

SINGAPORE CONSTRUCTION INDUSTRY AND LAW UPDATES

Technical:

David Shuttleworth, Foremost Consultants

Eight building champions recognized for fronting sustainability initiatives

Tenants and visitors will now be able to identify green buildings with the display of the BCA Green Mark plaque at building entrances, lobbies and atriums of buildings. At the current time there are eight building owners and developers who are also BCA Green Mark champions and they have received a customised glass plaque commissioned by BCA.

Ascendas, City Developments Limited (CDL), Nanyang Technological University (NTU), National University of Singapore (NUS), Keppel Land Limited, CapitalLand Limited, Housing and Development Board (HDB) and JTC Corporation (JTC) are the eight building owners with projects having achieved the highest green building standards. Also known as BCA Green Mark Champions, these developers have demonstrated a strong commitment towards corporate social responsibility and outstanding achievements in environmental sustainability, having achieved a substantial number of Green Mark buildings at Gold level and above. As at 1 July 2014, projects undertaken by these Green Mark Champions represent 13 percent of all Green Mark projects and 37 percent of Green Mark Platinum projects in Singapore.

The plaque was introduced to recognise the developer's achievement in building and operating a sustainable property, and also to showcase the achievement to users and visitors. Tenants, users and visitors will now be able to identify that they are at the premises of a building owner or developer who has invested resources to green mark the building.

The Green Mark plaque is sculpted in glass and is moulded from recycled glass, with the text sandblasted on the surface. Building projects that have completed verification through the BCA Green Mark Verification Audit will be eligible to display a plaque reflecting their BCA Green Mark Rating and the year of Award. The plaques can be purchased from BCA's authorised supplier who will produce the plaque.

Singapore Construction Productivity Week 2014

The annual Singapore Construction Productivity Week (SCPW) was held during the National Productivity Month, from 13 to 16 October 2014 at the Singapore Expo and Max Atria. SCPW presents the ideal platform for suppliers, developers, architects, consultants and builders to come together and exchange ideas in transforming the built environment sector into one that is integrated, technologically-advanced and productive.

Since the launch of BCA's Construction Productivity Roadmap in 2011, the industry has made substantial progress by the introduction of more efficient construction designs and methods. To date, more than 80% of the BCA Construction Productivity and Capability Fund (CPCF) has been committed to help firms improve their productivity through technology adoption, process re-engineering as well as workforce training and upgrading programmes.

At the launch of the SCPW, the government announced new measures aimed at promoting the use of modular construction techniques, especially for developments on government land. Modular construction involves assembling building components in factories with final



installation in position on site. This approach is considered to be faster, safer, and less labour dependent than traditional construction methods.

The government also plans to introduce courses with help from Stanford University to enable the construction industry in adopting the latest approaches in virtual design and construction.

Case Law:

Chow Wen Si, Clasis LLC; Tan Lee Jane, ChangAroth Chambers LLC

In **Tech-System Design & Contract (S) Pte Ltd v WYWY Investments Pte Ltd** [2014] SGHC 57, the Plaintiff applied for an injunction to restrain the Defendant's call of two performance bonds until determination of the arbitration proceedings between the parties, on the ground that the Defendant's call on performance bonds was unconscionable. The court held that in the absence of unconscionable conduct and subject to the terms of the performance bond, the beneficiary of a performance bond would generally be entitled to call on the performance bond regardless of whether there are dispute resolution proceedings between parties. The court also made 2 observations: (i) that even if the beneficiary was mistaken as to his entitlement to call on a performance bond, the call would be legitimate so long as the beneficiary had honestly and genuinely believed that the obligor was in breach of its obligations; and (ii) in deciding whether to restrain the calling on a bond, the court's inquiry should be focused on the beneficiary's alleged unconscionable conduct rather than the resulting effect on the obligor. In the circumstances, the court dismissed the Plaintiff's application for an injunction as it was unable to find any prima facie case that there was unconscionable conduct on the part of the Defendant.

HP Construction & Engineering Pte Ltd v Chin Ivan [2014] SGHC 137, the Plaintiff appealed against the Assistant Registrar's decision to grant a stay of proceedings pursuant to section 6 of the Arbitration Act. Before the Assistant Registrar, the issue that the architect's certificate was procured by the Plaintiff's fraudulent misrepresentation to the Defendant's architect was raised. The Assistant Registrar granted a stay of proceedings on the grounds that there appeared to be a bona fide dispute as to whether any fraudulent misrepresentation was made to the architect, resulting in the issuance of the certificates. On appeal, Edmund Leow JC held that while fraud is a serious allegation, the same standard of proof applies to the exceptions of fraud, improper pressure or interference in the context of Clause 31(13) of the SIA Conditions of Contract, which is that there must be a bona fide case of dispute. However, the party seeking to rely on the exception of fraud must provide credible evidence of fraud, as mere allegations of fraud are insufficient for the court to grant a stay of proceedings. On the facts, the Court found that there was a bona fide dispute of fraud on the Architect's Certificates, but while there was a bona fide dispute on fraud, such fraud, even if proven, only affects certain items in the certificate and is thus severable from the rest of the Plaintiff's claim. In the premises, the court allowed the appeal in part and granted a stay of the part of the Plaintiff's claim that do not relate to the dispute on fraud, with no stay of proceedings for the remaining claimed sum.

