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Liability for Building Operations in Singapore: Sorry and then Safe?

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ABSTRACT

The Workplace Safety and Health Act (WSHA) came into effect in Singapore on 1 March 2006. It is now the primary legislation regulating workplace safety and health, assigning greater responsibility and accountability to everyone involved in the workplace. Such persons – the "stakeholders" - are required to take "reasonably practicable" steps to ensure the safety and health of every workplace and worker. This contrasts with the previous position under the prescriptive Factories Act, where legal liability lay primarily with the factory occupier.

This paper considers the impact of the WSHA when "building operations" are carried out on common property in strata developments. These are a regular feature of post-construction maintenance works. The paper also considers the responsibilities that must be borne by the development's Management Corporation in various capacities as "stakeholders" involved in "building operations", and how such duties may be discharged.

KEYWORDS: Workplace Safety and Health Act, Building Operations, Common Property, Strata Developments, Management Corporation

1. INTRODUCTION

The design, construction and post-construction maintenance stages in the life cycle of a building pose a variety of safety and health concerns. In Singapore, the regulatory framework for construction safety was comprised in the Building Control Act and the Factories Act administered by the

Ministry of National Development (MND) and the Ministry of Manpower (MOM) respectively.

The inadequacy of the existing framework to recognize and / or address the wide spectrum of safety and health issues at the design and construction stages was manifested by as many as three devastating accidents in Singapore, in the year 2004 alone. Two out of the three accidents were on construction sites, and happened practically just within days of each other. Together, they caused a total of six fatalities. The most dramatic of the accidents was the collapse of the Nicoll Highway in the course of the construction of the Circle Line, Singapore's mass transit system developed by Singapore's Land Transport Authority (LTA).

A Committee of Inquiry (CoI) was appointed to investigate the causes of the collapse of Nicoll Highway. The CoI's Report brought to the fore, wide-ranging and numerous gaps in existing construction safety practices. The Government accepted the CoI's recommendations in full. In addition, the relevant Ministries also drew on the experiences and regulatory frameworks and best practices in occupational safety and health in Sweden, the United Kingdom, France and Germany.

The upshot to all these was the new WSHA, based on the English Health and Safety Act of 1974, and which came into effect on 1 March 2006. The WSHA replaced the Factories Act as the primary legislation regulating workplace safety and health. One of the key features of the WSHA is that it assigns greater responsibility and accountability to everyone involved in the workplace, ranging from rank-and-file workers to managers and directors of companies. Every such person, even if not directly involved at the workplace, but within the ambit of "stakeholder", is required to take "reasonably practicable" steps to ensure the safety and health of every workplace and worker. "Stakeholder" is described as "any person or party who is affected by the WSHA (Ministry of Manpower (1) 2006). This contrasts with the previous position under the Factories Act where legal liability for safety and health in a factory lay primarily with the occupier of the factory.

This paper examines the WSHA's impact on post-construction maintenance works (or building operations) carried out in premises such as common areas in strata developments. The paper points to the responsibilities that must be borne by the strata development's Management Corporation (MC) in various capacities, and considers how these duties may be discharged.

2. PRESENT APPLICATION OF THE WSHA

By section 2, the provisions of the WSHA presently apply to workplaces within the class or description of workplaces specified in the First Schedule. It is expected to eventually cover all workplaces, albeit in stages. The First

Schedule provides a list of workplaces which are now subject to the WSHA and includes a “factory”.

In addition, section 5 (1) defines “workplace” as any premises where a person is at work or is to work, and includes a factory, while section 5(3)(a)-(r) provide a comprehensive listing of premises within which persons are employed that are deemed to be “factories”. It appears that section 5(3)(q) is very wide, whereby factory includes “any premises where building operations or any work of engineering construction are carried out [and] within which persons are employed”. In turn, "building operations" is defined in section 4 *to include* “the construction, structural alteration, repair or maintenance of a building including the re-wiring of any electrical installation, the replacement of any lift, air-conditioning plant and ancillary ducting of a building, and the re-pointing, redecoration and external cleaning of the structure”. It is noted that by section 5 (8), no premises shall be excluded from the definition of a “factory” by reason only that they are open-air premises.

