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CLIENT PRACTICE NOTE

RECENT CASE LAW IN A NUTSHELL

A Client Practice Note

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INTRODUCTION

"*Make fair agreements and stick to them*". Despite this robust quotation from Confucius, 2007 was a year which saw several legal cases of particular interest to the construction industry before the Singapore Court of Appeal and the High Court. These include *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric [2007] SGCA 36*, *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency [2007] SGCA 37, RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd & Another [2007] SGCA 39, Chief Assessor & Another v First DCS Pte Ltd (Civil Appeal No 77 of 2007)* and more recently, *NCC International AB v Alliance Concrete Singapore Pte Ltd [2008] SGCA 5*.

This practice note highlights a selection of these recent legal cases and presents them as bite-sized readable summaries in a nutshell.

SUNNY METAL & ENGINEERING PTE LTD v NG KHIM MING ERIC [2007] SGCA 36

- **Decision Date:** **July 2007**
- **Court:** **Court of Appeal**
- **Issue:** **Does an Architect owe the Employer any additional duties over and above his duties as the Contractor's Qualified Person (QP) in a design-build contract?**

Facts

The factual matrix based on the PSSCOC Design and Build Form is illustrated in Figure 1.

Sunny Metal ('SME') sued Ng Khim Ming Eric ('Eric Ng') for breach of his contractual duties under a Deed of Indemnity to carry out the following additional duties:

- Supervise and monitor progress of work; and
- Procure from the Contractor inspection reports, certificates and forms for the purpose of obtaining the Temporary Occupation Permit.

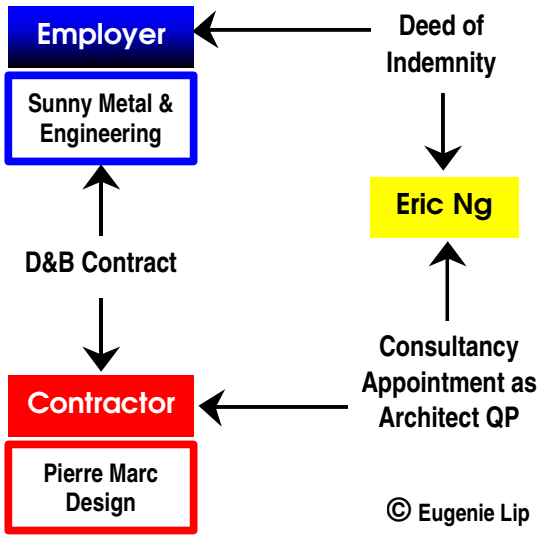

Figure 1:

Factual Matrix

Eric Ng contended that he only owed duties as a Qualified Person.

Decision

The Court of Appeal held that Eric Ng did not contractually undertake additional duties under the Deed of Indemnity. The Deed was intended to be a collateral warranty providing SME with direct contractual rights against Eric Ng in the event of a default in the latter's obligations under his principal contract with the Design-Build Contractor. In other words, all Eric Ng agreed under the Deed was to perform the work sub-contracted to him by the Design-Build Contractor. There were no additional duties.

It was also found that Eric Ng did not owe any duty of care in respect of the additional duties under the Deed. The applicable test to ascertain the existence of a duty of care is premised on whether there existed sufficient proximity of relationship between the parties. As it was decided that the Deed did not impose additional duties on Eric Ng, it followed that there could not be proximity between the parties by way of the Deed, or in tort as evidenced by SME's reliance on its own employees as Project Manager, Project Coordinator/Superintending Officer - and not Eric Ng - to resolve problems with the Design-Build Contractor.

SPANDECK ENGINEERING (S) PTE LTD v DEFENCE SCIENCE & TECHNOLOGY AGENCY [2007] SGCA 37

- **Decision Date:** **August 2007**
- **Court:** **Court of Appeal**
- **Issue:** **Can a Superintending Officer (SO) be held liable for under-certification of payments?**

Facts

Spandeck Engineering ('Spandeck') claimed against Defence Science & Technology Agency ('DSTA') for breach of their duty of care to exercise professional skill and judgment in certifying payments for work carried out.

In consequence of such alleged under-valuation and under-certification, Spandeck claimed they had suffered losses under the following heads:

- Difference between the amounts claimed for work done and the certified amount as progress payment;
- Underpayment of variation orders;
- Loss of profit from the balance of works;
- Loss of management fees from mechanical and electrical variation orders; and
- Loss of interest.

Decision

Citing the findings of the English Court of Appeal decision in *Pacific Associates Inc & Another v Baxter & Others [1989] 2 All ER 159*, the salient facts of which the Court of Appeal found to be materially the same as in the present case, a duty of care should not be superimposed on a contractual structure of relationships which the parties had entered into and where there were provisions for compensation in the event of default by one of the parties.

In *Pacific Associates*, the court ruled that the engineer was not liable to the contractor for negligent certification in the absence of a contractual duty. The engineer could not have voluntarily assumed responsibility to the contractor or that the contractor could have relied on the engineer given the contractual framework set up between the employer and the contractor. The engineer's duty to exercise skill and care arose out of the contract with the employer.

Applying the reasoning in *Pacific Associates*, the Court of Appeal ruled that DSTA (as the Superintending Officer) owed no duty of care to Spandeck and there was also no assumption of responsibility given the presence of an arbitration clause to settle disputes or difference including that relating to any certification or valuation of the Superintending Officer.

