**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2016] SGCA 42**

Civil Appeal No 44 of 2015

Between

Nam Hong Construction &
Engineering Pte Ltd

… *Appellant*

And

Kori Construction (S) Pte Ltd

… *Respondent*

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# JUDGMENT

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[Building and Construction Law] — [Statutes and regulations] — [Building control]

# Nam Hong Construction & Engineering Pte Ltd
# v
# Kori Construction (S) Pte Ltd

**[2016] SGCA 42**

Court of Appeal — Civil Appeal No 44 of 2015
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Steven Chong J
4 November 2015; 30 March 2016

8 July 2016 Judgment reserved.

**Sundaresh Menon CJ (delivering the judgment of the court):**

1 This is an appeal against the decision of the learned Judicial Commissioner which in turn was an appeal from the decision of a District Judge. At the start of the trial before the District Judge, the respondent raised as a preliminary question of law the following issue: whether the appellant, which was not itself licensed to carry out the building works in question, was precluded by s 29B(4) of the Building Control Act (Cap 29, 1999 Rev Ed) ("the Act") from maintaining an action for the recovery of its fees. This issue arose in the context of an action brought by the appellant against the respondent over the non-payment of sums owed under a construction contract. The District Judge answered the question of law in the negative and held that the claim was not precluded by s 29B(4) of the Act ("s 29B(4)"). The respondent appealed and its appeal was allowed by the Judicial Commissioner.

2 Lying at the heart of this dispute is the licensing regime set out in Part VA of the Act. Ostensibly, this appeal turns on the scope of s 29B(4), which reads:

> Subject to the provisions of this Act, a person who carries out any general building works or specialist building works in contravention of subsection (2) shall not be entitled to recover in any court any charge, fee or remuneration for the general building works or specialist building works so carried out.

3 Section 29B(2)(*c*) of the Act prohibits the carrying out of the business of specialist building works without the required licence. As the appellant did not have such a licence, the precise question which the parties posed was whether the appellant had performed "specialist building works" within the meaning of s 29B(4) read with s 2(1) of the Act. However, it became clear to us that the substantial question on appeal was whether the licensing regime set out in Part VA (of which s 29B(4) was but a part) applied at all to subcontractors such as the appellant. Given the serious ramifications that this would likely have on the construction industry as a whole, we invited – with the consent of the parties – the Building and Construction Authority ("BCA") to assist the court by furnishing written submissions on the practical aspects of the licensing regime and the policy objectives which undergird it.

4 We appreciate the assistance rendered by the BCA. Their input was helpful. While their views cannot, of course, be determinative of the questions of statutory interpretation which we are confronted with, they provided us with some insight into the operational aspects of the Act and this helped inform our analysis. We now deliver our judgment on this matter.

**Background**

5 The respondent, Kori Construction (S) Pte Ltd ("Kori"), was a subcontractor for the MRT Downtown Line project ("the Project"). Sato Kogyo (S) Pte Ltd ("Sato Kogyo") was the main contractor for the Project. Kori engaged the appellant, Nam Hong Construction & Engineering Pte Ltd ("Nam Hong"), to perform a part of the works which it had been subcontracted to perform. In a Letter of Award issued by Kori to Nam Hong, the latter's scope of work was said to "consist of fabrication, loading and unloading of steel strutting works". It was not disputed that at the material time Sato Kogyo and Kori held both a general builder's licence as well as a specialist builder's licence granted by the BCA but Nam Hong held neither.

6 The works were carried out between February and August 2013 and a total of 11 invoices were issued. The sums owed under the first ten invoices were duly paid but Kori did not pay Nam Hong the sum of $147,538.39 owing under the 11th and final invoice. Nam Hong then commenced District Court Suit No 3508 of 2014 ("DC Suit 3508") for the recovery of that sum. In its defence, Kori pleaded, among other things, that Nam Hong had carried out "structural steelwork", which is a type of "specialist building works" within the meaning of s 2(1) of the Act, without a specialist builder's licence and was therefore barred from maintaining an action for the recovery of its fees by virtue of s 29B(4).

7 At the commencement of the trial, Nam Hong raised the preliminary issue of whether Nam Hong's claim was precluded by s 29B(4) for determination pursuant to O 33 r 5 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). The District Judge agreed to hear the preliminary issue and invited written submissions on this from the parties. When the matter was argued, it

was common ground that the crux of the issue was whether the steelwork which Nam Hong performed fell within the meaning of "specialist building works" as defined in s 2(1) of the Act. The relevant parts of that section, which we shall refer to as "para (*d*)", provide:

> "specialist building works" means the following types of building works:…
>
> (*d*) structural steelwork comprising —
>
> (i) fabrication of structural elements;
>
> (ii) erection work like site cutting, site welding and site bolting; and
>
> (iii) installation of steel supports for geotechnical building works; …

8 Nam Hong contended that only steelwork that involved *all* three tasks in para (*d*), that is to say: (i) the fabrication of structural elements; (ii) the carrying out of erection works; *and* (iii) the installation of steel supports for "geotechnical building works" (*ie*, underground building works), would be considered "structural steelwork" within the meaning of s 2(1) of the Act. On the other hand, Kori contended that the performance of *any one of* the tasks listed in para (*d*) would amount to the performance of "specialist building works". We shall refer to these as the "conjunctive interpretation" and the "disjunctive interpretation" respectively.

