# CIDB CONSTRUCTION LAW REPORT 2019

(Summary of 2019 Written Judgments & Lessons Learnt)

CIDB MALAYSIA

2020 EDITION

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CIDB MALAYSIA

**Construction Industry Development Board Malaysia**
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## ◂ PUBLISHER'S NOTE ▸

The Construction Industry Development Board (CIDB) in advancing the rule of law and in its quest to elevate the construction industry in Malaysia, is pleased to present the latest volume of construction related case decisions by the Malaysian Courts from January to December 2019, value-added with case summaries and commentaries.

This publication continues on the successes of previous volumes published since 2016. All efforts to accomplish a comprehensive, accurate and up-to-date publication were taken as our nation, the world and in this instance, the construction industry joins the battle to rein control and curb the COVID-19 pandemic. In pursuant to this objective, the following have been included:

(1) Eighty-one summary of construction cases decided by Malaysian Courts.
(2) Forty-one insightful commentaries by experts and professionals with vast experience in construction law and industry.
(3) 2019 statistics on construction industry.
(4) 2019 statistics on construction law cases.
(5) Subject index.

This volume contains practical features introduced in the previous volumes which enhances the ease of reference and research mechanism. Para numbers at the end of each paragraph under the *Held* section of cases published in this volume, correspond with the relevant paragraphs in the original case judgments. Readers will further gain exceptional value in the form of analytical commentaries by experts from the legal fraternity together with professionals from the construction industry, namely engineers, architects and quantity surveyors who express their in-depth opinions, lessons learnt and best practices.

We are assured that our objective to equip the industry stakeholders to make professional and well-informed decisions in their day-to-day affairs will be achieved through this distinctive publication.

While every effort has been taken to include all major construction related cases, some cases may have been inadvertently omitted. The readers are, therefore, encouraged to conduct further research if and when circumstances peculiar to their situations arise.

We express utmost gratitude to the technical committee appointed to guide and advance the purpose of this publication, and contributors and the courts for expending their valuable time and expertise contributing towards this noble publication.

September 2020

# Malaysian Resources Corporation Bhd v HSBC Bank Malaysia Bhd & 3 Ors and anor case

HIGH COURT, KUALA LUMPUR
SUIT NO: WA-22C-103-11/2018 & WA-22C-104-11/2018
LEE SWEE SENG J
30 JULY 2019

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**[2020] 1 CIDB-CLR 204**

The judgment was in respect of two suits, namely Suit No: WA-22C-103-11/2018 ("Suit 103") and Suit No: WA-22C-10411/2018 ("Suit 104"), which were heard together as they involved the same issues between the same Plaintiff and Defendants, who are part of the Desaru Group of Companies. Malaysian Resources Corporation Bhd ("MRCB"), the Plaintiff in both suits, had been appointed as the contractor by the Defendants to undertake various construction projects as part of a mixed development called the Desaru Resort ("the projects") under the various underlying contracts. It was a term of the contracts that MRCB had to procure in favour of the Defendants a performance bond in the form of a bank guarantee. The Plaintiff procured the HSBC Bank Malaysia Bhd ("HSBC") to issue a performance bond in Suit 103 and the Standard Chartered Bank Malaysia Bhd ("SCB") to issue a similar bond in Suit 104. The bonds were in the nature of an on-demand, unconditional and irrevocable bank guarantees for an amount equivalent to 5% of the contract sums for the due performance and observance of the contracts in question. The guarantees also provided that if the Plaintiff failed to execute the contract or committed any breach of its obligations thereunder, the relevant bank will pay unconditionally on-demand to the Defendant the sum stated in the said guarantees notwithstanding any arbitration or legal proceedings. MRCB had earlier proceeded with separate adjudications under the Construction Industry Payment and Adjudication Act 2012 against the Defendants who were parties to the underlying contracts. The claims in the adjudication were for the sums due as a result of wrongful under-certification. There were also disputes to be tried as to which party should bear the contractual responsibility for the delay in completion and whether it was caused by the Defendants or MRCB. When the Defendants gave notice to call on the bond, MRCB applied for an injunction under s 11 of the Arbitration Act 2005 ("the Act"), to restrain the Defendants from calling upon the bond. Alternatively, if the call had already been made, MRCB also sought by way of this application to restrain the Defendants from receiving the bond sum from the banks. It was the Plaintiff's case that as a Certificate of Practical Completion ("CPC") had already been issued in Suit 104 and a Certificate of Completion and Compliance ("CCC") issued in Suit 103, the contracts had been substantially performed and it would be unconscionable for the Defendants to call on the bond. However, the Defendants argued that MRCB had failed to attend to defective works resulting in a long list of outstanding and defective

