

Building & Estate Management Alumni

Seminar on

Building Defects
– Avoidance and Legal Liabilities

15 July 2006
Amara Hotel

Seminar Programme

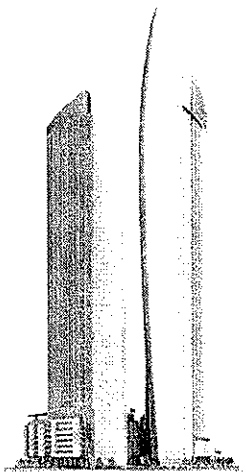
0815	Registration
0900	**Welcome Address** *Dr Teo Ho Pin, President, BEMA*
0905	**Developer's Approach in Building Quality** *Mr Kelly Tan*
1015	Coffee Break
1035	**Legal Liability for Defects** *Mr Edwin Lee*
1145	Q & A Session
1200	End of Seminar

This seminar is accredited by the Singapore Professional Engineers Board's CPD Programme for 3 PDUs.

Developer's Approach in Building Quality

By

Mr Kelly Tan
Head, Projects Division
City Developments Limited



CITY DEVELOPMENTS LIMITED

One of the Largest Property Developers in Asia

A Developer's Approach to Building Quality

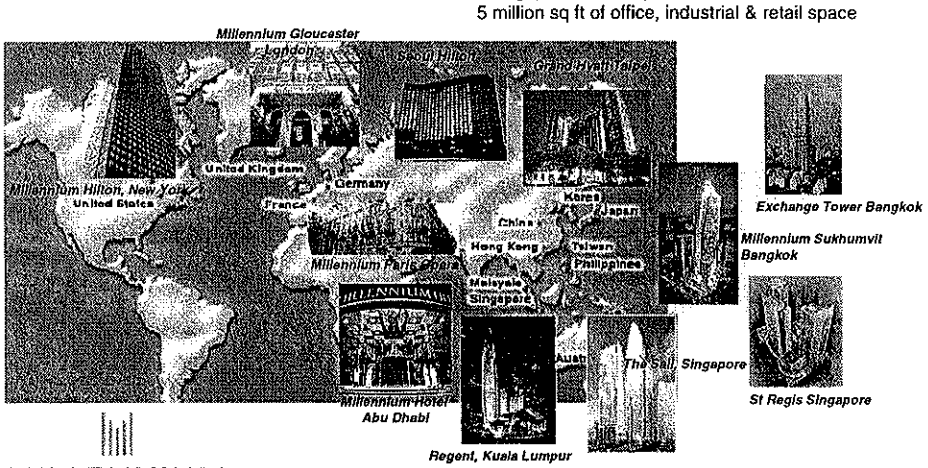
Kelly Tan
Head of Department (Commercial)
Projects Division

12 July 2006

Singapore's First and Only Private Property Developer Certified with ISO14000 & OHSMS18000

Who is City Developments Limited (CDL)?

- Millennium & Copthorne – one of the largest hotel owners and operators in the world
- Own and manage more than 100 hotels spanning 17 countries in 5 continents
- Singapore's premier residential developer with over 17,000 homes or about 10% of Singapore's private housing
- Singapore's leading commercial landlord with over 5 million sq ft of office, industrial & retail space



MILLENNIUM
HOTELS AND RESORTS

City Developments Limited

Agenda

- What is Building Quality?
- How we measure Quality
- Strategies to sustain Quality

Quality Concepts

Quality
degree to which a set of inherent characteristics fulfils **requirements**

↔

Requirements
need or expectation that is stated, implied or obligatory

↔

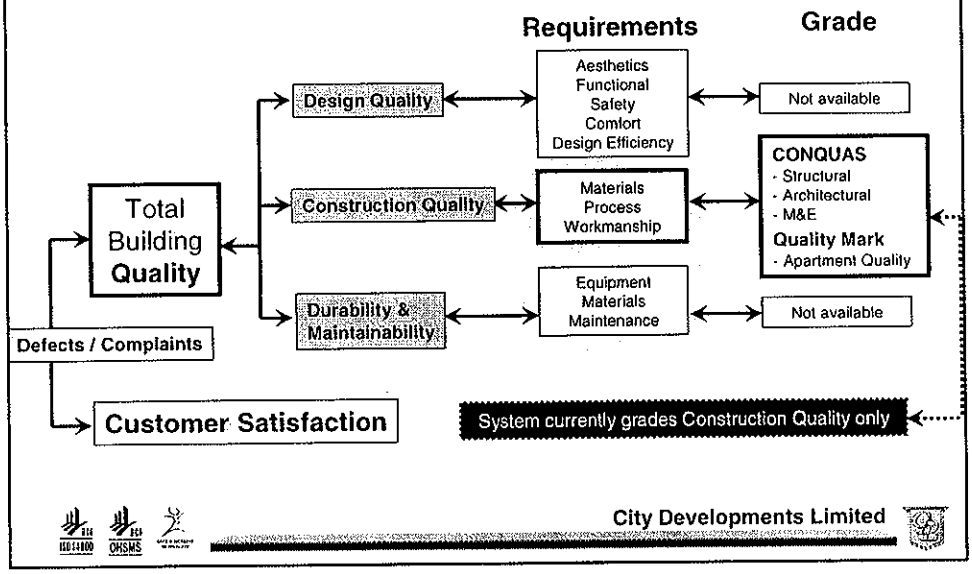
Grade
category or rank given to the different quality **requirements** for products, processes or systems having the same functional use
e.g. difference between a 5-Star & 3 Star Hotel is well established

↕

Customer Satisfaction
customer's perception of the degree to which the customer's **requirements** have been fulfilled

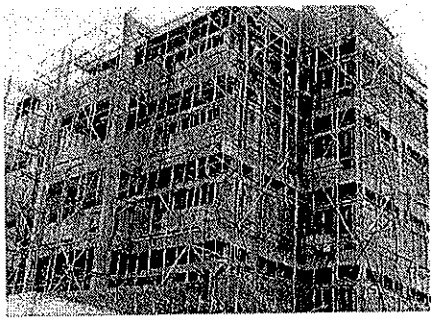
Source: SS ISO 9000:2000

What is Building Quality?

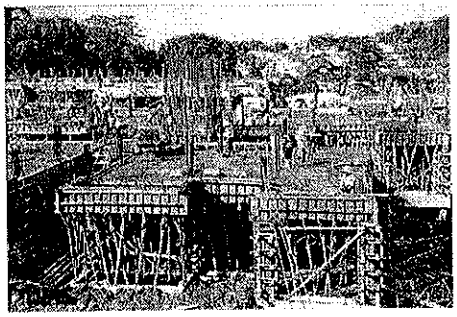


Flashback....
Construction of the yester-years

CDL in 80s....



CDL in 90s....

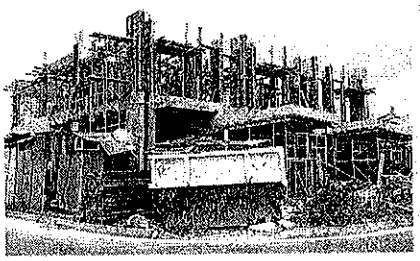


- Messy
- High accident rate
- Labour-intensive
- Low quality
- Lack of quality benchmarks

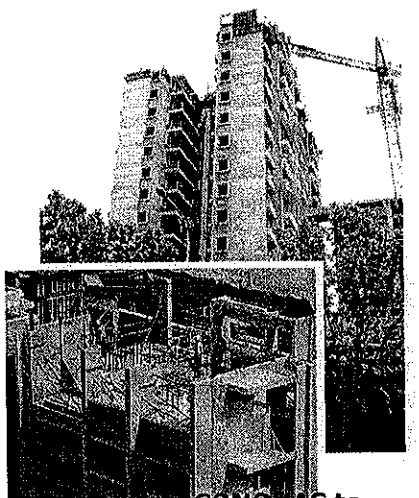
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How some others are doing today...





