

## **CHAPTER 26 BUILDING AND CONSTRUCTION LAW**

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### **SECTION 1 INTRODUCTION**

26.1.1 Building and construction law in Singapore shares common features with its equivalent in other common law jurisdiction. It is built largely on the contracts between the participants in the building and construction industry. Contracts governing projects of any significance are usually in standard form. While the terms and conditions of the standard form contracts in use in Singapore may not be identical to those used elsewhere, they have a basic structure that is similar to those used internationally.

26.1.2 Aside from contract that regulates the private arrangements between the parties, there is the law of torts that also have a significant impact on the rights and liabilities of the parties in the building and construction industry. In addition, there are statutes and regulations, giving expression to various considerations of public policy, that govern the conduct of construction industry players. Indeed, many of the Commonwealth jurisdictions, including Singapore have introduced legislation to govern both the substantive rights of the parties in terms of payment as well as a statutory dispute resolution process to support the right to timely payment.

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### **SECTION 2 BUILDING AND CONSTRUCTION CONTRACTS IN SINGAPORE**

#### ***Standard Form Contracts***

26.2.1 At one time, building and construction contracts tended to conform to a certain pattern shaped by procurement policies and systems that survived

Singapore's colonial past. A number of indigenous standard form contracts have since emerged in response to local arrangements and practices.

26.2.2 In the detail, significant differences can be found in the local standard forms, from those used elsewhere. However, in terms of organisational structure, the contractual arrangements between the parties fall into a number of categories that should be readily recognisable.

26.2.3 First of all, there is the "traditional" system of contracting. In this approach, the owner or developer of an intended project first engages someone to administer the contract. For a building project, he is usually the architect. The other professionals e.g. the quantity surveyor, the structural engineer, and the mechanical and electrical engineer are then appointed. Contracts are entered into between the employer and these consultants. A standard form for the contract with the architect is the Singapore Institute of Architects (SIA) Conditions of Appointment which also contains the Scale of Professional Charges. A similar form issued by the Association of Civil Engineers, Singapore (ACES) is also available for the appointment of engineers.

26.2.4 The architect (or engineer) would usually prepare a design. The architect usually by himself or with the other consultants prepares the drawings, the specifications, the bills of quantities and other documentation that would constitute the contract documents. These must be in sufficient detail to enable contractors to submit competitive tenders for the construction of the works. The successful tenderer would be 'awarded' the contract. In the traditional structure, as the design function is usually left in the hands of the consultants, there will not be any competitive design submitted by the contractors.

26.2.5 For any project of significant value organised around the "traditional system," the contract arrangements between the parties are almost always based on a standard form contract. For the construction of buildings, the most popular form of contract is the SIA standard form currently in its seventh edition. Other forms adopted include the Royal Institute of British Architects' (RIBA) or the Joint Contracts Tribunal (JCT) standard forms or their derivatives. The public sector has its own set of standard form and for the traditional system, the one adopted is usually the Public Sector Standard Conditions of Contract for Construction Works (PSSCOC) (now in its fourth edition as at 2005) (see <http://www.bca.gov.sg/>).

26.2.6 In recent years, along with trends elsewhere, there has been a movement away from the "traditional system." For instance, "design and build" contracts are getting popular. Under this arrangement, the contractor agrees to accept all responsibility for the structure he constructs including obligations relating to design on top of his usual obligations for the work done.

26.2.7 The Public Sector Standard Conditions of Contract for Design and Build for the public sector was issued in 2001 (now in its third edition as at March 2005) (see <http://www.bca.gov.sg/>). This was soon followed in the same year by the Real Estate Developers' Association, Singapore (REDAS) Design and Build Conditions of Contract. Employers would typically rely on these local standard forms or adapt non-local forms (this may include the FIDIC Design and Build Conditions of Contract

(commonly known as the 'Orange Book') and the Articles of Agreement and Conditions of Building Contract with Contractor's Design, 1981 issued by the JCT (JCT81).

26.2.8 A variant of this is what is now commonly described as Engineering Procurement & Construction (EPC) contracts. Such contracts are often used in construction of petrochemical and pharmaceutical facilities and would involve the main contractor in the design of the facilities as well as the procurement of the equipment and machinery to be used.

### **Contract Documents**

26.2.9 Other than small projects, it is relatively rare for all the terms and conditions of a construction contract to be contained in a single document. The contract is usually contained in or evidenced by the standard form contract together with drawings, specifications, bills of quantities and often exchanges of correspondence, and quotations. It is not uncommon for there to be disputes as to which documents form part of the contract (see for example, [Ohbayashi-Gumi Ltd v Kian Hong Holdings Pte Ltd \[1987\] SLR 94](#), [1987] 2 MLJ 110, CA).

26.2.10 The standard form contract would usually contain provisions relating to certification of payment, variations and defective work.

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## **SECTION 3 ARCHITECTS, ENGINEERS AND SURVEYORS**

26.3.1 In Singapore, in order to comply with the requirements of planning and building legislation, the appointment of a 'qualified person' by the employer is often necessary (Building Control Act, Cap 29, s 6(3): <http://statutes.agc.gov.sg/>). The qualified person must be a registered architect or a professional engineer. The qualified person has statutory obligations that he must properly discharge.