9 Given that it was common ground that Nam Hong did not install any steel supports for geotechnical works, but that it did engage in the fabrication of structural elements, the difference between the conjunctive and disjunctive interpretations is critical. If the conjunctive interpretation were adopted, Nam Hong's claim would not be precluded because it would not be taken to have performed specialist building works and s 29B(4) would not bite. By contrast, if the disjunctive interpretation were adopted, Nam Hong's claim would *seem*

bound to fail because of s 29B(4) of the Act. The District Judge held that the conjunctive interpretation was to be preferred and Kori appealed.

**The Judicial Commissioner's decision**

10 The Judicial Commissioner's decision is reported as *Kori Construction (S) Pte Ltd v Nam Hong Construction & Engineering Pte Ltd* [2015] 2 SLR 616 ("the GD"). When the matter came before her, the focus continued to be whether the conjunctive or disjunctive interpretation was to be preferred (see the GD at [13]). The Judicial Commissioner disagreed with the District Judge and agreed with Kori that the disjunctive reading should be preferred. She gave three reasons for her decision:

(a) The licensing regime in Part VA of the Act was meant to enhance safety standards in the construction of buildings *generally* and not just "structural steelwork" carried out underground (at [36]). Viewed in this light, a disjunctive reading of the three limbs of para (*d*) would promote the object of the Act whereas a conjunctive reading would not because the latter would "confine the licensing requirements in respect of 'structural steelwork' only to the narrow situation where a portion of such work is carried out underground" (at [33]).

(b) The conjunctive interpretation would defeat the objects of the licensing regime, since it would enable industry players to easily circumvent the licensing requirements by "employing separate contractors to perform separate functions under [para (*d*)]" (at [37]).

(c) The conjunctive interpretation would render the definition of "minor specialist building works" under s 29(1)(*b*) of the Act otiose (at [41]–[42]).

11 The Judicial Commissioner also rejected Nam Hong's alternative argument, which was that s 29B(4) of the Act did not apply because Nam Hong was merely a subcontractor and was therefore not a "builder" within the meaning of s 2(1) of the Act who was subject to the licensing regime in Part VA. The Judicial Commissioner held that the argument was misconceived because it disregarded specific definitions of "builder", "general builder", and "specialist builder" contained in s 29A of the Act, which applied for the purposes of Part VA in preference to the general definitions set out at s 2(1). In her assessment, the Act required *all persons* who carried out specialist building works to be licensed, irrespective of whether they were main contractors or subcontractors (at [38]–[40]).

**The parties' cases on appeal**

12 Mr Andrew John Hanam, counsel for Nam Hong, advances many of the same arguments before us that he did before the Judicial Commissioner. First, he submits that the conjunctive reading should be preferred. He contends that para (*d*) refers to a single composite activity which is made up of three constituent elements (found in each of the sub-limbs of the paragraph), all of which must be present before it can be said that "structural steelwork" has been carried out. He gives two reasons for preferring this interpretation:

> (a) First, it will be consistent with the purpose of the licensing regime, which is that only inherently "dangerous work" with the potential to cause extensive damage is to be regulated. Under the disjunctive reading, even those who carry out "non-risky" structural steelwork (such as welding) would require specialist builder's licences. This would result in overregulation and will prevent smaller businesses from entering the market, thus pushing building costs up.

(b) Second, he invokes the rule against doubtful penalisation. Mr Hanam points out that persons who perform specialist building works without a licence are liable to criminal sanction (see s 29B(3) of the Act). Since the wording of the statute did not unambiguously favour the disjunctive interpretation, he contends that this court ought to prefer the conjunctive interpretation, which narrows rather than expands the ambit of criminal liability.

13 Second, and in the alternative, Mr Hanam submits that Nam Hong is not caught by the Act's licensing regime because it is not a "builder" within the meaning of s 2(1) of the Act to whom the licensing regime would apply. However, he did not deal with the specific definitions of "builder", "general builder", and "specialist builder" contained in s 29A of the Act which the Judicial Commissioner referred to.

14 Mr Twang Kern Zern, counsel for Kori, argues to the contrary on both issues. On the first issue, he submits that the disjunctive construction is to be preferred because it is both consistent with the purpose as well as the text of the statutory scheme. On the second issue, he relies on the legal maxim *lex specialis derogat legi generali* (a specific law prevails over a general law) and submits that the definitions of "builder" and "specialist builder" contained in ss 29A(1) and 2(1) of the Act respectively should be applied in preference to the general definition of "builder" in s 2(1) of the Act. On this basis, he submits that Nam Hong required a licence to perform specialist building works even though it was only a subcontractor at the material time.

**Issues**

15 Given that the parties have reprised the same arguments before us as they did before the Judicial Commissioner, the same two issues arise for our consideration. They are:

(a) whether Nam Hong had carried out "specialist building works" within the meaning of s 2(1) of the Act; and

(b) whether Nam Hong (which is a subcontractor and not a "builder" within the meaning of s 2(1) of the Act) falls within the Act's licensing regime.

