SOCIETY OF CONSTRUCTION LAW (SINGAPORE)

SINGAPORE CONSTRUCTION LAW NEWSLETTER

MICA (P) 117/07/2009
AUGUST 2009
NO. 9

SOCIETY OF CONSTRUCTION LAW SINGAPORE

SWEET & MAXWELL

2008–2010 COUNCIL

Chairman: Mohan Pillay
Vice-Chairman: Karen Fletcher
Secretary: Christopher Nunns
Treasurer: Christopher Vickery
Asst Treasurer: Johnny Tan
Immediate Past Chairman: Naresh Mahtani

Members: Goh Phai Cheng SC
Brendon Choa
Anil Changaroth
Peter Chow
Audrey Perez
Hardesh Singh

Honorary Auditors: Ho Chien Mien
Joseph Liow

Newsletter

Editors: Naresh Mahtani
Hardesh Singh
Brendon Choa
Adrias Tan

Contents

Society of Construction Law (Spore)
3 Raffles Place, #07-01
Bharat Building,
Singapore 048617
Tel 31273797 Fax 65-63299699
www.scl.org.sg

CHAIRMAN'S MESSAGE

It will be immediately apparent to you that there has been a dramatic change in the size and presentation of the SCL Newsletter.

The "New Improved" SCL Newsletter

What you are looking at now is an expanded full colour version. I hope you will find the extended content and the move away from plain black and white, to your liking.

Credit for this is due to Naresh Mahtani, immediate past Chairman and the current head of the Publication Committee who persuaded Sweet & Maxwell to support this change. I would also like to acknowledge my thanks to Sweet & Maxwell for their continued and encouraging support of the Newsletter in its expanded form.

As part of the extended support from Sweet & Maxwell, they also now offer SCL members attractive discounts of 10% to 15% on all construction related titles they publish. I wish to record my personal thanks and appreciation to John Mitchell, Sweet & Maxwell's General Manager, Asia. His commitment and enthusiasm have been instrumental in securing these new arrangements for the Society.

The SCL(S) Inaugural Dinner

Many of you would have attended our Inaugural Annual Dinner event on 30 July. With more than 70 registrations, we found ourselves somewhat oversubscribed for the event and had to turn some members away. So thank you all, for your tremendous and overwhelming support.

For those able to join us, the cheerful combination of good food, great wine and excellent networking made for a thoroughly enjoyable fun evening.

Without the support of our three very generous sponsors, the wine would not flowed so well, nor such an agreeable meal as on offer that evening, rendered so affordable. On behalf of the Council, I wish to gratefully acknowledge our three sponsors – Davis Langdon and Seah Singapore Pte Ltd, Dragages Singapore Pte Ltd and Pinsent Masons LLP. A very warm and appreciative thank you to all three of them.

The evening was the more memorable, for the wit and humour of our after-dinner speaker, Philip Jeyaretnam SC. Many of you know him as SCL's Founding Chairman and one of Singapore's leading Senior Counsel.

His talk on "*Constructing a Society – Collision & Collusion*" traced, with humour and charm, the twists and turns of the formation of our Society, and the work we have been doing since then.

Finally I would like to recognize the very significant efforts that went into the arrangements for the dinner. Everything from the venue to the menu was the result of the personal touch of one individual. Her untiring efforts made the evening the thoroughly pleasant event it was. On behalf of the SCL Council and all of us present that evening, I offer my very grateful thanks to Audrey Perez.

The Council and I enjoyed the opportunity of meeting our many members at this annual dinner. We sincerely hope that it will develop into a regular feature on the construction industry's calendar in Singapore.

continued overleaf...

Issue 9 OrangeColour BlockA.indd 1 8/11/2009 4:22:28 PM

The AGM

We are now in the lead up to our Annual General Meeting scheduled for 19 August 2009. Each of our committees will be presenting reports outlining the work they have done in the past year, as we complete the first half of this Council's two-year term.

We have had a busy first year in terms of activities and programs. There has been participation from a significant cross section of our members, with positive feedback about the quality and content of our programs.

Membership Growth

I would like to think that this is perhaps one of the reasons why we have seen a regular and consistent increase in membership over the years.

I am very pleased to announce that we have now crossed the 200 mark with a current membership of 205 members as at August 2009. This represents an increase of over 20% from 2008. This increase has been slowly building up over the years. It follows on the back of membership increase of 14% in 2008 and a 10% increase in 2007.

It has been on the growth generated by the activities and programs of previous years that we have been able to finally move up to this very much broadened base of membership. This will present enhanced opportunities for new programs and activities, as well as the increased networking benefits at the many events that we organize.

New SCL Website

The Website Committee under the guidance of Christopher Vickery and Peter Chow has been busy looking at a significant revamp of our website. We hope to be able to offer a sneak preview very soon and if opportunity permits, possibly at the Annual General Meeting itself. The overall objective is to ensure members have ease of access to current and useful updates. The new website promises to be a much more valuable resource and user friendly tool.

