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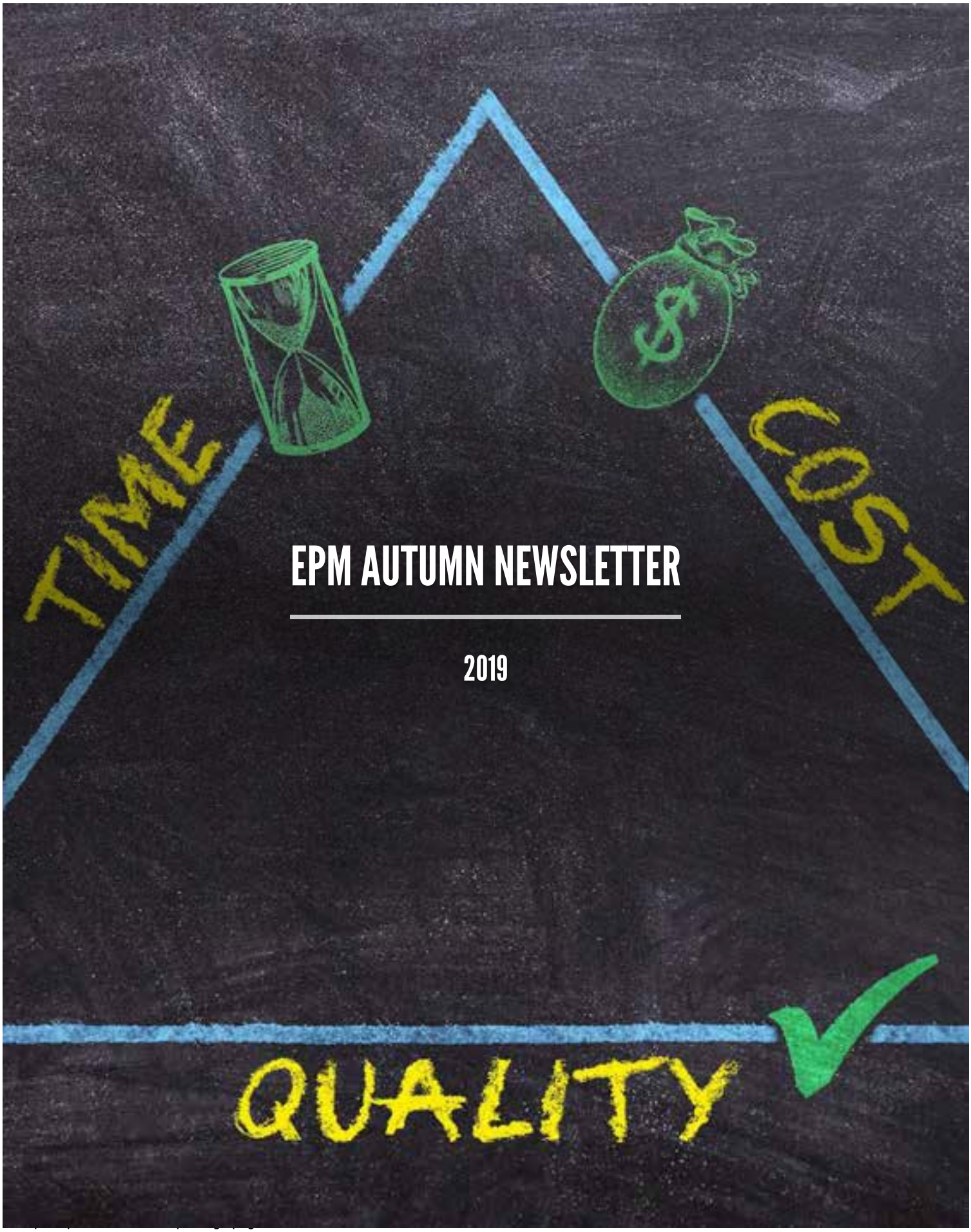

EPM AUTUMN NEWSLETTER

2019

RISK ALLOCATION WITH AN EYE ON SYDNEY'S OPAL TOWER FIASCO

Ryan Aitken, Project Manager, EPM

In the construction industry, the effective management of risk can make the difference between a lucrative and fruitless development. More commonly we are seeing project risks transferred from the client or 'principal' to the builder or 'contractor', but to what end?

