INCORPORATION OF ARCHITECTURAL FIRMS AND THE RIGHT TO REMUNERATION

BEP Akitek (Pte) v *Pontiac Land Pte*[1] a decision of the High Court of Singapore, has highlighted the importance of section 7A of the Architects Act, 1967 ("the Malaysian Act")[2] to practising architects in Malaysia who have restructured their practice from ordinary partnerships to corporate bodies.

In that case, the plaintiffs were incorporated as a company in Singapore, having unlimited liability under the name of BEP Akitek (Pte). The main object of the plaintiffs' business activities, as stated in their Memorandum of Association, was the carrying on of the practice of architects. Upon its incorporation, the plaintiffs had taken over the architectural practice of the partnership, BEP Akitek.

Before the incorporation exercise, BEP Akitek had been engaged by the defendants, who were property developers, to act as project architects for some of the defendants' building projects. On 27 May, 1974 the plaintiffs had notified the defendants in relation to the defendants' project in Jakarta, Indonesia, of the fact of incorporation and that they, the plaintiffs, had taken over the practice of BEP Akitek . The defendants agreed to the taking over of the Jakarta project by the plaintiffs. The project, however, was called off later by the defendants.

The defendants requested the plaintiffs to accept the sum of $100,000 in full settlement of their fees totalling $416,318. The request was agreed to by the plaintiffs on the condition that should the defendants decide to continue with their project at Institution Hill and Grange Road in Singapore, the plaintiffs would be retained as project architects "on agreed fees". No

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[1][1992] 1 SLR 251
[2]Act of Malaysia No 117.

agreement on the fees and other terms were entered into by the parties. Subsequently, the plaintiffs were discharged by the defendants.

The plaintiffs filed a suit claiming the sum of $946,668 being loss of profits arising from the wrongful termination by the defendants of the plaintiffs' services as project architect. They grounded their action on the basis that they were a firm of architects practising in partnership. In their defence, the defendants contended that the plaintiffs were an incorporated company and as such they were "not a registered architect" within the meaning of the Singapore Architects Act, 1976 and were therefore "prohibited by law from claiming or recovering any charge, fee or remuneration from the defendants for work done by them as architects."

The plaintiffs then amended their statement of claim and claimed damages for wrongful termination of their services; professional architectural services provided to the defendants through the plaintiffs' members and employees, who were registered architects, in respect of the defendants' projects.

I. THE LAW

Under section 11(1) of the repealed Singapore Architects Act, 1970 (Cap 13) it was provided that no person, company or firm not duly registered and in possession of a valid certificate of registration could practise or profess to practise as an architect or sell or hire or otherwise supply for gain any architectural plans. Nor could such person, company or firm be entitled to recover in any court any charge or remuneration for professional ser-vices rendered as an architect in Singapore.

When the Singapore Architects Act 1970 was repealed and replaced by a new statute, the Architects Act No 14 of 1976 ("the 1976 Act") with effect from 21 January 1977, only natural persons holding approved architectural qualifications could be registered with the Singapore Board of Architects. Section 17 of the 1976 Act prohibits any person not registered under it from practising as architects. Subsection (2) of section 17 then provides that -

> no person, other than a registered architect, shall be entitled to recover in any court any charge fee or remuneration for any professional service rendered as an architect in Singapore.

Section 18(1) prohibits any person from employing "as an architect any person who is not registered under this Act".

II. THE JUDGMENT

At the conclusion of the hearing, the court handed down its judgment in the following terms:

(a) The purpose of incorporation of the plaintiffs was to carry on the practice of architects under the name of the plaintiffs. It was the plaintiffs who undertook the professional work although the work was executed by registered architects who were either shareholders or employees of the plaintiffs.
(b) The plaintiffs' claim was therefore unenforceable under the 1976 Act. The plaintiffs had also not suffered any loss due to the "premature termination" as they were fully occupied with other projects.

In the course of his judgment, the learned trial judge had referred to an earlier Singapore decision in *Raymond Banham & Anor* v *Consolidated Hotels Ltd.*[3] In that case, the plaintiffs were partners of a firm of consulting mechanical and electrical engineers practising in Hongkong. They had rendered professional engineering services[4] to the defendants in respect of the Sheraton Hotel project in Singapore, a project owned by the defendants. The plaintiffs had claimed the sum of $106,250 being the value of work done by them up on a *quantum meruit* basis.[5]

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[3][1976] 1 MLJ 5.

