
- CIS therefore sued Comaq for damages for breach of contract

## Held by Singapore Court of Appeal (affirming the lower court's decision):

- There was no concluded contract
- The phrase “subject to final terms and conditions being agreed” simply meant that the award was conditional upon the final terms and conditions being agreed



## Held by Singapore Court of Appeal (affirming the lower court's decision):

- However, there was nothing on the facts to indicate where the nature of those “final terms and conditions” were
- The LOA also did not set out all the essential terms of the arrangement and all vital issues such as the payment terms, exclusion of liability, insurance or termination were not addressed in the award

## **Koon Seng Construction Ptd Ltd v Siem Seng Hing & Co (Pte) Ltd [2005] SGHC 8**

### **The facts:**

- Plaintiff main contractor requested from a number of suppliers (including the defendant) for the supply for steel bars
- In response, defendant quoted a price but added that the price was “subject to final confirmation”



## The facts:

- Plaintiff then asked defendant to proceed with the delivery – letter also mentioned that it would follow up with a letter of award to the defendant
- However, plaintiff did not issue the letter of award – in the meantime, defendant sought to increase the price for the rebars

## The facts:

- Plaintiff then placed an order for the rebars at the previously amended price
- Defendant replied that it was unable to accept the order as it was not able to obtain supplies from its own supplier
- Accordingly, plaintiff brought the action against the defendant alleging that the defendant had repudiated the contract and claimed damages to be assessed



## The issue:

- Main issue was whether there was a binding agreement between the plaintiff and the defendant for the supply of steel bars by the defendant to the plaintiff

## Held:

- Court rejected plaintiff's argument that there was in existence a binding contract
- “the intention that the contract should not be binding until the said letter of award was issued was unmistakable” and considered this to be “fatal” to the plaintiff's claim



## Some common bad practices

- Use of wrong standard form of contract
- Commencement of work when contract not finalised
- Contracting parties not accurately identified or described
- Reference to documents which are not annexed to the contract

## Identity of contracting parties

- *Lai Yew Seng Pte Ltd v Pilecon Engineering Bhd* [2002] 3 SLR 425
- *CS Geotechnic Pte Ltd v Neocorp Innovations Pte Ltd* [2005] SGHC 116
- *Resource Piling Pte Ltd v Geocon Piling & Engineering Pte Ltd & Anor* [2006] SGHC 134



## *Lai Yew Seng v Pilecon*

### The facts

- Plaintiff company was incorporated in June 2000 with the partners of the firm (Lai Yew Seng Iron Works) as the shareholders of the plaintiff company
- The registration of the firm was terminated in Sept 2000
- The object of the plaintiff company as stated in its MA was to acquire and take over the business of the firm

## The facts

- In July 2000, the firm sent letters to its clients and business associates, including the defendant, stating that “with effect from 1 Aug 2000”, Lai Yew Seng Iron Works will be known as Lai Yew Seng Pte Ltd”
- From this letter, it could be seen that the address of the plaintiff company was the same as the firm’s



## Defendant's argument

- On claim by the Plaintiff for work done under the sub-contracts made between the defendant and the firm, defendant argued that the contracts of employment were all made between the defendants and the firm and not with the plaintiff, and that there were also provisions in the contracts prohibiting the assignment of the contracts without the plaintiff's consent

## Court framed the issues as follows:

‘What counsel was really saying is that the defendant cannot now deny that it had agreed, whether implicitly or by conduct, to the plaintiff taking over the contracts from Lai Yew Seng Iron Works. In which event, the issue will be whether there is an assignment of the contracts to the plaintiff; and flowing from that, the question arises as to whether the defendant had waived the requirement for its written consent for such assignment, or it may be a question as to whether the plaintiff and the defendant had entered upon a fresh contract the terms of which were implied, perhaps from the contracts between Lai Yew Seng Iron Works and the defendant or on a quantum meruit basis.’