26.3.2 Architects in Singapore are regulated by the Architects Act, Cap 12 (<http://statutes.agc.gov.sg/>). While the Architects Act does not define who is an architect, 'architectural services' is defined to include selling or supplying for gain or reward any architectural plan, drawing, tracing or the like for use in the construction, enlargement or alteration of any building or part thereof (s 2(b)). No one can "draw or prepare any architectural plan, drawing, tracing, design, specification or other document intended to govern the construction, enlargement or alteration of any building or part thereof in Singapore" unless he is a registered architect with a practising certificate or unless he is someone working under the direction or supervision of such an architect (s 10(1)). The designation 'architect' or any of its derivatives cannot be used by anyone unless he is a registered architect (s 10(3)).

26.3.3 A register of architects is kept and maintained by the Board of Architects (s 8) (see <http://www.boa.gov.sg/>). The Board is also responsible for the issuance of practising certificates<sup>2</sup> and exercises overall control over the profession. It has power to conduct disciplinary proceedings and may cancel the registration of any

registered architect or suspend him from practice in specified circumstances. In addition to registration, most architects are also members of professional bodies. In Singapore, the main body is the Singapore Institute of Architects (SIA) (<http://www.sia.org.sg/new/>). Besides membership of the SIA, architects educated abroad are often also members of foreign professional bodies like the Royal Institute of British Architects (RIBA) for those educated in the United Kingdom.

26.3.4 There are no restrictions in Singapore against anyone describing himself as an 'engineer'. However, a person is not entitled to call himself a 'professional engineer', or use the word 'engineer' or the abbreviation 'Er.' or 'Engr.' as a title before his name or to use any word, name or designation that will lead to the belief that the person is a registered professional engineer<sup>1</sup> unless he is one properly registered under the Professional Engineers Act, Cap 253 (<http://statutes.agc.gov.sg/>). Whilst there is no definition of the term 'engineer' or 'professional engineer' provided by the Act, the Act does attempt to define 'professional engineering services' and 'professional engineering work' (s 2).

26.3.5 A [Professional Engineers Board](#) is established by the Professional Engineers Act. The Board keeps and maintains a register of professional engineers, a register of practitioners and a register of licensees. The register of professional engineers contains the names, qualifications and other particulars of all persons registered under the Act whereas the register of practitioners, kept and maintained annually, contains the particulars of those professional engineers with practising certificates. Besides registration as a professional engineer, an engineer in Singapore is usually also a member of a professional body like the [Institution of Engineers, Singapore \(IES\)](#) or Association of Civil Engineers, Singapore (ACES). Many engineers who are trained overseas are also members of foreign professional bodies like the Institution of Civil Engineers, United Kingdom.

26.3.6 The term 'surveyor' encompasses a large number of fields. There are building surveyors who examine and evaluate defects to buildings, land and hydrographic surveyors, valuers of properties and the quantity surveyor. The registration of land surveyors is provided for under the Land Surveyors Act, Cap 156. It is also provided that no person can certify to the correctness or accuracy of any title survey unless he is a registered surveyor who has in force a practising certificate. Surveyors practising other types of survey work, such as topographical, engineering and hydrographic surveying, need not be registered under the Act. A [Land Surveyors Board](#) is also established by the Act. Among its other functions, it keep and maintain a register of surveyors, a register of practitioners, and a register of licensees.

26.3.7 Quantity surveyors, who are sometimes described by themselves and the other construction professionals as 'costs consultants' or 'construction economists', are responsible for the evaluation of construction costs. These costs would usually include site preparation costs, labour, material and equipment costs, professional fees, taxes and maintenance costs. There are no registration requirements before someone can practise as a quantity surveyor nor are there any prohibitions against anyone styling himself as a quantity surveyor. There is no equivalent of the Board of Architects or the Professional Engineers Board to govern the professional conduct of quantity surveyors. Many are also members of the local professional body for valuers

and surveyors, namely, the [Singapore Institute of Surveyors and Valuers \(SISV\)](#). SISV has three divisions that represent the various fields of surveying, namely, quantity surveyors, land surveyors, and valuation and the general practice surveyors. An acceptable degree or professional qualification and at least two years of relevant postgraduate experience are necessary for membership. A person can also seek membership of professional bodies like the Royal Institution of Chartered Surveyors, United Kingdom which conduct examinations in the various fields of surveying.

26.3.8 In Singapore, professional bodies like SIA and ACES have published standard form agreements that architects and engineers can put forward for the person engaging them to agree to. Contracts of engagement can also be specially drafted, or adapted from the standard form agreements. A contract might just state that the terms and conditions of engagement are to be 'in accordance' with the standard agreement of the relevant professional body ([Soon Nam Co Ltd v Archynamics Architects \[1978-1979\] SLR 123](#)).