Annual SCL Law Society Construction Law Conference 2009

On the professional development side, we have since August 2008, held several events in the form of lectures, talks and the very well received weekend training program Engineering 101 for non-Engineers. Moving into the 2nd half of the year, the key highlight of the Professional Development Committee s work is the Annual SCL Law Society Construction Law Conference 2009, scheduled for 23 September.

The Conference is now into its 5th year and has proved with each successive year, its popularity and relevance to the construction industry in Singapore. We are very fortunate this year to have Sir Vivian Ramsey (English High Court Judge and Joint Editor of *Keating on Construction Contracts*) deliver the key note address. There will also be some very interesting panel discussions looking at a possible upturn in the industry from both the regional and management point of view.

Concluding Remarks

As you will see we have had busy 1st half of the year; and the 2nd half looks no less exciting.

I hope all of you have enjoyed and will continue to participate in our ongoing activities and programs. As always, I welcome your feedback and comments on what we have been doing and perhaps as importantly, what we have *not* been doing.

All comments, positive or negative, are welcome and you can email me c/o the SCL Secretariat [secretariat@scl.org. sg].

Finally, many of you will know Chow Kok Fong as a stalwart of the Society. He is a Past Chairman and active supporter of the Society. As a result of the increasing demands on his time, he has stepped down from the Council in May this year. On behalf of the Council, I would like to acknowledge and thank Kok Fong for his counsel, assistance and unstinting support of the Society.

Mohan R Pillay
Chairman
2008-2010

Atkin Chambers on: (1) Delay Analysis, Concurrency and the Contractual Allocation of Risk (2) Immunity of Expert Witnesses?

4 March 2009 saw the Society addressed at a seminar by Stephen Dennison QC and David Sears QC of Atkin Chambers. As Oscar Wilde might have suggested, to be addressed by one silk of an evening is good fortune, to be addressed by two is almost an over-indulgence. And so it was. Stephen Dennison spoke on the subject of delay analysis, concurrency, and the contractual allocation of risk, whilst David Sears dealt with the issue of the immunity of the expert witness. There was an interesting discourse on the English approach to these issues, followed by a lively debate. Almost 110 participants from the construction industry benefitted from this talk held at the STI Auditorium.

Stephen Dennison QC

David Sears QC

Speakers with Chairman and Vice Chairman

Site Visit: High Rise Constructions: Site Tour and Challenges

On Friday 20 March 2009, a second construction site visit was held this year, this time at The Arte project at Balestier. The event was hosted by the Design and Build main contractor, Dragages (Audrey Perez, Corporate Head of Department; Frederic Perez, Projects Director; and Sebastian Roisne, Project Manager). The Arte is a residential development in the Balestier area consisting of two 36 storey high rise towers.

The visit commenced with a thorough presentation of the project itself along with the construction details and techniques involved. The very specific and active interest shown by the audience made this session much longer than scheduled but very interactive, with many questions and answers. Particular interest was raised regarding pre-cast concrete, construction speed and other construction challenges for high rise buildings in the context of Singapore.

The attendees were then escorted by a large team for a comprehensive tour of the site to see many aspects of the construction such as the first completed apartments; the construction cycle at the top of the building; some architecturally “difficult” materials management areas (such as stone/marble) and, to end the visit, a site external works tour to discover pre-cast concrete yards.

The group was very enthusiastic and participative and both the SCL delegates as well as Dragages representatives enjoyed sharing information and views on the reality of construction as well as how it interlinks with other challenges relating to Construction Law and Contracts! Audrey, on the Behalf of the SCL, thanked the Dragages representatives for volunteering their time to share their knowledge with the SCL members with accurate, yet pragmatic, presentations and for conducting this site visit.

PRE-CONTRACT NEGOTIATIONS: ARE THEY ADMISSIBLE AS EVIDENCE WHEN INTERPRETING THE MEANING OF A CONTRACT TERM?

Are you involved in a dispute over a contract term? If so, you may want to take a look at the recent July 2009 House of Lords decision of ***Chartbrook Limited v Persimmon Homes Limited*** .

The existing rule under English law (known as "the exclusionary rule") that evidence of pre-contract negotiations is not admissible in interpreting the meaning of a contract has long been questioned and criticised by members of the judiciary and academics alike. The Persimmon judgment was, therefore, eagerly anticipated because commentators expected it to address and even possibly settle the issue. After all, the lead judgment was provided by none other than Lord Hoffman himself who has had considerable influence on the law of interpretation of contracts: it was Lord Hoffman who gave the lead judgment in *ICS v West Bromwich* which summarised the universal principles which courts will apply when attempting to ascertain the meaning of the terms used by parties in an agreement - what lawyers now commonly refer to as "Hoffman's principles".

Hoffman's Principles

A quick summary of Hoffman's Principles (emphasis added) before moving on to consider the Persimmon judgment:

Principle 1: "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

Principle 2: "The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man."

Principle 3: "The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear."

Principle 4: "The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 W.L.R. 945)."

