SOCIETY OF CONSTRUCTION LAW (SINGAPORE)

SINGAPORE CONSTRUCTION LAW NEWSLETTER

SWEET & MAXWELL

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Contents

Society of Construction Law (Singapore)
Level 16, Malacca Centre,
20 Malacca Street,
Singapore 048979
Tel & Fax: +65-31273797 (no 6 prefix)
www.scl.org.sg

Chairman's Message

As the year draws to a close, it's usual to reflect on achievements and commit to new challenges. I will try to do so myself.

Since my last message, we have held our Annual Conference for 2011. The theme was 'Productivity' and the intention was to consider how improved contract practices could contribute to improved construction productivity. We were fortunate to be able to gather a strong team of speakers from both the construction / engineering fraternity and, of course, the legal profession. Inevitably the papers were very diverse and, whilst this was certainly intended, my overall impression was that we did not quite succeed in merging the 'construction' with the 'law'. I would like to categorise this as a learning experience for SCL. We need to be constantly striving to bring the construction lawyers and the industry professionals together, not just in the same room but in the same intellectual pursuit. Next year, I hope we will find another topical theme that we can use as a basis for sharing our professional knowledge and ideas.

Looking back further still, I am pleased to report on changes to our current Council. At the AGM in August, Hon Sec Joseph Liow stood down from the Council as a result of his work commitments and Zoe Stollard kindly agreed to replace Joe as Secretary for the 2nd year of this Council's 2 year term. Zoe is already responsible for Publications and I'm extremely grateful to her for stepping up to perform a dual role.

Similarly, I am pleased to announce that we have co-opted Denash Gopal onto the Council. Denash has been a member of SCL for quite some time and he is professionally involved in the Oil & Gas Sector of the construction industry. The SCL Singapore Council has a standing committee tasked with the development of interest and membership in what we have vaguely called 'specialist sectors', meaning those important parts of the construction industry which fall outside the better-known building and civil engineering sectors. This standing committee is led by Darren Benger and in the new year Darren will be working closely with Denash to encourage greater participation from the oil & gas, power and industrial scene. With help from Denash, the specialist sector standing committee will then be free to identify other specialist sectors (tunnelling perhaps?) which have specific and often unique interests.

Wishing you all a Happy and Prosperous New Year!

Christopher Nunns
Chairman
2010-2012

Inaugural SCL (Singapore) Debate: Construction Contracts in Singapore are Inherently Biased Towards Employers - 24 August 2011

Zoe Stollard
Nabarro LLP

The SCL (Singapore) held its annual construction industry debate on Wednesday, 24 August 2011. The proposed motion was:

"This house believes Singapore construction contracts are inherently biased towards the employer".

Mr. Christopher Nunns, Chairman of SCL (Singapore) introduced the speakers. Chris highlighted to attendees this was intended to be a "fun" debate: Views expressed by the speakers may not be their actual views. He thanked the speakers in advance for entering into the spirit of the debate.

The team proposing the motion (the "hats") was led by Bill Gallagher, with team members James Taylor and Mohan Pillay. They were presented with yellow construction safety helmets to wear for the debate. The opposition team (the "red shirts") was led by Eugene Seah, assisted by Calvin Pereira and Daniel Koh. All opposition team members wore red shirts.

Bill Gallagher opened the debate with a well presented argument that Singapore construction contracts are inherently biased towards employers. Eugene Seah replied from the opposing perspective ending his argument with a commendable summary "rap".

CALENDAR OF EVENTS - 2012

No.	Date	Event
1	17 January 2012	Updates and Developments in Construction Law 2012
2	23 February 2012	An Examination of Concurrent Delay
3	15 March 2012	Liability for Design
4	April 2012	SCL Networking Cocktails
5	July 2012	SCL Annual Dinner
6	August 2012	SCL Annual Construction Law Conference 2012
7	August 2012	SCL Annual General Meeting 2012

After each team had put forward second speakers to reinforce their arguments, the debate was opened to the floor. A lively feedback session followed and comments from the audience were thoughtfully responded to by the debating teams. Each team then presented its third speakers.

