

Client Alert

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Rong Shun Engineering & Construction Pte Ltd v C.P. Ong Construction Pte Ltd

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Forging new boundaries: A Court may set aside only part of an adjudication determination

The Building and Construction Industry Security of Payment Act (the "**SOPA**") does not contain provisions that create a power to set aside an adjudication determination, let alone define the grounds on which that power ought to be exercised.

In our [previous client alert](#), we discussed the holding by the Singapore High Court that applications to set aside adjudication determinations and/or judgments under section 27 of the SOPA are akin to judicial review proceedings - and that in such applications, the Court is exercising its supervisory jurisdiction.

In *Rong Shun Engineering & Construction Pte Ltd v C.P. Ong Construction Pte Ltd* [2017] SGHC 34, the Singapore High Court considered for the first time whether the Court, in the exercise of its supervisory jurisdiction, has the power to sever and set aside a part of an adjudication determination - as opposed to the entire adjudication determination.

1. Background

The Respondent, C.P. Ong Construction Pte Ltd (the "**Main Contractor**"), invited selected contractors to submit quotations for electrical and fire alarm works in a HDB construction project.

The Applicant, Rong Shun Engineering & Construction Pte Ltd (the "**Sub-Contractor**"), submitted two written quotations in two separate documents, to which the Main Contractor made a counter-offer for each of the two written quotations. The Sub-Contractor accepted the counter-offer.

On 20 January 2016, the Sub-Contractor submitted a progress claim for all electrical and fire alarm works done from the commencement of works till 20 January 2016. The Main Contractor did not pay the progress claim; neither did it provide a payment response.

Subsequently, the Sub-Contractor took out an adjudication application in relation to the payment claim, and invited the adjudicator to adjudicate upon the Sub-Contractor's claim to recover the retention sum - even though the retention sum claim was not advanced in the progress claim.





The adjudicator awarded the Sub-Contractor:

- a) The principal sum claimed in the progress claim in its entirety; and
- b) The retention sum.

The Sub-Contractor sought to enforce the determination in the same manner as a judgment and an order that judgment be entered against the Main Contractor in terms of the determination.

On the other hand, the Main Contractor argued that the determination should be set aside. The Main Contractor argued that the parties' intention, ascertained objectively from their conduct, was to contract separately for two separate scopes of work:

- a) The Main Contractor invited separate tenders for each scope of work;
- b) The Sub-Contractor submitted separate quotations for each scope of work; and
- c) The Sub-Contractor submitted separate progress claims for each scope of work prior to disputes that arose in the construction project.

The Main Contractor also argued that the adjudicator had no power to determine the retention sum claim because it was not part of the Contractor's payment claim.

Finally, the Main Contractor argued that the adjudicator had breached his obligation under section 16(3)(c) of the SOPA to comply with the principles of natural justice because he adjudicated upon the retention sum claim while barring the Main Contractor from being heard on that claim.

2. Issues before the High Court

The High Court had to consider the three alternative grounds raised by the Main Contractor upon which the determination should be set aside:

- a) The adjudicator exceeded his jurisdiction by adjudicating upon a claim for payment which did not arise from a single contract ("**Issue (a)**");
- b) The adjudicator exceeded his jurisdiction by adjudicating upon the Sub-Contractor's claim to recover the retention sum when the Sub-Contractor did not advance that claim in the payment claim ("**Issue (b)**"); and/or
- c) The adjudicator breached the rules of natural justice by determining this retention sum claim without hearing from the Main Contractor ("**Issue (c)**").

The Main Contractor argued further that, if any one of these grounds is upheld, the Court has no power to set aside only that part of the determination and that the entire determination must be set aside ("**Issue (d)**").



3. The High Court's Decision

As a preliminary point, the High Court held that a failure to raise a jurisdictional ground in a payment response or otherwise in the course of an adjudication does not estop a respondent from taking that point before a court when applying to set aside a determination or when resisting an application to enforce a determination.

