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IN THIS ISSUE, we'll look at:

1. **Condition Precedents and Claims under the SOP Act;**

2. **Legislative Link -- Licensing in the Construction Industry**

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Condition Precedents and Claims under the SOP Act

In the previous quarter we looked at the definition and type of construction contracts that are protected by the SOP Act. In this issue we will look at condition precedents, whether they still survive the strictures of the SOP Act and their impact on payment claims. For ease of reference, the Singapore SOP Act, the NSW SOP and the UK HGCRA will all be referred to as SOP, notwithstanding the different names used in different countries.

The NSW SOP encountered challenges posed by condition precedents soon after their new law was passed. The 1999 NSW SOP defined a claimant as a person who was entitled to payment under a construction contract. Respondents were able to challenge the validity of payment claims (and adjudication based on such claims) by showing that certain condition precedents were not met and the claimant was not entitled to payment under the construction contract, notwithstanding the adjudication's decision in favour of the claimant. This led NSW to amend their SOP in year 2002. Their SOP now defines a claimant as a person who is entitled or "claim to be entitled" to payment under a construction contract. With these additional few words, claims escaped the snare of failed condition precedents. This legislative victory was important for claimants (as shown in the next paragraph) but that is not the end of the story (as we shall see in subsequent paragraphs below).

First, the significance of the amendment is that payment claims were valid notwithstanding that certain condition precedents were not fulfilled. Once the validity of

the payment claim is secured, respondents have to bear the consequences set out in the SOP. For eg. if the respondent fails to serve a payment response, he will have forfeited the right to dispute the payment claim, and the claimant will be entitled to his adjudication decision and eventually his summary judgment. Similarly if the respondent failed to cite the condition precedent as reason for non-payment, he would have forfeited his right to rely on the condition precedent. These are not hypothetical situations. Respondents have found themselves in such careless positions in NSW and been unable to prevent adjudication decision or summary judgment being issued against them.

However (as stated above), securing the validity of the payment claim is not the end of the story. What happens if the payment response cites the condition precedent as a reason for not paying? If he is right and the contract required the condition precedent to be fulfilled before payment is due, will the payment claim and the SOP be defeated? Can the SOP over-ride the condition precedent by invoking the statutory provision against contracting out of the SOP? That may well depend on the nature of the condition precedent.

Parties familiar with the Standard terms and conditions of Main Contract published by the Singapore Institute of Architects (the "SIA Form") will recall that there are several conditions to payment therein. First, variations have to be authorised in writing or by the contractor confirming a verbal authorisation in writing within 14 days or by the contractor disputing the classification of a written direction within 28 days. Secondly, claims for extension of time have to be filed within 28 days. Thirdly, payment for stage instalment is due only after certified completion of the stages. In any case, payment for completion and/or release of retention sum is due only after the completion certification (and maintenance certification). Fourthly, claims for both payment and extension of time are subject to submission of adequate vouchers, information and details. Fifthly, and with the more recent standard form amendments this year, the payment claim itself may have to be made on a specific date. Some are called condition precedents. Others are merely expressed as part of the procedure for obtaining payment.

Problems posed by the application of the SOP to such clauses have attracted judicial attention in both UK and Australia. The first question is whether such clauses are condition precedents to payment. The second question is whether they can defeat payment under the SOP regime.

A UK court has applied the test whether the Architect was able to value the claim without fulfillment of that condition. If he was not able to do so, the condition was held to be a condition precedent to extension of time or payment. The test applied by the UK court raises a fundamental question – namely whether an Architect is required to keep track of the project via the weekly reports, monthly reports, quotations and vouchers submitted during the course of the project so that he can conduct his valuation and analysis of extension of time without more; or whether he can sit back and wait for the contractor to feed him with information in the format that the Architect desires; and how the SOP regime impacts on this issue. Prior to 2005, the SIA Form did not mention progress claims at all. It merely required the Architect to issue interim certificates for payment,

presumably based on weekly reports and other documentation. Since early 2005, the amended SIA Form now requires contractors to submit progress claims. In at least one UK case, the information submitted by the contractor was held to be inadequate and the payment claim invalid for purposes of the SOP regime.