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## **SECTION 4 PERFORMANCE BONDS**

26.4.1 The reason for requiring a performance bond in Singapore is the same as that elsewhere in the world, namely, to provide the employer some security against non-performance by the contractor (see [Wah Heng Glass & Metal Products Pte Ltd v Gammon-CCI Construction Ltd, \[1998\] SGHC 48](#), where a brief description of the purpose and usage of a performance bond was given by the court). In Singapore, the bond is usually given by financial institutions like banks and insurance companies ("the surety"). The amount secured is usually around 5% to 10% of the value of the contract. Such a bond is usually issued valid for a year subject to annual renewals until the completion of the project or the expiry of the maintenance or defect liability period. The extent and nature of the security provided by the bond will, of course, depend on its terms and conditions. The only standard form performance bond in use in Singapore is that found in the appendix of PSSCOC" (<http://www.bca.gov.sg/>).

### ***Nature and Type***

26.4.2 There is some confusion as to the meaning to be attached to what is commonly referred to as the performance bond. First, in terms of its label, it has been variously described as a performance bond, performance guarantee, first demand bond or its American sibling, the stand-by letter of credit. Second, in terms of application or usage, it has been used to secure various stages of the construction process and the document concerned is often described with reference to that particular process; examples of these would be the tender or bid bond, the advance payment bond, the retention money bond, the maintenance bond and so forth. Third, in terms of conditions attached to the call, bonds have also been distinguished by whether they payable on demand (described as "demand bonds") or only upon proof of default (described as "default bonds").

26.4.3 Aside from the payment of money, there is another type of performance bond that requires the surety to perform the works left undone or outstanding by the contractor. Such a bond is usually given by the parent company of the contractor. This kind of bond is not popular with local employers who often prefer cash payment by the surety. If they are used at all, they are usually accepted by employers who are multinationals operating in Singapore who have engaged contractors from their home country under arrangements and conditions similar to those found in the home country.

#### ***Payment Under "Demand" Bonds***

26.4.4 It has been recognised that performance bonds, particularly, those expressed to be payable on demand, stand on a similar footing as irrevocable letters of credit and that an injunction restraining a call or payment upon the bond will not be granted unless fraud or unconscionability is involved ([Bocotra Construction Pte Ltd & Ors v Attorney General \(No 2\) \[1995\] 2 SLR 733](#)). There is no distinction between the principles to be applied in the cases dealing with attempts to restrain banks from making payment from those dealing with restraint of beneficiaries from calling upon the bond ([Bocotra Construction Pte Ltd & Ors v Attorney General \(No 2\) \[1995\] 2 SLR 733, CA](#)).

26.4.5 The sole consideration in the application for an injunction is whether there is fraud or unconscionability. The party seeking the injunction would be required to establish a clear case of fraud or unconscionability in interlocutory proceedings. It is not enough to raise "mere allegations." An interlocutory injunction will not therefore be granted against a bank which has given a bond or guarantee to restrain its payment, since the bank must honour it according to its terms, unless it has clear notice or evidence of fraud (Edward Owen Engineering Ltd v Barclays Bank International Ltd [1978] 1 All E.R. 976). As regards the standard of proof of fraud, the courts have accepted, for cases involving letters of credit, what is known as "the Ackner standard" in assessing allegations of fraud in applications for interlocutory injunctions (propounded by Ackner L.J. in United Trading Corporation v Allied Arab Bank [1985] 2 Lloyd's Rep. 554; applied in Singapore in Korea Industry Co Ltd v Andoll Ltd [1989] 3 MLJ 449).

26.4.6 There is a recent line of cases, mostly in the High Court, elaborating on the requirement of "unconscionability" as distinct from "fraud". In the decision of the High Court in [Min Thai Holdings Pte Ltd v Sunlabel & Anor \[1999\] 2 SLR 368](#), the court stated that the concept of unconscionability "involves unfairness, as distinct from dishonesty or fraud, or conduct so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party." The doctrine that unconscionability is a separate ground from "fraud" was reiterated by the Court of Appeal in [Samwoh Asphalt Premix Pte Ltd v Sum Cheong Piling Pte Ltd \[2002\] 1 SLR 1](#).

26.4.7 However, a contractor who seeks to restrain the employer as beneficiary of the performance bond from calling on it must establish a strong prima facie case of unconscionability ([Liang Huat Aluminium Industries Pte Ltd V Hi-Tek Construction Pte Ltd \[2001\] SGHC 334](#)). It has been suggested that the "current conception of the ground of unconscionability by the Singapore courts may be disproportionately wide

in light of the causes that have led to it being introduced as a disjunctive ground for injuncting a call on a performance bond” (see *Injuncting Calls on Performance Bonds: Reconstructing Unconscionability* [2003] 15 SAcLJ 30 ). The article contains a detailed discussion on this subject.

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## **SECTION 5 SUBCONTRACTS**

26.5.1 In Singapore, as is the case elsewhere, it is usual for the contractor to engage sub-contractors to whom he will owe and be entitled to contractual obligations according to the terms of the sub-contract. For larger projects, sub-contracts are also usually in standard forms that are mostly derivatives of the main contract forms. There would be appropriate cross-references between the main and sub-contract forms and some provisions of the main contract may even be replicated in the sub-contract. The sub-contractor will not normally owe any direct contractual obligations to the employer or consultants.