In the case of the Sydney Opal Tower (SOP), the client appears to have transferred control to the contractor for the design and construction of this $155M residential tower. Despite the perception of the transfer of a significant amount of project risk through adopting a Design & Construct (D&C) methodology, we can now see that the client is likely

to suffer significant losses from this investment and potentially face the burden of the remedial costs.

Let's take a closer look at what happened in the case of the SOP, which many of you may have been following and eagerly awaiting an explanation of events that unfolded. It's Christmas Eve and all is not well for the residents of the SOP. Across the 33 floors and 392 apartments, approximately 3,000 residents are being evacuated from the SOP due to reported severe cracking and an extremely loud crash echoing from level 10. Hundreds of families are forced to abandon their Chrissy presents and that delicious leg of ham to move into temporary accommodation. An Interim Report completed by Unisearch in early January 2019 recognises a number of potential errors or failures that occurred ranging from incorrect structural member sizes, incomplete or cut structural connections and potential anomalies in the substructure. Despite the client's intention to transfer risks associated with such items, it now appears that the client is suffering the direct and indirect consequences of the issues raised.

With the popularity of D&C procurement increasing and client's reluctance to accept project risks, we are seeing inequitable and unreasonable risk allocation increasingly prevalent. So we must ask ourselves; is the contractor best suited to adopt and manage the majority of project risks faced? EPM does not believe this is always the case. By transferring risks, these risks are not typically eliminated or even reduced, they are merely shared with another party, commonly at a cost to the client. So what should we consider when allocating risk? Here are EPM's thoughts on the matter:

1. EPM strongly believes that a risk should be allocated and managed by those best suited to mitigate the overall risk. For example, if the proposed development is specialised and technical, the design risk is typically best placed with the client. The client has an in-depth understanding of the intricacies and desired product and therefore the best party manage the operation. If a risk is misplaced and not

correctly managed, any shortcomings will quickly become the problem of all stakeholders.

2. The three key components and variables for any project are time, cost and quality/scope. When planning a project it is important to consider which two areas are going to take priority over the third. By prioritising time and cost, quality will naturally be sacrificed. Handing the control of quality to the contractor will often lead to corners being cut and compromises made to reduce the project cost and to minimise the construction programme. Risks around time, cost and quality/scope should be allocated to reflect the client's project drivers.
3. You don't have the time and money to compromise on quality. This not only relates to construction, but the procurement of the team and preparation of the documentation to inform the construction. Investing time and money into a quality consultant team will greatly assist with the preparation good quality design documentation. Consultant costs typically comprise 10-15% of the total project cost. Attempting to reduce consultant costs will likely result in far greater costs during construction through poor documentation induced variations.
4. If a D&C contract is adopted, it does not necessarily mean the full control of the design and review procedures need to be passed to the contractor. The involvement of a client's representative to supervise the regular workflows and quality assurance procedures will play an important role in mitigating the various project risks.

As the construction industry evolves, we are seeing client's drivers changing with an intention to transfer additional risk to the contractor. This appears to be evident in the SOP where perceived risk allocation did not necessarily mean that the client was protected from direct and indirect shortcomings of the project. In conclusion, we must stop treating risk through transfer. Rather, we must place an emphasis on accurate risk identification and equitable risk allocation through procurement. A client and their contractor must work together to effectively mitigate risk. In

the end, the contractor and client have a mutual goal in the success of the project.

REMOVAL OF TREES WITHIN BOUNDARIES OF AN EDUCATIONAL ESTABLISHMENT

Patrick Holland, Partner, McCullough Robertson

The development of land or buildings within the boundary of an educational establishment often requires consideration of the impacts it may have on trees and vegetation. More often than not, trees are a prominent feature of school grounds and the preservation of this

vegetation, pursuant to section 3.14(1)(e) of the Environmental Planning & Assessment Act (EP&A Act), is an objective of most local environmental plans. Local councils are authorised to ensure this preservation (section 3.14(4) EP&A Act). The State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (ESEPP) has specific provisions to manage impacts on vegetation.