How CDL have moved...



We adopted CONQUAS to measure quality since 90s...

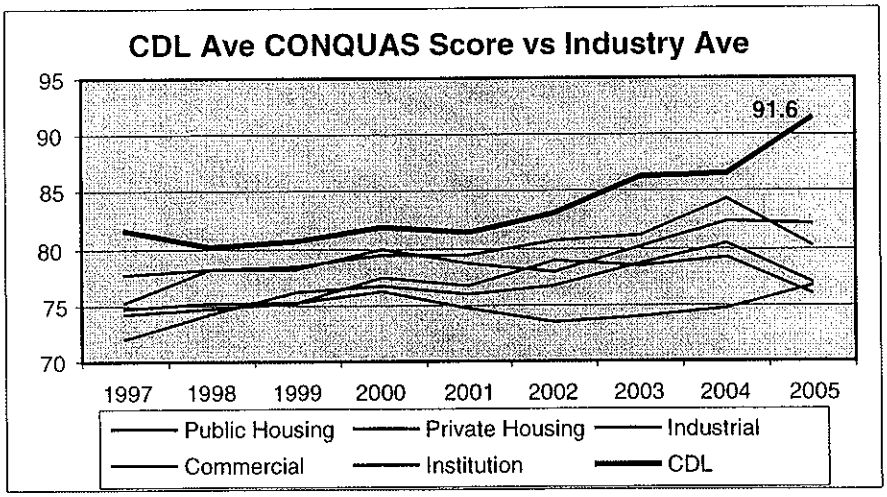
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How we measure construction quality?

We adopted CONQUAS (Construction Quality Assessment System) since 1992

- Launched in 1989 by BCA
- Objectives
  - A standard construction quality assessment system for buildings
  - Objective measurement
  - Sampling approach
- Assessment covers the entire building
  - Structural 25% }
  - Architectural 65% } Private Non-Landed
  - M&E works 10% }

CDL's Quality scores vs industry



Source: BCA

Our High Performers

PRIVATE HOUSING (ALL)

CONQUAS 21 PROJECTS

click on the column names to sort in order

S.No	FY	PROJECT	CONTRACTOR	DEVELOPER	SUBSIDIARY	STRUCT SCORE%	ARCH SCORE%	M&E SCORE%	CONQUAS SCORE
1	2005	Savannah Condopark	Dragages Singapore	CDL		95.1	92.8	98.9	94.1
2	2005	Monterey Park	Woh Hup (P) Ltd	CDL		96.1	89.0	97.3	92.3
3	2002	The Ladyhill Project	Dragages Singapore Pte Ltd	Razgrad Pte Ltd	NA	90.0	93.0	90.0	91.0
4	2002	Queens	Woh Hup (Pte) Ltd	Allgreen Properties Ltd	Queenstown Peak Pte Ltd	91.7	89.8	98.9	91.4
5	2004	Belmond Green Condo	Dragages Singapore P L	CRL Realty P L	NA	92.3	88.6	97.5	90.8
6	2004	Waterplace Condominium	Woh Hup (Pte) Ltd	Tanjong Properties Pte Ltd	NA	90.1	85.3	94.4	90.0
7	2004	Goldenhill Park Condominium	Hyundai Engineering and Construction Co Ltd	City Developments Ltd	NA	89.6	88.0	97.2	89.5
8	2004	The Gardens At Bishan	Woh Hup (Pte) Ltd	First Capital Corpn	First Garden Development Pte Ltd	92.9	85.6	97.3	89.3

Our 3 Strategies to sustain Quality...

since 2001

- Adopt Quality Mark

  - to measure and benchmark apartment quality

- Adopt Buildability

  - to raise quality through construction-friendly designs

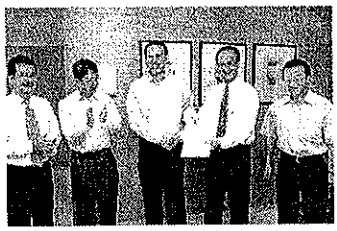
- Adopt Pre-fabrication & Pre-cast technology

  - to reduce external wall leaks

Strategy 1 - Quality Mark (QM)

(Measurement of individual apartment quality)

- Developed by BCA in 2001
- Objective is to raise apartment quality with 100% check
- Every completed **apartment unit** is assessed in 7 areas:
  - Floors
  - Internal Walls
  - Ceilings
  - Doors
  - Windows
  - Components
  - M&E Fittings





Impact of QM on CONQUAS

CONQUAS Weightage

Components	Private Housing (Non-Landed)
Structural Works	25%
Architectural Works	65%
M & E Works	10%
CONQUAS Score	100%

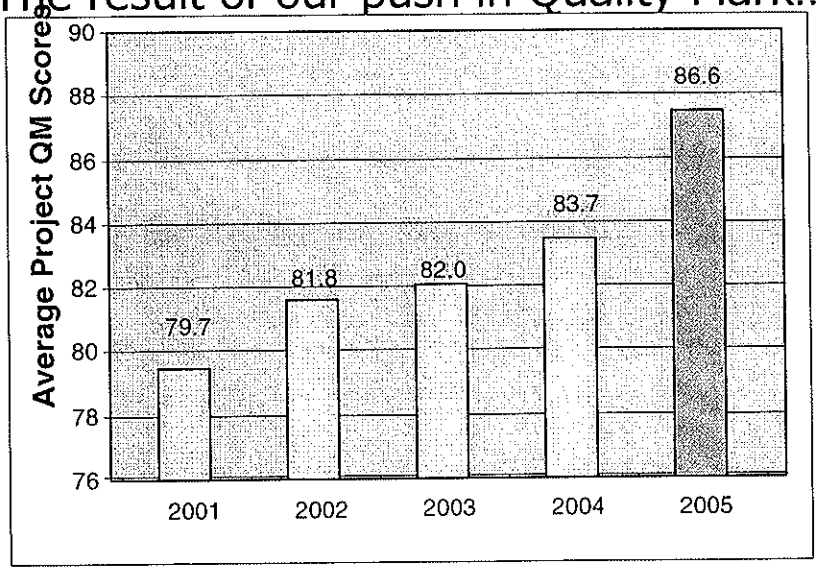
56% of 65%

QM Weightage

Internal Elements	
1 Floor	22%
2 Internal Wall	10%
3 Ceiling	6%
4 Door	20%
5 Window	10%
6 Component	22%
7 M&E Fittings	10%
QM Score	100%

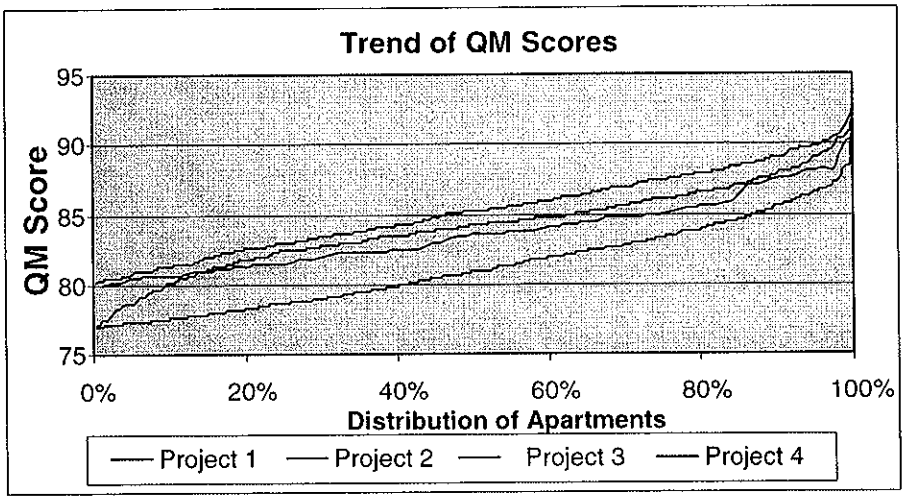
This has 36% impact on CONQUAS Score

The result of our push in Quality Mark...