works having to be undertaken by the Defendants. The Defendants submitted that the breaches consisted of late completion resulting in a claim for LAD, and also for slow progress in the rectification works resulting in the termination of the Plaintiff, and that they had thereafter engaged third party contractors to rectify the defects at additional costs. As such, the Defendants contended that they were within their respective legal rights under the bond contract between the Defendants and the Bank, and also under the underlying contracts between MRCB and the Defendants to call on the bond as there was nothing unconscionable in their conduct in so doing. Until the inter-partes applications for an injunction were heard together, the court had granted an ad-interim injunction to restrain a call on the bonds to HSBC and the Standard Chartered Bank.

**Held**, dismissing the Plaintiff's applications with costs of RM50,000.00:

(1) An injunction may be granted by a court to restrain a bank from making payment upon a performance bond or bank guarantee as the case may be if there is ground of unconscionable conduct apart from fraud. It is settled law that "unconscionable conduct" is said to extend to all cases where unfair advantage has been gained by unconscientious use of power by a stronger party against a weaker. As the issue of unconscionable conduct must of necessity be fact-sensitive and fact-centric, the court would have to consider the particular and peculiar facts of each dispute to discern if the high threshold of unconscionable conduct had been sufficiently made out. In the present case, it was the Plaintiff's submission that since the contracts had been substantially performed, it would be unconscionable for the Defendants to call on the bonds. However, the purpose of the bonds must be ascertained from the underlying contracts as a whole especially with respect to relevant clauses on the circumstances under which the bonds may be called. The intention of the parties must be gleaned and gathered from the whole of the underlying contracts. Under cl (a) of all the 3 guarantees in Suit 103 and the 1 guarantee in Suit 104, it is provided that if the Plaintiff shall in any respect fail to execute the contract or commit any breach of its obligations thereunder, the relevant bank has agreed to pay unconditionally on-demand without proof or conditions forthwith upon receipt of the demand to the Defendants up to and not exceeding the sum stated notwithstanding any contestation, arbitration, legal proceedings or protest. Where contractually the parties had addressed their mind as to the scope of the bond, ie. not merely for the substantial completion of the works but for the due performance and observance of the underlying contracts and for any breach of the contractor's obligations under the contracts, then effect must be given to it. The fact that a CPC had been issued with a list of defects in Suit 104 and a CCC issued in Suit 103, does not mean that there has been completion of the works and due performance of the contracts with no breaches on the part of the Plaintiff. Here, the Defendants were saying that the breaches consisted of late completion resulting in a claim for LAD and also for

slow progress in the rectification works resulting in the termination of the Plaintiff and that they had thereafter engaged third party contractors to rectify the defects at additional costs. In any case, it is settled law that there was nothing unconscionable in calling on the bond even though there was already a provisional certificate of acceptance issued. *(paras 20–23, 33, 37, 38, 46)*

(2) Further, the CPC in the present case was issued with "A Copy of the Outstanding Works and Defect List". The contract clearly provides under cl 49.5 that the whole of the works shall not be regarded as practically complete unless the requirements listed under cl 49.5(a) to (g) are fulfilled. Despite the said obligations, the Plaintiff failed to attend to defective works resulting in a long list of outstanding and defective works attached together with the CPC. As for the issue of the CCC, this is a requirement by law, whereas practical completion and CPC is a contractual requirement. Essentially before the issue of the CCC, it is the duty of the principal submitting person ("PSP") to ensure that the building is safe and fit for occupation as provided for in ss 70(20) and (21) of the Street, Drainage and Building Act 1974 and By-law 25A of Uniform Building By-Laws 1984. As can be seen from the CCC (Form F), the PSP is responsible to ensure that the building has been constructed in conformity with the approved plans, and that the building is safe and fit for occupation. Thus, once the CCC has been obtained, the buildings can be occupied. On the other hand, a CPC is a contractual requirement. The contract clearly provides under cl 49.5 that the whole of the works shall not be regarded as practically complete unless the requirements under cl 49.5(a) to (g) are fulfilled. Thus, there was nothing unusual for a CPC not to have been issued if the whole contractual requirements had not been fulfilled by the Plaintiff as the Defendants alleged in this case. *(paras 39–45, 50, 55–57)*