16 Each of the issues is distinct but they both relate, in essence, to the question of whether Nam Hong's claim is precluded by s 29B(4). If Nam Hong succeeds on either point then the appeal will have to be determined in its favour. Specifically, if Nam Hong had not carried out "specialist building works" then its claim would not be precluded by s 29B(4). Likewise, if Nam Hong were correct that only "builders" within the meaning of s 2(1) of the Act need be licenced then s 29B(4) would not apply to bar its claim.

**Our decision**

17 After careful consideration of the submissions of the parties and the text and purpose of the Act, we consider that Nam Hong had carried out "specialist building works" within the meaning of the Act. However, we hold that the licensing regime in Part VA of the Act does *not* apply to subcontractors. It follows, therefore, that s 29B(4) does not operate to bar Nam Hong's claim in DC Suit 3508 even though it had carried out specialist building works. We now set out our reasons.

***Had Nam Hong carried out specialist building works?***

18 We agree with the Judicial Commissioner that this issue turns on whether the conjunctive or disjunctive view is to be preferred. We also find ourselves in substantial agreement with the reasons she gave for preferring the latter construction. For this reason, we can deal with this issue briefly.

*The purposive argument*

19 It is common ground that both the conjunctive and disjunctive interpretations are grammatically possible. In this context, the use of the verb "comprising", when used in relation to different items in a list of numbered paragraphs connected by the expression "and", can be interpreted in one of two ways. First, it can be interpreted to mean that "structural steelworks" refers to a single set of items, all of which must be present before it can be said that "structural steelworks" have been carried out. This is the conjunctive interpretation. Second, it can be read to mean that "structural steelworks" come in different forms, including those listed in the numbered paragraphs in para (*d*), each of which is a separate form or type of structural steelwork. This is the disjunctive interpretation. Whether one reading or the other is to be preferred turns on Parliamentary intention.

20 The licensing regime in Part VA of the Act was introduced with the passage of the Building Control (Amendment) Act 2007 (Act 47 of 2007) ("the Amendment Act") and it came into force in December 2008. The Amendment Act was introduced in the wake of the collapse of Nicoll Highway in 2004. Following the incident, perhaps the worst construction disaster in Singapore in recent memory, the Ministry of National Development and the Ministry of Manpower set up a Joint Review Committee on Construction Safety ("JRC") to "systemically examine the regulatory

framework at various stages of the construction process" (see *Singapore Parliamentary Debates*, *Official Report* (20 September 2007), vol 83 at col 2054 (Grace Fu Hai Yien, Minister of State for National Development) ("*Second Reading Speech*").

21 The collapse of Nicoll Highway was caused by, among other things, critical design and construction errors in the support system for the geotechnical work that was being carried out at the site of the collapse (see *Report of the Committee of Inquiry into the Incident at the MRT Circle Line Worksite that led to the Collapse of The Nicoll Highway on 20 April 2004* (11 May 2005) vol 1 (part 1) at pp 88–89 (Chairman: Richard Magnus)). Referring to the incident, the JRC made a number of recommendations as to how safety standards in the construction industry could be enhanced, one of which was the introduction of a licensing scheme for contractors (see *Second Reading Speech* at col 2054). Pointing to this, Mr Hanam submits that the targeted mischief is a narrow one: it is the installation of steel support for geotechnical works (and the fabrication and erection works which precede such installation) which Parliament intended to regulate by their designation as "specialist building works". The mere fabrication of structural elements or the performance of erection works alone, he argued, would not qualify. With respect, we cannot agree.

22 First, we agree with the Judicial Commissioner that there is nothing in the Parliamentary debates which accompanied the passage of the Amendment Act which suggests that the scope of "specialist building works" is limited *only* to geotechnical works. While flaws in the geotechnical building works were identified as the proximate cause of the collapse of Nicoll Highway, the remit of the JRC (and therefore the ambit of the Amendment Act) was much wider. In moving the Building Control (Amendment) Bill 2007 (Bill 34 of

2007) ("the Bill"), then Minister of State for National Development Grace Fu Hai Yien said (see *Second Reading Speech* at cols 2054 and 2058):

> This Bill will put in place various measures recommended by the JRC to enhance professionalism and safety standards in the construction industry. These include the regulation of underground building works, provision of adequate site supervision, ensuring independence of parties in a construction project, licensing of builders and raising of penalties for noncompliance.
>
> …
>
> For specialist builders, there will be different types of licence, each authorising a specific area of specialist building works to be carried out as a business. These include specialist works in piling, ground support and stabilisation, site investigation, structural steel, pre-cast concrete and on-site post-tensioning. The intention is to ensure that only competent licensees are allowed to execute these specialist works, given the inherently high risks associated with such works.

23 Apart from the more stringent regulation of underground building works through the new licensing regime, the Amendment Act also makes rules instituting requirements for adequate site supervision and measures to ensure the independence of parties in a construction project. It also raises penalties for non-compliance with building control regulatory requirements (see, *eg*, ss 3, 6, 8, and 14 of the Amendment Act). Taken together, the purport of the Amendment Act, in our judgment, was to improve safety standards in all areas of the construction industry, and not just the sector which deals with geotechnical works. This is also supported by a reference to the Explanatory Statement to the Bill, where it was stated that the object of the licensing regime was to "raise standards of work in the construction industry". To that end, the disjunctive interpretation should be preferred to the conjunctive interpretation.