[4]Architect, engineers and quantity surveyors are loosely referred to as "building professionals". Most countries have enacted laws to control the practice of these building professionals. Thus, the principles applicable to interpretation of statutes governing architects, for example, may be relevant when one interprets statutes governing engineers or quantity surveyors.

[5]A *quantum meruit* award may be given in varying circumstances. In all cases however, it is given to compensate for the value of work, goods or services supplied where contractual provisions for such compensation do not exist, have been abandoned or have ceased to apply because of the rescission or termination of the contract: *Morrison Knudsen* v *British Columbia Hydro & Electric Power Authority* [1978] 85 DLR 3d 186 (Canada). See also *Sir Lindsay Parkinson & Co Ltd* v *Commissioner of His Majesty's Works Public Buildings* [1950] 1 All ER 208.

The defendants contended that the contract was illegal and unenforceable because the plaintiffs were not registered as required by the Professional Engineers Act of 1970 (Cap 225).

Section 18 of the Professional Engineers Act prohibits any unregistered person from practising as a registered professional engineer and, in particular, from engaging in professional engineering work unless he does so "under the direction or supervision of a registered professional engineer". Section 19 of the Act imposes a penalty on a person who engages in professional engineering work except under the supervision of a registered professional engineer.

The court held as follows:

(a) The plaintiffs were engaged in professional engineering work in Singapore even though the drawing of the plans was carried out in Hongkong;
(b) An overseas professional engineer who undertook employment as such in Singapore even in respect of one isolated project as this one, would be contravening the provisions of section 18 of the Professional Engineers Act should he fail to register himself under the statute unless he was engaged in such employment under the direction or supervision of a registered professional engineer; and
(c) Services performed by the plaintiffs under the said contract were therefore illegal in that the plaintiffs never took steps to get themselves registered beforehand nor to engage in such services under the direction or supervision of a registered professional engineer.

The court accordingly held that the plaintiffs' claim was unenforceable notwithstanding the defendants' own participation in this illegal contract. The severity of the law was singularly emphasised by Winslow J when he said:

> I am aware that to hold that the contract is illegal *ab initio* may appear to be harsh but such is the position with regard to illegal contracts where both parties have contravened the law, and the

> plaintiffs, much as I sympathise with them, (are) left without a remedy.[6]

The Professional Engineers Act does not expressly state that an unregistered engineer cannot claim fees for services rendered to his client. Notwithstanding that, because of the inherent illegality of the contract, the court rejected the plaintiffs' claim. The learned judge, Winslow J, took the following approach in determining the effect of illegality in this contract:

> In deciding whether a contract is illegal in itself a distinction must be made between contracts which are illegal as a result of their prohibition by statute and contracts which are illegal at common law. Such prohibition by statute can be either express or implied.[7]

According to his lordship, the plaintiffs' contract with the defendant was illegal because it was prohibited by statute, namely the Professional Engineers Act.

Based on the ratio laid down in *Raymond Banham,* the learned trial judge in the BEP Arkitek case rejected the plaintiffs' claim.

III. THE SKILLING CASE

In *John B Skilling & Ors* v *Consolidated Hotels Ltd*[8] a decision of the Singapore Court of Appeal, the appellants were partners in a firm of consultant engineers practising in Seattle, USA. The respondent company, incorporated in Singapore and having its registered office in Singapore, was at the material time engaged in the construction of a hotel complex known as the Singapore Sheraton Project. By an agreement made in August 1971, the appellants were required to render professional engineering services to the respondents in respect of the project. The agreement was subsequently terminated and the appellants sought to recover their professional fees from the respondents totalling $143,358.28. The claim was dismissed by the trial judge and the appellants

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[6] *Supra* n 3 at p 8.

[7] *Ibid* at p 6.

[8] [1979] 2 MLJ 2.

appealed.

