The Right to Sue a Consultant – Who does it lie with?

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Every construction project has at least one consultant appointed by a developer, also known as an employer of the project ("**Employer**"). Whilst the types of consultants and their respective roles may differ from project to project, a Consultant's roles would generally include the certification of work and progress. This, in most instances, also requires the consultant to certify the amount payable for work done and payable by the Employer to a Main Contractor. A payment certificate will be issued thereafter.

As cashflow is the lifeline of Main Contractors for any ongoing construction project, a prompt and expeditious payment by the Employer is often expected. However, if the Main Contractor is dissatisfied with the payment certificate, can the Main Contractor sue the Consultant for being negligent? This has been addressed by the Court of Appeal in a recent appeal commenced by PCP Construction Sdn Bhd ("**PCP Construction**") against L3 Architects Sdn Bhd ("**L3 Architects**")[1], where the Court of Appeal had unanimously upheld the decision of the High Court in dismissing PCP Construction's claim against L3 Architects[2].

Brief Background

PCP Construction and L3 Architects had been respectively appointed by the developer, Leap Modulation Sdn Bhd ("**Leap Modulation**"), as the main contractor and consultant in a construction project ("**Project**"). The said Project was regulated by the Agreement and Conditions of Building Contract (Private Edition with Quantities) 1998 with amendments ("**PAM Contract**").

A dispute arose between PCP Construction and Leap Modulation concerning the non-payment of interim payment certificates ("**IPC**") No. 17R and 18 to which PCP Construction sought to resolve by way of adjudication under the Construction Payment and Adjudication Act 2012 ("**CIPAA**"). The Adjudicator had found in favour of PCP Construction ("**Adjudication Decision**").

[1] W-04(C)(W)-347-06/2019
[2] *L3 Architects Sdn Bhd v PCP Construction Sdn Bhd* [2019] 1 LNS 1321

However, when the Adjudication Decision was heard at the High Court, the High Court had set aside part of the Adjudication Decision as the Adjudicator had failed to consider Leap Modulations' set-off (which includes amongst others IPC No.19 wherein L3 Architects had allowed a deduction of RM750,000.00 for non-compliance works) on the basis that they were not set out in the payment response.[3]

Thereafter, PCP Construction commenced a negligence action against L3 Architects which stemmed from IPC No.19. It was PCP Construction's case that because of L3 Architects' negligence, they now had to pay a sum of RM351,646.68 to Leap Modulation (i.e., the set-off).

It is important to bear in mind that at all material times, it is not disputed that there is no contractual relationship between PCP Construction and L3 Architects and each have their respective contracts with Leap Modulation.

A Case of Negligence?

It is trite that in an action for negligence, the following 3 elements must be proved:

(1) whether the Defendant has a duty of care towards the Plaintiff;
(2) whether the Defendant has breached the said duty of care; and
(3) whether the breach by the Defendant has caused the Plaintiff to suffer losses.

Without a contractual relationship between the parties, can there be a duty of care owed by L3 Architects towards PCP Construction? The Sessions Court found that there was a duty of care and gave judgment against L3 Architects.

Appeal to the High Court

Dissatisfied, L3 Architects appealed to the High Court. The High Court allowed the appeal and set aside the judgment against L3 Architects, mainly on the basis that L3 Architects did not owe a duty of care to the PCP Construction as the main contractor. In any event, PCP Construction suffered no loss or damage as a result of IPC No.19.

[3] *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd* [2017] MLJU 905

Duty of Care by a Consultant to a Main Contractor?

The law in England

In *Sutcliffe v. Thackrah and others*[4], the House of Lords held that in general, any architect or valuer would be liable to the person who employed him if he caused loss by reason of his negligence. However, as an exception to that rule, immunity would be accorded to the architect or valuer if he could show that, by agreement, he had been appointed to act as an arbitrator or quasi-arbitrator. This would nevertheless depend on the facts and relevant provisions of the contract. In *Sutcliffe,* the architects were found not to be immune from liability for their negligent over-certification. Notably, this was not a suit by a contractor against an architect.