24 Second, it seems to us that the conjunctive interpretation would *not* even achieve the stated aim of subjecting underground building works to tighter regulation. As noted by the Judicial Commissioner at [37] of the GD, if the conjunctive interpretation were adopted, builders who *only* install steel supports for geotechnical works would *not* be required to be licensed. They would need to apply for a licence *if and only if* they *also* carry out the fabrication of structural elements *and* erection work. By contrast, the disjunctive interpretation would require every builder that carries out underground building work, whether solely or in conjunction with other structural steelwork, to be licensed. Thus, even by Nam Hong's understanding of the purpose of the Amendment Act, it is the disjunctive, and not conjunctive, interpretation which is to be preferred.

*The textual argument*

25 Section 29B(2)(*b*) of the Act provides that persons who are only in the business of carrying out "minor specialist building works" need not apply for a specialist builder's licence. Instead, they would only need a general builder's licence. Section 29A(1) lists four separate categories of "minor specialist building works" of which only the second pertains to structural steelwork. The relevant part of s 29A(1) reads:

> "minor specialist building works" means the following specialist building works: …
>
> > (b) structural steelwork comprising fabrication and erection work for structures with a cantilever length of not more than 3 metres, a clear span of less than 6 metres and a plan area not exceeding 150 square metres; …

The carve-outs in the aforementioned paragraph pertain only to (a) fabrication work and (b) erection work. Works of either description which fall below the specified dimensions are considered "minor specialist builder works" and may

be performed by persons who hold only a general builder's licence. There is no carve-out for the installation of steel supports for geotechnical work.

26 The point to be made is this. On the conjunctive interpretation, the performance of fabrication work and/or erection work of *any dimension* would not fall within the definition of "specialist building work" *unless* it also includes the installation of steel-supports for geotechnical work. This renders the carve-outs in s 29A(1) of the Act completely otiose. To us, this is a strong indication that Parliament intended that para (*d*) be read disjunctively, for that would be the only reason why it would have thought it necessary to provide for these specific carve-outs. Mr Hanam places great reliance on the legal maxim "Parliament does nothing in vain". However, as the Judicial Commissioner rightly noted, Nam Hong's own argument militates *against* the conjunctive interpretation which it advances (see GD at [42]).

*The principle against doubtful penalisation*

27 If the disjunctive interpretation were adopted, Nam Hong might not only be deprived of payment for its services, but it might also find itself in contravention of s 29B(3) of the Act, which makes it a criminal offence to carry out either general building works or specialist building works without a licence. Mr Hanam therefore relies on the principle against doubtful penalisation (see Oliver Jones, *Bennion on Statutory Interpretation* (LexisNexis, 6th Ed, 2013) ("*Bennion*") at p 749) to submit that we should prefer the conjunctive interpretation over the disjunctive interpretation in order to avoid subjecting Nam Hong (and other contractors in like situation) to penal consequences in the face of an ambiguous statute. We cannot accept this submission.

28 In the decision of the Singapore High Court in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183 ("*Low Kok Heng*") at [30]–[38], V K Rajah JA considered the principle against doubtful penalisation, which he termed the "strict construction rule", at some length. The following propositions may be gleaned from the judgment of the court:

(a) Section 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) enjoins the courts to interpret statutes purposively, irrespective of whether it is a penal or civil statute. The purposive approach towards statutory interpretation takes precedence over all other common law principles of interpretation, including the strict construction rule: at [55]–[57].

(b) The strict construction rule is a "tool of last resort" to which recourse may be had only if there is genuine ambiguity in the meaning of the provision *even after* the courts have attempted to interpret the statute purposively. If the meaning of the provision is sufficiently clear after the ordinary rules of construction have been applied, there is no room for the application of the strict construction rule: at [37], [38], and [85].

(c) The strict construction rule does not prevent the court from adopting an interpretation which involves changing the words of the statute or reading one word in substitution of another, *if* that was clearly the intention of Parliament. Rajah JA referred to the case of *Regina v Oakes* [1959] 2 QB 350, in which the English Court of Criminal Appeal held that the conjunction "and" should be read as "or", even though it produced a result which was unfavourable to the respondent, an accused person: at [84].

29 In our judgment, para (*d*) is free of any genuine ambiguity and it is clear that the disjunctive interpretation is the right one. Such a construction is both consonant with Parliament's intention in addition to being congruent with the text of the Act. The arguments presented by Nam Hong to the contrary are, with respect, unpersuasive and do not succeed in showing that there is any uncertainty as to its meaning. There is therefore no room for the application of the rule against doubtful penalisation.

***The scope of the licensing regime***

30 We turn to the second issue, which is the deceptively simple question of whether the licensing regime even applies to subcontractors such as Nam Hong. We will state from the outset that the provisions in question are not felicitously drafted and at many points, they present contradictions which we highlight in the course of our judgment. On the whole, the provisions in question strike us as being the product of perhaps hasty engraftment. Notwithstanding this, our task is first to find, and then to give effect to Parliament's intention to the greatest extent that this is permitted by the express words of the statute (see *Low Kok Heng* at [52]).