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How we compare Apartment Quality among projects...



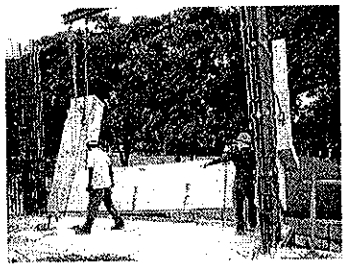
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Strategy 2 - Buildability

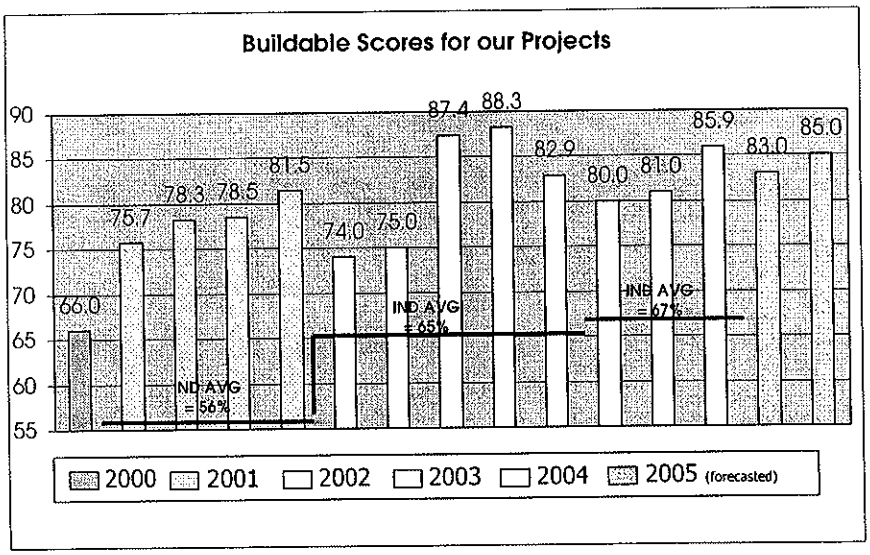
(Construction friendly designs ie. design for ease of construction)

- **Higher Buildability Score implies**
  - **easy to build**
  - **higher quality**
  - **cleaner and safer site**

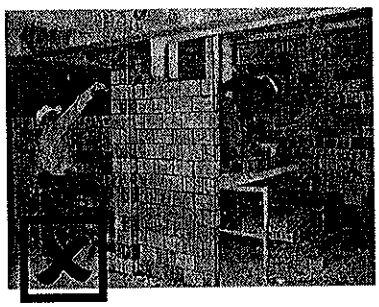




The result of our push for Buildability....

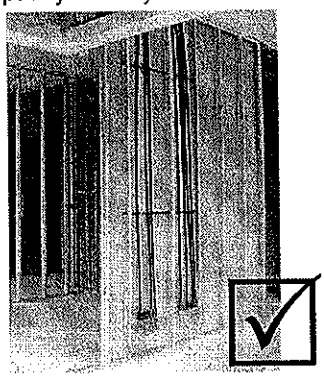


Our Construction-Friendly Designs
– Internal Dry Wall Systems

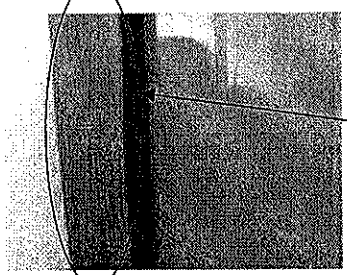


Brick Wall constructed manually

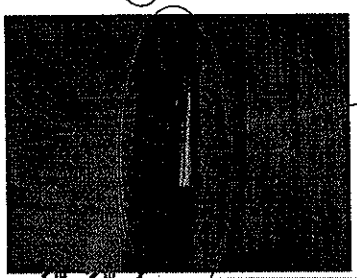
We adopt Dry Wall Systems instead



Our Construction-Friendly Designs
– Internal Door Systems

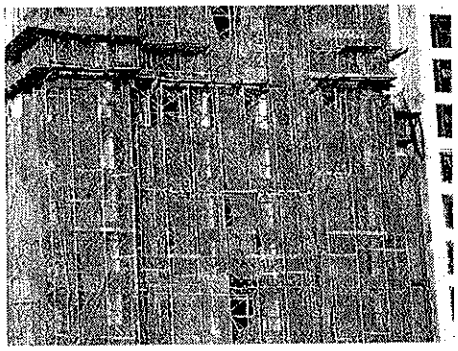


- Architrave on the wall and frame to cover the unsightly joint

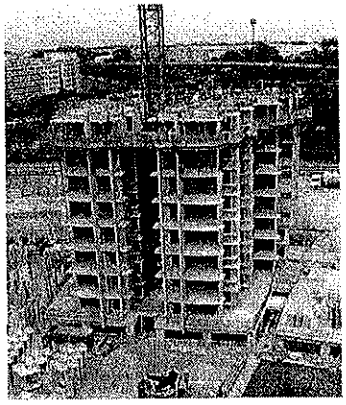


- Slot-In Joint allows delay to the fitting of doors
- Results in less damage to door