(3) Where the intention of the parties is clear as to the scope of coverage of the bond as may be gathered from the various terms and expressions used in the underlying contract as a whole, then effect must be given to it. In the present case, there was no inconsistency to be resolved in favour of a more reasonable interpretation and thus, not giving effect to the clear words used would be to denude the words of their intended meaning and would be unreasonable. As stated under cl 7.2 in the underlying contract in Suit 103 or the corresponding provision in Suit 104, if the Plaintiff as "the contractor should commit any breach of his obligations under the contract the employer on its behalf notwithstanding whether any dispute arises between the parties as to such breach may utilise and make payments out of or deductions from the performance bond (if applicable) or any part thereof and receive payment thereto in accordance with the terms of this contract or forfeit the same". The Plaintiff's contractual obligation to complete the works by the completion date is provided for under cll 6.2(c), 13.2, 43.8, 43.9 and 48.1 of the underlying contract. A failure to complete the works by the completion date would mean a breach of the

Plaintiff's obligations under the underlying contract. It is a breach where the Defendants are prima facie entitled to claim for LAD as provided for. In any event, even if the LAD for the whole works is calculated till the earliest date where part of the works were taken over, the total LAD sum would still exceed the guaranteed sum of RM10.58m. Based on a plain reading of the agreed damages clause for non-completion, the Defendants had some basis for their claim for LAD and the Defendants' call on the bond was not unconscionable in the light of the LAD Clause. *(paras 68, 71–76, 80–82)*

(4) The Plaintiff's argument that the use of the performance bond to meet the claim for LAD would cut across the purpose for which the bond was provided and would also constitute an undue preference in the Defendants' claims, had no merit. There was nothing unconscionable for the Defendants to take into consideration the sum to be deducted for LAD claims from the bond sum called upon for its release when the underlying contract had provided expressly for it. There was nothing repugnant to the purpose of the bond if clear language as is in this case had been used to express the scope of the bond and the usage of the bond sum when called upon. The fear of undue preference did not arise at all for at the end of the day the Plaintiff could still challenge the amount to be "set-off" or "deducted" from the bond sum. In the case of a bond, the bond sum had already been set aside in the bank for the bond sum to be called upon if certain events transpire such as the failure to duly perform or observe the underlying contract. Thus, the fear of offending s 24 of the Contracts Act 1950 in that of fraud on the creditors did not arise. *(paras 95–97, 106)*

(5) The dispute between the parties as to the certification of Interim Claim No. 32 was insufficient to constitute unconscionability on the part of the Defendants in calling on the bond. The Defendants cannot be said to have acted unconscionably by relying on the valuation made by the Consultant Quantity Surveyor. At best the Plaintiff's allegations only showed that there was a genuine dispute between the parties as to the certification of Interim Claim No. 32, but there was nothing unconscionable in the dispute of this nature. There was a tendency to elevate contractual disputes to the level of unconscionable conduct when the disputes are nothing more than genuine disputes not uncommon in the execution of construction contracts. *(para 126, 127,129)*

(6) It does not stand to reason that the legislature in enacting s 11(1)(a) of the Act had intended a different test to be applied with respect to a call on the bond or to restrain the receipt of the bond sum where the parties are proceeding with arbitration, compared to if there is no arbitration clause and thereby requiring them to resolve their disputes in the court. The difference between arbitration and litigation was nothing more than a difference in the mode of dispute resolution process, with the issues of law remaining the same. In the circumstances, the test as set out by the Federal Court in *Sumatec Engineering and Construction Sdn Bhd v*

*Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1, applies whenever an injunction is applied for to restrain the call on a bond or receipt of the bond monies irrespective of whether there is or is not an arbitration clause in the underlying contract between the parties. To hold otherwise would be to prescribe two separate tests for the same issue and problem pending two different modes of dispute resolution with or without an arbitration agreement, the former via arbitration and the latter via litigation. *(paras 142, 143, 146–149)*

## COMMENTARY

by *Sr Maselawati binti Shamsuddin*
CQS, FRISM, MRICS
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### Introduction

Two application for an ex-parte injunction in relation to two suits were heard together before the High Court as they involved the same issues between the same Plaintiff, ie. Malaysian Resources Corporation Bhd, and the Defendants, who are part of the Desaru Group of Companies. This case highlighted the issue of injunction applications to restrain the call on performance bonds and whether unconscionable conduct can be established in the circumstances of the calls. The court dismissed the Plaintiff's application with costs.

### Issues arising from the case

In arriving at its judgment, the court addressed the following issues:

(1) Whether the call on the bond is unconscionable as the Plaintiff had substantially performed the contracts in that CCC had been issued in the projects in Suit 103 and CPC had been issued with respect to the projects in Suit 104.

(2) Whether the call on the bond is unconscionable when it is provided that deductions may be made from the bond sum for any breaches of the contract and here there were deductions of LAD for the failure to complete by the completion date.

(3) Whether the contractual disputes between the parties including improper assessment of EOT application, under-certification and delay events attributable to the Defendants would make the call on bonds unconscionable.

(4) Whether the test to issue an injunction to maintain status quo under s 11(1)(a) of the Arbitration Act 2005 pending reference to arbitration is different from the test of unconscionable conduct as laid down by the Federal Court in *Sumatec Engineering*.

## Lessons learnt from the case and best practices to be adopted

*Lessons learnt*

The law on restraining a call on performance bond is settled and has been confirmed in the Federal Court case of *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Company Sdn Bhd* [2012] 4 MLJ 1. The courts now recognised unconscionable conduct of the beneficiary of a bond, apart from the traditional ground of fraud, may be raised as a separate and distinct ground to restrain a call on the bond. This is in spite of the fact that in the bond contract/bank guarantee, the clear language used is that it is an on-demand, unconditional and irrevocable bond to be paid irrespective of protestations or contestations from the party procuring the bond. Whether or not unconscionable conduct is found to exist would depend largely on the facts of each case. The court would have to consider the particular and peculiar facts of each dispute to determine if the high threshold of unconscionable conduct had been sufficiently made out. The court in this case recognised the fact that in order for unconscionability to be made out, there must exist an element of unfairness or some form of conduct which appears to be performed in bad faith.

(1) *Whether the call on the bond is unconscionable as the Plaintiff claimed that they had substantially performed the contracts*

The court had established that contractually the parties had addressed their mind as to the scope of the bond based on the various terms and expressions used in the contract, ie. not merely for the substantial completion of the works but for the due performance and observance of the contract and for any breach of the contractor's obligation under the contracts. Even though a CPC had been issued with list of defects in Suit 104 and a CCC issued in Suit 103, there are breaches on the part of the contractor. The breaches comprising the late completion resulting in a claim for Liquidated and Ascertained Damages (LAD) and also slow progress on the rectification work, resulting in the Defendant having to engage third party contractors to rectify the defects at additional cost. In any case, the court stressed that it is settled law that there was nothing unconscionable in calling on the bond even though there was already a provisional certificate of acceptance issued.

(2) *Whether the call on the bond is unconscionable when it is provided that deductions may be made from the bond sum for any breaches of the contract*

Based on the agreed damages clause for non-completion, the Defendants had basis for their claim for LAD. The court decided that there was nothing unconscionable on the part of the Defendants to take into consideration the sum to be deducted for LAD claims from the bond sum called upon when the underlying contract had expressly provided for it.

(3) *Contractual disputes between the parties including improper assessment of EOT application, under-certification and delay events attributable to the Defendants*

The court acknowledged that there are genuine disputes between the parties that are not uncommon in the execution of construction contracts and therefore should be resolved through arbitration. The court decided that the dispute as to the improper assessment of EOT and under-certification of interim payment claim are insufficient to constitute unconscionable conduct on the part of the Defendants. As to the dispute regarding delay events, the court agreed that the Plaintiff had shown that there are genuine disputes to be tried. Consequently, the court decided that for the moment there is insufficient evidence to satisfy the high threshold of unconscionability on the part of the Defendants in calling the bond.