Chris Nunns wrapped up the debate and thanked speakers for their considerable time and effort. The final voting decision was made by a "show of hands". Chris announced that the winners were the "hats", proposing the motion.

For a more detailed summary of the debated arguments by Dr. Anand Jude Anthony, please see the SCL (Singapore) website.

Investment Arbitration in Construction - 7 September 2011

Zoe Stollard
Nabarro LLP

The Investment Arbitration in Construction seminar was held on Wednesday, 7 September 2011.

It was held at Maxwell Chambers and was a very popular event, attended by 43 people. Mr. Gordon Smith, Council Member of SCL (Singapore) made some opening remarks, as seminar chairman, and introduced the seminar topic and visiting speaker.

The speaker for the event was Mr. John Uff. As many readers will know, John is a practising barrister and arbitrator, specialising in international construction and engineering cases. His very interesting talk examined investor stake issues in the context of construction disputes, including how contractors and other stakeholders in construction projects can benefit from the protection offered by bilateral investment treaties (or BITs).

The talk was very interesting and informative, including a brief review of the basic principles of investment arbitration. It was followed by an enthusiastic and vibrant question and answer session.

SCL Construction Law Conference 2011 - Construction Productivity: Insights & Opportunities - 21 September 2011

Helen Waddell
Pinsent Masons

The SCL's annual conference took place on 21 September 2011 with a focus this year on productivity within the construction industry. Mr Tan Tian Chong delivered an excellent keynote speech providing much food for thought with details of the Building and Construction Authority of Singapore' productivity roadmap.

He set the scene for the day, highlighting the need for a change in procurement models in order to involve contractors and the supply chain at a much earlier stage. He also touched on 'carrot and stick' methods of changing attitudes in the construction industry, with incentives for training and retaining of local workers and the use of less labour intensive practices through points systems and mechanisation credits, as well as deterring the use of foreign workers through increased levies.

These themes were taken up by other speakers, with Seah Hsiu-Min Eugene of Davis Langdon & Seah and Chantel-Aimée Doerries QC of Atkin Chambers focusing on the types of contracts used in Singapore, the need for full disclosure of design information at an early stage and questioning whether there is a need for a change in the way risk is allocated in order to encourage more cooperative methods of working and thus more efficiency.

Presentations by Er Wong Pui Fun Joanne of Meinhardt, Dr Cui Wei of Shimizu and Dr Philip Chan of NUS about the submissions procedures, the use of prefabrication and BIM, highlighted the need for increased team working and project management at an early stage in the project if the goals of greater productivity and improved safety are to be achieved.

Alternative dispute resolution methods were also discussed as a means to avoid expensive and lengthy disputes at the end of a project. Methods such as expert determination under the new SIA rules (Theresa Ee of CP2M, Naresh Mahtani, ATMD Bird & Bird) and adjudication under the Security of Payment Act (Edwin Lee, Eldan Law) are ways in which disputes can be dealt with quickly during the course of a project with the aim of maintaining cash flow. Swift resolution can enable parties to focus on completing the project as productively as possible.

Construction Law 101 (2nd Run) - 29 September, 4, 6 & 11 October 2011

Kevin Ong
WongPartnership LLP

The course was held following an oversubscribed inaugural run last year. Once again, it was conducted by Mohan Pillay, Joint Head of Office of Pinsent Masons MPillay LLP and Past Chairman of the SCL. There were 23 attendees from a good mix of backgrounds, mainly architects, engineers, contractors, quantity surveyors and lawyers, but also representatives from a public employer and an arbitral institute.

The course was designed for practitioners in the construction industry interested in the basic principles of construction law. It was delivered through modules on:

- Key elements of construction contracts e.g. completion, defects liability period, extension of time
- Roles of the various parties in a project and payment obligations
- Claims and adjudication under the Security of Payment Act
- Common types of construction disputes, notice requirements, dispute provisions and arbitration.

The sentiment among the attendees was that the course was well designed and delivered. Some participants had expected only parts of the course to be relevant to their work, but found that their acquired understanding of the legal overview was helpful and indeed necessary in anticipating problems and dealing with counter parties. The materials were presented in a concise and structured manner; jargon was used only when necessary and clearly explained. Through illustrations from case law and the speaker's own experience, technical points of law and procedure were brought to bear real life relevance to the attendees. If clarity and adaptiveness are features of mastery, then Mr Pillay is a true master of his trade.

