

HKCA – CEC Conference

The New Economic Reality, Implications for the Construction Industry in HK

28 & 29 October 2009

***Goodbye to the Gentleman's Agreement,
Hello to Statutory Adjudication***

by

Dr Philip Chan

bdgccf@nus.edu.sg

National University of Singapore

29 October 2009

Text of Paper

- **Introduction**
- **Problems faced in securing progress payment**
- **Ensuring cashflow**
- **The Singapore Experience**
- **Observation**
- **Concluding Remarks**

Introduction – 1

- **First to recognise plight of Cs & SCs – Lord Denning in *Dawnay's* case**
- **Held : Architect's certificate to be treated as cash**
- **Shot down by House of Lords in *Gilbert Ash's* case**
- **Quarter Century Later – *Housing Grant and Construction Regeneration Act 1996***

Introduction – 2

- **“Security of Payment” Legislation : Australia, New Zealand & Singapore**
- **The other side of the globe : US & Canada – Mechanic’s Lien & Payment Bond : more recently Prompt Payment Act**

Problems faced in securing progress payment

- **3 main obstacles to cashflow**
- **1. Condition precedent to payment – MC : payment certification or SC : pay-when-paid provision**
- **Exception : Wallace's SIA Form – Architect's Payment Certificate may be used to obtain Summary Judgment**
- **2. Right to set-off : obstacle to obtaining summary judgment**
- **3. Agreed recourse to arbitration : usually postponed to after completion**

Ensuring cashflow

- **Statutory payment scheme – stand alone : not dependent on payment certification**
- **Statutory adjudication scheme – fast and cheap : 7D or 14D & capped fees**
- **Statutory enforcement scheme – ensure effective recovery of adjudicated amount : lien on goods; suspension; judgment debt; [direct payment by Er]**

The Singapore Experience

- **Similar to other jurisdictions :**
Slow start with steep pick up
- **Whether no of arbitrations reduced remains to be seen**
- **The earlier cases indicate lack of awareness of SOP Act by Respondents : either no or ineffective Payment Response**

Observation

- **Ranking of users : Subcontractors, Contractors & Consultants**
- **Publication of Adjudication Determinations – good learning platform**
- **Main set back in Singapore : Main users, the Subcontractors may not appreciate English text**

Concluding Remarks

- **Cash flow – lifeblood of an enterprise & SOP type legislation – a solution to avoid no unnecessary bankruptcies & winding up of Cs & SC**
- **Price to pay – Erode Freedom of Contract & Downgrades importance of Payment Certificate**
- **Statutory Adjudication is Fast & Cheap has Effective Enforcement Scheme**
- **Set-off Preserved**
- **Rough Justice for Temporary Finality**

The End

Thank You