(4) *Whether the test to issue an injunction to maintain status quo under s 11(1)(a) of the Arbitration Act 2005 pending reference to arbitration is different from the test of unconscionable conduct as laid down by the Federal Court in Sumatec Engineering*

The court concluded that the test as set out by the Federal Court in *Sumatec Engineering* applies whenever an injunction is applied for to restrain a call on a bond or receipt of the bond monies irrespective of whether there is or is not an arbitration clause in the underlying contract between the parties. To hold otherwise would mean to prescribe two separate tests for the same issue and problem, the former via arbitration and the latter via litigation.

*Best practices*

The courts have set a high threshold to prove unconscionable conduct and emphasised that a bare assertion will not suffice. The party alleging unconscionable conduct must provide manifest or strong evidence of

such degree as to prick the conscience of a reasonable man as provided in *Sumatec Engineering*. For this, the party need to show whether the beneficiary's conduct has been unconscionable in the circumstances surrounding the underlying contract between the parties. Thus, in view of the difficult and limited grounds available to restrain a call on an on-demand performance bond, it is best and advisable for the contractors to have all the genuine disputes well documented and account for such risks in the implementation of projects.

# Shabiru (1990) Sdn Bhd v Goh Aik Chin & Anor

HIGH COURT, KUALA LUMPUR
APPEAL CIVIL NO: WA-12BC-10-11/2018
LEE SWEE SENG J
31 JULY 2019

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**[2020] 1 CIDB-CLR 249**

This had been an appeal from the Sessions Court proceedings, where the Plaintiffs had claimed for damages from the Defendants, for damage caused to its property, due to the Defendants' negligence in executing construction works on its buildings, on adjacent land. The Plaintiffs are siblings, a brother and a sister, and they had inherited Lot 2, which had a 2-storey shophouse on it, from their deceased father. They operate a sundry shop business from the ground floor of their property and the family members reside there as well. The First and Second Defendants (D1 and D2) are sisters, and they own the adjacent Lots 6 and 4 respectively along the same row of pre-war shophouses. They had wanted to have an additional floor added to their existing 2-floor shophouse, and had engaged the services of a contractor, Shabiru (1990) Sdn Bhd ("D3") to carry out the construction works. While D3 carried out the works, cracks, subsidence and water seepage appeared on the Plaintiffs' property, some communication took place between the parties and certain payments were made. However, the Plaintiffs' building deteriorated further due to the continuing construction works, and the Plaintiffs decided to sue for damage to their property due to the Defendants' negligence. The Sessions Court judge ("trial judge") found in favour of the Plaintiffs and awarded them damages and interest ("SC decision"). Hence this appeal, which had only been brought by D3. The other appeal by D1 and D2 had been before another High Court and had not been disposed of when this appeal was heard.

**Held**, D3's appeal dismissed with costs of RM10,000, decision of the trial judge with respect to D3, affirmed:

(1) On the question of whether D3, as the Defendants' independent contractor, had owed a duty of care to the Plaintiffs, in the execution of the construction works, the proposition of law by D3/Appellant that they had been independent contractors engaged to carry out the works, and that they had not owed a duty of care to the Plaintiffs, had not been supported by the authorities. Rather, the reverse had been true, ie. that independent contractors had owed a duty of care to adjoining owners of land, when carrying out works on the property adjacent and adjoining it, to ensure that no damage would be caused to the neighbouring property.
*(paras 22, 25, 26, 30)*

(2) On the question of whether D3 had breached its duty of care to the Plaintiffs, by the foreseeable damage that it had caused to the Plaintiffs' property, it would be answered in the affirmative. D3 had not called any expert witness to contradict the evidence of the Plaintiffs' expert witness, and it had not been able to refute the fact that all of the damage sustained by the Plaintiffs' property had arisen from its incompetent execution of the construction works. D3 had tried to deflect liability by stating that there had already been cracks in the Plaintiffs' building before the demolition works had commenced but it had been unsupported by the evidence. The Plaintiffs, on the other hand, had adduced evidence to show that its property had been without any distress and had been in a safe, stable and sound condition for its family to reside in and operate its business, prior to the commencement of the demolition works. The nature of the damage had also been something that had been foreseeable and D3 had taken out an insurance policy to cover such damage or loss. *(paras 34, 52–54, 58)*