In **PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia) and another matter** [2014] SGHC 146, the High Court affirmed the Singapore Court of Appeal's decision in *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 (CA) and adopted the one-dispute approach in interpreting the security of payment regime in "the Red



Book". The "Red Book" is the first edition of the "Conditions of Contract for Construction" published in 1999 by the International Federation of Consulting Engineers (FIDIC).

In this case, the Plaintiff applied to set aside both (i) a majority arbitral award issued in favour of the Defendant and (ii) an order permitting that award to be enforced as though it were a judgment of the High Court. The issue before the High Court was whether the Defendant is entitled to enforce the Dispute Adjudication Board's (DAB) decision by way of an interim arbitral award which is final and binding but without the arbitral tribunal first arbitrating on the "primary dispute" and determining the merits of the DAB's decision. The High Court defined the "primary dispute" as the parties' underlying dispute of the Dispute Adjudication Board's (DAB) decision while the "secondary dispute" refers to parties' dispute, which arises from the Plaintiff's failure to pay the Defendant pursuant to the DAB's decision.

The High Court dismissed both of the Plaintiff's application and held in favour of adopting the one-dispute approach to interpreting clauses 20.4 to 20.7, such that a secondary dispute is merely an aspect of the primary dispute to be subsumed in and resolved in the very same dispute/resolution procedure invoked to resolve the primary dispute. Accordingly, when the Defendant referred both the primary and secondary disputes to the arbitral tribunal, the arbitral tribunal was correct to treat the DAB's decision as immediately enforceable by way of an interim award, pending final resolution of the primary dispute between the parties. This approach is consistent with and best advances the "pay now" and "argue later" principle underlying the Red Book's Security of Payment regime.

The Court was also of the view that such a one-dispute approach will not contravene sections 19B(1) and 19B(2) of Singapore's International Arbitration Act ("IAA"), given that section 19B does not exclude the parties' autonomy to agree in their contract for substantive provisional rights i.e. for the Plaintiff to "pay now" without having to wait for all remaining aspects of the parties' dispute to be resolved with finality. This too, will not contravene section 19B(2) of the IAA, because in resolving the primary dispute, the tribunal will not have to deal with the interim award in anyway that is contrary to section 19B(2). The interim award will cease to have effect once the primary dispute has been resolved and a final award is made.

In ***YTL Construction (S) Pte Ltd v Balanced Engineering and Construction Pte Ltd*** [2014] SGHC 142, the High Court was asked whether a claimant was permitted to claim, in both its notice of intention to adjudicate and adjudication application, amounts which were higher than that claimed in its payment claim. It was held that, by virtue of these changes to the amounts claimed, the payment claim was rendered invalid pursuant to section 10(3)(a) of the Building and Construction Industry Security of Payment Act (Cap 30B) ("SOPA"), as the actual amount claimed could not be ascertained by the respondent from the payment claim. It was also considered that this non-compliance with the SOPA could not be waived by the respondent as the invalid payment claim affected the adjudicator's jurisdiction to hear the dispute. As a further consequence of the change in the claimed amounts, the court also held that the claimant's claim was not merely one of non-payment of a response amount, but was, in essence, a dispute of the response amount. In this regard, the adjudication application should have been made following the issuance of the disputed payment response (and not the non-payment of the agreed response amount) and, therefore, had been made out of time pursuant to the SOPA. In view of these reasons, the court set the adjudication determination aside.

In the case of ***LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd*** [2014] SGHCR 10, the High Court clarified two issues arising under the interpretation of the Building and



Construction Industry Security of Payment act (Cap 30B) (“SOPA”). Firstly, where a contract does not preclude the respondent from serving a payment response before a certain due date, and the respondent does serve its payment response on an earlier date, the dispute settlement period under section 12 of the SOPA will begin to run from the day on which the payment response was served, and not from the last day on which it is supposed to be served under the contract. This was found to be commercially sensible, having regard to the purpose behind the SOPA, which is to promote a speedy and effective dispute resolution process. Secondly, the court also held that a claimant is not precluded from submitting a repeat claim (that is, a payment claim which repeats an earlier payment claim in its entirety and does not include any new items of work) under section 10(4) of the SOPA as long as the payment claim had not previously been adjudicated upon its merits. In this connection, the court had to consider the earlier approaches to this issue and adopted the position taken in *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 and *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2014] 3 SLR 609, and declined to follow that taken in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157.

