

MESSRS NG & KOH

ADVOCATES & SOLICITORS

51 Merchant Square #04-07

Merchant Square

Singapore 058283

Tel: 6538 7292 Fax: 65387291

Email: ngandkoh@singnet.com.sg

Website : ngandkoh.com.sg

NAK

Newsletter

June 2005 Quarterly
Issue

IN THIS ISSUE, we'll look at:

- 1. Contracts covered by the SOP Act;**
- 2. Joint or Sole Custody : A Man's Perspective.**

Contracts covered by the SOP Act

The SOP Act came into operation on 1 April 2005. A genesis of the legislation may be found at our previous newsletter (November 2004 Issue). Since then, many in the construction industry have expressed confusion as to when and whether their contract is governed by the SOP Act.

DATE : For starters, the Government Regulations enacted under the SOP Act stipulates that the universal commencement of the SOP Act is actually 1 October 2005. In the interim period, only the Main Contract (and Sub-contracts for the same projects) signed from 1 April 2005 to 30 September 2005 comes within the operation of the SOP Act. Hence Sub-contractors, in particular tendering for projects, should first ascertain the date when the particular Main Contract for the project arose.

However ascertaining that date may not be a simple matter. Many in the construction industry have asked whether that is the date of the tender, letter of intent, letter of award, or formal contract. Next, is whether the date of a variation agreement or novation agreement is relevant for the purposes of the SOP Act. Courts in New South Wales have resolved the issue by looking at whether and when the party citing the SOP Act undertook liability for new construction works. Hence the date of a true letter of intent which created no binding contract was ignored. The date of the letter of award was held to be the date of the contract (rather than the date of the formal contract). A variation agreement to vary the contract price only (with no change in the works to be performed) was held to be irrelevant because the claimant had not undertaken any liability for new works. But a novation agreement (by which a new party undertook liability for works under an old agreement) attracted the new rights and duties flowing from the New South

Wales version of the SOP Act. And this notwithstanding the retrospective effect on works already completed under the old agreement.

WRITING : The contract has to be in writing to enjoy the protection of the SOP Act. This may appear simple enough if a formal contract document was signed. But difficulties arise if a claimant had to rely exchange of letters to prove the written contract. In one case at least, the parties' correspondence tried to impose their respective forms on each other (in what lawyers call a "Battle of Forms"). As both parties did not agree to each other's standard forms, there was a possibility that there was no contract. Hence even after the claimant obtained an Adjudication decision in his favour, the UK court declined to enforce it on the ground that there might have been no written contract to satisfy the UK version of the SOP Act.

Even if a written contract is signed, what is to prevent the respondent from claiming that there was an additional and material term verbally agreed between the parties which was critical to the issue in adjudication? This happened in another case with the result that the UK court also declined to enforce the Adjudication decision on the ground that a material verbal term of contract brings the dispute outside the purview of the UK version of the SOP Act. The moral of the story that it is best to have a proper formal contract drafted and signed, and preferably with a clause which requires all variations to be in writing.

CONSTRUCTION WORKS : Surprisingly, there is hardly any Australian court case on what constituted construction works and how the SOP Act would apply to contracts comprising both construction and non-construction works.

A UK case involved a sub-contractor who entered into two Sub-contracts A and B. Sub-contract A involved the supply and installation of building services for a building project. Sub-contract B was for supply and installation of electrical services for a plant dryer in the same building project. The UK court held that Sub-contract A involved construction works and was governed by their SOP Act but Sub-Contract B was held NOT to be construction works. This was notwithstanding that the plant dryer (and hence the electrical services) was anchored and affixed to the building. So, physical attachment to the building or land in Sub-Contract B was not sufficient. The UK court made a distinction between works intended to form part of the building and land, as opposed to works merely attached as part of the use thereof.

The Singapore SOP Act defined "construction works" in similar fashion by reference to works that formed "part of the land". It includes the construction works itself, as well as the design, preparatory, temporary works, architectural, mechanical and electrical, and maintenance of the construction works.

CONCLUSION : The construction industry may be grateful that the scope of the SOP Act is defined very widely. Nevertheless there will be some types of works which fall between the cracks inherent in the definition of "construction works" and the dilemma posed by mixed contracts.

=====

JOINT OR SOLE CUSTODY : A MAN'S PERSPECTIVE

In May 2005, the Court of Appeal awarded custody for his child to the spouses jointly notwithstanding that their relationship was acrimonious. This represents a sea change for men in divorce proceedings.