31 With that in mind, we propose to deal with this issue in four parts:

(a) First, we will summarise the respective parties' arguments on this issue.

(b) Second, we will explain why we think there is a crucial ambiguity in the operative provisions of the licensing regime.

(c) Third, we will attempt to resolve this ambiguity by reference to the purpose of the Act.

(d) Finally, we will set out what we consider to be the appropriate rectifying construction to be adopted in these circumstances.

*The parties' arguments on the licensing regime*

32 Mr Hanam's argument is very simple. He submits that subcontractors fall outside the general definition of a "builder" as it is set out in s 2(1) of the Act and therefore are not subject to the licensing regime. The relevant part of s 2(1) of the Act provides:

> **"builder"** means *any person who undertakes, whether exclusively or in conjunction with any other business, to carry out any building works* for his own account or for or on behalf of another person (referred to in this definition as A), but does not include any person who contracts with a builder for the execution by that person of the whole or any part of any building works undertaken by the builder for or on behalf of A under a contract entered into by the builder with A [emphasis added in italics and bold italics]

It can be seen that a subcontractor (that is, any person who merely "contracts with a builder for the execution by that person of the whole or any part of any building works undertaken by the builder for or on behalf of A under a contract entered into by the builder with A") is *not* considered a builder within the meaning of s 2(1) of the Act.

33 Mr Twang does not dispute that Nam Hong – as a subcontractor – does not fall within the definition of "builder" as it is set out in s 2(1) of the Act. However, he contends that the reference to the general definition of a "builder" in s 2 of the Act is a red herring because the relevant provisions to help shed meaning on the term "builder" as it is used in the context of the licensing regime are to be found in Part VA of the Act itself.

34 To facilitate the understanding of his argument, we will first set out the other relevant sections of Part VA of the Act:

> [s 29A(2)(*b*)] *a person carries on the business of a specialist builder* if the person carries out, or undertakes to carry out, (whether exclusively or in conjunction with any other business) any specialist building works for or on behalf of another person for a fixed sum, percentage, or valuable consideration, or reward other than wages;
>
> …
>
> [s 29B(2)(*c*)] Subject to the provisions of this Act, *no person shall… carry on the business of a specialist builder* in Singapore *unless he is in possession of a specialist builder's licence.*
>
> …
>
> [s 29B(4)] Subject to the provisions of this Act, *a person who carries out any general building works or specialist building works* in contravention of subsection (2) shall not be entitled to recover in any court any charge, fee or remuneration for the general building works or specialist building works so carried out.
>
> [emphasis added]

35 Mr Twang's argument, as we understand it, proceeds in the following way. He submits that Part VA of the Act neither refers to nor imposes any obligations on persons by virtue of their general *status* as builders. Rather, the material prohibition is against a defined *activity*: namely, "carry[ing] on the business of a specialist builder" (s 29B(2)(*c*)). This is a term of art which is defined in s 29A(2)(*b*) as carrying out or undertaking to carry out specialist building works on behalf of another for valuable consideration. Nam Hong, having performed specialist building works for Kori for a fee, is a "person" who had carried on the business of a specialist builder within the meaning of s 29A(2)(*b*). The Act enjoins Nam Hong from doing so unless it has a licence, which it did not, and accordingly penalises it by providing that it cannot maintain an action for its fees (s 29B(4) read with s 29B(2)(*c*)).

36 During oral argument, Mr Twang built on this by drawing our attention to the extract from the *Second Reading Speech* at col 2058 set out above at [22], where Ms Grace Fu explained that the purpose of the licensing scheme was to "ensure that only competent licensees are allowed to ***execute*** [specialist building works], given the inherently high risks associated with such works" [emphasis added]. Mr Twang laid considerable stress on the word "execute", arguing that this suggested that the intention was that the persons who were *actually performing* specialist building works would need a licence, irrespective of whether they were the main contractor or a subcontractor. He pointed out that the licensing regime was introduced against the backdrop of the collapse of Nicoll Highway where lapses in the performance of geotechnical works were the proximate cause of the accident. In the light of this, he submitted that it was wholly understandable why Parliament would take a stricter view of the performance of specialist building works as compared to general building works. While it might be sufficient for an unlicensed subcontractor performing general building works to be supervised by a main contractor who holds a general builder's licence, this was *not* Parliament's intention where specialist building works was concerned.

37 Were that the whole of the matter, we might have been prepared to agree with Mr Twang, whose textual analysis of the relevant statutory provisions cited at [34] was persuasive, and whose explanation of the relevant Parliamentary intent was plausible. However, when we reflected more carefully on the matter, several points gave us cause for concern. In particular, we found this reading difficult to reconcile with the scheme set out in the Act for the grant of licences and what the BCA told us of the way the Act operates in practice. We elaborate on both of these matters in turn.

*The licensing regime*

38 It is clear that Part VA of the Act is concerned with licensing the "*business* of a general builder or a specialist builder". This is made clear, for instance, by:

(a) the heading of Part VA which is "Licensing of Builders";

(b) s 29B(2), which prohibits the carrying on of the *business* of a builder (of whatever form, general or specialist) without a licence; and

(c) s 29C, which provides for the licensing of one who wishes to carry on the *business* of a builder.