Issue (a)

The High Court held that it is possible under the SOPA for a payment claim to comprise more than one progress payment (i.e., a claim for payment arising over more than one reference period). However, the High Court examined various provisions in the SOPA and held that the SOPA mandates that a "payment claim" within the meaning of section 10 of the SOPA must arise from one contract: *"the Act mandates that one adjudication application be founded on one payment claim which arises from one contract"*

However, on the evidence, the High Court held that the Sub-Contractor's progress claim arose from one contract comprising two scopes of work. The High Court was also satisfied based on evidence that the quotations for each scope of work were separated for administrative convenience rather than contractual effect.

Accordingly, the High Court held that the progress claim arose from a single contract, and was therefore a "payment claim" within the meaning of section 10 of the SOPA.

Issue (b)

The High Court held that the adjudicator exceeded his jurisdiction by adjudicating upon the retention sum claim.

The High Court held that the payment claim fixes the parameters of the substantive content of an adjudication application, subject only to any additional issues introduced by a duly-served payment response. Accordingly, no payment claim dispute within the meaning of section 13(1) of the SOPA arose in connection with the retention sum claim, or could arise once the respondent failed to serve a payment response. The adjudicator was never clothed with the statutory power to deal with the retention sum claim.

Issue (c)

As a result of its holding in Issue (b), the High Court found no sense to decide whether the adjudicator breached the rules of natural justice in determining a claim which he had no statutory authority to determine.

In any event, the High Court stated that even if it were wrong in its holding in Issue (b), section 15(3) of the SOPA operates to bar the adjudicator's jurisdiction from considering any reasons that a respondent failed to include in its payment response.



Issue (d)

Most significantly, the High Court's holdings in Issues (a), (b) and (c) results in the outcome that the adjudicator had the statutory authority to adjudicate upon the Contractor's payment claim, but had no statutory authority to adjudicate upon the Contractor's retention sum claim.

The question then is whether it is only the adjudicator's determination of the retention sum claim which was a nullity; or whether his entire determination was a nullity. The High Court answered in the former.

The High Court stated that the power to set aside an adjudication determination is a common law power which exists outside the SOPA. The High Court restated that this was an aspect of the High Court's supervisory jurisdiction (i.e., the inherent power at common law of a superior court to review the proceedings and decisions of inferior courts and tribunals or other public bodies discharging public functions).

In that context, the High Court held that the doctrine of severance, when applied to an adjudication determination, permits the Court to give the maximum effect permitted by law to an adjudication determination - and thereby to advance the purpose of the SOPA.

The High Court therefore exercised the power to sever in order to set aside that part - and only that part - of the determination comprising the retention sum claim. However, the power to sever can be exercised only if "*it is both textually severable and substantially severable from the remainder of the determination*".

4. Conclusion

The High Court provided some practical observations on when different scopes of work under different tenders may still result in a single contract - which can be useful in the construction industry where it is common for many sub-tenders to be carried out.

Most significantly, the High Court had set out the ground-breaking principles upon which an adjudication determination under the SOPA is severable for jurisdictional error:

- a) The severance should not undermine the interim finality and enforceability of the remainder of the determination under the SOPA;
- b) The valid part of the adjudicator's reasons should still be grammatical and coherent (i.e., severed part is "**textually severable**" from the remainder of the determination);
- c) The valid part of the determination should be identifiable in terms of liability and quantum, without adjustment or contribution by the Court (i.e., severed part is "**substantially severable**" from the remainder of the determination); and



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- d) The Court may modify the text of the adjudicator's determination in order to achieve severance if the Court is satisfied that it is effecting no change in the substantial effect of the adjudication determination after accounting for the jurisdictional error and its necessary editorial consequences.

The Main Contractor has since appealed against this decision and it remains to be seen whether the Court of Appeal will endorse this decision.

For now, adjudication determinations can be set aside in part - but only where the severed part is still textually severable and substantially severable from the remainder of the determination.

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