Principle 5: "The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v Salen Rederierna A.B.* [1981] A.C. 191, 201:

"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

The Persimmon Judgment

Early reports in legal media have overstated the significance of the judgment by suggesting that evidence of pre-contract negotiations can now be used to clarify the meaning of the contract. In fact, however, the House of Lords:

(i) overturned the previous decisions of both the High Court and Court of Appeal through the application of Hoffman's principles and common law rules, without reference to pre-contract negotiations;

(ii) upheld a long and consistent line of authority that evidence of pre-contract negotiations should not be used in interpreting contracts; and

(iii) confirmed that rectification may be available if, by a common mistake, the contract does not reflect what an objective observer would have thought the intentions of the parties to be.

Background

Chartbrook entered into an agreement with Persimmon, a well known house-builder, for the development of a site which Chartbrook had recently acquired. The structure of the agreement was that Persimmon would obtain planning permission and then, pursuant to a license from Chartbrook, construct a mixed residential and commercial development and sell the properties on long leases. Chartbrook would grant the leases at the direction of Persimmon, which would receive the proceeds for its own account and pay Chartbrook an agreed price for the land.

Planning permission was duly granted and the development was constructed, but there was a dispute over the price which became payable to Chartbrook.

Interpretation of the Contract

The dispute turned on the interpretation of a formula in the Contract which, on Chartbrook's interpretation, led to £4.5 million being due, and on Persimmon's interpretation, led to just under £1 million being due.

Both the court of first instance and the Court of Appeal found in favour of Chartbrook's interpretation which was consistent with the plain meaning of the contract. All other contemporaneous documents, however, supported Persimmon's case. Persimmon invited the House of Lords, contrary to the exclusionary rule, to take into account the parties' pre-contract negotiations in interpreting the contract, but the House of Lords declined to do so. Lord Hoffman, in particular, did not consider this to be necessary because *ICS v West Bromwich* had already allowed the Court to look at the background against which the contract had been entered into (see in particular the emphasised text in the section on 'Hoffman's Principles' above). Having looked at the background and context, the only interpretation possible was that something must have gone wrong with the language in drafting the contract - to interpret the contract in accordance with the normal rules of syntax made no commercial sense. This was a classic case in which 'the drafting was careless and no one noticed'. Unlike the Court of Appeal, Lord Hoffman did not feel constrained by the extent to which the contract would need to be amended in order to correct it. It was sufficient that something had gone wrong with the language and that it was clear what a reasonable person would have understood the parties to have meant.

> 'Evidence of pre-contract negotiations remains inadmissible in interpreting the contract. However, it is still important to document those negotiations fully because such evidence is not excluded for the purposes of establishing that a fact which may be relevant as background was known to the parties. Such evidence may also be used to support a claim for rectification or estoppel'

The Court's Approach to interpreting contractual obligations

First, the Court will seek to ascertain the meaning of the words as used in that agreement (a question of fact) and then determine the legal effect of those words (a question of law).

Next, words can only be understood within the context in which they have been used. The context determines the idea that is prompted in a person's mind by the words used.

Next, to find out what the idea is, the Court should not ask "What did the parties mean to say?'. Rather, the Court should ask 'What is the meaning of what the parties have said?'.

Next, parties are assumed to have intended that which they said. The Court will therefore consider the actual language used in light of its context, that is, the surrounding circumstances and the agreed or proven object of the contract. This is an objective exercise - what would a reasonable person in the position of the parties have intended by the words used? The court may examine the commercial purpose of the agreement and may draw on its experience of similar contracts or understanding of the particular commercial context, but may not examine the pre-contract negotiations.

Lastly, the Court may look at dictionaries and other materials. For example, if a word has a technical meaning, the Court may consult an appropriate technical dictionary, unless that meaning is itself in dispute, in which case the Court can only proceed upon evidence.

Practical Implications

This judgment confirms the importance of ensuring that contract terms are clearly understood and drafted. As far as possible, parties should define the terms used in the contract. If a formula is included in the contract terms, make sure that it works and include a worked example so that it is clear just how the formula is to be applied.

The next time you find yourself spending hours (or even days) poring over a complex document, try getting someone else who is not involved in the preparation of the document to review it. Lord Hoffman gave his own practical tip: "It is…usually possible to avoid surprises by carefully reading the documents before signing them. Better still, get someone not involved to read them.

Evidence of pre-contract negotiations remains inadmissible in interpreting the contract. However, it is still important to document those negotiations fully because such evidence is not excluded for the purposes of establishing that a fact which may be relevant as background was known to the parties. Such evidence may also be used to support a claim for rectification or estoppel. In fact, Lord Hoffman suggested that as evidence of pre-contract negotiations is invariably tendered in support of an alternative claim for rectification or estoppel, the Court will in any event read such evidence and may be influenced by it, even if the claim for rectification or estoppel does not succeed.