Kudos must also be given to the SCL for the happy inclusion of dinner on every evening the course was held. Apart from serving as a natural intermission during lectures, it allowed participants to network and discuss events in the industry. The course ended with the presentation of certificates by Christopher Nunns, Chairman of the SCL, to all attendees who had fully attended the course.

Construction vs Construction Law – An Update - 24 October 2011

Darren Benger
ATA Architects Pte Ltd

The penultimate SCL seminar for the calendar year was held on 24 October 2011 at Maxwell Chambers. There was an excellent attendance of about 50 delegates (comprising a good mix of Architects, Engineers, Project Managers, Quantity Surveyors, Construction & Design Consultants, Lawyers and In-House Counsel), all keenly interested in hearing a topic on construction law from a construction practitioner's view-point.

Opening Remarks were given by Seminar Chairman, Mr. Raymond Chan – Partner, Chan Neo LLP - who then introduced the speaker for the seminar, Ms Audrey Perez, Head of Department QSE & Maintenance, Dragages Singapore Pte Ltd. Audrey presented an informative and thought-provoking update on her talk at the 2008 SCL – Law Society Annual Conference by discussing developments in the Singapore construction industry since 2008, and she also covered the latest landmark court decisions impacting on the construction industry.

The presentation was well received, and evoked some thoughtful discussion in the the Q&A session that followed. It was evident from the seminar that construction practitioners are facing a dynamic environment relative to which both construction-related practices and the law are developing, and thus constantly presenting new challenges and opportunities.

The Application of Force Majeure & Frustration in Construction Contracts - 15 November 2011

Paul Sandosham
WongPartnership LLP

The final SCL seminar for the calendar year was held on 15 November 2011. There was an excellent turn-out of almost 100 delegates (consisting of Architects, Engineers, Project Managers, Quantity Surveyors, Lawyers and In-House Counsel) at the SCI Auditorium at Capital Tower, in no small part due to the keen interest in what was highly topical issue for the construction industry i.e. Force Majeure & Frustration.

The guest speaker for the seminar was Francis Xavier SC from Rajah & Tann and the event was chaired by Paul Sandosham from WongPartnership LLP. Francis, who was lead counsel in the landmark case of Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd [2011] SGCA, shared his insights into the findings of the Court of Appeal, in particular, the Court's ruling that Force Majeure clauses could be worded so as to relieve a party of its contractual obligation where its performance was commercially impractical.

In addition to the discussion on Force Majeure, Francis also examined the doctrine of Frustration, analysing the Court's observations relating to the interplay between the 2 doctrines in the case of RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd [2007] 4 SLR(R) 413.

The presentation was followed by a highly engaging discussion between delegates, Francis and the Chair on the impact of the Court of Appeal's decisions in the Holcim and RDC cases. In particular, delegates were keen to discuss in what circumstances a significant price increase could excuse a party from its obligations under a contract. Francis also offered practical suggestions on how Force Majeure clauses should be worded.

2nd Networking Cocktail 2011 - 30 November 2011

Darren Benger
Chair, SCL (Singapore) Social & Networking Committee

The second SCL Networking Cocktails event for 2011 was held on 30 November 2011 at Urban Fairways, Capital Tower, a unique bar with screen golf technology. In this suitably informal social setting, the SCL Council were joined in an attendance of approximately 30 members, their guests, and non-members from the construction industry.

Following an introduction and welcome in his fashionably brief and succint manner, the gathering wasted no time in joining Chairman, Chistopher Nunns, on the indoor fairways for a "par 3 golf challenge." While awaiting turns to 'tee-off,' and while watching the fun being had by other players in overcoming the challenging simulation golf course, many acquaintances were renewed and many new contacts were made. In this conducive environment, and with a catalyst of good food and beverages, engaging conversations were held on various themes ranging from current construction law issues and opportunities, through to a sharing of experiences in social interests. It was further pleasing to note the range of attendance from various fields and disciplines within the construction-related sector, which lead to a depth and diversity of networking and conversation topics. This was another successful event in providing an interactive and exciting networking platform for those involved in Construction Law in Singapore.