Our Construction-Friendly Designs
– External Wall Systems

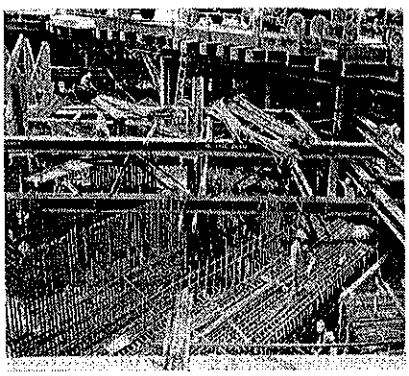


Construction with External Scaffold

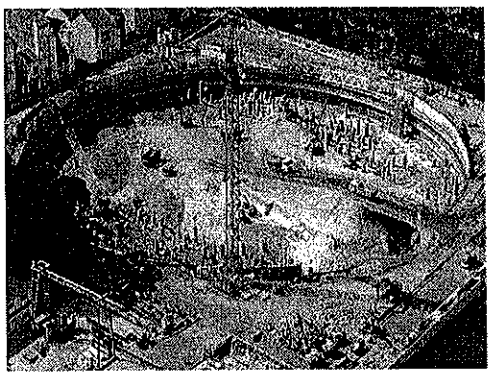


Scaffold-free external wall

Our Construction-Friendly Designs
– Basement Construction System



Basement Construction with struts

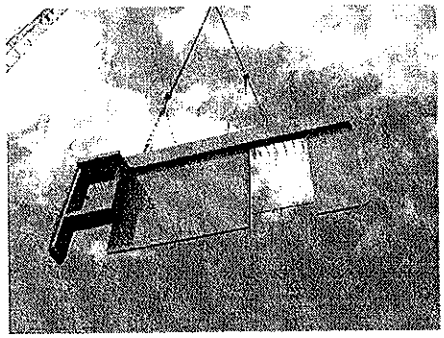


Strut-free, Safe & labour-efficient basement

Strategy 3 – Prefabrication & Precast

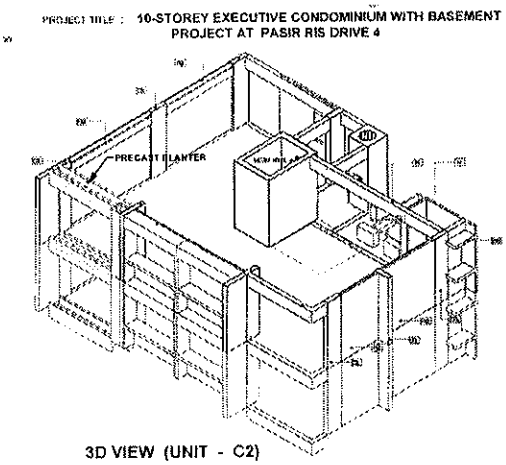
Advantages

- Factory made components
- More durable & watertight
- Straighter walls & smoother surfaces
- Better quality
- Cleaner & safer sites
- Higher productivity



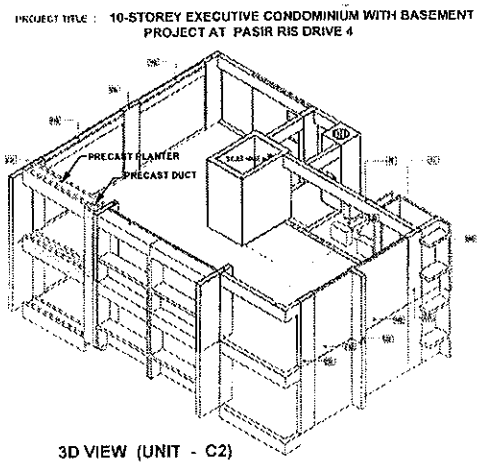
The Concept of Precast

- **Precast Planter**



The Concept of Precast

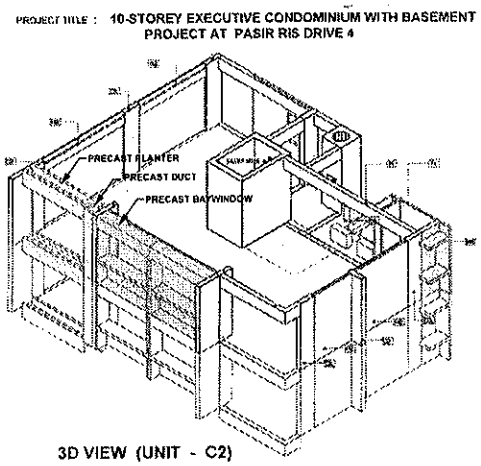
- Precast Planter
- Precast Duct



3D VIEW (UNIT - C2)

The Concept of Precast

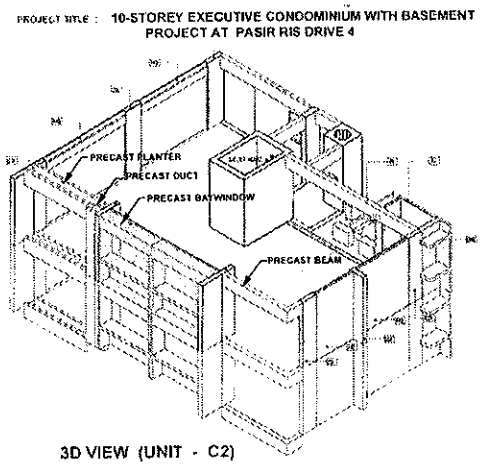
- Precast Planter
- Precast Duct
- Precast Bay-Window



3D VIEW (UNIT - C2)

The Concept of Precast

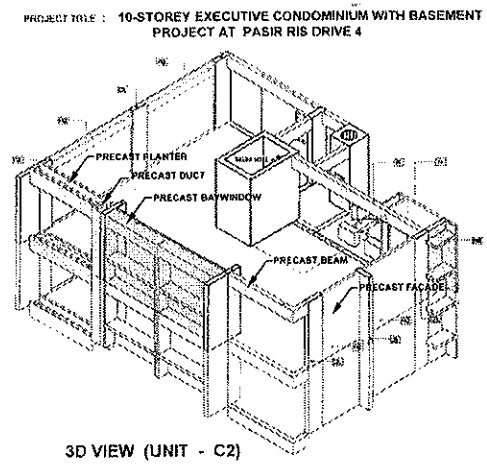
- Precast Planter
- Precast Duct
- Precast Bay-Window
- Precast Beam



3D VIEW (UNIT - C2)

The Concept of Precast

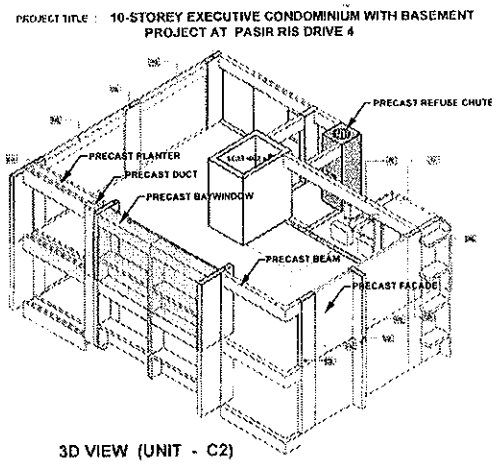
- Precast Planter
- Precast Duct
- Precast Bay-Window
- Precast Beam
- Precast Facade



3D VIEW (UNIT - C2)

The Concept of Precast

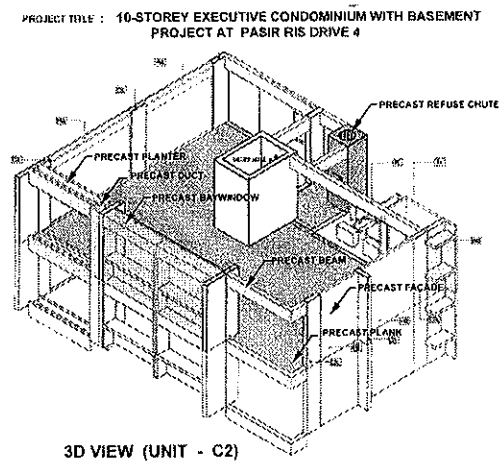
- Precast Planter
- Precast Duct
- Precast Bay-Window
- Precast Beam
- Precast Facade
- Precast Chute



3D VIEW (UNIT - C2)

The Concept of Precast

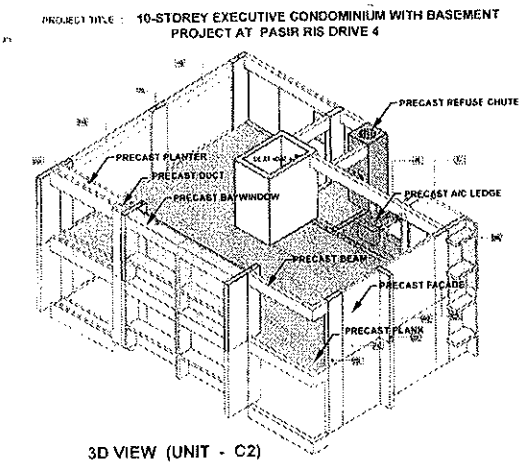
- Precast Planter
- Precast Duct
- Precast Bay-Window
- Precast Beam
- Precast Facade
- Precast Chute
- Precast Plank