26.5.2 The type of contractual arrangements that can be arrived at in sub-contracts can vary considerably. They can involve the supply of labour only, a supply of goods and materials only, a supply and build arrangement, or even a complete 'design and build' arrangement. Most of the principles of law applicable to a main contract would also be applicable to a sub-contract.

### ***Employer's Selection of Sub-contractors***

26.5.3 In the traditional system, it is usual to provide in the main contract, terms that allow the employer to select for the main contractor, certain specialist contractors whose participation in the project he desires. The specialist contractor is then usually made to enter into a sub-contract with the main contractor. This process is usually described as a 'nomination'.

26.5.4 Two standard form nominated sub-contracts are in wide usage in Singapore. They are (1) the Standard Conditions of Nominated Sub-Contract for use in conjunction with Public Sector Conditions of Contract for Construction Work 2005 (now in its fourth edition), and (2) the SIA Conditions of Sub-Contract for use in conjunction with the main contract (now in its third edition).

### ***Incorporation of Main Contract Terms***

26.5.5 As the sub-contract obligations commonly mirror that of the main contract (in a limited aspect), the draftsman of sub-contracts typically incorporates the terms of the main contract by reference. As a general rule, anything in the main contract that is not applicable or appropriate in the sub-contract ought not to be impliedly incorporated (*Star-Trans Far East Pte Ltd v Norske-Tech Ltd* [1996] 2 SLR 409, CA).

26.5.6 The relevant principle in ascertaining whether a provision or a document ought to be incorporated is to ascertain the intention of the parties. Where the

meaning of the provisions already in the sub- contract is perfectly clear, there can be no resort to other documents to give another meaning to it. Where the draftsman had purposely left out any condition which he could without difficulty have put in, then the contra proferentem rule may be applied to prevent the clause or document from forming part of the sub-contract (Union Workshop (Construction) Co v Ng Chew Ho Construction Co Sdn Bhd [1978] 2 MLJ 22). Where the alleged clause incorporating terms of the main contract in the sub-contract is unclear or ambiguous, as where it merely provides 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 is unlikely that the court will find that such a clause has the effect of incorporating the provisions of the main contract into the sub-contract ([Kum Leng General Contractor v Hytech Builders Pte Ltd \[1996\] 1 SLR 751](#)).

### **"Pay When Paid" Provisions**

26.5.7 A provision that has become increasingly common in sub-contracts is one which provides that the sub-contractor is only entitled to be paid when the main contractor has himself received payment. When such a provision is inserted in the sub-contract, it is usually not enough that the payments have been certified, but not received yet by the main contractor. It may not even matter whether the payment has been withheld from the main contractor by the employer due to the main contractor's own default or breach, and the default or breach was not caused or contributed to by the sub-contractor ([Brightside Mechanical and Electrical Services Group Ltd v Hyundai Engineering and Construction Co Ltd \[1988\] SLR 186](#); [Interpro Engineering Pte Ltd v Sin Heng Construction Co Pte Ltd \[1998\] 1 SLR 694](#)).

26.5.8 The Building and Construction Industry Security of Payment Act 2004 (<http://statutes.agc.gov.sg/>) that came into operation on 1st April 2005, contains in section 9, a prohibition against "pay when paid clauses."

### **Direct Claims**

26.5.9 As a general rule, a sub-contractor cannot make any claim against the employer for the price of work done or material supplied under the sub- contract ([Henderick Engineering v Kansai Paint Singapore Pte Ltd \[1992\] SGHC 184](#)). The existence of a direct payment clause, permitting the employer to make direct payments to the sub-contractor, does not create a contractual relationship between the employer and the sub- contractor (A Vigers Sons & Co Ltd v Swindell [1939] 3 All ER 590). Similarly, an employer cannot make any claim against the sub- contractor directly (Dawber Williamson Roofing Ltd v Humberside County Council (1979) 14 BLR 70).

26.5.10 With the enactment of the Contracts (Rights of Third Parties) Act 2001 that came into operation on 1 January 2002, it may be possible for a nominated sub-contractor to assert rights as a third party against the employer even in the absence of a direct contract with the employer. Section 2(3) of the Act provides that the third party should be expressly identified in the contract by name, as a member of a class, or as answering to a particular description. It is possible that a wide category of persons can qualify as third parties under the Act.

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## **SECTION 6 TIME AND COMPLETION**

26.6.1 This section will look at the issue of completion and extension of time in construction projects within the contractual framework of the SIA form as most of the case law has arisen in that context.

### ***Completion Criteria***

26.6.2 Where standard form contracts are being used, the issue of completion is often reduced to construing what is meant by 'completion' in the standard form in question. A number of standard form contracts, including pre-1980 versions of the SIA Contract defined completion in terms of 'practical completion'. Usage had also been made of the term 'substantial completion' in some other standard form contracts. For the SIA Contract, the term completion is used without the description 'practical' or 'substantial'.