New ICC Rules: A Welcome Change

This article briefly summarises some of the new ICC Arbitration Rules coming into force on 1 January 2012.

SUMMARY

The ICC International Court of Arbitration is the world's leading institution for resolving international business disputes. It has recently published a revised (third) version of the ICC Arbitration Rules (the "New Rules").

The New Rules replace the previous (1998) version of the ICC Arbitration Rules and become effective on 1 January 2012.

The Key focus of the New Rules includes:
- increased efficiency;
- cost reduction; and
- protection of fundamental procedural rights.

WHAT ARE THE MATERIAL CHANGES?

The author of this Article is supportive of the changes and sets out below a summary of some of the more innovative ones.

ADMINISTRATION OF ICC ARBITRATIONS

The New Rules (Article 1) provide that the ICC Court is the only body authorised to administer arbitrations under the New Rules.

These provisions are intended to avoid the situation where parties agree to arbitration under the New Rules, but the New Rules are administered by another institution or the parties agree to a non-administered (ad hoc) arbitration under the New Rules.

By agreeing to arbitration under the New Rules the parties accept that the arbitration is administered by the ICC.

MULTI-PARTY SCENARIOS

The New Rules include entirely new provisions to address disputes involving multi-contracts and parties. The New Rules (Articles 7 to 10) now enable joinder, multiple-party arbitrations, cross-claims and consolidation.

The need to join additional parties to an arbitration or to consolidate proceedings is becoming more frequent, reflecting an increasing complexity of transactions underlying disputes referred to ICC arbitrations. These are very welcome changes for increased cost and time efficiency.

THE ARBITRAL TRIBUNAL

The 1998 ICC Arbitration Rules required arbitrators to be independent. The New Rules (Articles 11 and 14) also require them to be impartial. This follows other arbitration texts, including the UNCITRAL Model Law on Arbitration and the IBA Guidelines on Conflicts of Interest in International Arbitration.

Arbitrators will also be required to sign a statement of their independence and impartiality, as well as a statement of confidentiality and confirmation of their availability.

The New Rules (Article 13) also introduce a number of scenarios in which the Court may directly appoint arbitrators if the ICC fails to do so within the specified time limit. This power also applies where a State party is involved in the arbitration.

These changes are expected to reduce delays and help to smooth out procedural issues.

CONDUCT OF THE ARBITRATION

The New Rules (Article 22) expressly provide that the arbitral tribunal and parties are required to make every effort to conduct arbitrations in an expeditious and cost-effective manner having regard to the complexity and value of the dispute.

To aid this:

- the arbitral tribunal must inform the Secretariat and the parties the date it expects to submit its draft award to the Court for review;
- the arbitral tribunal will convene a case management conference and consult with the parties on procedural measures to be adopted (Appendix IV contains suggested case management techniques);
- when awarding costs, the arbitral tribunal may take into consideration whether the parties have conducted the arbitration expeditiously and cost-effectively.

EMERGENCY ARBITRATORS

A new emergency arbitrator appointment procedure has been inserted into the New Rules (Article 29 and Appendix V). This is intended for parties who require urgent interim relief or conservatory measure which cannot wait until the arbitral tribunal has been formed.

This is one of the most significant changes or additions to the New Rules and follows global trends across other arbitral institutions.

IMPACT

The New Rules appear to the author of this Article to be a step in the right direction and to have been well received across the arbitration field.

It remains to be seen whether, in practice, these changes will have the required practical results and achieve the intended objectives, but let's hope so.

Zoe Stollard
Nabarro LLP

Email: z.stollard@nabarro.com

Deceptive Expertise

This is part 1 of an article written by Peter Hartog. Peter has prepared and presented expert evidence in litigation, arbitration and mediation arising from defects of design, construction and performance in Australia, Thailand, Singapore, Malaysia, Hong Kong, the UAE, Egypt and Britain.