Justyn Jagger &
Jonathan Choo
DLA Piper Singapore

**With our thanks to members of DLA Piper's Specialist Litigation team for researching this case and for producing the publications 'Say What You Mean Then You'll Mean What You Say' and 'To Admit Or Not To Admit' on which this article is based. For the avoidance of doubt, the comments made in this article are based on principles of English law. They are not intended, and should not be used, as a substitute for taking legal advice in any specific situation.*

Engineering 101 for Non-Engineers

Ever wondered how some buildings actually stand up or why they are now reaching so high? Ever wondered who does what in a project team or what happens where and when on site? All these questions and many, many more were encompassed into a two and a half day course on engineering which was tailor-made for non engineers. Following the successful Engineering 101 and Common Construction Disputes vs. Construction Challenges papers presented at the 2008 Joint SCL-Law Society Annual Conference in 2008 and the overwhelming positive feed-back, Audrey Perez (Head of Department, Dragages Singapore Pte Ltd and an active SCL Council member) devised and delivered this unique training event.

Participants comprising of lawyers, academics and construction industry professionals, were presented with five modules covering Construction Features; Construction Facts and Figures; Engineering principles; Construction Project teams and their role; Construction Execution and Common Construction Disputes vs. Construction Challenges.

The well prepared material (with text, illustrations and pictures) provided an in depth exposure to the construction industry from various aspects including engineering, architectural, historical amongst many others. Despite it being two and half days long and over a week-end, Audrey was able hold the interest of the audience throughout the programme. All of the course modules were interactive and this enabled many facts, contradictions and controversial construction related issues to be discussed and debated.

Audrey Perez

2009 SIA Conditions of Contract

Almost 120 participants from the construction industry, including quantity surveyors, contract managers, engineers, lawyers, in-house counsel, project managers and consultants, attended this talk by Mr. Johnny Tan a Council member of SCL (Singapore) and a member of the SIA Contracts Committee which drafted the changes.

Johnny discussed the amendments in respect of the payment scheme in respect of Final Payment Claims, the provision for price fluctuations, the rationale for the approach taken and other practical considerations.

Speaker Johnny Tan, with seminar chair Joseph Liow

The Role of a Claims Mentor on Major Projects

Tony Farrow, Director of Trett Consulting, Houston office

During 2005/6, Tony Farrow of Trett Consulting's Houston office was involved on a major highways project in Israel. His appointment was 'Claims Mentor', assisting the Joint Venture constructing over 80 miles of highway. In this article, Tony describes his role and how the appointment provided an effective solution to a predicament often faced by contracting parties.

The project situation was typical of a major infrastructure scheme, or indeed of any mega project; the +$500 million contract had demanded the resources of several major national contractors coming together in a joint venture. The scope of work had been divided between them and each firm had different organisational, resource and construction challenges in undertaking their obligations. Given the unique local geological conditions and the prevailing political environment, the project had fallen into delay and each contractor to the venture had different ideas for dealing with the commercial consequences.

In order to create a unified position that was based upon the best solution for the Joint Venture (rather than for any one individual venture party), the group took the decision to seek outside advice and support. Consequently, over a period of 18 months, I had the great privilege of spending two weeks every month in Israel, offering guidance to the Joint Venture in its strategic management of its multi-million dollar extension of this claim.

The language of the contract and the communications was in Hebrew, and therefore, mercifully, there was not the usual extensive amount of reading-in for me to do! However, the contract terms and other documents dealing with important events and issues had been translated into English. The various contractors' record-keeping systems were explained to me and reviewed, and of particular importance were the planning and progress data. With an understanding of the contract and the available records, it was then possible to consider how to approach the exercise of preparing a delay analysis. From this, a methodology and specification was prepared upon which the Joint Venture would organise its data and begin to analyse progress, events and delays.

In this case, it was possible to adopt a time-impact analysis approach and, in particular, adopting the relevant programme in use by the Contractor just prior to the introduction of each delay event. Each impact analysis was then compared to the actual as-built situation and 'event chronologies' described the claim issue, its history and its consequences.

Organisationally, the Joint Venture established a Claims Group to undertake the work, with staff seconded from the various contractor groups or from outside agencies. Having created the specification for preparing the claim, my role was to work with the team as a mentor, offering guidance, providing experience and acting as an impartial sounding-board whenever there were alternative views concerning the way forward.

The issues of float and its ownership, concurrency, constructive acceleration, disruption and preferential engineering all had to be dealt with. It was necessary to consider the comparative approaches taken in different legal jurisdictions and then develop the best approach for the local laws in this case. As with most jurisdictions, there was no clear precedence to follow on these issues and so the goal was to gather and analyse the project records and structure the claim so that it provided a detailed analysis of what had occurred i.e. as is always good advice, we focussed on the facts and their factual consequences; with this done, the legal interpretation was always a going to be a matter of debate, whatever the jurisdiction.

Having worked with the Joint Venture to prepare and present its case to the Employer, the next stage was to seek to direct the negotiation process in an effective manner. As in many claim situations, the negotiation process can quickly polarise, as Parties immediately take opposing views, and we did not want this to happen. We, therefore, proposed a two-tier negotiation process.

The first tier was concerned with issues of principle and was to involve the senior management and their advisors. The second tier was to be concerned with the detailed facts and the more technical aspects of the project and the claims. The meanings of the contract terms, the different methods of analysis, the treatment of concurrent delays etc were issues of principle and each party proposed those topics of principle it wished to have debated. The senior members of each organisation and their advisors then met to exchange views and to understand and record the competing arguments on issues of principle. At the same time, more working-level meetings were held by respective project staff in order to review the facts and chronologies of the individual claims and establish those things that were agreed and those that were not.