Was it only a generation ago? -- when men assumed that they would obtain custody and care and control of his children after a divorce. In a by-gone era, wife and children were considered the property of the man and head of household. After a divorce, the children remained the property of and remained with the father – and this irrespective of the attachment of the children to their mothers and vice versa.

Since the 1960's, the Women's Charter introduced a new era in legal relationship within the family. Women were given equal (and, some may argue, more than equal) rights within the family. Men no longer have property rights over their wives and children. This was evident in the Guardianship of Children Act, where spouses have guardianship rights over their children. And as shown by the word "guardian", the emphasis was on the duty (rather than right) to safeguard the interests of their child. In almost all proceedings affecting children, the interests of the child was paramount.

Over a period of time, the Women's Charter was amended to introduce the concepts of custody, care and control and access. Taken together, these three elements are equivalent to guardianship rights under the Guardianship of Children Act. Viewed in this manner : (a) custody came to represent the right and duty to decide the major issues relating to the religion, country of residence, education and health of the child; (b) care and control referred to the daily upbringing and place of residence of the child; and (c) access conferred visitation rights between the child and the absent parent. In deciding these three elements, the interests of the child is the decisive factor.

In previous issues of this newsletter (September 2004 Issue), we recited a quote from the former Chief Justice Wee CJ who (in the context of adoption proceedings) said that "Thousands of years of human experience have shown that the young child is always better off with the natural mother". Consequently, the Courts in divorce proceedings usually granted care and control of the child to the mother (there were exceptions where the mother was shown to be unsuitable because she was a drug addict, or gambler, or led a gypsy lifestyle). Whether this judicial attitude should continue is a dilemma. There are studies in the United Kingdom which showed that more children died at the hands of their fathers (than mothers). There is a 2003 survey and thesis on the comparison between absent fathers and absent mothers from the National Technological University which showed that an authoritative father figure was more important for the development of discipline in children (than mother figure). And recent surveys in the West showed that men are more family oriented today than in previous generations. The only safe assumption we can make is that the answer depends on the structure of the family and the respective roles of men and women within that structure. And with changing family structure and roles of men and women, one can only hope that our Family Court will be

able to adapt as fast as changes in our society -- but all these comments relate to care and control of the child.

Now when we move our focus back to custody, the analysis is very different. Unlike the case of care and control, there is very little reason why the rights and duties of joint custody should not continue to be vested in both ex-spouses. Since the major issues regarding the child are few and far between, any dispute over such major issues may be settled by the Court as and when they arise, without the need to deprive one parent of custody rights and duties. In the resolution of such disputes, the child (and the Courts) will be better off with the views of both opposing parents (rather than to rely on the views of just one parent). If this is so self-evident, one wonders why the Courts have in the past, leaned so readily towards depriving fathers of custody rights on the ground that their relationships with their ex-wives were acrimonious?

As recently as 2004, a husband and wife were negotiating with each other to settle their ancillary issues before the divorce court. The parties had agreed on almost all matters including the divorce, the maintenance, care and control and access for their child. They had one last issue to resolve, namely custody. The couple went before the Family Court judge during pre-trial conference to ascertain if they could settle the one last issue. It was unfortunate that the Family Court judge conveyed her view that sole custody should usually be granted to the mother where relationship between the parties is acrimonious. She asked the father why he wanted to share custody. Emboldened by those comments, the mother pressed for sole custody. As the father could not give up custody, the negotiation collapsed. The couple ended up fighting over all the issues including maintenance, care and control and access as well as custody!

It is true that the Family Court comprised more women judges than men. It is true that judges (both men and women) might be swayed by the tears of an ex-wife, swearing pitifully in Court that she could not fathom continuing consultations with her ex-husband on matters relating to their children. It was left to the High Court judges and Court of Appeal judges (far removed from the witness' tears in the trial courts) to shift the focus back to where it should be – the interests of the child, rather than the tears of the mother.

It is also true that a survey of the judges at the High Court and Court of Appeal who reversed sole custody orders granted by the Family Court were mainly men. The sole exception was Justice Lai Siu Chu who was one of the judges in the May 2005 decision. It was indeed fitting that it was also Justice Lai who proclaimed, at a conference subsequent to the May 2005 decision, her preference for joint custody to continue after an acrimonious divorce. By so doing, Justice Lai has reinforced public confidence that our judicial system and outcome should not and will not be biased by gender differences.

=====

Disclaimer: Thank you for reading our newsletter. Any information you obtain here should not be considered a substitute for professional and/or legal advice by your own consultants. We undertake no legal responsibility for the opinions expressed above.