General Rule

Generally, development under the ESEPP that involves the removal or pruning of tree or other vegetation that requires permit or development consent will not be considered eligible for the exempt development pathway (clause 17(3)(g)) or the complying development pathway (clause 19(2)(e)).

Exempt Development Exception

Trees that have been assessed by a Level 5 qualified arborist as 'posing a risk to human health or safety, or a risk of damaging infrastructure at a school' are permitted to be removed as exempt development under clause 38(1)(b) of the ESEPP. If these circumstances apply, the development will be exempt from the requirement under clause 17(3)(g) (clause 38(2)) of the ESEPP. However, to proceed requires a replacement tree capable of 'achieving a mature height of 3 metres or more' is planted within the grounds of the school to make sure tree numbers are not significantly impacted.

Complying Development Exception

There is also an exception from the requirement under clause 19(2)(e) of the ESEPP if the complying development proposed involves the removal or pruning of trees that are not 'significant trees' on a register kept by the local council, the tree(s) are located within 3 metres of the development and have a height of less than 8 metres (clause 20 of the

ESEPP). Enquiries with council are recommended initially to work out whether the subject trees are 'significant' before proceeding.

Requirement for Consent

If the development involves the removal or pruning of trees and vegetation, and does not satisfy either clause 38(1)(b) (in the case of exempt development) or clause 20 (in the case of complying development) of the ESEPP, then it may require an application to be lodged with council for assessment and approval. If this removal or pruning is incidental to development that requires consent, then the impact on the trees or vegetation will form part of council's assessment in reaching its determination. Also bear in mind that it can be a criminal offence to unlawfully destruct or damage trees under NSW environmental legislation (section 9.56 EP&A Act) and there may be additional requirements if it is native vegetation. We encourage you to seek advice if working on a future project that involves the removal of trees within a school boundary.

MANAGING THE HAZARDS AND RISKS OF TREES

Malcolm McKenzie, Director, Arborsafe

In relation to tree failures and hazards trees can pose, whilst the number of significant tree incidents can be considered comparatively low (NTSG UK 2011) in relation to other activities (for example driving a car as part of a daily commute), this may not always match public perception of large trees, particularly where a previous incident has occurred.

As with other facility assets and activities, it is recommended that a proactive (as opposed to reactive) approach be undertaken to the hazard and risk assessment and then maintenance of trees. The occurrence of a significant failure incident in the absence of a suitable (documented) hazard assessment and risk control strategy is likely to result in some degree of liability post an incident. This can come from Occupational Health and Safety and 'Duty of Care' legislative requirements and/or civil proceedings.

When commissioning a risk assessment, it is important to distinguish between the terms 'hazard' and 'risk' in a tree management context. The two terms are not synonymous and can often be misapplied. Whilst a hazard is something that has the potential to cause harm (i.e. whole or part of a tree) it is risk that indicates the possibility or likelihood of harm occurring.

As with the inspection of other complex site assets and infrastructure it is important to understand the limitations of self or unqualified assessment. Where formal tree inspections are undertaken it is recommended that a suitably qualified (and insured) practitioner be engaged, preferably holding a minimum AQF Level 5 in Arboriculture with at least five years' experience of tree assessment and management.

In addition, the methodology selected as part of tree hazard identification and risk assessment should align with both Occupational Health and Safety laws and arboricultural standards of best practice. Repeat measures are a fundamental component of any monitoring program and as such it is recommended that documented tree assessment(s) in areas of higher relative occupancy be undertaken annually (unless mandated in some government facilities as more frequent).

Whilst whole of site assessments are considered preferable from a tree inventory perspective (i.e. knowing what a site has in terms of total tree assets), assessments focused on the (documented) higher

occupancy areas of sites under management can be acceptable where budgets are limited.