'The role of Claims Mentor on large projects is an effective organisational option because it provides firms with the forensic, often retrospective-looking, skills that may not always be available within project teams who are more focused on looking forward and building projects'

Over time, the Parties gained a fuller understanding of the respective merits of their positions (and their weaknesses) and a settlement was achieved, perhaps not in a scientific manner, but in a way whereby the risks and consequences were better understood.

The role of Claims Mentor on large projects is an effective organisational option because it provides firms with the forensic, often retrospective-looking, skills that may not always be available within project teams who are more focused on looking forward and building projects. It also provides the senior management with an independent, third-party view of the strengths and weaknesses of the case, experienced in contributing to the strategy of effectively prosecuting a claim situation.

Review of Singapore books on Adjudications

by Naresh Mahtani
ATMD Bird & Bird LLP

Many of us would agree that adjudication under the Building and Construction Industry Security of Payments Act ("SOP Act") is currently the quickest and most cost-effective form of resolving construction industry claims in Singapore.

It is very practical, in that while it assists contractors to secure cash-flow for work done and materials supplied and hence to continue with projects to completion, the parties can still proceed to arbitration or other dispute resolution processes for their more complex final account or damages claims. After all, the sum paid under a adjudication determination is taken into account in any subsequent arbitration award.

Thus far (from 2005 to date, there have been about a hundred or so adjudications under the SOP Act administered by facilitated by the Singapore Mediation Centre (SMC). A large proportion of claimants have succeeding in their adjudication claims wholly or partially. So far, there has been only one published Adjudication Review under section 18 of the Act, only one High Court decision on this (namely *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] SGHC 142*)* and several decisions made by registrars in the courts in relation to enforcement/setting-aside of the determinations under section 27 of the Act (such as *Tuck Ah Electrtc & Engineering Pte Ltd v Team Corp Engineering Pte Ltd* (in OS No. 6 of 2007); *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co. Ltd* [2008] SGHC 159 and *Tasei Corpn v Doo Ree Engineering & Trading Pte Ltd [2009] SGHC 156.*

The importance of this method of dispute resolution is demonstrated by the fact that, from 2005 to date, other than numerous commentaries and journal articles, and papers and presentations at various seminars, there are already three published reference books on the subject. This article will review them briefly.

Chow Kok Fong: *Security of Payments and Construction Adjudication* (2005, Lexis Nexis)

First, we had **Chow Kok Fong's *Security of Payments and Construction Adjudication* (2005, Lexis Nexis)**, which I had reviewed before soon after its release. Chow Kok Fong (CKF) is the author of several other very useful construction law reference books such as the *Law and Practice of Construction Contracts* (now in its 3rd Edition, Sweet & Maxwell, 2004) and the *Construction Contracts Dictionary* (Sweet & Maxwell, 2006).

Parts of CKF's adjudication textbook are often cited as authoritative commentaries for guidance in many adjudications, and referred to in the *Tiong Seng* case. In CKF's usual systematic and meticulous style, his book covers historical, current, legal as well as practical industry issues. It covers in depth the history of construction law and policy issues which led to the concept and practice of adjudications in other countries, mainly England and Australia, and the genesis of the SOP Act in Singapore. The book handles in separate chapters the practical steps in adjudications in Singapore (i.e. payment claims, payment responses, adjudicator's duties and powers, the adjudication determination and so forth).

Although CKF's book was written very soon after the coming into operation of the SOP Act, and did not have the benefit of the many adjudication decisions and several court decisions since that time, it continues to be a useful primer and textbook. An ensuing edition might perhaps contain guidelines, issues and lessons from the local precedents since 2005; and perhaps also how the published determinations have interpreted the issues foreseen in his 2005 book.

Dr. Philip CF Chan*: Statutory Adjudication in Singapore the Act, Standard Forms and Determinations*

Which brings me to the next book, namely ***Statutory Adjudication in Singapore the Act, Standard Forms and Determinations*** by **Dr. Philip CF Chan** (Sweet & Maxwell, 2008). Dr. Chan, other than being an associate Professor in the Department of Building, National University of Singapore, is also a well-known speaker on construction law (including one of SMC's trainers in adjudication) and writer of construction law publications such as the Building and Construction section of *Halsbury's Laws of Singapore* and *Commonwealth Construction Cases: A Singapore Perspective* amongst others.

Dr. Chan's book takes a practical, involved, passionate and critical look at the subject of statutory adjudication in Singapore. As stated in the book's Preface, many parties in Singapore(potential claimants and respondents alike) are still unaware of their rights and responsibilities under the SOP Act, and a major reason for writing the book was to help the parties involved learn lessons from the limited number of adjudications in Singapore thus far. The book thus includes an explanation of the basic framework of the Act as well as the "parallel" contractual payment and dispute resolution schemes in the oft-used local standard forms, specifically the SIA Form and the PSSCOC forms, as well as some lessons from reported determinations. There are also suggestions in the book for consideration in future amendments to the Act for enhancing its effectiveness.