## Held:

- Court decided against the possibility of an assignment of the original contracts to the plaintiff company
- Instead, it preferred to find the existence of a new contract entered into between the defendant and the plaintiff company

## Held:

- It noted that there was no dispute that the defendant had received the benefit of the plaintiff's work & that the Plaintiff's refusal to pay was simply based on the contention that the contracts were signed with someone else even though a substantial sum had already been paid to the plaintiff as progress payment



## *CS Geotechnic v Neocorp*

### The facts:

- Neo Corporation Pte Ltd was the main contractor for a HDB upgrading project at Marine Crescent Precinct
- It approached the plaintiff to carry out the piling work for the project
- However, it was the defendant and not Neo Corporation, who signed the piling sub-contract that was awarded to the plaintiff

## The facts:

- The defendant was described as the main contractor for the project under the sub-contract
- When sued for unpaid sums due under the subcontract, defendant claimed that it was not a real party to the sub-contract
- It also denied liability on the ground that it had assigned the sub-contract to Neo Corporation, against whom a winding-up order was made in February 2005



## Held:

- Defendant's claim that it was not a true party to the piling contract was to be rejected
- Defendant was in actual control of the project & intended at all material time to take over the project from Neo Corp
- Indeed, it went so far as to misrepresent in the piling subcontract that it was already the main contractor for the project even though that contract had not yet been assigned to it

## Held:

- Defendant's assertion that it had effectively assigned its rights and obligations under its piling subcontract to Neo Corporation is fraught with difficulty



## Held:

- Although defendant pointed out that Neo Corporation's liquidator had confirmed that the latter was the main contractor of the project and that the retention sum for the piling subcontract was in Neo Corporation's hands, an assignment of contractual burdens by the defendant to Neo Corporation is, without more, not binding on the plaintiff if the plaintiff did not consent to it

## Held:

- Defendant's contention that the assignment was done with the plaintiff's consent could not be taken seriously as there was no evidence whatsoever of any express or implied consent at the material time



## *Resource Piling v Geocon:*

- One of the issue was whether the subcontract for the piling works was made between Resource and Multi-Con or between Resource and Geocon
- Refer to actual case

## Documents not annexed

- *United Eng Contractors Pte Ltd v L & M Concrete Specialists Pte Ltd* [2000] 2 SLR 196 – discussed earlier



*L & M Concrete Specialists Pte Ltd v United  
Eng Contractors Pte Ltd* [2000] 4 SLR 441

- L&M was the main contractor and UE was the sub-contractor for two building projects, namely, the ‘Hilltop Project’ and the ‘Sinsov Project’
- Its claim against UE was in respect of structural rectification works carried out at Hilltops Apartment

*L & M Concrete Specialists Pte Ltd v United  
Eng Contractors Pte Ltd* [2000] 4 SLR 441

- UE raised a counterclaim for moneys due to them by L&M in respect of the 'Sinsov Project'
- L&M applied for a stay the defendant's counterclaim



*L & M Concrete Specialists Pte Ltd v United  
Eng Contractors Pte Ltd* [2000] 4 SLR 441

- L&M relied on an arbitration clause found in the 'Standard Sub-Contract (Domestic) For Labour and Materials', which was unsigned
- There was no reference to arbitration in the LOA

*L & M Concrete Specialists Pte Ltd v United  
Eng Contractors Pte Ltd* [2000] 4 SLR 441

Held:

- L&M's application for a stay was refused
- Although the LOA referred to the 'Standard Sub-Contract (Domestic) For Labour and Materials', that document was never given to the defendant nor was it signed or executed



*L & M Concrete Specialists Pte Ltd v United  
Eng Contractors Pte Ltd* [2000] 4 SLR 441

Held:

- The arbitration clause, which L&M sought to rely, was, in any event, contained in a document called the “Standard Sub-Contract (Domestic) For Labour and Materials”, which was also not signed

*L & M Concrete Specialists Pte Ltd v United  
Eng Contractors Pte Ltd* [2000] 4 SLR 441

Held:

- There was no evidence to show that the “Standard Sub-Contract (Domestic) For Labour and Materials” and the “Standard Conditions of Subcontract” were one and the same document



*Shia Kian Eng (trading as Forest Contractors) v  
Nakano Singapore (Pte) Ltd* [2001] SGHC 68

- Nakano was the design and build contractor for the Woodvale Executive Condo
- Forest was employed by Nakano to undertake various types of works, which included block wall construction and external wall plastering
- The parties agreed that there was no single sub-contract, which covered the works to be carried out by Forest

*Shia Kian Eng (trading as Forest Contractors) v  
Nakano Singapore (Pte) Ltd* [2001] SGHC 68

Nakano's position

- The sub-contracts were in writing and comprised in its POs and various other documents mentioned in the POs
- All POs referred to a document entitled "Conditions of Sub-Contract, and many referred to an "Undertaking on Hiring of Foreign Workers



*Shia Kian Eng (trading as Forest Contractors) v  
Nakano Singapore (Pte) Ltd* [2001] SGHC 68

Nakano's position

- The POs, which caused the most dispute, related to the contract for blockwall construction and external wall plastering, and that referred, in addition the documents just mentioned, to documents entitled “Conditions of Purchase”, “Bills of Quantity/Schedule of Rates” and “Drawings”