The House of Lords in *Arenson v. Casson Beckman Rutley & Co.*[5] which was relied upon by PCP Construction in both Sessions Court and High Court had referred to *Sutcliffe*. In *Arenson*, the question before the House of Lords, as Lord Simon of Glaisdale framed was *"whether an accountant/auditor of a private company who on request values shares in the company in the knowledge that his valuation is to determine the price to be paid for the shares under a contract for their sale is liable to be sued if he makes his valuation negligently."*

The House of Lords in *Arenson* found that there was no reason of public policy to treat the respondent valuers' task to evaluate the shares as an exception to the general rule of liability for negligence whereby immunity is granted to judges and arbitrators. In the course of its judgment, the House of Lords made obiter observations on a duty of care owed by a consultant to the main contractor, drawing from the decision of *Sutcliffe*.

At this juncture, it is crucial to highlight that both *Sutcliffe* and *Arenson* concerned the immunity of a party.

The case of *Arenson* was considered in *Pacific Associates Inc and another v. Baxter and others*[6] but the Court of Appeal decided against following *Arenson,* given the absence of a contract between the parties (i.e., contractor and engineer) and the availability of a contractual remedy between the contractor and the employer. It was held, amongst others, that the courts should be slow to superimpose an added duty of care upon a party when the relevant rights came under a contractual framework that provided for the same. Further, the Court of Appeal held:

[4] [1974] 1 All ER 859
[5] [1977] A.C. 405
[6] [1989] 2 All ER 159

> *"Where an engineer was employed or retained by a person, such as a building owner, to oversee the work of a contractor in circumstances where the engineer was under a duty to the employer to exercise care and skill in overseeing the contractor's work and was liable to the employer if the employer was sued by the contractor for economic loss which the contractor had suffered as the result of the engineer's negligence and where there was no direct contractual relationship between the contractor and the engineer or any assumption by the engineer of direct responsibility to the contractor for economic loss caused to the latter, the engineer owed no duty of care directly to the contractor coterminous with the contractor's rights against the employer. Accordingly,* ***since there was no direct contractual relationship between the contractor and the engineer*** *and* ***since the contractor was entitled under its contract with the employer to claim the additional payments for hard materials from the employer, the engineer owed no duty of care to the contractor****."*

post-*Pacific Associates*

Since the decision of *Pacific Associates,* the Courts of Hong Kong[7], Singapore[8], and Malaysia[9] have applied its approach.

In Singapore, the Court of Appeal found that the salient facts in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*[10] to be materially the same as *Pacific Associates* and had laid down a two-stage test of proximity and policy considerations with a preliminary requirement of factual foreseeability for purposes of determining a duty of care.

Applying the said test, the Singapore Court of Appeal was of the view that it was foreseeable that any negligence by the superintending officer (SO) in its certification would deprive the contractor of monies it would have been entitled to. However, in light of the arbitration clause that existed in the contract which allowed the contractor to claim under-certified amounts and any interest in relation thereto by arbitration proceedings against the employer, the requirement of proximity was not satisfied.

The Position in Malaysia

Locally in Malaysia, *Spandeck Engineering* was thoroughly discussed by the Federal Court in *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor*[11] wherein the apex court had propounded a more restricted approach for cases of pure economic loss and held:

[7] *Leon Engineering & Construction Co Ltd (in liquidation) v KA Duk Investment Co Ltd* [1989] 2 HKC 318
[8] *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2008] 4 LRC 61
[9] *Credit Guarantee Corp Malaysia Bhd v SSN Medical Products Sdn Bhd* [2017] 2 MLJ 629; *Bodibasixs Manufacturing Sdn Bhd v Entogenex Industries Sdn Bhd* [2018] 9 MLJ 417
[10] [2008] 4 LRC 61
[11] [2015] 7 CLJ 1008