3D VIEW (UNIT - C2)

The Concept of Precast

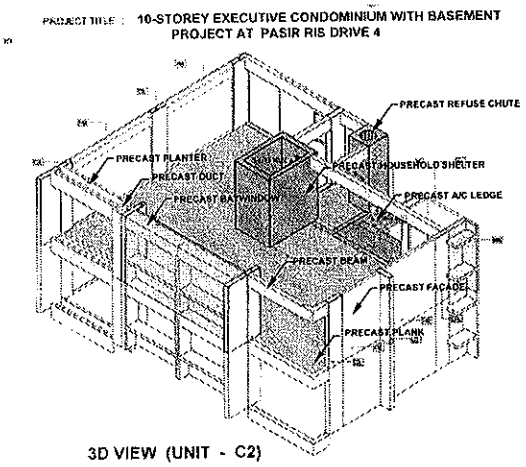
- Precast Planter
- Precast Duct
- Precast Bay-Window
- Precast Beam
- Precast Facade
- Precast Chute
- Precast Plank
- Precast Ledge



3D VIEW (UNIT - C2)

The Concept of Precast

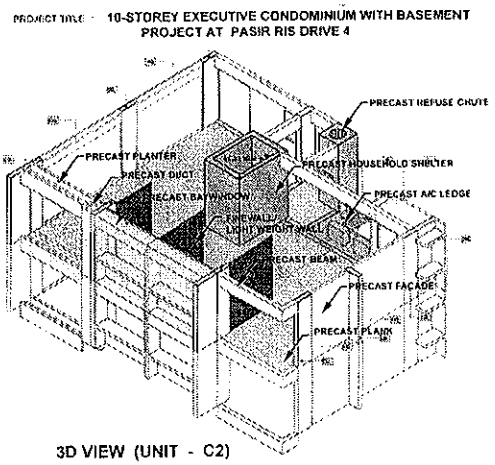
- Precast Planter
- Precast Duct
- Precast Bay-Window
- Precast Beam
- Precast Façade
- Precast Chute
- Precast Plank
- Precast Ledge
- Precast HS



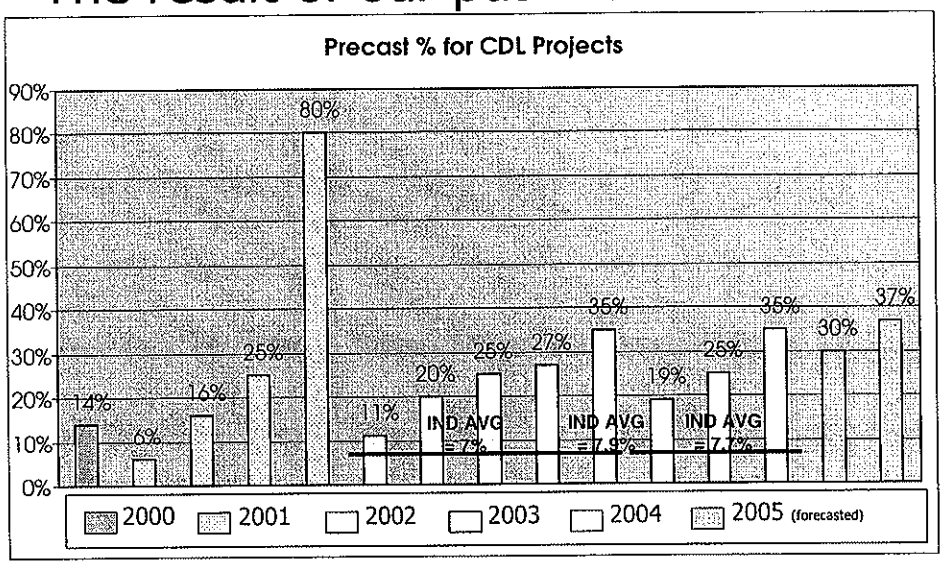
3D VIEW (UNIT - C2)

The Concept of Precast

- Precast Planter
- Precast Duct
- Precast Bay-Window
- Precast Beam
- Precast Façade
- Precast Chute
- Precast Plank
- Precast Ledge
- Precast HS
- Precast Internal Wall Panel



The result of our push for Precast....



Moving forward... our next strategy to further improve Quality & Durability

- **Design for Durability and Ease of Maintenance**

Durability problems..... Water Seepage a great industry challenge

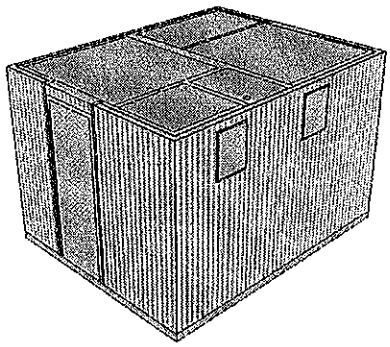
Water Seepage Defects

Breakdown of water seepage defects:

Location of Water Seepage Defects	Breakdown of defects (in relation to building age)	
	0 - 5 year	6 - 10 year
Internal Wet Areas	24.0 %	55.0 %
External Walls	52.7 %	37.6 %
Windows	16.3 %	4.6 %
Roofs	7.0 %	2.8 %
Total	100.0 %	100.0 %

Source: BCA

A solution to improve durability...
Unit Bath System



In Conclusion ...

Our Vision – To achieve Assembly Line Quality



Legal Liability for Defects

By

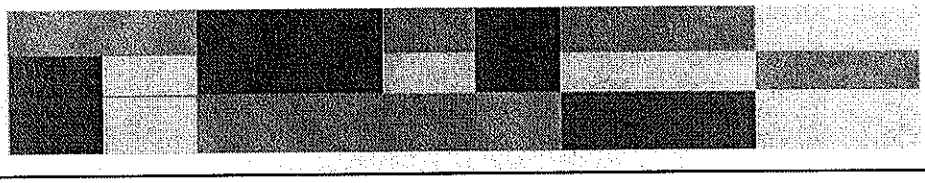
Mr Edwin Lee
Partner, Rajah & Tann
LLB (Hons)
Advocate & Solicitor, Supreme Court of Singapore

RAJAH & TANN
advocates & solicitors

LEGAL LIABILITY FOR DEFECTS

12 July 2006

Edwin Lee
RAJAH & TANN



Contents

RAJAH & TANN
advocates & solicitors

- What is a defect?
- Who can claim?
  - Claims by MCST
  - Claims by Developer
  - Claims by Main Contractor
- When must a claim be made?
  - Defects Liability Period
  - Limitation
- How much can be claimed?
- How to prepare the claim?

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RAJAH & TANN
advocates & solicitors

PART 1:
WHAT IS A DEFECT?

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What is a Defect

RAJAH & TANN
advocates & solicitors

- Claim for breach of contract: Strict Liability
- Non-conformity with contractual specification
- Express & implied term
- *Example: MCST 1166 (Mandarin Gardens) v Chubb [1999] 3 SLR 540.*

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What is a Defect (2)

RAJAH & TANN
advocates & solicitors

- Claim in tort ~~negligence~~ MCST Vs Developer
- Below industry standard: negligent construction/design.
- Exercise of reasonable competance is a defence.