2.1 RANGE OF PERSONS WHO MUST FULFIL OBLIGATIONS UNDER THE WSHA

Section 10 of the WSHA imposes duties on the following persons: (1) an employer; (2) a contractor; (3) a subcontractor; (4) a principal; (5) a self-employed person; (6) an occupier of a workplace; (7) a designer, manufacturer or supplier of any machinery, equipment or hazardous substance for use at work; (8) an erector, installer or a modifier of machinery or equipment for use at work; (9) an owner, a hirer or lessee of machinery moved by mechanical power or a person who maintains such machinery for use at work. It is noted that no less than nine persons may individually, or together in various capacities, be responsible to ensure a safe working environment. This is in keeping with the objective of the WSHA to make a broader range of persons responsible for health and safety at the workplace. Against the backdrop of the above, the particular issue of the MC’s responsibility for common areas in strata developments is examined.

3. STRATA DEVELOPMENTS AND RESPONSIBILITY FOR COMMON PROPERTY

Presently, there are about 3 000 strata developments in Singapore. The number of strata developments in Singapore is constantly increasing as a result of its intractable land scarcity problem. Hence the importance of the WSHA’s impact on post-construction maintenance of common property in such developments. Strata developments in Singapore are governed by the Land Titles (Strata) Act and the Building Maintenance and Strata

Management Act (BMSMA). Strata law provides inter alia for individual ownership of individual units, and shared ownership as tenants- in-common of the common property (or common areas).
Upon registration of the strata title plan, the owners of the strata units – the subsidiary proprietors (SPs) become members of the MC. The MC so constituted is a distinct legal entity having the essential attributes of a body corporate, has a common seal and may sue and be sued in its own name. It also has the power to enter into contracts.

3.1. POWERS AND DUTIES OF MC IN RELATION TO COMMON PROPERTY

Section 29(b) of the BMSMA provides that it is the duty of the MC to properly maintain and keep in a state of good and serviceable repair the common property. By section 2 of the BMSMA, "common property", subject to subsection (9), means-

(a) in relation to any land and building, such part of the land and building

> (i) not comprised in any lot or proposed lot in that strata title plan; and
> (ii) used or capable of being used or enjoyed by occupiers of 2 or more lots or proposed lots; or

(b) in relation to any other land and building, such part of the land and building

> (i) not comprised in any non-strata lot; and
> (ii) used or capable of being used or enjoyed by occupiers of 2 or more non-strata lots within that land or building;

Thus common property in a strata development can be parts of the building, the land it sits on or any facility on the land (Christudason, 2004).

3.2. FUNDING FOR MAINTENANCE OF COMMON PROPERTY

SPs are required to contribute in proportion to their share value to two types of fund. These are the maintenance and management fund and the sinking fund. The contributions to the former pay for inter alia the day-to-day costs of maintaining common property, while those in the latter pay for cyclical expenses.

3.3. RANGE AND NATURE OF WORKS UNDERTAKEN BY MC

Cyclical expenses relate to works such as painting or repainting, renewal or replacement of M&E installations and major repairs & improvements. The section and Table below give an indication of the types and frequency of works that may need to be effected on the common property in a strata development. These works must be done on a regular basis, and are the responsibility of the MC.

3.3.1. Other Works on Common Property

These include daily cleaning of car parks, removal of waste in bins, regular checks of carparks to rectify defects like potholes on tarmac floors, and repair of leaking pipes above carparks. The same applies to driveways. In relation to the vehicular entrance – there has to be regular maintenance of barrier systems, code-identification systems and the computers that control these systems, which may be located in a central control room like the management office or guardhouse. In addition, maintenance work on swimming pools includes weekly draining of the pool, and the maintenance of machinery in the motor room, as well as of filtration systems. The MC also needs to engage contractors for landscape maintenance, clearing away excess leaves/branches from trees in premises and routine cutting of grass in the common areas, tending and watering of the flora. In addition, the appearance of common areas of the façade such as pipes, ceilings, floors and walls will deteriorate over time due to climactic, weather and other factors and will therefore need refurbishment.