> *"[45] The most difficult ingredient to prove in establishing a duty of care is the requirement of sufficient proximity between the claimant and the defendant.* ***The court would have to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case****. These factors are likely to vary in different categories of cases. The fact that damages sought by the claimant is pure economic loss not flowing from personal injury or damage to the property is also a factor to be considered. As has often been acknowledged, a more restricted approach is preferable for cases of pure economic loss.* ***As such, the concepts of voluntary assumption of responsibility and reliance are seen as important factors to be established for purposes of fulfilling the proximity requirement****. The reason for* ***a more stringent approach taken in the claims involving pure economic loss is because such loss might lead to an indeterminate liability being imposed on a particular class of defendants, thus leading to policy issues****."*

The High Court's Decision

Having analysed the various cases and authorities submitted, the High Court was of the view that the approach taken in *Pacific Associates* ought to be followed. Amongst others, Aliza Sulaiman JC (now High Court Judge) had noted that the issues, subject matter, and the relationship of parties in *Sutcliffe* and *Arenson* were quite different from the present case. In *Sutcliffe*, the architect was sued by its employer (not a contractor) while the case of *Arenson* concerned the evaluation of shares and was not, a construction dispute.

The High Court was of the view that the arbitration clause in the PAM Contract (i.e., Clause 34) served as an adequate machinery for PCP Construction to pursue its grievances against Leap Modulation for issues such as wrongful certification. As such, it would not be reasonable to impose a duty of care on L3 Architects given the factual matrix of the case as this would cut across and be inconsistent with the structure of relationships as governed by the contracts entered between Leap Modulation and PCP Construction; and between Leap Modulation and L3 Architects.

It was thus held that architects (such as L3 Architects in this case) ought not to be liable for claims for pure economic loss in negligence where a contractual matrix exists between the Employer and the Main Contractor by way of the PAM Contract which has clearly defined the rights and liabilities of each party. As held in *Lok Kok Beng*, there is a need to adhere to the agreed contractual terms.

Was there a Loss Suffered?

When this case was brought before the High Court, the entire Adjudication Decision between PCP Construction and Leap Modulation had been set aside[12] for failure of considering the set-offs raised by Leap Modulation, consistent with the Federal Court case of *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd*[13].

As such, even if there exists a duty of care, PCP Construction had not suffered any losses as adjudication decisions are only of temporary finality as propounded in *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal*[14]. Accordingly, PCP Construction is not prevented from pursuing its claim in a final dispute resolution forum i.e., court or arbitration.

The High Court further held that unless and until such a claim is pursued and dismissed on the ground that there was a wrongful under-certification by L3 Architects in a final dispute resolution forum, PCP Construction has not suffered a loss. We might add that IPC No.19 was also an interim certificate.

The case of Saga Fire Engineering Sdn Bhd v IR Lee Yee Seng

The High Court case of *Saga Fire Engineering v IR Lee Yee Seng*[15] (affirmed on appeal) which was raised by PCP Construction during the Appeal is of significance.

In *Saga Fire Engineering,* the Plaintiff Contractor had faced a variety of problems that arose from the Defendant Engineer's professional negligence. The Plaintiff Contractor commenced a claim in adjudication against the owner of the project, obtained an adjudication decision in their favour, and later resolved their dispute with the owner by way of a settlement agreement.

The Plaintiff Contractor's contention is that as a result of the Defendant Engineer's negligence in certification, the Plaintiff Contractor had suffered losses. The High Court in its decision had found that the architects owed a duty of care to the contractor and were liable for the losses suffered.

Saga Fire is arguably distinguishable as the Plaintiff Contractor and the owner in *Saga Fire* had resolved their disputes by way of an adjudication decision and later, a settlement agreement. There was a crystallisation of the loss. Accordingly, the only remaining avenue for the Plaintiff Contractor was against the Defendant Engineer in negligence.

[12] Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd and another appeal [2019] 1 MLJ 334
[13] [2019] 5 CLJ 479; [2017] 1 LNS 1378; [2018] 2 MLJ 22
[14] [2018] 2 CLJ 163
[15] Shah Alam High Court Civil Suit No. BA-22C-10-02/2017

The Court of Appeal's Decision

Despite PCP Construction's attempts to rely on *Saga Fire Engineering*, the Court of Appeal ultimately agreed with the findings of Aliza Sulaiman JC (now High Court Judge) and affirmed the High Court's decision.

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