39 One would expect that the "*business*" of a builder would draw meaning from the definition of a builder. To put it another way, if a given activity carried out by a given person is held not to constitute the activity of a "builder" then one would expect for that reason that a person engaged in that activity cannot be said to be engaged in the *business* of a builder.

40 The expression "builder" is defined at two points in the Act. The first is at s 2(1), where a builder is simply defined as a person who undertakes to carry out "building works" (which itself is defined at s 2(1)), whether exclusively or as part of any other business, and irrespective of whether he does so for himself or for another. It is common ground, and indeed it is evident upon a careful reading of the definition of "builder" in s 2(1) of the Act, that it does not include a subcontractor (see [32]–[33] above). The second is at s 29A(1), which provides that a "'builder' means a general builder or a specialist builder". Section 29A(1) does not in fact provide a definition of "general builder" or "specialist builder". Indeed, the expression "general builder" is not defined anywhere in the Act and the expression itself is not

used outside Part VA. The expression "specialist builder" is defined at s 2(1) as "any person who is licensed under Part VA as a specialist builder".

41 If we were to apply the general definition of "builder" in s 2(1) of the Act (as it would appear we must, for the expression "builder" is not meaningfully defined in s 29A(1)), it would follow, as Mr Hanam submits, that Nam Hong is *not* a builder because it is a subcontractor; and if it is not a builder, then the regime in Part VA of the Act which is concerned with licensing the *business of a builder*, should not apply to Nam Hong.

42 As against this, Mr Twang points out that s 29B(2)(*c*) of the Act provides that "no *person* shall—carry on the business of a specialist builder in Singapore unless *he* is in possession of a specialist builder's licence" [emphasis added]. He argues that if Parliament had intended that subcontractors be excluded from this prohibition, the expression "builder" would have been used in place of the more neutral "person". This would have made it clearer that subcontractors do not need a licence to perform specialist building works. While this argument can certainly be put, it seems to us that it cuts both ways. If Parliament had intended that the licensing regime would apply to all persons who sought a licence then it would likewise have been a simple matter for it to have used the expression "person" instead of "builder" in s 29C(1) to make that clear. Yet, Parliament did not do so. Instead, s 29C(1), which provides for the licensing of the business of a builder, provides in material part that a "license may be granted… to a *builder* authorising the *builder* [to carry out building works]" [emphasis added]. The point is that Parliament used the expression "builder", which suggests that it intended that subcontractors would not be subject to the licensing regime.

43 We note that the Judicial Commissioner also did not think that the general definition of builder in s 2(1) of the Act should apply nor did she think that subcontractors were excluded from the licensing regime. Instead, she adopted the specific provisions that are concerned with defining how one may come to "carry on the business" of a general or a specialist builder found in ss 29A(2)(*a*) and 29A(2)(*b*) to arrive at the opposite conclusion. In essence, these sections provide that one who undertakes the relevant type of building works (whether general or specialist) for reward carries on the business of the corresponding type of builder. Section 29A(2)(*b*) has already been set out above, but for ease of reference, we reproduce both sections here:

> 29A(2) For the purposes of this Part —
>
> (a) a person carries on the business of a general builder if the person carries out, or undertakes to carry out, (whether exclusively or in conjunction with any other business) general building works for or on behalf of another person for a fixed sum, percentage, or valuable consideration, or reward other than wages, *but not if the person carries out, or undertakes to carry out, general building works only as a sub-contractor;*
>
> (b) a person carries on the business of a specialist builder if the person carries out, or undertakes to carry out, (whether exclusively or in conjunction with any other business) any specialist building works for or on behalf of another person for a fixed sum, percentage, or valuable consideration, or reward other than wages;
>
> [emphasis added]

44 The Judicial Commissioner pointed to a telling contrast between ss 29A(2)(*a*) and 29A(2)(*b*) of the Act. The former defines what it means to carry on the business of a general builder and it *specifically excludes* a person who "carries out, or undertakes to carry out, general building works *only as a sub-contractor*" [emphasis added]. The latter, which defines what it means to carry on the business of a specialist builder, contains no such proviso. She therefore inferred, from the absence of such a proviso in s 29A(2)(*b*), that

Parliament's intention was that all subcontractors who perform specialist building works must themselves hold a licence (see the GD at [39] and [40]).

45 We can certainly understand why the Judicial Commissioner arrived at this conclusion, but with due respect to her, if the general definition of a "builder" under s 2(1) of the Act does not include a subcontractor, then it would seem counterintuitive to construe Part VA, which concerns the licensing of the *business* of a builder, as extending also to those who do building works as subcontractors only, *even though* they are not builders at all as defined by the Act. To put it another way, it seems perverse to say that one who undertakes specialist building works as a subcontractor is not a builder; but if one is doing so for reward then one, though not a builder, shall be taken to have carried out the business of a specialist builder. Indeed, the situation would seem doubly perverse because if Kori's construction were accepted, Kori would appear to be the recipient of an undeserved windfall. Nam Hong, not being a licensed specialist builder would be precluded from enforcing payment against Kori for the subcontracted steelworks; but Kori, which hired Nam Hong to perform the steelworks in the first place, would nevertheless be entitled to recover its fees from Sato Kogyo (the main contractor) in respect of the very same steelworks because it, unlike Nam Hong, was licensed.