Table 382.1: Types of maintenance works typically undertaken by MC

Nature of works	**Frequency of works**
Building R & R	Every 3-5 years
Re-roofing	Every 10 yrs
Re-wiring	Every 15 to 20 yrs
Water pumps & tank:	
Servicing	Every 45 days
Flush & Sterilisation	Every 15 to 18 mths
Pumpset replacement	Every 10 yrs
Lifts:	
Servicing	Every 2 weeks
Testing	Quarterly
Testing (full load)	Every 5 yrs
Public lighting point checks	Every 2 weeks

4. CAN CONDO PREMISES BE CONSIDERED A “FACTORY”?

The works outlined above are some examples of facilities in common areas in strata developments that require regular maintenance. The *physical locations* where the works are carried out indicate that they relate to the common areas in a strata development. The *nature* of the works fall within the ambit of “building operations” as defined in section 4 and read with 5(3)(q). To recap, these include the construction, structural alteration, repair or maintenance of a building (including the re-wiring of any electrical installation, the replacement of any lift, air-conditioning plant and ancillary ducting of a building, and the re-pointing, redecoration and external cleaning of the structure); It can therefore be inferred that the strata premises where the building operation works are carried out can be considered a "factory" within the WSHA.

5. DUTIES IMPOSED IN VARIOUS CAPACITIES

The MC may appoint persons to carry out “building operations” on the common property under a contract of service or contract for services. In such cases, (even the latter) it is noted that the WSHA does not completely relieve the MC of responsibilities. As discussed earlier, section 10 of the WSHA can impact on parties in at least nine capacities. In relation to the common areas in a strata development, the MC may have to bear responsibility in the following capacities: as employer, principal and / or occupier. These are considered below.

5.1. MC AS EMPLOYER AND / OR PRINCIPAL

By section 4 of the WSHA, an "employer" is a person who, in the course of the person’s trade, business, profession or undertaking, employs any person to do any work under a contract of service. “Principal” refers to a person who, in connection with any trade, business, profession or undertaking carried on by him, engages any other person otherwise than under a contract of service (a) to supply any labour for gain or reward; or (b) to do any work for gain or reward. By section 12, where the MC is an employer or principal, it must as far as reasonably practicable, *inter alia* protect the safety and health of its employees or workers working under its direct control, and all who may be affected by their work. Such duty can be fulfilled by *inter alia* (1) conducting risk assessments to remove or control risks to workers at the workplace, (2) maintaining safe work facilities and arrangements for the workers at work (3) ensuring safety in machinery and work processes at the workplace, (4) developing and putting into practice control measures for dealing with emergencies; and (5) providing workers with adequate instruction, training and supervision. It would also be

necessary to ensure that such persons are not exposed to other hazards in or near their workplace and under the control of the principal.

The MC may, even as principal, appoint and direct a contractor, subcontractor or employee as to the manner in which the work is carried out. In such cases, section 14 requires the MC to take reasonably practicable measures to ensure their safety and health when at work.

5.3. MC AS "OCCUPIER"

Another capacity in which the MC may have to bear responsibility is as "occupier". Section 19(3) states that in relation to a common area, "occupier" includes the MC, having control of that common area. By section 11, the MC must, as far as reasonably practicable, ensure that *inter alia*, the following are safe and without risks to the health of any person within those premises, even if the person is not one of its employees: (1) the workplace itself (2) all entrances to or exits from the workplace, and (3) any machinery, equipment, or substance kept on the workplace**.** In addition, in its capacity as "occupier", by section 19(2), the MC will have to assume responsibility for the following in the common areas used by persons working at the workplace: electric generators and motors, hoists and lifts, lifting gear and lifting machines, means of entry to or exit, and any machinery owned by the owner or occupier of the common area.

6. STANDARD OF CARE EXPECTED FROM MC

In its various capacities, the standard of care expected of the MC is that it must take "reasonably practicable" measures to ensure the safety of every workplace and worker (Ministry of Manpower (1), 2006). The phrase "reasonably practicable" keeps recurring in the WSHA. The concept and standard appear to be borrowed from the English Health and Safety at Work Act of 1974 (EHSWA), which resulted from the Report of the Robens Committee (Robens, 1970). The main thrust of that Report had been that the primary responsibility for safety and health at work lay with managements and workers, that [this] is the continuous responsibility of all who have control over the conditions and circumstances in which work is performed, and to encourage employers and employees to take a more rounded view of their responsibilities (Simpson, 1973).