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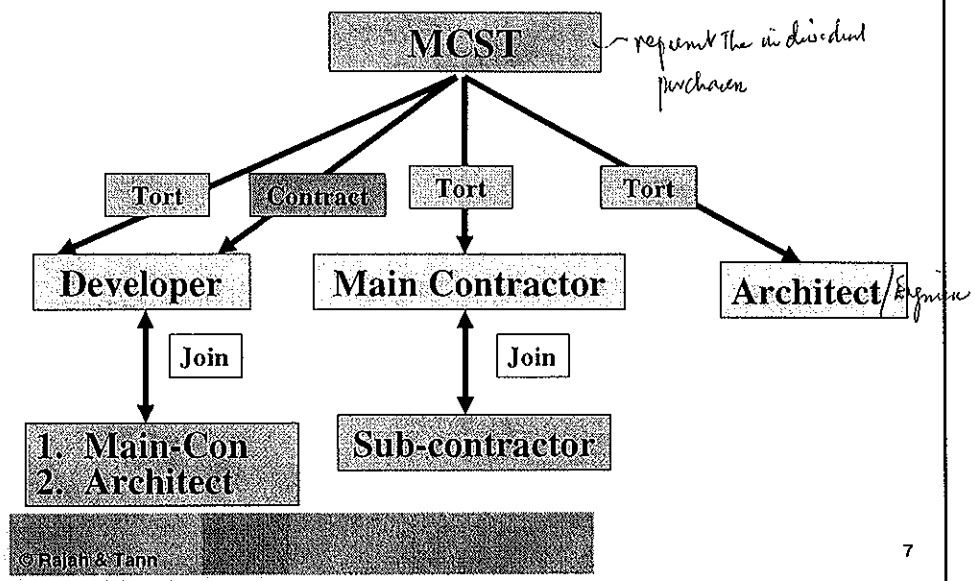
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PART 2:
WHO CAN CLAIM?

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Claims by MCST

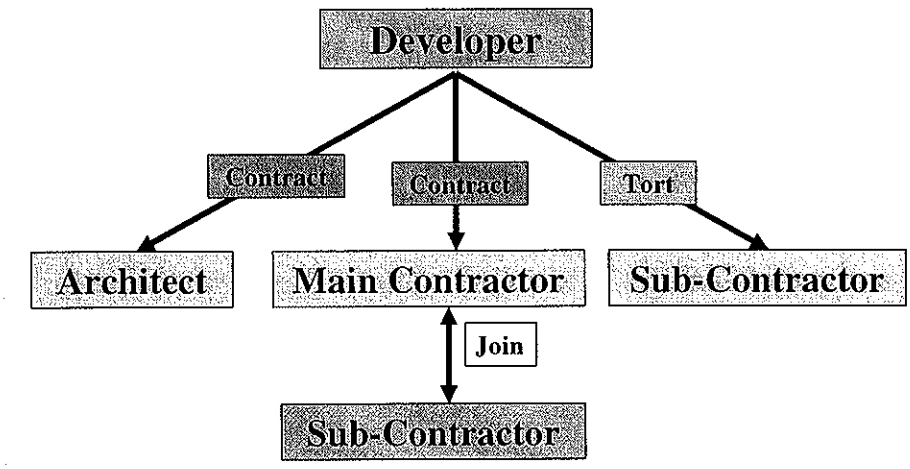
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Claims by Developer

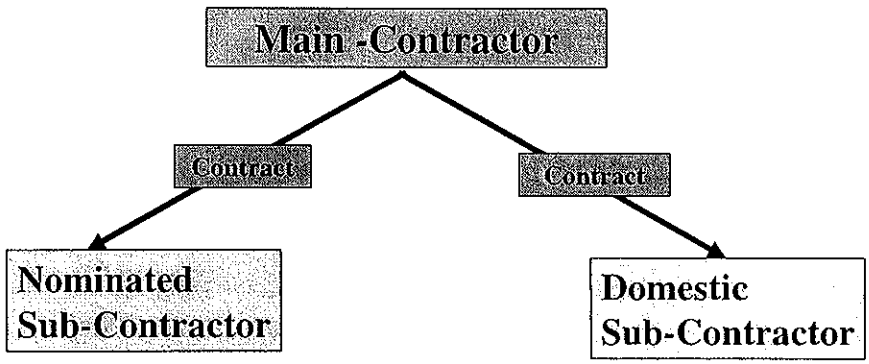
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Claims by Main-Contractor

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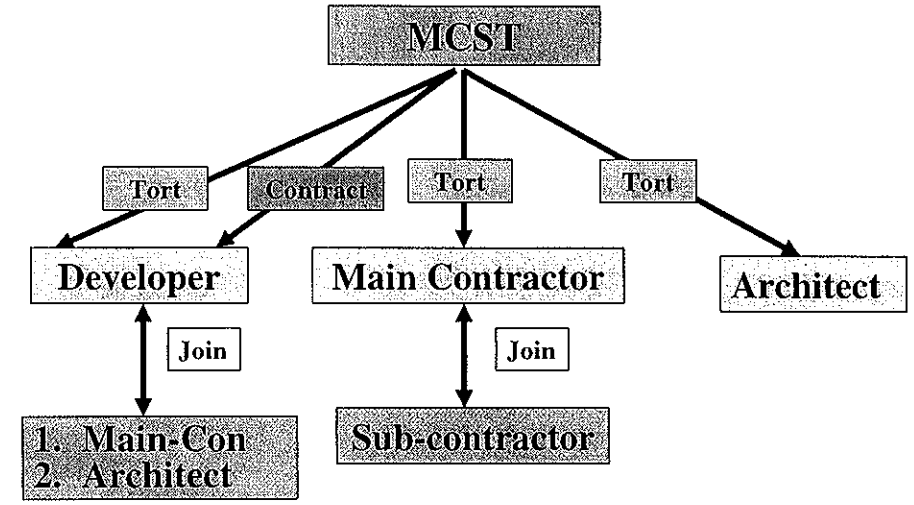
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Claims by MCST

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MCST vs Developer

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- Section 85 of the Building Maintenance and Strata Management Act 2004 (No. 47 of 2004)
  - empowers an MCST to institute actions on behalf of subsidiary proprietors
- Action can be commenced in
  - Contract
  - Tort

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MCST vs Developer

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MCST No 2297 v Seasons Park Ltd [2005] 2 SLR 613

Brief facts:

- Plaintiff: MCST for a condominium with 390 units.
- 319 units: original purchasers
- 71 units: sub-purchasers
- Defects in the common property of the condo
- AGM was held by MCST to claim against Developer
- Action in contract and in tort was brought against the developer.

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MCST vs Developer

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- Preliminary issues court had to decide:
  - Whether the MCST was entitled to sue on behalf of all the subsidiary proprietors, and if not, which of them;
  - In relation to the claim in tort, whether the developer could avail itself of the defence of "independent contractor" against the MCST's claim.

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Seasons Park

MCST vs Developer

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Claim in CONTRACT

- Held that sub-purchasers were not entitled to sue a developer in contract.
- s116 LTSA (now s85 BMSMA), did not confer a cause of action upon the MCST → only a procedural provision to facilitate the institution of an action.
- Have to specify on behalf of which of the subsidiary proprietors the action in contract was instituted.