In NSW, an express condition precedent requiring certification before payment or vetting procedure before inclusion in progress payment were rejected as contracting out of the SOP.

Finally, the fifth category of possible condition precedents, namely the date for submission of payment claim, may prove to be the greatest test for contractors in Singapore. In UK the time for service of payment claim has been held to be a condition precedent for a progress claim to be valid under their SOP regime. However a NSW court has held that date of service of payment claim is not an essential condition to its validity. The NSW court left it to the Adjudicator to decide whether a contract term was a condition precedent and whether the claim was submitted on the correct date. This begs the question whether the different SOP regimes in UK and the NSW may lead to different treatment of condition precedents. If so, contractors in Singapore will have something to cheer about as our SOP regime is modeled on the NSW rather than the UK SOP.

In any event, both the UK and NSW SOP contemplates a time period within which to serve a payment claim and their standard form contracts specify the necessary time period.

In contrast, the Singapore SOP contemplates not a period of time, but a specific date for service of the payment claim. With this inspiration, both the amended SIA Form and the Singapore Contractors Association Limited's standard form for domestic sub-contracts now contemplate a single day for service of progress claims. Interpreted literally, this may mean that progress claims are valid only if they are served precisely on the date specified. Those served one day early or one day late may be considered invalid.

Even more problematic is that many in-house domestic sub-contracts merely specified that progress payment might be made "monthly". How the SOP applies may depend on the interpretation of this word. One view might be that this word was too ambiguous to qualify as a specific date for service of payment claims. The consequence would be that the date specified in the SOP Regulations would apply. The SOP Regulations were more generous in specifying the date to be "by the last day of the month". This would give the claimant a period of time up to the last day of the month to serve his payment claim. The opposite view might be that the word "monthly" referred to the end of each calendar month from the date of commencement of the Sub-contract works. This was the startling result in a UK case where the UK court invalidated the progress claim (as well as the adjudication decision based on that claim) served by a sub-contractor who could not prove when his works commenced.

In conclusion, the construction industry may now have to be more vigilent with their contracts as well as their documentation and procedures if parties wish to secure the

benefit of the SOP. This is so, with regard to commencement and completion dates, giving proper notices, supporting documents, or submitting claims within the time period or on the date specified in their contracts. This should be food for thought for Contractors (and sub-contractors) who have no contracts department to support their project managers. Who is going to safeguard their rights under the SOP?

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LICENSING IN THE CONSTRUCTION INDUSTRY

US and Australian Builders (or what we call "Main Contractors" in Singapore) were stumped when they started business in Singapore. It could hardly be denied that building and construction was an industry that required complex skills and technical knowledge. Builders in both US and Australia had to be licensed or registered before they could offer their building and construction services to the public. Hence, they could hardly believe their ears when they were given legal advice that they did not need a license to offer such services in Singapore.

Some in the construction industry thought that the CIDB (as it was previously known) register was the Singapore equivalent. However the CIDB system was relevant only to public projects. It did not apply to private projects. And even then, it did not prevent the registered Main Contractors sub-contracting 100% of the public works to unregistered sub-contractors.

This question has also been raised in Parliament several times. In 1997, Dr Teo Ho Pin called for registration system with a view towards removing the "fly-by-night" contractors and sub-contractors. He also called for restrictions to prevent 100% sub-contracting. In 1999, he called for registration of construction firms and practitioners (ie project managers, quantity surveyors and property managers). After 5 years, the Government finally announced early this year that they were looking into the registration and licensing of contractors. When another quarter passed without any announcement, Dr Amy Khor (the current chairperson of the Group Parliamentary Committee on National Development) was moved to ask for an up-date. The MND Minister's July reply in Parliament showed that :

1) The Ministry is considering a licensing scheme for contractors involved in (a) works requiring building control approval; and (b) specialist trades that impact on construction safety.
2) The formal educational requirements for (b) (ie specialist trades that impact on construction safety) may be higher than for (a). It was suggested that such specialists must have professional engineering qualifications.
3) There may be a transitional period during which existing contractors or specialists without the requisite formal qualifications may continue – but they may have to undertake mandatory training in lieu of formal qualifications.