### ***Time for Completion***

26.6.3 Construction contracts would contain provisions relating to the commencement and completion of the works that the contractor is engaged to carry out. If the contract is silent on this, a reasonable time for completion would be implied (*Charnock v Liverpool Corp* [1968] 3 All ER 473; [Lee Kai Corp \(Pte\) Ltd v Chong Gay Theatres Ltd](#) [1992] 2 SLR 689, CA). If in a standard form contract, the time for completion in the schedule to a contract is left blank, the court will imply a term to complete within a reasonable time (*Hick v Raymond and Reid* [1893] AC 22; [Shia Kian Eng \(trading as Forest Contractors\) v Nakano Singapore \(Pte\) Ltd](#) [2001] SGHC 68). What is a reasonable time will be treated as a question of fact.

26.6.4 The SIA contract, as with most building contracts, contains extensions of time and liquidated damages clauses (See SIA Clauses 23 and 24 respectively). The liquidated damages clause gives the employer a remedy in pre-agreed damages if the contractor fails to complete on time.

### ***Extension of Time Clauses***

26.6.5 The contractor's progress and completion may be affected by acts of the employer or his agents. These employer related events can be found in SIA 7th Edition, Clauses 23(1)(f), (g), (h), (i), (j), (k), (n) (o) and (p). Clauses 23(1)(a), (b), (c), (d), (e), (l), (m) deal with neutral events, mainly arising from circumstances not reasonably foreseeable.

26.6.6 The contract date for completion may be affected by neutral events and employer related events to such an extent that it is rendered inapplicable. Without an applicable date for completion, time will be set 'at large' and the obligation to complete becomes assessable by normal common law principles of reasonableness instead of the agreed contractual framework. With an extension of time, on the other

hand, a new date may be set for completion and the right to liquidated damages preserved.

26.6.7 The employer could arguably lose his right to compensation where the express provision for liquidated damages is exhaustive of his rights and "nil" is inserted for the rate of liquidated and ascertained damages, *Temloc Ltd v. Errill Properties Ltd* (1987) 39 BLR 34. However, in the local decision of *Shia Kian Eng* (trading as *Forest Contractors v Nakano Singapore (Pte) Ltd* (Suit 600245/2000, HC, unreported) the parties agreed that there should be no liquidated damages. *Judith Prakash J* found it 'difficult to accept the proposition that simply because it was agreed that there should be no liquidated damages clause, no damages at all could be claimed' if the plaintiff's delay had caused loss to the defendants.

### ***'Contra Proferentem'***

26.6.8 Both liquidated damages and extensions of time clauses (see [Lian Soon Construction Pte Ltd \[2000\] 1 SLR 495](#), Warren Khoo J's views) operate primarily for the employer in that the main contractor is sufficiently protected by the common law rules on impossibility and interference with performance. Thus, the attitude of the courts has been to construe them *contra proferentem*, strictly against the employer (*Peak Construction Ltd v. McKinney Foundations Ltd* (1971) 1 BLR 111).

26.6.9 However, it should be noted that Article 7 SIA 7th Edition excludes the application of the *contra proferentem* rule of construction.

### ***Requirements of Notice of Cause of Delay***

26.6.10 Clause 23(2) of SIA 7th Edition states that it is a condition precedent to the contractor's entitlement to an extension of time that he gives notice in writing within 28 days of the event entitling him to an extension of time. However, Clause 23(2) then contains the proviso "unless the architect has already informed the contractor of his willingness to grant the extension of time". There are two aspects to Clause 23(2): the contractor's notice requirements and the architect's in principle intimation.

26.6.11 Once the contractor has given notice, the architect is required to inform the contractor in writing within 1 month of receipt of the contractor's application for extension of time whether or not he considers the delay caused entitles the contractor "in principle" to the extension of time.

26.6.12 In [Assoland Construction Pte Ltd v. Malayan Credit Properties Pte Ltd \[1993\] 3 SLR 470](#) it was held, *inter alia*, that the architect's failure to comply with the procedural requirements in Clause 23(2) meant that the purported exercise of power to later grant an extension of time was invalid. As such there was no date by which liquidated damages could be computed. In contrast, in [Aoki Corporation v. Lippoland \(Singapore\) Pte Ltd \[1995\] 2 SLR 609](#) it was held, *inter alia*, that while the Contractor's notification under Clause 23(2) is a condition precedent to his entitlement to an extension of time, the Architect's "in principle" intimation is not expressed as a condition precedent to the validity of his decision on extension of time or the delay certificate.

26.6.13 A detailed analysis of Clause 23 and its requirements can be found in the more recent decision of [Lian Soon Construction Pte Ltd \[2000\] 1 SLR 495](#).

26.6.14 Most standard forms of contract provide for loss and expense to be certified by the architect where the contractor has been delayed by breaches or acts of prevention by the employer or his agent. However, none of the SIA forms after 1980 has a loss and expense clause for prolongation. In fact, Clause 31(14) expressly provides that the architect has no power to decide or certify any claim for breach of contract made against the Employer by the Contractor. However, one might consider that Clause 12(4) [Valuation of Variations] does provide a limited express entitlement under the contract to additional 'preliminaries' costs which are associated with variations, which in themselves do not amount to a breach of contract.