This very same objective reverberates throughout the WSHA: it is aimed at cultivating good safety habits and practices in all individuals at the workplace – right from the top management to the last worker (Ministry of Manpower (1), 2006). It would therefore be apposite to examine English case law on the interpretation of the phrase "reasonably practicable".

The phrase "reasonably practicable" was interpreted in R v Gateway Foods Ltd1 in the context of the employer's obligations under the EHSWA. Sections 2 (1) and 3(1) require employers "to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees". It was held that the breach of duty and liability under the section do not depend upon any failure by the [employer] itself… to take all reasonable precautions. Rather, the [employer] is liable in the event that there is a failure to ensure the safety etc. of any employee, unless all reasonable precautions have been taken by the company. The onus was on the [employer] to prove that all reasonable precautions were taken both by it and by its servants and agents on its behalf stated Evans LJ, adopting the approach of the House of Lords in R v Associated Octel Co Ltd 2.The same point had been made in Austin Rover Group Ltd v Her Majesty's Inspector of Factories 3 (Austin), and Tesco Supermarkets Ltd v Nattrass4.

6.1. ASSESSING WHETHER MEASURES ARE "REASONABLY PRACTICABLE"

In *Austin,* Lord Goff, (at page 625D) had said: "It is now established that, in cases concerned with a statutory duty which is qualified by [the words] "so far as is reasonably practicable", the risk of accident has to be weighed against the measures necessary to eliminate the risk, including the cost involved. If, for example, the Defendant establishes that the risk is small, but that the measures necessary to eliminate it are great, he may be held to be exonerated from taking steps to eliminate the risk on the ground that it was not reasonably practicable for him to do so". Lord Goff then referred to the judgment of Asquith LJ in *Edwards v National Coal Board*[5] and to the speeches of Lord Oaksey and Lord Reid in *Marshall v Gotham Company Ltd* [6]. He concluded at p 626H: "… for the purpose of considering whether the Defendant has discharged the onus which rests upon him to establish that it was not reasonably practicable for him…..to eliminate the relevant risk, there has to be taken into account (inter alia) the likelihood of risk eventuating. The degree of likelihood is an important element in the equation. …. The effect is to bring into play forseeability in the sense of likelihood of the incidence of the relevant risk, and that the likelihood of such risk eventuating has to be weighed against the means, including cost, necessary to eliminate it".

Apparently based on these interpretations from English cases, the MOM has provided the meaning of "reasonably practicable" (Ministry of

[1] [1997] 2 AllER 8
[2] [1996] 4 AllER 846.
[3] [1989] 2 WLR 520.
[4] [1972] AC 153, [1971] 2 All ER 127.
[5] [1949] 1 KB 704 at p 712.
[6] [1954] AC 360.

Manpower (1), 2006). It means that the degree of risk in a particular situation can be balanced against the time, trouble, cost and physical difficulty of taking measures to avoid the risk. An action is considered to be practicable when it is capable of being done.

Whether it is also reasonable usually takes into account the severity of any injury or harm to health that may occur, the degree of risk (or likelihood) of that injury or harm occurring, how much is known about the hazard and the ways of eliminating, reducing or controlling it, and the availability, suitability and cost of the safeguards. (Ministry of Manpower (1), 2006). The similarity of the interpretation here of the term "reasonably practicable" to the English position is unmistakable.

7. DISCHARGING THE MC'S DUTIES

By section 48, where an offence has been committed by a body corporate, an officer of the body corporate shall be guilty of the offence and shall be liable….unless he proves that the offence was committed without his consent or connivance; and he had exercised all such diligence to prevent the commission of the offence.

It is suggested that the MC or officer can discharge its duty of having exercised "all such diligence" by engaging responsible contractors. Such contractors would have safety measures in place and/or have done risk assessment for the work that they are engaged for at the development prior to commencement of work. In this regard, the MOM has provided useful Risk Assessment Guidelines (the RA Guidelines, see below). It would be prudent for the MC to insist on such requirements when it calls for tender documents for the maintenance works. Where an MC has required the contractor to comply with the requisite risk assessment procedures, it is likely that the duty to ensure safety on the premises will have to be borne largely by the contractors in the course of their work. This is provided that the MC does not direct the contractors in the manner that they carry out their work.