"Experts are nowadays often the mere paid advocates or partisans of those who employ and pay them….. There is hardly anything that is not palpably absurd on its face, that cannot now be proved by some so-called "experts".

(Albers v. Church of the Nazarene, 1899)

That was written in a US judgment in 1899. More than a century later, the Law Reform Commission of New South Wales, Australia found that "biased, partisan and polarized evidence" from expert witnesses had become a "pervasive and persisting" problem. It observed that:

"Experts frequently chosen by plaintiff's lawyers, or by insurance companies, will know perfectly well that they have been chosen because their views happen to favour the client's position. It might involve loss of face, as well as perhaps loss of income, for them to depart from their familiar views, and this may make it difficult to approach the issues with an open mind."

The New South Wales Attorney General had earlier recommended tougher penalties for unethical experts after an expert witness in an epic intellectual property case conceded he had revised his initial opinions at the request of his instructing solicitors. The New South Wales Law Reform Commission's 2005 report, however, merely proposed reminding expert witnesses of their primary duty to the triers of fact (and not those who engage or instruct them). It also recommended informing rogue experts of the sanctions available to Courts for those who meander mendaciously into evidentiary Fantasyland under oath and behind the traditional protection of expert witness immunity.

Most construction lawyers in Singapore, Hong Kong, Australia and Britain can readily recall instances of expert evidence concocted and averred in reckless disregard of experts' sworn duties. Few, however, can provide verifiable examples of judges doing much more than arching the odd judicial eyebrow or offering mildly sardonic witticisms in response to evidence from diehard dissemblers and bloviating advocates in the guise of disinterested experts. Similarly, arbitrators usually signal incredulity and reproof through adverse body language and affecting the visible symptoms of lockjaw.

Published judgments occasionally record certain difficulties in accepting transparently confected and implausible opinions from hired gun experts. These gentle ripostes have negligible effect. Indeed, they may inadvertently assist desperate litigants and their legal advisors to identify predictably partisan and obligingly malleable experts. Contrary to common expectations, The System is not ultimately self-policing; bad apples do not necessarily stay at the bottom of the barrel. They may simply ferment and eventually re-surface.

I have been reviewing, assessing and occasionally presenting expert evidence in building claims for more than 25 years. During that time, the amount of other experts in the field has expanded significantly to include a plethora of dispute resolution and claims consultants, semi-retired eminences grises of the building design professions, self-accredited forensic polymaths, superannuated and moonlighting academics, otherwise insolvent builders and so on.

Indeed, there are so many experts now that expert agencies are being set up as clearing houses and talent agencies for putative and potential experts. In Australia, one invites experts to join, suggesting they will be "paid extremely well for their consulting services….up to and over $10,000 per day."

Many who cannot resist similar enticements will quickly come to appreciate that success may depend on telling prospective clients what they want to hear and, thereafter, on meticulously sidestepping codes of conduct such as Part 5 of the Australian Uniform Civil Procedures Rules (2005), Order 40A of Singapore's Rules of Court, and Part 35 of Britain's Civil Procedures Rules (CPR). I offer an exceptional example of this:

CASE EXAMPLE 1 – NSW, AUSTRALIA

A building surveyor appeared as an expert witness in support of a building owner's claim against an architect. In cross-examination, the surveyor was questioned in unrelenting detail on his reported observations of defects of design and construction of a geometrically complex profiled sheet metal roof and pyramidal skylights. For almost 20 minutes he was encouraged to recount how he had gained access to the roof, climbed its steep slopes and steps, ridges and parapets and identified various defects in joints, cappings, fixings and flashings. Asked why he had taken no photographs, the witness explained that the roof was so precipitous that he needed to use both hands to avoid slipping.

The bemused judge eventually intervened to ask where this epic journey was leading. It was then suggested to the witness that he had first been engaged on behalf of the owner more than a week after the allegedly defective roof was demolished. Without evident hesitation, the witness acknowledged that he had not actually inspected the roof and its defects *in situ*.