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## **SECTION 7 TERMINATION**

26.7.1 A typical construction contract usually lasts for a fairly long period of time and the option to terminate the contract by an innocent party in the event of a breach by the defaulting party before the date of completion is an important remedy, apart from the remedy of a right to damages. The right of the innocent party to terminate a contract may arise under the common law or pursuant to express provisions in the contract.

26.7.2 Parties may expressly provide that a particular contractual provision is a "condition" the breach of which would then entitle the innocent party to terminate the contract. Alternatively, parties may insert express termination provisions in the contract to give the parties a right to terminate the contract on the occurrence of certain pre-defined events.

26.7.3 In the absence of express agreement or contractual termination provisions, the common law enables an innocent party to terminate a contract in the following circumstances:

- a. a defaulting party commits a fundamental breach of the contract;
- b. a defaulting party evinces a subjective intention not to be bound by the contract or an objective indication of inability to execute the contract properly, for instance by deliberately and consistently breaching the contract despite repeated warnings or notices by the innocent party;
- c. where a party informs the other that he does not intend to perform the contract any longer, or conducts himself in such a manner as to render his own future performance impossible. This is known as anticipatory breach.

26.7.4 In [Brani Readymixed Pte Ltd v. Yee Hong Pte Ltd \[1995\] 1 SLR 205](#), the Court of Appeal affirmed the common law position that the mere failure or delay in making payment per se would not amount to a repudiation. However, as on the facts in that case, the Court of Appeal found the failure went beyond the mere stalling for

time and evinced an intention not to pay at all. This amounted to a repudiation of the contract.

26.7.5 Under Clause 32(10) of the SIA Main Contract, an employer is entitled to withhold payment under the interim certificates if he accepts the wrongful repudiation of a contractor as terminating the contract.. [SA Shee & Co \(Pte\) Ltd v. Kaki Bukit Industrial Park Pte Ltd \[2000\] 2 SLR 12.](#)

26.7.6 If an innocent party elects to terminate a contract, it is vital that there is an unequivocal acceptance of the breach as terminating the contract. Where the contract provides for a procedure and timing in which the termination is to be effected, there must be strict compliance for the termination to be effective. Failure to do so may result in wrongful repudiation.

26.7.7 As termination, also known as forfeiture clauses, are construed strictly *Roberts v. Bury Commissioners* (1870) LR 5 CP 310, the contractual provisions prescribing the procedures by which a contract may be determined must be properly and faithfully complied with for the termination to be effective. Otherwise, the termination may be wrongful and amount to a wrongful repudiation by the employer instead - *Lodder v. Slowey* [1904] AC 442. The contractor is then entitled to sue the employer for the actual value of the work done and materials supplied or damages or both.

26.7.8 Typical grounds for termination by the employer include:

- default of the contractor;
- bankruptcy of the contractor;
- failure to start work;
- failure to proceed with the work;
- failure to comply with architect's instructions;
- failure to comply with the contract;
- failure to complete the works; and
- failure to remedy defects.

26.7.9 Since forfeiture clauses have such serious consequences, they are construed *contra proferentem* and the requirements for notices to be given need careful observation - [Central Provident Fund Board v. Ho Bok Kee \[1980-1981\] SLR 180](#); *AL Stainless Industries v. Wei Sin Construction Pte Ltd* (Suit No. 221 of 2000, High Court, unreported judgment dated 28th August 2001).

26.7.10 Where the contract does not contain a termination clause and the contractor disputes the alleged default, he may contest or resist any attempt to eject him from the site *London Borough of Hounslow v. Twickenham Garden Developments Ltd* [1971] Ch. 233. See also *Mayfield Holdings Ltd v. Moana Reef Ltd* [1973] 1 NZLR 309.

26.7.11 Clauses 32(4) & 32(5) of the SIA Main Contracts, however require the contractor to deliver possession of the site upon receipt of the Notice of Termination, irrespective of the validity of the notice.

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## **SECTION 8 TORT IN CONSTRUCTION**

26.8.1 The law of tort has a significant impact on construction projects. In particular, its importance relates to owners of buildings who have no contractual relationship with those who have been involved in, for instance, the negligent design or construction of their property. Devoid of a contractual route, as the caveat emptor rule would apply in relation to the contract of sale of the property, these owners relied on the law of tort to obtain a remedy against those involved in the design or construction of their property. Singapore has since passed the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) which came into force on the 1 January 2002.

26.8.2 There are several difficulties faced in this area of the law, including the nature of the claim of the property owner. Earlier cases reveal the confusion. Liability within the *Donoghue v. Stevenson* [1932] AC 562 formulation required either injury to person or damage to 'other' property to be caused by the defectively constructed building, but did not extend to pure economic loss for the defectively constructed building itself. These are losses which are unrelated to injury to the person or 'other' property. It was only after the decision in *Hedley Byrne & Co Ltd v. Heller & Partners Limited* [1964] AC 465 that liability for the tort of negligence included "pure economic losses".