Dr. Chan's long and illustrious experience as a teacher and writer serves him well in his detailed commentaries on the standard contract forms, the Act as well as the underlying legal and contractual issues involved in the practice of construction law and adjudication and determination of construction claims. Thus, there is an introductory analysis of the "*Right to Payment after Set-off*" in Part 1, Chapter 1. The chapter distinguishes between *procedural* and *substantive* set-off, as well as their origins in either statutes, common law or equity. Chapter 2 onwards examines the statutory payment and adjudication scheme under the SOP Act.

The book takes a critical look at the provisions of the Act in relation to the parties' freedom to contract. For example, in the concluding section in Part II, Chapter 4, the book remarks that parties who have chosen international arbitrations to resolve disputes relating to works in Singapore may be surprised to learn that any actions in court here could be stayed, whereas ironically any statutory adjudication in Singapore would be permitted notwithstanding the parties' choice of arbitration as their chosen method of dispute resolution. In Part II, Chapter 5, the book notes that while pursuing parallel remedies is generally not allowed at common law, the SOP Act allows adjudication to be carried out in parallel or concurrent with arbitration. The book also highlights the "creative" statutory supportive remedies provided by the SOP Act outside the contract such as the right of lien, suspension of works and direct payment from the principal to the claimant.

Part IV attempts to deal with issues from the cases then (at time of publication) dozen or so reported on the SMC website, and the author's concluding remarks that users of the system had yet to get familiar with the system and its procedures and applicable rules of evidence. Perhaps in a later edition, the book will at that time have much more material (from the over hundred reported decisions) to set out the prevailing and common issues comprehensively.

***Singapore Construction Adjudication Review* [2005-2007] 1 SCAdjR**
(2009 Sweet & Maxwell)

General Editors: Chow Kok Fong, Christopher Chuah and Mohan Pillay

Which then, chronologically, brings me to the next book being considered here, namely the ***Singapore Construction Adjudication Review* [2005-2007] 1 SCAdjR (2009 Sweet & Maxwell).** All the three General Editors of the book, namely **Chow Kok Fong, Christopher Chuah and Mohan Pillay,** are probably amongst the most well versed in Singapore on this subject, being the lecturers on the subject for the training of SMC accredited adjudicators.

This casebook, being the inaugural volume of an intended series of reports on adjudication determinations made under the SOP Act, sets out the adjudication determinations lodged with the SMC from 1 October 2005 to 31 December 2007, the copyright for the book hence being with the SMC as expressly stated therein. In these published reports, the names of parties and details are sanitized for anonymity, but they do include the identities of the parties' legal representatives and of the adjudicators involved. The 73 published determinations cover a whole range of jurisdictional issues (such as whether the claims qualify as "Payment Claims" or "Payment Responses" under the Act), practical issues (such as those concerning the "Notice of Intention to Apply for Adjudication" and issues relating to the timelines and deadlines set out in the Act and the Regulations) and a whole gamut of actual issues relating to disputes such as those on quantities of work, on defects, on counterclaims and set-offs and so forth. This is hence a useful reference book with guidelines for adjudicators and practitioners alike. Whatever the issue is in your current adjudication, it is probable you will find comfort in knowing there have been similar situations in prior determinations.

One must bear in mind though that the prior determinations are not binding precedents and not necessarily authoritative as guides. The 44-page Commentary by the learned Editors in the beginning of the book helps to summarize the main or recurring issues in SOP determinations of the past two years. It looks likely there will be more comprehensive commentary in the future editions, which would cover probably many more determinations arising during the various building projects now in progress in Singapore.

As a subsidiary of Thomson Reuters, Sweet & Maxwell Asia is one of Asia's foremost information providers for the legal and regulatory professions. Sweet & Maxwell Asia delivers information that is current, comprehensive and authoritative.

We are proud to be partnering the Society of Construction Law (SCL) in providing their valued membership with useful publications/resources in the important practice area of construction law. A wide range of selections, from the latest title "*Singapore Construction Adjudication Review*" to the all-important "*Keating on Construction Contracts*" (UK) are available.

All SCL members will enjoy great discounts when purchasing any of the titles listed at the following web address: http://www.sweetandmaxwellasia.com.sg/events/SM-Construction-Law-Titles.pdf.

The discounts are as follows:

- 15% for all Singapore titles
- 10% for all imported titles

Guaranteed Maximum Price (GMP) Contracts in Singapore

Matthew Yew, Senior Consultant , EC Harris Built Asset Consultancy, Singapore Office

In Singapore, bespoke GMP agreements are often drafted to suit project specific requirements and have been typically applied to lump sum contracts with the Contractor taking on either full or partial design and build responsibilities. However, these GMP agreements often lack some of the key elements that are widely regarded as essential in a reasonably equitable GMP contract.