7.1. RISK MANAGEMENT AND RISK ASSESSMENT (MINISTRY OF MANPOWER, 2006)

Under the WSHA (Risk Management) Regulations, risk management duties are imposed on *inter alia*, every employer, and principal, including contractor and sub-contractor. Every workplace, including factories, is required to conduct risk assessments for all routine and non-routine work undertaken. Non-compliance may result in a fine or jail term.

Risk management entails (1) risk assessment of any work activity or trade; (2) control and monitoring of such risks and (3) communicating these risks to all persons involved. The RA Guidelines (Ministry of Manpower (2), 2006) provide a three-step process for Risk Assessment.

The three steps are (1) hazard identification; (2) risk evaluation and (3) risk control. These appear to be based on the UK Health and Safety Executive's Five-Steps to Risk Assessment (Health and Safety Executive, 2006). Depending on the industry and nature of work activities, companies can adopt the Activity-Based or Trade-Based risk assessment approaches described in the RA Guidelines or alternatively, other approaches to achieve the same or higher levels of protection. The outcome of the risk assessment conducted, regardless of the method used, should be effective risk control measures. Arising from the risk assessment, safe work procedures for work which may pose safety and health risks should be established and implemented. The safe work procedures should include the safety precautions to be taken in the course of work and during an emergency, as well as the provision of personal protective equipment.

7.1.1. Discharge of MC's responsibilities as Principal

In the context of strata developments, the MC may require that where it has appointed contractors and suppliers to undertake work, such parties must take all reasonably practicable measures to eliminate any risk that may be posed by their machinery, equipment or hazardous substances. The MC may also manage its statutory duties by requiring contractors and suppliers to conduct risk assessment in their workplaces and requiring information of any machinery, equipment or hazardous substances. Thus for example, contractors and suppliers may be required to provide manual of operations, maintenance, and material safety data sheets.

7.1.2. Discharge of MC's Responsibilities as Employer

According to the RA Guidelines, where the MC engages a party in a contract of service in its capacity as employer, it has the duty to *inter alia*: (1) designate… or engage a competent person leading a team of personnel to conduct risk assessments; (2) ensure that the risk control measures are implemented; (3) Inform all persons working at the workplace of the risks, and the means to minimise or eliminate the risks; (4) provide a risk assessment register to record the findings of risk assessment; (5) approve the risk assessments conducted; (6) keep the risk assessment record for inspection for at least three years from the date of the assessment; and submit the record to the authorities if required; (7) review and update the risk assessment at least once every three years or earlier should there be a significant change in the work; (8) ensure that all employees are aware of the risk assessment for the work activity they carry out; (9) develop and implement safe work procedures for work which poses safety or health risks to workers; and (10) keep a written description of the safe work

procedures and produce this to the inspector for inspection when requested.

8. SUMMARY AND CONCLUSION

Arising from three high profile workplace accidents that claimed 13 lives in Singapore in 2004, the MOM undertook a thorough review of workplace safety systems. In 2005, the Ministry proposed a fundamental change in the prevailing approach towards safety regulation to improve safety outcomes and in March 2006, the WSHA came into force.

The WSHA requires the industry to take greater ownership for safety outcomes, and to play an integral role in setting standards. This is by focusing on safety management systems, risk assessment and the reduction of risks at source. Being outcome-based, the WSHA marks a paradigm shift from the prescriptive scheme of procedure-driven compliance in the now-repealed Factories Act (Chuah, 2007). It puts in place a new legislative structure to foster a culture where everyone takes responsibility for safety outcomes. It is based on the premise that workplace safety and health cannot be achieved by any single organisation or person but rather, requires the collective efforts of all stakeholders. In particular, occupiers and employers now have a duty to take reasonably practicable measures to eliminate or reduce risks at the workplace. The Ministry's target is to halve the occupational fatality rate from 4.9 (in 2004) to 2.5 by 2015 and to attain standards of the top 10 developed countries with good safety records.

It is patently clear that the WSHA has critical implications for, and arose in the context of high-risk environments such as construction sites and shipyards. However, this paper has focused on the impact of the WSHA when "building operations" are carried out on the common property of strata developments. This is of great significance in view of the increasing number of strata developments in Singapore, and the regular post-construction maintenance works which their common areas are perforce subject to. MCs will have to assume new responsibilities in the capacity of employer, principal and/or occupier and fulfil such duties by ensuring compliance with risk assessment and risk management requirements.

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