26.8.3 In the context of the construction industry, the decisions of *Dutton v. Bognor Regis Urban District Council* [1972] 1 QB 373 and *Anns v. London Borough of Merton* [1978] AC 728 classified a claim for damages for a defectively constructed building as damage to 'other' property within the *Donoghue v. Stevenson* formulation. The extension of the tort of negligence triggered off by the *Anns* decision reached its high-water mark with the decision of *Junior Books Ltd v. Veitchi Ltd* [1983] 1 AC 520. *Junior Books* had applied, inter alia, the two-tier test dealing with proximity and policy considerations derived from *Anns*. In *Sutherland Shire Council v. Heyman* (1985) 60 ALR 1, the High Court of Australia made its mark in four exceptionally researched judgments, by being the first to discredit the classification in *Dutton* and *Anns*. Since then, reservations have been repeatedly expressed about both *Junior Books* and the *Anns* two tier test. In England, the decline of the trend in favour of liability for defective building was initiated by *D. & F. Estates v. Church Commissioners* [1989] AC 177 and completed by *Murphy v. Brentwood D.C.* [1991] AC 398. In *Murphy*, the House of Lords, inter alia, overruled the *Anns* decision and categorically denied liability for defective building works in the tort of negligence. They placed reliance on the Defective Premises Act 1972. They also preserved the *Hedley Byrne* decision and accepted the *Junior Books* decision as part of it.

26.8.4 The Singapore Court of Appeal had an opportunity to review the tort of negligence in the context of defective strata-titled common property in [RSP Architects Planners & Engineers v. Ocean Front Pte Ltd & Anor](#) [1996] 1 SLR 113 ("Bayshore Park"). In *Bayshore Park*, the plaintiffs were the management

corporation, a statutory legal entity created to manage and maintain the common property of the condominium project called Bayshore Park. The plaintiffs sued the developer for damages arising out of the defective construction of common property which had led to spalling of concrete in the ceilings of the car parks and water ponding near the lifts. The developers joined the main contractors and an architectural and engineering firm as third parties. The Singapore courts were faced with 2 preliminary issues which included the issue of whether the management corporation was barred from claiming for pure economic loss.

26.8.5 After a thorough review of all the Commonwealth cases, the Court of Appeal held that the degree of proximity between the developers and management corporation was sufficient to give rise to a duty on the part of the developers to take care to avoid causing to the management corporation the kind of damage the latter had sustained. The relevant proximity was established, *inter alia*, as the management corporation was conceived and created by the developers and the developers knew or ought to have known that negligence in the construction of the common property would have to be made good by the Management Corporation. In addition, the Court found that there were no policy reasons to negative such a duty of care as there would be no liability "in an indeterminate amount for an indeterminate time to an indeterminate class."

26.8.6 Bayshore Park was applied in [Management Corporation Strata Title Plan No. 1075 v RSP Architects Planners & Engineers \(Raglan Squire & Partners\) F.R \[1999\] 2 SLR 449](#), ("Eastern Lagoon"). In Eastern Lagoon, the Court of Appeal extended the rights of the management corporation to recover economic losses caused by the negligence of an architect. The Court of Appeal had placed reliance on the two tier test in *Anns v Merton London Borough Council* [1978] AC 728 as it was applied in *Bryan v. Maloney*(1995) 128 ALR 163.

26.8.7 In [Man B&W Diesel S E Asia Pte Ltd v PT Bumi International Tankers \[2004\] 2 SLR 300](#) the Court of Appeal had another opportunity to consider the issues arising from a claim for pure economic loss, albeit not in the building and construction industry context. Despite a shipbuilding contract between the owner and a shipbuilder, the owner sued the suppliers and manufacturers of the engine in the tort of negligence when the engine broke down completely. The Court of Appeal rejected their claim on the basis that a finding of a duty of care would conflict with the contractual scheme and in particular the limitations of liability contained in the main contract. In doing so, the Court of Appeal expressed the view that the Bayshore Park and Eastern Lagoon cases should be viewed in the context of their particular facts.

26.8.8 The current position in Singapore on pure economic losses arising from defective strata-titled common property is that recovery has been allowed in tort by the management corporation. However, the UK position today has reverted to the non-availability of recovery for pure economic losses in the context of defective building work generally after the decision in *Murphy* while other common law jurisdictions like Australia, Canada and New Zealand, as reflected in the decisions of *Bryan v. Maloney* (1995) 128 ALR 163, *Winnipeg Condominium Corp No.36 v. Bird Construction Co* (1995) 121 DLR 193 and *Invercargill C.C. v. Hamlin* [1994] 3 NZLR 513 respectively, are allowing recovery.

26.8.9 Recently, in [MCST Plan No 2297 v Seasons Park Ltd \[2005\] SGCA 16](#), the Court of Appeal had to consider whether the developer could avail itself of the defence of “independent contractor” against the MCST’s claim in tort for damages for defects in the common property. The Court of Appeal affirmed the general rule that the employer is not liable for an independent contractor’s negligence in the execution of his contract. The application of the general rule meant that the developer only owes the MCST a duty in relation to the appointment of a competent contractor to execute the construction works.

26.8.10 The Court of Appeal then considered the application of the exceptions to the general rule. Where the exceptions applied, the employer’s duty is to ensure that care is taken in relation to the execution of the works. However, they found none of the exceptions relevant to the case. The MCST relied on the Housing Developers (Control and Licensing) Act (Cap 130, 1985 Rev Ed) and the relevant rules to assert that the developer could not delegate to an independent contractor the duty of building the condominium in a good and workmanlike manner. In rejecting the MCST’s assertion, the Court of Appeal was of the view that there was nothing in the legislation or the rules to support it.