CHIEF ASSESSOR & ANOTHER v FIRST DCS PTE LTD (CIVIL APPEAL NO 77 OF 2007)

- **Decision Date:** October 2007
- **Court:** Court of Appeal
- **Issue:** Whether machinery and its underground pipelines conveying chilled water and extending beyond the taxpayer's property boundary should be included in the property tax assessment

Facts

The principal activity of First DCS ('DCS') is the production of chilled water to serve the air-conditioning needs of other buildings at Changi Business Park. DCS charges its customers for the provision of chilled water via an underground pipeline system that extends beyond the property boundary.

The Chief Assessor assessed the property by including the district cooling machinery and the pipelines conveying chilled water to DCS' customers for their air-conditioning requirements and warmed water back to the chillers for re-chilling, in their assessment. The pipelines extend beyond the property boundaries (Figure 2).

DCS objected to the Chief Assessor's method of assessment. Whilst the objection was partially allowed, DCS made a further appeal to the High Court after their appeal against the Chief Assessor's revised assessment was dismissed by the Valuation Review Board.

Under the Property Tax Act (Cap. 254), machinery on immovable property used for the following purposes is excluded from the assessment of the annual value of a property:

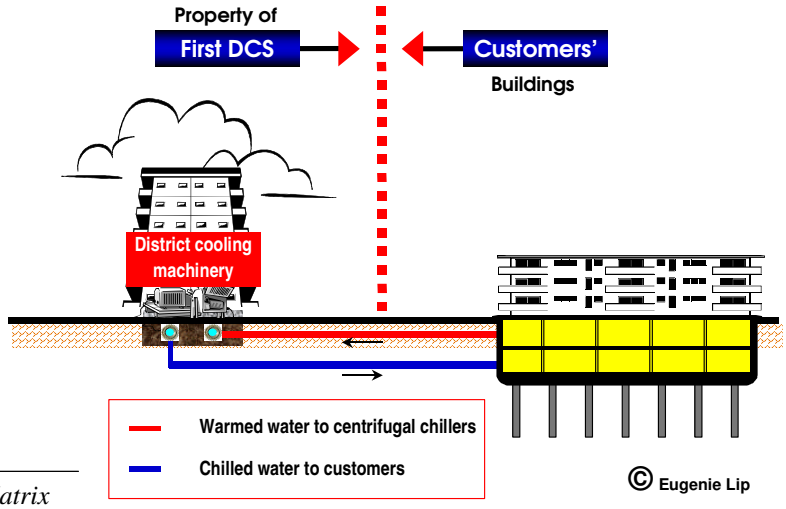

Figure 2:
Factual Matrix

- Making of articles;
- Altering, repairing, ornamenting or finishing of articles; and/or
- Adaptation of articles for sale.

Decision

The Court of Appeal endorsed the findings of the High Court on the following questions:

	Question	Decision
1	Whether machinery used for production of chilled water, qualify for exclusion in the property tax assessment.	▪ Yes – water is an 'article' and by chilling, it has been altered or adapted. ▪ Provision of district cooling service is a sale of water, as defined in the District Cooling Act (Cap. 84A).
2	Whether the pipelines qualify for exclusion in the property tax assessment.	▪ Yes – pipelines are not assessable. ▪ As found in Question 1, the machinery qualifies for exclusion and the pipes are an integral part of the machinery and hence, must also be excluded. ▪ Even if on the assumption that the machinery does not qualify for exclusion (which in this case, it does), the pipelines are also not assessable as they are clearly outside the boundary and not part of the property.

NCC INTERNATIONAL AB v ALLIANCE CONCRETE SINGAPORE PTE LTD [2008] SGCA 5

- **Decision Date:** **February 2008**
- **Court:** **Court of Appeal**
- **Issue:** **Whether a concrete supplier could be compelled to deliver ready-mixed concrete at the contracted price stated in its concrete contract following the sand export ban**

Facts

NCC International ('NCC') filed for a mandatory injunction requiring Alliance Concrete ('Alliance') to deliver ready-mixed concrete under the terms of a concrete contract formed between the parties. The concrete contract was a fixed price contract and there was no mention that sand must be obtained from Indonesia.

Alliance argued that the sand ban had frustrated the concrete contract, altering radically its contractual obligations so much so that it was no longer bound to perform it. They further asserted that NCC refused to share the additional cost of the sand price and also did not follow the procedure laid down by the Building and Construction Authority ('BCA') to obtain sand from BCA's stockpile for delivery to the ready-mixed concrete suppliers.

Decision

It was held by the High Court that NCC was not justified to insist on delivery of the ready-mixed concrete at the fixed price stated in the concrete contract simply because the contract did not specify that Indonesia sand must be used. NCC should be more pragmatic and attempt to resolve the "very real problems". Many other contractors were able to continue work and there was "no widespread stoppages of construction work". The matter should have been referred to the Engineer, or a mediator or an arbitrator as provided in the contract or to follow the procedure in the SCAL Advisory document to obtain sand from BCA's stockpile.

NCC's inaction in that they chose not to do so weakened its case to deserve the intervention and assistance of the Court.

NCC appealed against the refusal of the High Court to issue an interim injunction to compel Alliance to deliver the ready-mixed concrete and perform the concrete contract by continuing to supply at the fixed price stated in the letter of acceptance and in accordance with the terms of the contract.

The appeal was dismissed by the Court of Appeal.

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