Comprehensive tree reporting should also provide information on required remedial maintenance and risk mitigation options (if any), i.e. the user of the report should be able clearly understand what (if anything) is needed, ideally with an estimate of cost, in order to reduce the risk posed by an individual tree. It is important to remember that pruning or removal may only be one way to mitigate or eliminate risk – residual habitat creation or target exclusion through physical barriers is often a more desirable alternative to full tree removal of significant trees.

In summary, facility owners and managers should seek to understand the value of trees at their facilities in terms of amenity for patrons, added monetary valuation and ecological and environmental benefits. They should implement a proactive tree management strategy which should include a proactive approach to tree hazard identification and risk management. This assessment strategy should include an agreed monitoring and reassessment cycle, documented evidence of hazard identification and risk mitigation actions required (as stipulated within OH&S laws). Further documentation held on "Duty of Care" actions taken over time in relation to tree hazards and risks posed and that these past, present and future actions are prioritised on a higher to lower risk basis. It is an understanding of these elements, combined with the sourcing of suitably qualified, experienced and insured consulting arborists and tree works contractors that will not only provide a proactive strategic plan and site continuity, but also well-balanced tree management. This will ultimately reduce both risk and associated costs, whilst nurturing the treescape and the intrinsic values that trees provide.


FIRE ALARM
PULL DOWN
Simplex


CONSTRUCTIO
LANES

AMENDMENTS TO NSW FIRE SAFETY LEGISLATION

Frazer MacDonald, Associate Fire Engineer, Umow Lai

The changes to the NSW Fire Safety Legislation relate to the Environmental Protection and Assessment Regulation 2000 (EP&A Regulations), which governs requirements associated with the certification of building works. The amendment follows a recent independent statutory review of fire safety and building certification legislation (the Lambert Report, 2015), public consultation and government review and response.

Summary of Amendments

The following summarizes fire safety changes included in recent EP&A Regulations amendments:

1. All fire related systems are to be designed, installed, commissioned and checked annually by 'competent fire safety practitioners'. Previously there was no accreditation requirement for those performing these works. Guidance on how competency is defined is still to be published. The responsibility for determining this in the interim has been put on Building Certifiers. This has presented issues for many Certifiers, who would argue that they are not equipped (or insured) to determine the competency of someone from another field.
2. Design documentation for the installation or modification of fire safety systems is to be submitted to a building certifier prior to any works commencing This is to minimise defective installations and is to ensure comprehensive design documentation on site for the duration of construction, and for ongoing maintenance.
3. New exemptions apply for minor works associated with existing fire systems designed to old standards, where strict compliance to a new standard is unreasonable and impracticable. This is on the basis that modifications don't reduce existing operational performance. Peer review will however be required by a 'competent fire safety practitioner'. This will generally apply to base-build infrastructure (e.g. fire hydrant pumps and Fire Indicator Panels), rather than for new hardware (e.g. new sprinkler heads, hydrant outlets and EWIS speakers).
4. New critical construction stage inspections are required, where certifying authorities are now required inspect fire compartmentation and associated services penetrations prior to covering by ceilings etc.
5. Discretion for Fire and Rescue NSW to inspect and assess fire safety system installations in any multi-unit residential buildings.
6. For building works involving installing, extending or modifying a fire safety measures, an Occupation Certificate cannot be issued without a Fire Safety Certificate from a 'competent fire safety

practitioner', in a standardised format. This Certificate is important because it defines all critical fire safety measures and the routine (typically annual) certification requirements.As per item 1, at this juncture no formal accreditation framework or guidance has not been published to assist PCAs in identifying competency.

7. Clarifications are provided around Fire Engineering (Alternative Solution) Reports to support non-standard fire safety designs. The PCA cannot issue a CC unless they are satisfied that the plans show/describe the physical elements related to alternate solutions (where they are capable of being shown).
8. Fire Safety Statements (typically Annual, which confirm the ongoing performance of critical fire safety measures) must now be undertaken by 'competent fire safety' practitioners. Currently the requirement is for a 'suitably qualified person' (in the opinion of the building owner).
9. For new building works, referral to the fire brigade for many projects where external combustible cladding is proposed to be addressed by a Performance Solution.
10. For existing buildings which are identified as containing combustible external facades (including metal composite panels or insulated cladding systems) the Regulations now require registration of the building with the NSW Planning Secretary. For buildings occupied before 22 October 2018, the deadline for registration is 22 February 2019. Owners of new buildings will be required to register their building within four months of the building first being occupied. This applies to both new and existing buildings of two or more storey Class 2, 3, 4, 9a & 9c buildings.