Dismissing the appeal, Chua J held:

> The respondents in their defence maintained that the said agreement was illegal, void and unenforceable. They relied on the provisions of sections 18 and 19 of the Professional Engineers' Act (Cap 225) ... The appellants conceded that they were not registered under the Act.
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> The crucial question for determination in this case was whether or not the said agreement was illegal in itself and accordingly unenforceable. The learned trial judge held that as the appellants were not registered under the Act the said agreement was illegal and accordingly unenforceable ... It is ... submitted that it was not necessary for the appellants to register under the Act because they were engaged in professional engineering works under the "direction or supervision" of a registered professional engineer.
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> Counsel for the appellants submits that the respondents had appointed a local supervision engineer who was registered under the Act and as the appellants were "engaged in professional engineering work under the direction or supervision" of the said local engineer, it was not necessary for the appellants to register under the Act because of the provision of section 18(c) of the Act. There is no substance in this submission. The facts of the case are against the appellants. It is clear from the terms of the said agreement that the appellants do not come under the control of anyone ...[9]

In *John B Skilling*, it was further submitted by the Plaintiff's counsel that (1) the proper law of the agreement (made between the plaintiff and defendant) was the law of the State of Washington, USA as the parties had expressly agreed that the agreement should be governed by that law; (2) since there was an express clause in the agreement providing what the proper law was to be, that was conclusive in the absence of some public policy to the contrary; and (3) since there was no evidence that the agreement was illegal by its proper law, the agreement between the plaintiff and the defendant was valid and binding and could be enforced in Singapore.

Chua J, for the appeal court, rejected these arguments and said it was clear that the agreement infringed the provisions of

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[9] *Ibid* at p 3.

sections 18 and 19 of the Professional Engineers Act which required a professional engineer to be registered before he could, *inter alia*, engage in professional engineering work. His lordship said it was an elementary principle of law that a court would not enforce a contract which by its own *lex fori* it would not enforce because it was tainted with illegality . He held that in this connection the foreign law factor was irrelevant and the agreement could not therefore be enforced in Singapore.

IV. THE POSITION IN MALAYSIA

What is the position in Malaysia?

Under section 7(1)(c) of the Architects Act 1967 (Revised 1973), it is provided that no person shall, unless he is an "architect", be entitled to recover in any court any fee, charge or remuneration for any professional advice or services rendered as an architect. The expression "architect" is defined in section 2 as a person registered under section 10 of the Act.

Section 10(2) then specifies in detail the persons who are entitled to be registered as architects. There are five categories of such persons who are entitled to be registered as architects, but none of these categories includes architects practising as a body corporate.

At the time when the Malaysian statute was passed by Parliament some two decades ago, our legislators could not conceivably have foreseen that architectural firms would one day be mutated from those archaic forms and assume the form of body corporates. Time and perspectives, however, change and the architect, as in any other profession, must keep pace with the dynamics of the business community if he wishes to remain viable and credible. The architectural profession is no exception; it must change in order to survive. Otherwise, it would be a veritable dinosaur in an age of computers, robotics and satellite technology.

The Malaysian legislature has since made the necessary changes in the form of section 7A of the Architect's Act. This section provides that, notwithstanding section 7(1), a body corporate may practise as architects and recover in any court any fee, charge or remuneration for any professional advice or services rendered by it pursuant to its practice as architects if such body

corporate obtains the approval of the Board or Architect to so practise and has been issued with a valid permit.[10]

The procedures relating to all application for a permit to practise as a body corporate, the several restrictions and conditions imposed by the Board of Architects, the handling of complaints, the withdrawal of registration, the issue of permits and all other matters relating to the practice by architects as bodies corporate are laid down in detail in subsections (2) to (12) of section 7A.

With regard to remuneration payable to architects practising as a body corporate, section 7A clearly spells out that once the architectural body corporate has obtained the necessary permit from the Board of Architects, it is entitled to demand its remuneration from its client for services rendered.

In a nutshell, the unfortunate predicament in which the plaintiffs in the *BEP Akitek (Pte)* case found themselves, would not happen on this side of the Johor causeway. Thus, in terms of legal development in this respect, Malaysia is well ahead of its neighbour. There is a valuable lesson here for the Singaporean architects and legislators.

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[10]See, however, sections 2 & 8 of the Licensed Land Surveyors Ordinance 1958, where only natural persons may be licensed as land surveyors.