*Shia Kian Eng (trading as Forest Contractors) v  
Nakano Singapore (Pte) Ltd* [2001] SGHC 68

Forest's position

- The sub-contracts were made partly orally, partly in writing and partly by conduct
- With reference to the POs, which Forest signed, they were issued purely for accounting purposes and for processing payments



*Shia Kian Eng (trading as Forest Contractors) v  
Nakano Singapore (Pte) Ltd* [2001] SGHC 68

Forest's position

- The conditions endorsed on the POs were not intended to be, and were not, incorporated as terms of the sub-contract

Held:

- Sub-contracts were partly in writing and partly oral

## Held:

- The written portions comprised the quotations and the original POs which Forest signed after commencing the work
- Forest did not object to any of the terms relating to the works that appeared on the face of the Purchase Orders and that these were the items that had to be agreed in order for a contract to exist



## Held:

- Court dismissed Nakano's arguments that the documents annexed to or referred to in the POs formed part of the contractual documents
- The fact that Forest had accepted and signed the POs did not mean that it had agreed to accept as part of the contract all the documents that were annexed to the POs or that the same were incorporated in the contract simply by being mentioned in the Pos

## Held:

- While the POs mentioned these various documents as being annexed to them, not all the documents were in fact so annexed
- For eg, in the PO relating to the external plastering works, among the documents stated as being annexed were 'Specification' and 'Drawings' but these were not in fact so annexed



## Held:

- It was difficult to incorporate as part of a contract, documents which are not furnished (and not simply shown) by one party to the other either prior to or at the time of signing of the contract unless there is clear indication by that other party that he would accept documents subsequently given as part of the contract
- This did not happen in this case

## Incorporation by reference to other documents – A Summary

- Attempt to incorporate arbitration clause found in another document – NO
- Reference to standard form of contracts - Yes even though not annexed
- Reference to other documents – NO if not annexed



## Other common problems

### *Nomination / Sub-contracting*

- *L&M Equipment Pte Ltd (formerly known as L&M Engineering Logistic Ptd Ltd v Hyundai Engineering & Construction Pte Co Ltd and ors [1999] SGHC*
- *L.K. Ang Construction Pte Ltd v Chubb Singapore Private Limited [2003] 1 SLR 635*

## *L.K. Ang v Chubb*

### The facts:

- Defendant tendered successfully for fire protection installation works
- It was informed by M&E consultant that it would be appointed the NSC for the works
- The identity of the main contractor was not disclosed in this letter

Subsequently, the architect



## Other common problems

### *Nomination / Sub-contracting*

- *L&M Equipment Pte Ltd (formerly known as L&M Engineering Logistic Ptd Ltd v Hyundai Engineering & Construction Pte Co Ltd and ors [1999] SGHC*
- *L.K. Ang Construction Pte Ltd v Chubb Singapore Private Limited [2003] 1 SLR 635*

## Other common problems

### *Nomination / Sub-contracting*

- *L&M Equipment Pte Ltd (formerly known as L&M Engineering Logistic Ptd Ltd v Hyundai Engineering & Construction Pte Co Ltd and ors [1999] SGHC*
- *L.K. Ang Construction Pte Ltd v Chubb Singapore Private Limited [2003] 1 SLR 635*



## Other common problems

### *Protracted / on-going negotiations*

- *Hock Chuan Ann Construction Pte Ltd v Kimta Electric Pte Ltd*  
[2000] 2 SLR 519
- *Gema Metal Ceilings (Far East) Pte Ltd v Iwatani Techno Construction (M) Sdn Bhd*  
[2000] SGHC 37

## Other common problems

### *Protracted / on-going negotiations*

- *Econ Corporation Ltd v So Say Cheong Pte Ltd [2004] SGHC 234*
- *Petrosin Corp Pte Ltd v Clough Engineering Ltd [2005] SGHC 170*



## Other common problems

### *Intention to create legal relations*

- For commercial contracts, there is generally a presumption that parties intended to create legal relations
- However, this presumption can be rebutted
- Objective vs subjective intention
- Extrinsic evidence admissible

**THE END**



## **Speaker's profile (Monica K. C. Neo)**

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Member of the Civil Practice Committee, Law Society of Singapore (2002)  
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Member, Chartered Institute of Arbitrators (Nov 2004 - todate)  
Legal Adviser, Institutions of Engineers Singapore (2006 - 2007)  
Panel of Arbitrators under the Law Society Arbitration Scheme (August 2007 - todate)  
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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