26.8.11 They also acknowledged that the legislature is far better equipped than the courts to deal with policy matters in the field of consumer protection, as such matters may require limitations or safeguards.

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## **SECTION 9 IMPACT OF LEGISLATION**

### ***Building Control Act 1989***

26.9.1 The Building Control Act is a prescriptive code. It prescribes standards of safety and good building practice. The legislation provides a blueprint to control legally the construction of building works, the monitoring of existing structures with powers to deal with them where safety is in issue. It is well known that the current legislation was a direct consequence of the Hotel New World collapse.

26.9.2 A central feature of the legislation was the conception of the role of an “accredited checker”. The accredited checker operates as an extra level of control in the process of design. The legislation obliges “every person for whom building works are to be carried out” to appoint an accredited checker. The accredited checker must be registered with the Building Authority and maintain no professional or financial interest (other than the stipulated appointment) in the building works concerned. In addition, only qualified civil or structural engineers of 10 years’ standing in terms of practical experience in the design and construction of buildings, in addition to being distinguished by ability, standing or special knowledge or experience could be appointed as accredited independent checkers. This is clearly to ensure that the professional stature of the expert would safeguard his independence when appointed as accredited checker. The appointed accredited checker is required to check the key structural elements in the plans and issue a certificate and evaluation report

approving them. This is the independent technical control prescribed by the legislation.

26.9.3 Section 6(1) provides for approval of plans by the Commissioner of Building Control. Among the documents to be submitted with the plans is the certificate of the accredited checker in relation to the adequacy of the key structural elements. By section 6(5), the Commissioner of Building Control is authorised to rely solely on the certificate and evaluation report of the accredited checker to approve plans. Hence, the Commissioner of Building Control has no duty to check the plans when granting “approval”.

26.9.4 Notwithstanding the earlier section, section 6(6) gives the Commissioner the discretion to carry out random checks with respect to structural plans and design calculations of the building works. The Commissioner also retains the right to revoke acquiescence of the building plans if satisfied that any information given in respect of the approval had been false in a material particular.

26.9.5 Section 32 is an extremely comprehensive exclusion of liability of the Government and public officers. It even protects the government and any public officer from suit arising by reason of the fact that any building works are carried out in accordance with the provisions of this Act or that such building works or plans of the building works are subject to inspection or approval by the Commissioner or the public officer. Accordingly, the Building Authority has been given unequivocal protection which the decision of *Murphy v. Brentwood District Council* [1991] 1 AC 398 achieved to a limited extent in England in 1991.

26.9.6 In September 2003, various amendments were made to the legislation. These included amendments to take into account the move away from the traditional form of procurement to the design and build method. Section 7A gives the Commissioner the power to issue an order to immediately stop building works that pose a danger to persons, property or other buildings. In addition, the Commissioner may require the person for whom the works are carried out to take certain remedial and other measures to avert such danger. An example of the type of situation to which this section could apply may be found in [Xpress Print Pte Ltd v Monocrafts Pte Ltd & Anor](#) [2000] 3 SLR 545.

### ***Building and Construction Industry Security of Payment Act 2004***

26.9.7 Preceding the introduction of the Building and Construction Industry Security for Payment Act 2004 (“the Act”) in Singapore, legislation in other Commonwealth countries was studied and considered, including the United Kingdom’s Housing Grants, Construction and Regeneration Act 1996, New South Wales’ Building and Construction Industry Security of Payment Act 1999, the Building and Construction Industry Security of Payment Act 2002 of Victoria, and New Zealand’s Construction Contracts Act 2002. The Act that was eventually passed incorporated most of the key features of the New South Wales Act and some elements of the rest, with several important modifications that took into account local concerns and circumstances.

26.9.8 The Act came into operation on 1st April 2005. Since then, most of the standard form contracts in use in Singapore have been amended to accommodate the provisions of the Act. In exercise of the powers conferred by section 41 of the Building and Construction Industry Security of Payment Act 2004, the Minister for National Development has introduced the Building and Construction Industry Security of Payment Regulations 2005 ("the Regulations") that accompany the Act. Like the parent Act, the Regulations came into operation on 1st April 2005. The Regulations contain, inter alia, requirements that were left by the Act to the Minister to prescribe.

26.9.9 The legislation has far-reaching impact on the practices of the construction industry, and the amendments made to the Public Sector Standard Conditions of Contract to bring it in line with the legislation indicate this. The primary objective of the legislation is to redress the difficulties faced by the construction industry in obtaining payment for work done and services rendered. The intention of the legislature is unequivocally to facilitate payment in the construction industry. In that regard, the Act not only categorically affirms the right to payment, it goes further and also provides a mechanism for obtaining payment through the speedy dispute resolution procedure of adjudication. Anticipating that efforts may be made to impede the right to payment, the Act prohibits any attempt to hamper the right to payment with its anti-avoidance provisions.

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