(3) On the question of whether the Plaintiffs' property had already been in poor condition, being a pre-war building, or that D3 should have taken the Plaintiffs' property under the "egg-shell skull rule" as the Plaintiffs' property had a proclivity to cracks because of its porous propensity through the prolonged passage of time with its foundation being more fragile than it otherwise would be because of age, there had not been any evidence from any expert witness to state that it would have cracked and subsided without D3 attending to any demolition and reconstruction works beside it. At any rate, this had been a fit case for the application of the "egg-shell skull rule" principle. Bereft of evidence of any special precaution that had been taken by D3, it could not now escape liability by saying that it had done all that a reasonable contractor would have done. *(paras 65, 66, 68)*

(4) On the question of whether the Plaintiffs had proved the damages that they had been claiming, there had not been any law to state that multiple quotes had to be produced or that a quote would become unreliable merely because it had been done some 2 years after the damage had occurred. Assessment of damages is an art and not a science, and an approximation and estimation may be used in some instances. The fact that loss could not be accurately determined, had not been an excuse for not granting any damages, as that would be adding insult to injury. *(paras 73, 74)*

(5) It is trite law that there is no need for an appellate court to disturb the finding of facts by the judge in the trial court, unless there are manifest errors. *(para 83)*

# COMMENTARY

by *Sr Maselawati Shamsuddin*
CQS, FRISM, MRICS
Director, Dispute Resolution Consultancy
Public Works Department Malaysia

## Introduction

This case was brought on appeal out of a decision of the Sessions Court (SC) where the Plaintiffs had claimed for damages arising out of the damage caused to their property due to the Defendants' negligence in executing construction works on their own buildings adjacent to the Plaintiffs' building. The SC judge found in favour of the Plaintiffs and awarded damages, against all the Defendants jointly and severally. This appeal was by a contractor in the Third Defendant (D3), as Appellant. The other appeal by the First Defendant (D1) and Second Defendant (D2) (both being the owners of the adjacent building) had been brought before another High Court (HC). This case provides guidance on the issues of whether an independent contractor can be held liable for negligence in the execution of construction works, the applicability of the "egg-shell skull rule" and the assessment of damages pertaining to reinstatement of damaged property.

## Issues arising from the case

In arriving at its judgment, the HC addressed the following issues:

(1) Whether D3 as an independent contractor of the Defendants (D1 and D2)/owners owed a duty of care to the Plaintiffs in the execution of the construction works.

(2) Whether there had been a breach of the duty of care by the contractor (D3) to the Plaintiffs, with damage caused that is foreseeable.

(3) Whether the Plaintiffs' property was already in poor condition being pre-war building or that D3 should take the Plaintiffs' property as is as they are under the "egg-shell skull rule".

(4) Whether the Plaintiffs had proved the damages claimed.

## Lessons learnt from the case and best practices to be adopted

*Lessons learnt*

(a) *Duty of care of an independent contractor*

The court emphasised the principle that any work done on a property must be done in such a manner as not to cause damage to neighbouring properties. The proximity of the Plaintiffs' property to the construction site of the Defendants as in both adjacent to and adjoining, was such that it was fair, just and reasonable to impose a duty of care on the Defendants in the execution of the construction works.

D3 submitted that they were just mere independent contractors engaged by the Defendants (D1 and D2)/owners to carry out the works, and they do not owe a duty of care to the Plaintiffs. The court viewed that the position of the law is that generally an employer is not liable for the acts of independent contractors. However, in cases where there are attendant risks involved, the employer would be held to be jointly liable with their independent contractor as joint-tortfeasors. Subsequently, the HC decided, as the trial court had held, that D3 owed a duty of care when carrying out the construction works on the property of the Defendants/owners in such a manner as not to cause damage to the Plaintiffs' property. Therefore, independent contractors engaged by employers do owe a duty of care in ensuring that no damage is caused to the nearby properties.