He explained that by examining the original roof materials in rubbish skips at ground level, he had been able to recreate and envisage all of the defects alleged by his client. He had also adopted the (self-serving) opinions (and technical errors, for instance, effervescence for efflorescence and carbonization for carbonation) of the

new contractor brought in to finish the house after the original builder had been dismissed. The expert's narrative of his journey of discovery over the roof had been no more than a literary device intended to assist lay readers of his evidentiary report.

The judge was not amused. He directed that the expert attend the reading of the judgment weeks later. At the hearing, he informed the expert that he and his fellow judges agreed the public interest would best be served if the expert were to give a solemn undertaking never again to appear before a court in New South Wales claiming more than a layman's knowledge of building construction. The tremulous witness did so and hastily departed. Within a few years, though, he reappeared as an expert witness in the small claims tribunals where magic realism in evidence is more tolerated.

The criteria for offering building "expertise" are often remarkably vague, sometimes profoundly low and rarely tested or even questioned prior to cross-examination. That, however, may be changing.

One senior judge in Singapore has lately directed that proposed experts document their relevant expertise to the Court's satisfaction before hearings commence.

In March 2000 the Straits Times published a laudatory article observing that local building surveyors:

"...make a very decent living thanks to developers, architects, engineers and contractors here, who cannot seem to get their acts together to erect defect-free buildings."

The article went on to explain how building surveyors are hired to assess the extent and causes of defects, notably as a prelude to building owners' litigated, arbitrated and mediated claims against developers and, in turn, cross-claims against architects, engineers, contractors and sub-contractors, or alternatively, respondents to these claims.

For architects, engineers, materials specialists, quantity surveyors and so on, expertise requires demonstrably higher levels of knowledge and experience than those of the average reasonably competent practitioner in their respective professions. That proposition simply does not apply to building surveyors. Membership of or affiliation with the RICS and some lesser known offshore and ostentatiously professional institutes and self-accrediting associations is evidently sufficient to qualify an ordinary or lesser building surveyor as an expert witness, irrespective of relevant experience and recognition among peers.

There is an abiding assumption, unusually prevalent in Singapore and Hong Kong, that building surveyors, having surveyed distress and deterioration in buildings, must also be competent to analyze the causes and to anticipate the consequences of defects and thereby to provide sound expert opinion to assist tribunals in apportioning liability.

This assumption has led some inadvertently to reveal that they have negligible knowledge of the materials and methods on which they have been engaged to expound with seeming detachment and confidence.

A related and equally questionable assumption is that experience in conventional residential construction (the focus of much of local surveyors' routine work), is a valid basis for expert opinion on sophisticated materials and elements more commonly found in high-tech industrial and high-rise commercial buildings.

CASE EXAMPLE 2 - SINGAPORE

In cross-examination, a building surveyor confirmed he was sufficiently knowledgeable of fabrication, welding and performance of stainless steels to assist the tribunal as an expert. He added, impromptu, that decades ago, he had operated a stainless steel fabrication plant (although not mentioned in his CV).

In cross-examination, the witness was unable to identify two of the three metals (nickel, chromium and molybdenum) used to impart corrosion resistance to stainless steel alloys. He could not recall the names, abbreviations and common factors of any of the three techniques normally used for welding stainless steel. He could not distinguish between different types of stainless steel (eg. austentic, martensitic and ferritic), could not explain the different grades of stainless steel (e.g. 304 and 316 commonly used in building construction) and could not recall the purpose of, and materials used in, pickling and passivation of stainless steel.

Although the expert initially denied having seen any failed tack welds alleged in stainless steel sheet cladding of the subject building, he later acknowledged "a number" of failed welds but refused to accept the occurrence of hundreds photographed by the owners' experts. He did so on the grounds that his own investigations had not "benefitted" from use of a boom-lift for close inspection. In other words, he had not examined the relevant parts of the cladding, could not confirm the incidence of defective welds and therefore felt obliged to deny their existence. The notion that what he was unable or unwilling to see did not occur – an affliction known as evidentiary scotoma – was a common theme in the expert's evidence.

The building surveyor explained that his expertise in this and many other subjects was practical rather than technical or scientific; in his peripatetic career, he had acquired a broad general hands-on expertise that could not easily be articulated on short notice. He later further explained that, prior to completing his report, he had discussed and confirmed the soundness of his opinions with a helpful stainless steel guy of his acquaintance at a workshop located somewhere in Clementi….. Unbelievable…. but true.