46 In this light, we return to the logic of the arguments we have outlined at [41]–[45] above, which, it seems to us, would lead to the following conclusions:

(a) Ignoring the proviso in s 29A(2)(*a*) of the Act and applying a plain reading of the general definition of a builder in s 2(1), the licensing regime seemingly would not apply to a subcontractor.

(b) The inclusion of the proviso in s 29A(2)(*a*) is, on this basis, an unnecessary addition.

(c) In that light, its omission from the corresponding provision in s 29A(2)(*b*) should not be vested with any significance.

47 This is certainly a plausible analysis, even if it is not ultimately a completely satisfactory one. While it enables a construction that affords a coherent meaning being placed on the term "builder", it does not address the various other inconsistencies in the Act. It seems to us that recourse to the text of the Act alone will not avoid some of the ambiguity in its drafting and so does not readily provide a complete answer to this question. Regard should therefore be had to the *purpose* of the enactment. Section 9A of the Interpretation Act mandates that an interpretation which advances the underlying legislative purpose of the enactment be favoured over one which does not (see *Low Kok Heng* at [41]). With that in mind, we turn to consider the relevant material which might shed light on the answer to this question.

*The purpose of the licensing regime*

48 There is no question that the improvement of safety standards in the construction industry is the chief object of the licensing scheme. It is also undisputed that specialist building works are treated differently under the Act because of the "high risks" which they pose (see [36] above). However, it does not, in our judgment, follow that Parliament intended that *all* persons who perform specialist building works, irrespective of whether they are main contractors or subcontractors, be licensed. We reach this conclusion for two essential reasons.

49 First, to read in such a requirement would impose a significant fetter on the ability of smaller construction companies to enter the market. At present, a corporation which seeks to be granted a specialist builder's licence must have a paid-up capital not less than $25,000 and it must be accredited or registered with a prescribed professional or technical body or association (see ss s 29G(3)(*c*) and s 29G(3)(*da*) of the Act). Additionally, it must also satisfy a slew of conditions, which are set out both in the Act as well as the Building Control (Licensing of Builders) Regulations 2008 (S 641/2008) ("BC Regs"). We set out two of them:

(a) The management of the business of the corporation must at all times be under the charge and direction of an "approved person" who either (i) possesses at least a diploma in a construction-related field *and* has at least three years of practical experience in the execution of construction projects in Singapore *or* (ii) has undergone a prescribed course conducted by the BCA *and* has at least 8 years of practical experience in the execution of construction projects in Singapore: s 29G(3)(*e*)(i) of the Act read with reg 14 of the BC Regs.

(b) The execution and performance of the class of specialist building works undertaken by the corporation must be under the personal supervision of a "technical controller", who must be a person who holds a Bachelor's degree in the field of civil or structural engineering from a recognised institution *and* has at least 5 years of practical experience in the execution of specialist building works of that class: s 29G(3)(*f*) read with reg 15 of the BC Regs.

50 These are significant barriers to entry and it would preclude a large number of small and medium enterprises from taking on specialist building

works. This does not mean it is therefore wrong to construe the Act as having this effect; but it is not evident that such barriers are necessary or were intended to apply to those undertaking *any* aspect of specialist building work regardless of whether they carry out such work under the supervision of a licensed contractor and regardless of the precise scope and nature of their responsibility. Parliament may be taken to know the realities of the conditions in which the legislation is to be applied. In this regard, it is germane to have regard to the view of the BCA, which explained that it is "not an uncommon industry practice for the first level sub-contractor (being the licensed specialist builder) to 'sub-contract' the specialist building works". It is clear that there is a wide range of contracting responsibilities in this context. To hold that each and every such subcontractor must be specially licensed seems implausible to us and indeed this was the view of the BCA. As they put it, to expect all subcontractors (whom they said "are mostly small businesses") to be licensed would be "unduly onerous" and they neither expected this of market participants nor thought it necessary in order that safety may be maintained in the construction industry.

51 In our judgment, if this were the intention of Parliament it would have had to be very clearly expressed and as we have already observed, the Act is certainly not clear in this regard. We are therefore satisfied, as suggested by BCA, that the regulatory objective of the Act would be adequately served as long as "there is a general builder and [specialist] builder on record for the carrying out of the building works". The scope of specialist building works is narrow enough, they say, for the "first level specialist sub-contractor… to take responsibility over the conduct of such specialist building works conducted by himself or by any sub-contractors engaged by him."

52 Second, it seems to us that the references to geotechnical works made by Mr Twang (see [36] above) were somewhat overstated and even misplaced. While it is not disputed that the collapse of Nicoll Highway (which was brought about by failures in the geotechnical works carried out) precipitated the passage of the Amendment Act, specialist building works are not, *per se*, about the performance of geotechnical building works. Geotechnical works are tightly regulated at other parts of the Act. Among other things, they may not be commenced save under the supervision of a qualified person who must be a geotechnical engineer (ss 7(2)(*a*) and 8(1)(*d*) of the Act) who must in turn be supported by a specialist accredited checker (s 8(1)(*f*)(i)). In our judgment, a holistic review of the Act suggests that different measures were applied to achieve the desired goal of regulating the industry. While Mr Twang's arguments draw on the general desire of Parliament to regulate specialist building works and geotechnical works, we are not satisfied that this justifies the particular conclusion he urges upon us, which is that each and every subcontractor involved in such work must be separately licensed.