GMP Principles

Typically, a GMP contract caps the final contract sum at an agreed fixed maximum price, i.e. the GMP, by a 'guarantee' from the Contractor that the final cost of the project will not exceed the stipulated GMP. Price adjustments to the GMP are permitted, but only through specific instructions by the Employer in accordance with contract provisions, thus ensuring strict cost certainty. The Contractor, therefore, assumes the risk of ensuring that the tendered price covers everything necessary to achieve satisfactory completion of the project. To enable the Contractor to take on this financial risk, GMP agreements typically include provisions to allow the Contractor to recover cost overruns by introducing cost saving proposals or initiating alternatives in the design.

The Contractor may also be motivated to achieve further cost savings by an added incentive in GMP agreements which provides for the Contractor's cost saving proposals to be shared in agreed proportions between the contracting parties.

Variation or Design Development

In order to achieve the earliest possible commencement of construction works, GMP contracts are often awarded based on schematic designs, leaving much of the detailed design to be developed and finalised during the course of the project.

As a result, design requirements and parameters at the time of award may be unclear or ambiguous; and disputes may arise at a later stage as to whether the refinement and development of the design amounts to an enhancement of the original design intent or a change in the employer's requirements constituting a variation, and change to the GMP.

Contractor's Involvement in Design Development

Since the GMP contract effectively caps the final contract price, it is only reasonable to afford the Contractor an opportunity to be involved in the development of the design, thus allowing him the chance to propose alternative designs or methods which may assist in maintaining the project cost under the agreed GMP. This is especially relevant in cases where the GMP agreement allows the sharing of effected cost savings.

In the past, it was not uncommon for local GMP contracts to allow little or minimal Contractor's design input with the direct appointment of Consultants by the Employer. Whilst this arrangement affords the Employer some level of control over matters relating to design and specification, the Contractor is prevented from effectively contributing alternative design proposals as the design develops. In some extreme instances, the cost saving mechanism, which is a vital characteristic of a GMP contract, is absent.

Liability for Errors and Omissions

Save for permitted adjustments in accordance with the contract conditions, the Contractor is often bound to take on all risks associated with the GMP agreement and allow for these costs in the Contract Sum. The issue then arises as to whether the Contractor's risk is extended to cover errors, omissions or shortcomings in the originally tendered design scheme. Issues also arise in relation to quantification of omitted work from a lump sum GMP contract since there is little information on the originally tendered base design scheme.

Conclusion

Whilst there are certain merits in adopting a GMP agreement, the inappropriate or partial application of the GMP principle can create a different set of problems. Some initial GMP agreements first introduced to Singapore were found to be extremely onerous with little attempt at genuine risk sharing.

Presently, there are no standard forms for GMP contracts readily available in Singapore and GMP agreements are drafted to suit project specific requirements. It often appears that the term "GMP" is used rather loosely, without regard to the true nature of the Contract.

Following some controversy arising from these early forms of GMP agreements in Singapore, there have been genuine attempts to craft GMP agreements to include reasonably equitable contract terms allowing Contractor's design input and cost sharing mechanisms.

It is recommended that careful consideration should be given before deciding to adopt the GMP approach. Some pertinent issues to consider at tender stage include:

- A clear and unambiguous tender design brief
- Clearly defined contractor's design responsibilities
- A cost sharing mechanism for achieved cost savings
- Clear provisions allowing for cost adjustments.

It is important to note that the terms and conditions of a GMP agreement vary from project to project and it is, therefore, essential for the parties to review tender documents to appreciate the provisions and specific risks, not merely accepting the GMP agreement at face value. The lesson is to look at each contract afresh, as it may not be what you expect from its title - do not judge a book by its cover!

"Asia-Pacific Construction Law Casebook – Hongkong, Malaysia and Singapore - 2007"

by Philip CF Chan and Asanga Gunawansa

Review by Naresh Mahtani
ATMD Bird & Bird LLP

As reported in the March 2009 issue of this SCL Newsletter, Lexis-Nexis and Sweet & Maxwell presented the Society of Construction Law, Singapore with copies of their newly published books at the ceremony of the SCL-NUS Annual Lecture & Award of SCL Annual Book Prize on 14 January 2009. These books were namely *"Statutory Adjudication in Singapore –the Act, Standard Forms and Determinations"* by Dr. Philip CF Chan (covered in the separate review of adjudication-related books in this newsletter), and ***"Asia-Pacific Construction Law Casebook – Hongkong, Malaysia and Singapore – 2007"*** by **Dr. Philip CF Chan** and **Dr. Asanga Gunawansa**, both of who are professors at the Department of Building, NUS and very well versed in construction law in Singapore and internationally.

The ***Asia-Pacific Construction Law Casebook***, as stated by the authors in its Preface, is an attempt to gather in this concise volume some of the most significant judgments in the Asia-Pacific region in recent years relating to contracts, torts and dispute resolution in relation to the construction industry.

Each chapter is organized according to a specific topic and begins with a discussion of the pertinent issues relating to that topic and a comparative analysis of the application of legal principles in the three jurisdictions covered in this book (namely Singapore, Malaysia and Hong Kong). The judgments covered are set out in full for easy reference.