CASE EXAMPLE 3 – SINGAPORE

The same witness averred he was also sufficiently expert on architectural glass and glazing, including that with magnetron sputtered and pyrolytic chemical vapour deposited reflective coatings. Immediately asked to explain those terms, he replied that this is ...not the sort of information that he ...carries around in his head; he would have to consult textbooks back at the office. He asserted (incorrectly) that sputtered reflective coatings are conventionally located on the exterior face of window glass, so any damage to the coating must have been occasioned during window cleaning rather than before or during construction.

When asked to identify the width of the air gaps in the conventional double-glazed units, he mistakenly claimed 6-8mm, rather than the conventional 12mm (the width shown on his client's as-built drawings).

Further, in averring that hundreds of aluminium-framed windows had been installed exactly as shown in those as-built drawings, the witness managed to overlook complete omission of more than 1.5 kilometres of site-applied silicone weatherseals. That defect was visible from the expert's own evidentiary report photos.

Many months later, the expert eventually admitted his survey report did not reflect actual construction of the windows. Nonetheless, he steadfastly refused to accept that omission of essential weatherseals could account for leaks in windows and damp brickwork. The cause of leaks, he averred, was deterioration of external paintwork already overdue for recoating at the building owner's expense.

Sometimes ignorance in expert reports is so profound that it cannot plausibly be feigned.

CASE EXAMPLE 4 - AUSTRALIA

A once eminent but semi-retired architect was engaged as an expert on façade waterproofing and structural glazing. His "expertise" was largely based on his role in design of a prominent and contentious high-rise office building almost 30 years earlier. In cross-examination on installation and performance of weatherseals in complex glazing assemblies, he consistently referred to polysulphide sealants. When gently reminded that polysulphides had long been supplanted for this and most other purposes, he replied that as far as he was concerned, polysulphides, polyurethanes, silicones and the like "...are all the same to me; they're all just Builders' Bog". An audible groan arose from his team of instructing solicitors.

Note: In Australia and New Zealand, *Builders Bog* is still a brand name for a two-part filler used by painters and plasterers. Its name derives from the phrase "to bog it up", meaning to roughly fill a gap or joint with mastic.

CASE EXAMPLE 5 – SINGAPORE

By the early 1990s, polysulphide sealants had been superseded for all but a few niche applications, notably seals in contact with sewage and aviation gasoline and secondary seals in prefabricated double glazing units. The persistent toxicity of polysulphide rubber sealants has caused them to be stripped from buildings in the Scandinavian countries and avoided in new construction elsewhere. By contrast, a surveyor appearing as an expert witness in Singapore in 2008 extolled these sealants, insisting they continue to be used widely in conventional building construction. Further, he reported that a distributor had assured him they "sell quite a lot of the stuff" hereabouts.

These anecdotes illustrate the occasional confusion of professional eminence and technical expertise. A few calamitous experts that I have encountered were probably engaged principally because, for a year or two at some late stage in their careers, they had been presidents of local chapters of professional associations and institutes.

By way of example, there are many matters of professional practice on which typical elder statesmen and eminences grises of the architectural profession may fairly be presumed to be expert. The reality, however, is that professional acclaim rarely comes from past achievements in such mundane practical matters as selection, detailing and performance of waterproofing membranes, knowledge of corrosion of non-ferrous metals, contemplation of the causes of leaks in roofs and curtain walls, familiarity with fixings in stone veneer cladding, installation of movement joints in brickwork and tiling, psychrometry and so on. Especially since these subjects are likely outside their actual experience over the preceding two or three decades.

Nevertheless, this has not stopped some one-time chapter presidents from offering preposterous *ex cathedra* opinions in expert evidence. Beware the expert witness on waterproofing who believes that roof membranes still involve felts saturated with molten bitumen and semi-rigid asphaltic sheets reinforced with asbestos fibres or who recognizes CPE as the abbreviation for Continuing Professional Education but not Chlorinated Polyethylene.