*Can a rectifying construction be adopted?*

53 Against this background of competing considerations, we consider that when the Act is examined in its totality, the better view is that Parliament's intention was that subcontractors would *not* be required to apply for a specialist builder's licence. The only question that remains is whether it is possible for us to give effect to this given the various ambiguities in the Act that we have referred to above (see [38]–[47] above). On balance, we see two ways in which Parliament's intention may be given effect to:

(a) First, a proviso similar to that currently found at the end of s 29A(2)(*a*) of the Act may be read into s 29A(2)(*b*) to make it *clear*

that a person who merely carries out or undertakes to carry out specialist building works only as a subcontractor is *not* to be taken as having carried on the business of a specialist builder and therefore need not apply for a licence to carry out specialist building works.

(b) Second, all references to "person" in s 29B of the Act, which is entitled "Prohibition against unlicensed builders", may read as references to "builders" instead. This would have the effect of harmonising s 29B with s 29C(1), which relates to the grant of licences and currently provides that only "builders" may be granted licences.

54 Each of these is a form of what is termed a "rectifying construction" in *Bennion* at p 788. It involves the addition or substitution of words to give effect to Parliament's manifest intentions. As between the two options, we have a slight preference for the former, for it would entail fewer alterations to the words of the Act and would enable a coherent construction of the Act based on the general definition of "builder" in s 2.

55 The test for when the adoption of a rectifying construction is permitted was set out by us in *Kok Chong Weng and others v Wiener Robert Lorenz and others (Ankerite Pte Ltd, intervener)* [2009] 2 SLR(R) 709 ("*Kok Chong Weng*") at [57] where we adopted the test that was set out by of the House of Lords in *Wentworth Securities Ltd v Jones* [1980] AC 74, as refined in *Inco Europe and others v First Choice Distribution (a firm) and others* [2000] 1 WLR 586. Chan Sek Keong CJ, delivering the judgment of the Court of Appeal, held that the following three cumulative conditions had to be adopted before the court would read words into a statute to rectify what it perceived to be an error in legislative drafting (see *Kok Chong Weng* at [57]):

(a) first, it was possible to determine from a consideration of the provisions of the Act read as a whole what the mischief was that Parliament sought to remedy with the Act;

(b) second, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, the eventuality that was required to be dealt with so that the purpose of the Act could be achieved; and

(c) third, it was possible to state with certainty what the additional words would be that the draftsman would have inserted and that Parliament would have approved had their attention been drawn to the omission.

56 In our judgment, these three conditions are satisfied in this case. The licensing scheme was introduced to improve professional standards in the construction industry. However, when the Act is examined in its totality, it seems to us to be clear that its object would be achieved as long as there is at least *one* licensed builder of each type (general and specialist) along the contractual chain who would undertake general supervisory responsibility for building works of each type falling within its purview. As it presently stands, the words of the statute seem, at least potentially, to apply the coercive force of the State wider than is necessary to achieve the object which Parliament had in mind. This is an instance of what is described in *Bennion* at p 795 as a *casus male inclusus* (a case wrongly included).

57 A literal reading of the provisions could have the consequence of imposing an onerous regulatory burden on the construction industry which we do not believe was intended by Parliament. This can easily be averted if a proviso similar to that which is already found in s 29A(2)(*a*) were introduced

to s 29A(2)(*b*) as well to make it clear that subcontractors are excluded from the licensing regime for specialist builders. We are also satisfied on balance that this was an instance of the draftsman and Parliament not appreciating the difficulties we have alluded to.

58 Finally, it is possible to state with certainty what the additional words would be, for a template is ready to hand. The additional words would simply reproduce, *mutatis mutandis*, the words of the proviso in s 29A(2)(*a*) of the Act. The amended s 29A(2)(*b*) would read as follows (inclusion in bold and enclosed in square brackets):

> a person carries on the business of a specialist builder if the person carries out, or undertakes to carry out, (whether exclusively or in conjunction with any other business) any specialist building works for or on behalf of another person for a fixed sum, percentage, or valuable consideration, or reward other than wages, [**but not if the person carries out, or undertakes to carry out, specialist building works only as a sub-contractor**]

59 This proposed amendment would restore congruence and integrity to the Act, and avert the undesirable consequences which we have identified in this judgment.

## Conclusion

60 For these reasons, we allow the appeal and hold that while Nam Hong had performed specialist building works within the meaning of s 2(1) of the Act, it did not need a licence to do so because it was a subcontractor. For this reason, its claim in DC Suit 3508 is not precluded by s 29B(4).

61 Nam Hong is to have its costs of the appeal and of the hearing before the Judicial Commissioner. We are inclined to fix the costs and will receive submissions presently. The usual consequential orders are to follow.

| | | |
|---|---|---|
| Sundaresh Menon<br>Chief Justice | Andrew Phang Boon Leong<br>Judge of Appeal | Steven Chong<br>Judge |

Andrew John Hanam (Andrew LLC) for the appellant;
Twang Kern Zern (Central Chambers Law Corporation) for the respondent.