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Seasons Park

MCST vs Developer

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Claim in CONTRACT

- The substantive party would be the original purchasers themselves, not the MCST.
- Only a proportionate part of the damages suffered can be claimed.
  - For example if only 50 out of 100 subsidiary proprietors are original purchasers, can only claim 50% of cost of rectification.

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Seasons Park

MCST vs Developer

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Claim in CONTRACT

- Ways to overcome the restriction:
  - By novation: but this depends on whether the developer was agreeable to a novation
  - Have the original purchaser agree to lend his name to being a co-plaintiff (subject always to the sub-purchaser indemnifying the original purchaser as to costs and other possible liabilities) to the action in contract.

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Lessons learnt...

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- The position is consistent with previous cases:
  - MCST 1279 v Khong Guan Realty Pte Ltd [1995] 1 SLR
  - RSP Architects Planners & Engineers v Ocean Front Pte Ltd and another appeal [1996] 1 SLR 113
- Take up solutions proposed by CA in Seasons Park
  - Hard to get developer to agree to novation.
  - Easier to include term that vendor of unit be included as co-plaintiff in any action.

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MCST vs Developer

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Claim in TORT

- Held that the general principle was that a developer was not vicariously liable for the negligence of an independent contractor, his workmen or agents in the execution of the contract.

- All the developer has to do is to raise the "Independent Contractor Defence".

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MCST vs Developer

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Claim in TORT

- "Independent contractor" defence was available because:

- In the law relating to building standards in Singapore (Building Control Act), it was not contemplated that the design and erection of the building in a development would be undertaken by the owner or developer personally.

- The BCA expressly recognised that all those matters should be undertaken by competent professionals and contractors appointed by the developer.

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Lessons learnt...

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- The independent contractor defence has been endorsed in the High Court previously:
  - MCST No. 1075 v RSP Architects Planners & Engineers (Raglan Squire & Partners F.E.) & Anor [1998] SGHC 302
  - "…. the developer would be able to escape liability on the basis that it had relied on its professional consultant to provide a proper design and exercise reasonable care in the design and that, having chosen a reputable architect, there had been no negligence on its part contributing to the defective design
- Now that the Court of Appeal has endorsed it, there is no doubt that developer would be able to rely on it.

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MCST vs Developer

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Claim in Contract contrasted with Claim in Tort

- Independent Contractor defence would not be available in respect of a claim in contract.
- Unlike a claim in contract, to succeed in a claim in tort, the claimant must establish negligence. Not all breaches of contract are evidence of negligence.

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Seasons Park

MCST vs Architect/ Main Con

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- Although some of the subsidiary proprietors may have a claim in contract against the Developer, they may also choose to claim in tort against the Architect or Main Contractor.

- The "Sunrise Crane" [2004] 4 SLR 715 (Court of Appeal)
  - Held that while the law of tort offered an avenue of redress for losses suffered by a person where such losses would otherwise be without a remedy, it did not conversely mean that remedies in tort became automatically unavailable simply because the plaintiff had a remedy in contract against another party.

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MCST vs Architect/ Main Con

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The "Sunrise Crane" [2004] 4 SLR 715

Brief facts

- Doman Shipping SA (Doman) owned the vessel 'Sunrise Crane'
- On the way to S'pore, discovered that some nitric acid it was carrying was contaminated.
- Doman engaged "Pink Energy" as the contractor for the job.
- "Pink Energy" in turn engaged "Pristine Maritime".
- "Pristine Maritime" chartered the vessel "Pristine".
- The Pristine was made of mild steel; when it was loaded with nitric acid, it capsized.

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MCST vs Architect/ Main Con

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- The owners of the Pristine sued the owners of the *Sunrise Crane* in tort for failing to inform the *Pristine* of the nature of the cargo immediately prior to the transfer.

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MCST vs Architect/ Main Con

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- Court of Appeal held that the Sunrise Crane did owe of duty of care which they had breached.
- It pointed out that remedies in tort do not become automatically unavailable simply because the plaintiff had a remedy in contract against another party.
- Although the owners of the *Pristine* would have a direct action in contract against the charterer, it did not mean that it could not nevertheless sue *Sunrise Crane* in tort.

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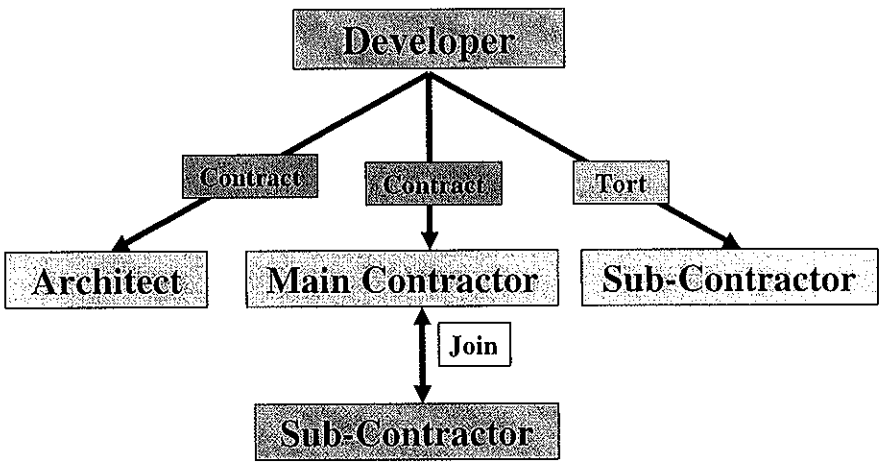
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Claims by Developer

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Claims by Developer



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Developer vs Architect/ MC

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Latest Development:

- Following the Court of Appeal decision in Chia Kok Leong v Prosperland, even though a developer who had sold off all the units in a development and no longer had ownership of the property, it may still be entitled to substantial damages.
- Furthermore, the court recognised that the loss of a "performance interest" may be sufficient to constitute loss.
- Same principles would apply in a claim against a main contractor. (both claims are in contract)

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Developer vs Architect/ MC

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Chia Kok Leong v Prosperland [2005] 2 SLR 484:

Brief facts

- Plaintiff (Prosperland) was the developer of a condominium
- Claimed against main contractors & Architects for defects
- By the time the suit was commenced, Prosperland was no longer the owner of the condominium and neither had it spent any money to effect the repairs nor had it been sued by the MCST.

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Developer vs Architect/ MC

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- Architect/ Contractor argued:
- That Prosperland was not the correct party to sue as it had suffered no loss;
- the MCST should the proper party, as it had a direct remedy in tort
- After all, the general rule in law was that a plaintiff was entitled to claim damages only for the actual loss suffered on account of a breach of contract.

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Developer vs Architect/ MC

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Court:

- "Legal Black Hole" is to be avoided – that a person who had undertaken contractual responsibility and been defective in performing it should not escape liability just because the person who had suffered the loss was not a party to the contract and could not sue on it.
- Example given of husband who contracted to repair house owned by wife.

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Developer vs Architect/ MC

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Court:

- Where it was in the contemplation of the parties that the proprietary interest in goods might be transferred from one owner to another after the contract had been entered into and before the breach which caused damage to the goods, an original party to the contract was to be treated in law as having entered into the contract for the benefit of all persons who might acquire an interest in the goods before they were damaged.
- It could be foreseen that damage caused by a breach would cause loss to a later owner and not merely to the original contracting party.
- He was entitled to recover by way of damages for breach of contract the actual loss sustained by these persons.

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Developer vs Architect/ MC

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What about Double liability?
-- being sued by the MCST as well?