Sometimes errors in expert reports are so improbable that it is difficult to accept that they are genuine.

CASE EXAMPLE 6 - SINGAPORE

An engineer, appearing as an expert witness on behalf of a building owner in a dispute over construction and performance of curtain wall cladding on a commercial building in Singapore, stated that the fluoropolymer coating on aluminium panels displayed conspicuous streaks and variations in colour that he attributed to errors in manufacturing. His evidentiary report contained photographs, taken from a swinging stage, illustrating examples of these defects to support the proposition that the cladding could not be repaired *in situ* and should be replaced in its entirety.

Another expert, engaged by the main contractor, correlated these photographs with their locations on the façade. He produced pairs of photographs recording the appearance of the affected panels before and after cleaning with water, household dish-washing detergent and paper towels. The accumulated grime – that is, the allegedly irreparable "coating defects" - came away easily to reveal pristinely uniform colour; it later transpired the whole facade had not been cleaned since the building was completed 8 years or so earlier.

CASE EXAMPLE 7 - AUSTRALIA

An engineer and reputed expert on architectural glass was engaged to determine the cause of breakage of a single panel of toughened glass in steel-framed balustrading along corridors bounding a seven-storey atrium space in an office building in Canberra. He advised the owner and tenant, a government department, that as many as 150 fractures could occur during the life of the building due to nickel sulphide inclusions. He added that balustrades throughout the building were under-designed for crowd loads. The distraught proprietor installed safety scaffolds and commenced proceedings against the main contractor.

Rebuttal reports, submitted on behalf of the contractor, noted that the engineer's analysis seemed to assume a lateral load ultimately derived from research into forces generated by rampaging soccer fans in two fatal incidents in Britain in the 1990s. He had also applied external wind loads to wholly internal glazing and over-estimated the quantity of toughened glass by a factor of 12.

The dispute was referred to expert determination before a barrister with an engineering degree. He could not be convinced that normally mild-mannered government actuaries, accountants and administrators were likely to stampede along 2.4 metre-wide corridors and hurl themselves bodily against glass balustrades, even when panic-stricken by unexpected gale-force winds within the fully-enclosed atrium. According to the Building Code of Australia, the maximum design loads on such balustrades are half those averred by the engineer. Despite several requests, he declined to submit his engineering calculations to the tribunal.

So, what is to be done about rogue "experts"? Is expert immunity to blame? Will Jones-v-Kaney provide the required relief? Perhaps a crackdown by insurers will make a difference: The author will discuss these issues, and more, in Part 2 of his article in the next SCL newsletter.

Peter Hartog
Principal
Building Diagnostics Asia Pacific

Email: phartog@jacksonteece.com

LIST OF NEW MEMBERS WHO HAVE JOINED SCL (SINGAPORE) IN SEPTEMBER – NOVEMBER 2011

1. John Baker
2. Chris McNally
3. Colin Kin
4. Cheng Weng Ng
5. Joanna Seetoh
6. Dolly Er
7. Swi Chun Poon
8. Seng Wee Wong
9. Magdaline Yeo
10. Linda Esther Foo Hui Ling
11. Emmeline Chan
12. Silas Lim
13. Zamri Hasan
14. Stanley Wong Kum Loong
15. Chellam Mathiarasan
16. Wee Hian Yeo
17. Kuan Ching Chew
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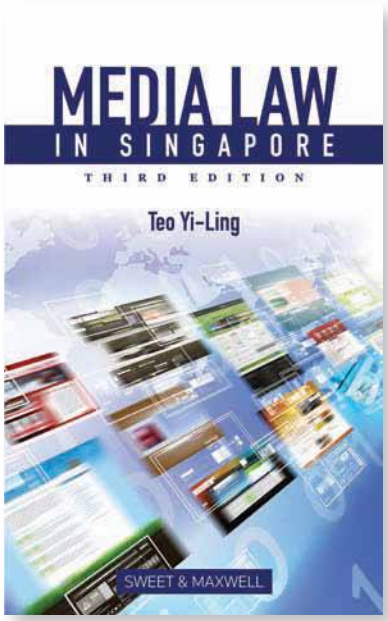

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