The topics covered include Building Contracts, Consultant Contracts, Supply and Materials Contract, Subcontracts, Tort and Dispute Resolution. The commentaries and judgments cover very specific sub-topics. For example, the chapter on Consultant Contracts covers several cases dealing with subjects such as contractual liability of an architect hired by the main contractor towards the client (*Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 3 SLR 782; and issues arising from termination of an architect's services *(Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] MLJ 697). The chapter on Sub-contracts deals with diverse issues such as those relating to back-to-back contracts *(GIB Automation Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2007] 2 SLR 918) and the release of retention monies in relation to limitation periods *Cycle Links Co Ltd v Chevalier Construction (Hong Kong) Ltd* [2007] 4 HKLRD 705). The chapter on tort covers issues such as consultant's negligence, builder's negligence and public nuisance. The chapters on Arbitration and the final chapter on other forms of Dispute Resolution cover various issues, from the role of courts to conduct of tribunals to adjudication, expert determination and "without prejudice" communications.

As the various subjects and court judgments in the book demonstrate, the growing library of construction law court authorities certainly covers a whole variety of interesting issues being considered in the region. This was previously largely unavailable given that most construction law disputes proceed to confidential and private arbitrations on which no published decisions are available as precedents or guides.

There is thus no shortage of subjects covered in this book. However, this is a casebook, and does not purport to be a comprehensive detailed textbook on the subjects covered. As again stated by the authors in the preface, they intend to produce a concise volume of cases for each ensuing calendar year.

SCL(S) CALENDAR OF EVENTS 2009

DATE	2009 EVENT DETAILS
14 Jan 2009	"Inaugural NUS-SCL Annual Lecture: Managing Construction Contracts During Times of Economic Uncertainty"
20 Jan 2009	Site visit: "Construction of the Circle Line MRT Stations and Interconnecting Tunnels"
04 Feb 2009	Social Event: 1st Networking Cocktail 2009
04 Mar 2009	Seminar: "Atkin Chambers on: (1) Delay Analysis, Concurrency and the Contractual Allocation of Risk (2) Immunity of Expert Witnesses?"
20 Mar 2009	Site Visit: "High Rise Constructions: Site Tour and Challenges Met"
27-29 Mar 2009	Workshop: "Engineering 101 For Non-Engineers"
07 May 09	Seminar: "The SIA Conditions of Contract 2009 (8th Edition): What's New"
16 Jul 09	Seminar: "The Importance of Insurance in the Construction Industry in Today's Economic Condition: What Does a Contractor's All Risks Policy Cover
30 Jul 09	Social: Inaugural SCL Dinner
19 Aug 09	Pre-AGM talk "Are Construction Projects Ever Completed"
19 Aug 09	Annual General Meeting 2009
23 Sept 09	Conference: "5th Joint SCL-Law Society Construction Law Conference"

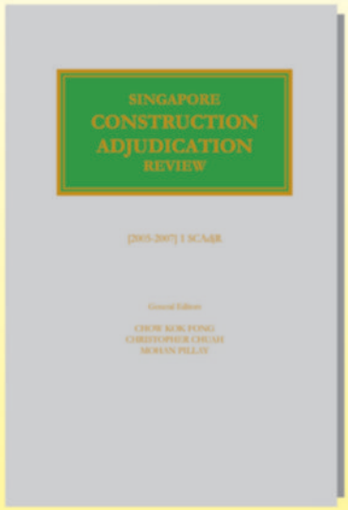
SWEET & MAXWELL

THOMSON REUTERS

First Complete and Definitive Compilation of Construction Adjudication Determinations !

Published **EXCLUSIVELY** by Sweet & Maxwell ! *

SINGAPORE CONSTRUCTION ADJUDICATION REVIEW



GENERAL EDITORS

Chow Kok Fong | Christopher Chuah | Mohan R Pillay

Order your copy now!

Tel: 6333 0800 Email: smasg.marketing@thomsonreuters.com

S$192.60 (GST Included)

Hardback ISBN: 9771793936005

*with the approval and in conjunction with the Singapore Mediation Centre.

Important Disclaimer: No person should rely on the contents of this publication without first obtaining advice from a qualified professional person. This publication is distributed on the terms and understanding that (1) the authros, consultants and editors are not responsible for the results of any actions taken on the basis of information in this publication, nor for any error or ommission from this publication; and (2) the publisher is not engaged in rendering legal, accounting, professional or other advice or services. The publisher, and the authors, consultants and editors, expressly disclaim all and any liability and responsibility to any person, in respect of anything, and of the consequences of anything, done or omitted to be done by any such person in reliance, whether wholly or partially, upon the whole or any part of athe contents of this publication. Without limiting the generality of the above, no author, consultant or editor shall have any responsibility for any act or omission of any other author, consutant or editor.

All rights reserved. No part of this work covered by copyright may be reproduced or copied in any form or by any means (graphic, electronic or mechanic, including photocopying, recording, recording taping, or any information retrieval systems) without the permission of the publisher.

Printed by Seng Lee Press Ptd Ltd, 61 Tai Seng Ave #01-01/03, Singapore 534167