SECURITY OF PAYMENT UPDATE: SEYMOUR WHYTE CONSTRUCTION V OSTWALD BROS NSWCA 11

Helena Golovanoff, Partner, Holding Redlich

NSW and Victoria remain apart on whether an insolvent claimant may make a claim under the SOPA. Much has been made in the past 10 years of whether a claimant who is in liquidation can take use the

Security of Payment Act (SOPA). The philosophical debate can be summarised as follows:

- Arguments against allowing SOPA claims by insolvent claimants: Where a claimant is insolvent, a party higher up the contracting chain is at risk in circumstances where SOPA adjudications require claims to be promptly paid "on account". This can only be reversed by a full "on the merits" case via the judicial process. However, by the time the judicial process is conducted, it may be too late if the insolvent claimant is in liquidation and has lost all of its assets.
- Arguments in favour of allowing SOPA claims by insolvent claimants: The SOPA is designed to promote cashflow through the industry and prevent parties further down the contracting chain, such as subcontractors, experiencing financial hardship because of payments being withheld. In such cases, the would-be claimant's insolvency may be caused or contributed to by a failure to pay funds claimed, raising the question of fairness if its resulting insolvency is used as a reason to bar it from benefiting from the SOPA.

Decisions have gone both ways on the issue, both in NSW and other Australian jurisdictions, often turning on the precise facts of each case, rather than some overall policy objective (although that is obviously still important).

In April last year the NSW Supreme Court in Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq) [2018] NSWSC 412 found that a subcontractor in liquidation was able to use the SOPA. The Court also found that the contract between the parties should be amended meaning that the combined effect of the findings was that the liquidator of subcontractor was able to recover the much higher amount determined by the adjudicator as due.

The matter of amending the subcontract deserves its own article, so we will not address that here. Instead we will focus on the issue of use of the SOPA by insolvent parties. The April 2018 decision caused

what can be politely described as a rift between the NSW Supreme Court and its Victorian counterpart. In 2016 in Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd [2016] VSCA 247 the Victorian Court of Appeal found that an insolvent claimant may not use the Victorian SOPA.

As a rule of thumb a lower courts of Australia's jurisdictions are bound to follow the superior courts of the other states and territories unless they find the superior court to be "plainly wrong". As you might imagine, this is a bold thing for a lower court to do and tends to cause a stir when done, as was the case here.

The April 2018 decision was appealed by Seymour Whyte. On 13 February 2019 the NSW Court of appeal upheld the lower court's finding that the Victorian Court of Appeal was "plainly wrong" with the important result of confirming that being insolvent does not, in and of itself, prevent a claimant from using the SOPA.

Even if an insolvent claimant may use the SOPA, the court may still stay any judgment that claimant might obtain. In other words, the availability of SOPA does not equal recovery. Indeed the court noted: "…there are mechanisms available to eliminate or at least minimize the risk of injustice to a respondent seeking to enforce contractual rights against a claimant in liquidation which has the benefit of a judgment…". These include s553C of the Corporations Act which dictates that an account must be taken of the parties' liabilities against each other. In this case s553C had automatic and "self-executing" effect upon the winding up of Ostwald. However whilst considered by the lower court, the Court of Appeal was not required to consider its application in the appeal as Otswald had provided an undertaking not to enforce any judgment in its favour without first providing notice to Seymour Whuyte (presumably allowing Seymour Whyte to make good any set-off claim it might have).

While the affirmation of the April 2018 (at least in respect of the question of the insolvency of a claim) swings in favour of claimants, given the objective merit of bot the arguments outlined in the second

paragraph above, we expect that this issue will remain an interesting area of development in SOPA jurisprudence for a while to come.

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