4) The Ministry named only one organisation, namely SCAL, whom they were in consultation with.

If the construction industry is hungry for more details, it may compare the US and Australian registration and licensing system to see what the Ministry may have in mind.

The US licensing system is akin to a professional licensing system. Its features include minimum formal qualifications, registration, de-registration and appeal procedures, as well a code of practice binding on all contractors and sub-contractors within the system. This code covers not merely technical and safety issues, but also the conduct of practitioners. The US system may be compared to licensing of lawyers and medical doctors where their respective codes of practices regulates not merely their technical expertise but also their professional conduct towards their clients, towards fellow professionals and extent of control by their professional bodies.

Hence, the US system is comprehensive in extending beyond technical matters to "professional" conduct. Indeed in one area the US system out shines even the established profession – and that is, the US construction licensing system contains a code of practice that governs even the payment behavior of contractors and sub-contractors. If a contractor (or sub-contractor) fails to pay within a prescribed period of time a judgment debt in favour of another contractor (or sub-contractor) arising from a construction project, the latter can apply to the licensing board to de-register the former. This is surely a recognition by the US authorities that bad payment behavior is harmful to their construction industry. Bad payment behavior does not merely harm the unpaid creditor. It also harms the industry if bad paymasters are allowed to distort the market by tendering below cost. Hence they have to be eliminated from the market as soon as possible.

By comparison, the Australian system seeks to license only the contractors whose works impact on safety issues. Hence builders have to be licensed. A specific list of specialist trades contractors also have to be licensed. Trades contractors not within that specific list need not be licensed. With the emphasis on safety, the licensing system in Australia does not seek to regulate the "professional" behavior of its licensed contractors, nor in particular their payment behavior. It may be observed that for payment behavior, Australia may rely on its Security of Payment legislations.

An analysis of the Minister's reply in Parliament may lead one to conclude that the Ministry is considering a licensing system akin to the Australian system rather than the US system. If true, this will be a pity. It will be a pity because the focus on technical and safety issues does not go far enough. In particular it does not address the adversarial behavior mentioned by Dr Teo Ho Pin, the bad payment behavior and illegal sale of MYE's mentioned by Dr Amy Khor.

This brings us to the MYE issue. Dr Amy Khor quoted a newspaper report on rampant illegal sale of MYE's and asked whether the Ministry will consider allocating MYE's through a neutral third party. The MOM Minister's rebuttal stated that "we cannot stop people from rampantly or indiscriminately disobeying our rules". This rebuttal ignored

the fact that the MYE rules were created by MOM. The rules and their enforcement must be robust enough to prevent "rampant" profiteering. Otherwise the rules must be replaced with a better system.

Dr Amy Khor raised the question of neutral third parties being involved in the allocation of MYE's. The construction industry may be intrigued as to the identities of third parties she had in mind. In Canada, work permits are issued by their government authorities with the assistance of their labour unions and trade associations. This begs the question whether our counterparts in Singapore are prepared to take on this Herculean task that has so far stumped our Government Ministries.

Finally the alliance of six + 6 trades associations have finally registered themselves as the Specialist Trades Alliance ("STA") in August 2005. While the Ministry's consultations on the licensing regime might have been conducted primarily with SCAL in the past, it is hoped that future consultations will extend to STA and perhaps, even the project managers and quantity surveyors that Dr Teo Ho Pin was speaking of.

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