- Dealt with as follows:
  - Payment of damages to the developer/ third party owner would discharge the liability to both;
  - Claim by developer would be subordinated to any claims made by MCST;
  - Court may join a third party to the proceedings. (MCST/Developer vs MC/Architect)

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Developer vs Sub-Con

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- There is no contract between a sub-con and a main contractor, therefore the claim would be in tort.
- This would apply even if the sub-con is an NSC.
- The preferred remedy is usually to proceed against the Main Contractor in a claim under contract, unless it is insolvent.

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Claims by Main Contractor

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Main-con vs Sub-Con

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- The claim would be in contract.
- The more likely situation would be that either the MCST or developer sues the main-contractor who thereafter joins the sub-contractor as a third party under Order 16 of the Rules of Court.
  - The proceedings between the main-contractor and sub-contractor in such a situation would be regarded as separate and would have a life of its own.

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Part 3:
When Must a Claim be Made?

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When to Claim

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- 2 time periods:
- Within Defects Liability Period
- Beyond the Defects Liability Period.

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Defects Liability Period (I)

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- Contractually provided
- "On site warranty" -- tied to release of retention funds
- Strict Compliance with provision

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Defects Liability Period (II)

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- Right as well as obligation to comply with procedure
- Failure to follow procedure:
  - May still claim for rectification costs
  - But sum is reduced to the amount it would have cost the contractor to carry out the rectification if procedure has been properly followed, and not necessarily actual cost of rectification
- Creates additional rights; does not limit remedies.

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After DLP

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- 6 years time bar for breach of contract or tort.
  - Contract: time runs from breach
  - Tort: time runs from damage
- Breach occurs from time of completion of contract – because it should be defect-free
- Exception and Additionally, for latent (hidden) defects, time is extended to 3 years from knowledge, subject to maximum of 15 years.

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DLP vs Time Bar

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- DLP tied to retention sum
- Possibly also tied to expiry of performance bond
- DLP carries some obligation on part of owner/employer to notify and allow time for rectification before deduction may be made
- Time bar always applies in the background.

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Time Bar

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- RSP Architects Planners & Engineers v Ocean Front Pte Ltd [1996] 1 SLR 113
  - action brought by MCST against the developer for faulty construction of some common areas
  - Building was more than 10 years old
  - this claim was in tort.

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Prosperland v Civic Construction

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FACTS:

- Construction of condominium completed: August 1993
- MCST constituted: May 1998
- Prosperland sued on 2 May 2002.

Dispute

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- External Wall Tiles – de-bonded & dislodged
- Glass Blocks in lobbies & stairwell – cracked
- Contractor & Architect say: claim is time barred
- Developer: latent defects.

Decision (1)

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- Section 24A of the Limitation Act extends time for claims in respect of damage caused by latent defects
- Time bar sets in only 3 years after Developer has acquired 2 types of knowledge:

(1) Knowledge that the defects were sufficiently serious to justify starting an action

(2) Knowledge of who was to blame for the defects.

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Decision (2)

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- Definition of "Knowledge"
  - Knowledge reasonably expected to be acquired
  - Reasonable belief rather than actual knowledge
- Burden of proof is on Developer to show he did not have knowledge earlier, before 2 May 1999 (since action was started on 2 May 2002).

Wall Tiles

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- August 1997: 1 tile de-bonded
  - Developer notified contractor
  - Contractor denied responsibility – said caused by stress
- Aug/Sept 1999: 2 tiles fell
- May 2000: Survey Report

Court:

Since only 1 cracked tile in 1997, it would not be reasonable to require developer to spend money to investigate. Just monitor situation.

[redacted]

Glass Block

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- Dec 1998: several cracked glass blocks
  - Developer informed contractor
  - Contractor denied liability – says weather
- Jan & Feb 1999: further list of damaged glass blocks
  - Contractor says will look into it
- May 2000: Survey Report

Court:

By Jan 1999 Developer had positively blamed contractor. It should have realised that expert opinion was useful. While it reasonable to give contractor time to investigate, this does not extend time bar. True test: when did it know?

[redacted]

Moral of the Story

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- Party who has exceeded the usual 6 years time bar for claims has onus of proving it did not have knowledge of the claim earlier
- 2 types of knowledge
  - Defect is sufficiently serious to warrant a claim
  - Who is to blame
- Knowledge is not just actual knowledge – includes situations where it should reasonably have been acquired
- Allowing the other party time to investigate defect does not extend time bar.

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PART 4:

HOW MUCH CAN BE CLAIMED?

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How Much to Claim

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- Cost of Rectification
- Diminution in value
  - *Ruxley Electronics* Case
  - *Afro-Asia* Case
- Use of proceeds irrelevant.
- Possible deduction for betterment — Newer for old
- Damages for distress and inconvenience. (Yes for residential
  No for industrial/Commercial)

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Part 5: Preparation of Claim – what evidence?

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Preparation of Claim

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- Contractual Clauses
- Completion Certificate
- Notification of Defects – letters, minutes, compliance with contractual procedure
- Photographs of Defects
- Expert survey of defects and recommended rectification
- Quotations.

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Opinion based on evidence

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Siow Soon Kim v Lim Eng Beng [2004] SGCA 4

- Court of Appeal held that an expert's opinion based on evidence not admitted is inadmissible.

Brief facts

- Data was obtained after a search order of the Defendant's premises.
- Data was loaded onto a CD-Rom and examined by an expert witness of the Plaintiff.
- CD-Rom itself not admitted into evidence.
- The Court held that the facts on which an expert's opinion is made must be proved by admissible evidence, just like any other fact relevant to the case.

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Lessons learnt...

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- Material reviewed by an expert must be separately admitted.
- Example where evidence separately admitted: Lim Guan Cheng v JSD Construction Pte Ltd and another [2004] 1 SLR 318:
  - expert relied on quotations from 3 contractors to determine the costs of rectification work
  - other party tried to argue that the evidence was hearsay as the contractors were not themselves called to give evidence.
  - However, as the quotes were themselves admitted as evidence as part of the expert's affidavit of evidence in chief, it was held that the quotes were not hearsay evidence

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Lessons learnt...

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- When preparing for trial, documents or any evidence used by experts in their reports should be disclosed.

- Examples include:
  - Soil settlement reports
  - Noise level readings

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Change of experts

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- English Court of Appeal case of Hajigeorgiou v Vasiliou [2005] EWCA Civ 236:
- Held that the party seeking to use a new expert would be required to disclose not only the first expert's final report, but also all earlier reports up to the first expert's report containing the substance of his or her opinion.

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Change of experts

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Brief facts

- Parties obtained permission to instruct one expert.
- Defendant's expert witness (1st) attended the plaintiff's premises for inspection.
- Subsequently, defendant's solicitors wrote to the plaintiff's solicitors asking for permission for a second expert to carry out an inspection.
- The plaintiff argued that the defendant should not have permission to use another expert without an explanation, and the original expert's evidence should be disclosed.

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Change of experts

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Court:

- Court held that it is possible to have a 2nd expert to replace 1st one, but disclosure must be made of the 1st expert's report as well.

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Lessons learnt...

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- When appointing an expert do some checks beforehand.
- Try to find out his/her stand in respect of certain issues, especially in situations where there are two or more schools of thought on a particular matter.

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Type of expert – Rectification costs

- Lim Guan Cheng v JSD Construction Pte Ltd and another [2004] 1 SLR 318:
  - Held that a building surveyor was competent to give evidence on the costs of rectification.
  - Do not need a quantity surveyor.

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THE END

THANK YOU