(b) *Breach of the duty of care by the contractor with damage caused that is foreseeable*

The Plaintiffs had adduced evidence by their expert witness that all of the damage sustained by the Plaintiffs' property, had arisen from D3's incompetent execution of the construction works. Among the breach of duty of care submitted by the Plaintiffs include the Defendants' failing to do proper shoring and propping works during demolition work, the use of micro-piling that affected the common foundation of the Plaintiffs' property and generally not complying with proper method of construction in ensuring cracks, settlement and water seepage does not occur to the Plaintiffs' building. However, D3 had not called any expert witness to contradict and refute the evidence of the Plaintiffs' expert witness. The court held that D3 had breached its duty of care and the damage caused was foreseeable, where it was evident that D3 had taken an insurance policy to cover such damage or loss arisen therefrom.

(c) *Property already in poor condition being pre-war building or take property as they are under the "egg-shell skull rule"*

The argument raised by the Defendants that the property was already in poor condition being pre-war building and having an inclination to cracks because of its porous propensity, with its foundation being more fragile than it otherwise would be through prolonged passage of time, would not succeed in court if the Plaintiffs could show proof that the damages caused were due to the Defendants' construction activities. Based on the facts of the case, D3 had not adduced evidence from any expert witness that the property would have cracked and subsided without D3 attending to any demolition and reconstruction work beside it. The HC found that the "egg-shell skull rule" principle was fit to be applied, which means that D3 must take the Plaintiff as he finds him with any weaknesses, predisposition to injury or damage. Lacking of evidence of any special precaution taken, D3 could not disclaim liability by stating that it had done all that a reasonable contractor would have done. Therefore, in a situation where the contractor having knowledge on the susceptibility of the neighbouring property to cracks, subsidence and seepage, the contractor must take special precaution and more than the standard practice to ensure no damage is caused to the Plaintiffs' property.

(d) *Whether the Plaintiffs had proved the damages claimed*

D3 had challenged the quotation as being merely a single quote and at best it is only an estimate, and that in a case of special damages claim, it must be strictly proved. However, D3 had not produced evidence of an alternative quote. The HC judge emphasised that there is no law to state that multiple quotes must be produced and the quote becomes unreliable merely because it was done some two years after the damage caused. The court viewed that assessment of damages is an art and not a science, and that approximation and estimation may be used in some instances. The fact that loss cannot be accurately determined is no excuse for not granting any damages at all. In relation to this, the HC judge was satisfied that the Plaintiffs' witness (PW2) had explained to the trial judge regarding the concluded calculation for the damages sustained by the Plaintiffs' property and the amount required to conduct the necessary repairs. The HC judge uphold the assessment of damages in this instant case, should fall more appropriately under general damages rather than special damages as no payments had been incurred or made out yet. Therefore, in cases where substantial

damage had been sustained, even though the Plaintiffs' claim was based on estimation, the court may be persuaded to consider compensation under general damages provided it was reasonable and fair. This would depend on the quality of the evidence adduced in court to support the approximation or estimation.

*Best practices*

Under a typical construction contract, the contractor owes a host of obligations in respect of third parties and consequently liabilities to them. These may arise out of the very contract itself or as practice shows, by statute or under the law of torts. Among the familiar tort encounters by practitioners of the construction industry is negligence. Therefore, it is crucial for all practitioners in the construction industry to have a working knowledge of negligence, its application and effects.

It is trite that those engaged in construction works such as contractors, subcontractors, etc. owe a duty of care to their neighbours who are affected by such work. In undertaking works, especially those involving poor conditions being pre-war buildings, contractors need to familiarise with the scope of work, plan, take necessary precautions, continuously monitor and address issues so as to mitigate risk of claims for damages and losses. Example of precautions to be taken include the preparation of method statement by a professional engineer with input from geotechnical engineer, dilapidation surveys and reports, purchase the necessary and adequate insurance to cover third party liabilities, provide temporary props and shore before start of demolition, strengthen the foundation, institute structural monitoring of the party walls and ground slab, and carry out control demolition.