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## 2017 in review: Developments in construction law in 2017

Thank you for taking the time to read this issue of Baker McKenzie's Construction Law Review.

The focus of this edition is a round-up of interesting developments in the law relating to building and construction law in the past year, 2017. We hope you will find the Review useful and informative.

Should you have any questions or queries on the cases discussed herein, please do feel free to drop a line to our team.

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The Singapore courts heard an interesting array of construction-related cases in 2017, which mainly covered issues relating to the statutory adjudication regime in Singapore. Before we come to the cases on the adjudication regime, we review four cases covering various issues in respect of standard form contracts, establishing unconscionability in preventing calls on performance bonds and implied terms in construction contracts.

## (a) Building and construction contracts

 Can a contractor claim for loss of profits arising from a termination by the employer under cl 31.4 of PSSCOC?

In *TT International Ltd v Ho Lee Construction Pte Ltd* [2017] SGHC 62, TT International Ltd ("TT") terminated the employment of its contractor, Ho Lee Construction Pte Ltd ("Ho Lee"), by issuing a notice of termination under cl 31.4 of the Public Sector Standard Conditions of Contract for Construction Works 2006 ("PSSCOC"). Subsequently, Ho Lee sought to recover against TT loss of profits for uncompleted work.

Prior to the trial, the parties were able to settle numerous issues, which left the High Court to decide on Ho Lee's claim against TT for its loss of profits under cl 31.4 of the PSSCOC.

Two issues were brought before the High Court:

- a) Whether, on a true interpretation of cl 31.4(2), Ho Lee may recover loss of profits for uncompleted work upon termination under cl 31.4(1); and
- b) Whether TT is entitled to rely on cl 31.4(2) to dispose of Ho Lee's claim for loss of profits.

## (a) Whether Ho Lee may recover loss of profits under cl 31.4(1)

Clause 31.4 is a "termination for convenience" clause which grants the employer the power to terminate the contract even if the contractor is not in breach or default of the contract. The High Court held that cl 31.4(2) exhaustively provides for the sums which Ho Lee is entitled to recover upon a proper termination under cl 31.4(1).

As such, the High Court held that Ho Lee could **not** acquire additional remedial rights at common law for which it can claim for loss of profits, because cl 31.4(1) in sufficiently clear words ousted such a right even if it may arise at common law. Nonetheless, in *obiter*, the High Court left open the question as to whether there is an implied duty of good faith on an employer when exercising its right under cl 31.4.

## (b) Whether TT is entitled to rely on cl 31.4(2) to dispose of Ho Lee's claims

Ho Lee argued that even if c 31.4(2) precluded it from recovering for loss of profits, TT may not rely on cl 31.4(2) on the grounds of issue estoppel and abuse of process, waiver by estoppel, and disablement. The High Court rejected all three grounds and found that TT was entitled to rely on cl 31.4(2) to dispose of Ho Lee's claim for loss of profits.

Firstly, on issue estoppel, the High Court found two issues in contention relating to two of the four requirements to make out a claim. On the requirement that there must be a final and conclusive judgment on the merits of the issue which is said to be the subject of an estoppel, the High Court found that the Court of Appeal did not

previously finally determine that Ho Lee was entitled to recover for loss of profits, being an issue that did not arise before either the High Court nor the Court of Appeal in the earlier proceedings for the sanction of the scheme of arrangement.

The second requirement that there be identity of subject matter between the present action and the earlier proceedings was also not satisfied. The earlier proceedings were concerned with Ho Lee's rights for the limited purposes of voting on the proposed scheme and not with its final entitlement to recover for loss of profits. As a result, there was no identity of subject matter between the two proceedings.

On abuse of process, Ho Lee argued that TT ought reasonably to have argued that Ho Lee could not recover for loss of profits during the earlier proceedings and could not raise this issue in the present case. The High Court rejected this argument on the basis that it was not reasonably incumbent on TT to make such an argument during the earlier proceedings given that such an argument would have been irrelevant at that stage.

Secondly, on waiver by estoppel, Ho Lee argued that TT had represented by its conduct that it was not challenging Ho Lee's right to recover for loss of profits, which Ho Lee had detrimentally relied on. The High Court dismissed this argument on the basis that there was no clear and unequivocal promise by TT that it would not enforce its rights under cl 31.4.

Thirdly, a disablement argument is founded on the basis that the contractual right or benefit being asserted must be a direct result of that party's own prior breach of contract. The High Court held that the benefit which TT was claiming – the right to dispose of Ho Lee's claim for loss of profits - was not a "direct result" of that breach and disablement would not apply on the facts.



## **Comments**

This case made clear several points in relation to cl 31.4 of the PSSCOC:

- (a) Any additional remedial rights at common law for which a contractor can claim for loss of profits, is ousted by cl 31.4(1).
- (b) The contractor is only entitled to the Loss and Expense defined under cl 1.1(q). Under cl 1.1(q)(iii), a claimant is entitled to 15% of direct relevant costs in lieu of any profits.
- Requirements to establish unconscionability in preventing calls on performance bonds

In Tactic Engineering Pte Ltd (in liquidation) v Sato Kogyo (S) Pte Ltd [2017] SGHC 103, the High Court set aside an injunction restraining Sato Kogyo (S) Pte Ltd ("Sato Kogyo") from calling on an on-demand bond taken out by the Tactic Engineering Pte Ltd ("Tactic") in favour of Sato Kogyo. Sato Kogyo was LTA's main contractor for a project and appointed Tactic as its subcontractor.

In the subcontract, clause 25 entitled Sato Kogyo to retain up to 5% of the subcontract sum ("Retention Monies").

At the end of 2013, Tactic was experiencing difficulties in completing its outstanding works. To ease Tactic's cash flow, Sato Kogyo agreed to release the Retention Monies in exchange for an on-demand bond.



Subsequently, Tactic's financial woes did not dissipate and Sato Kogyo had to make arrangements to complete Tactic's outstanding works – incurring back charges as a result. Sato Kogyo then repeatedly indicated that it would call on the bond if its demand for payment was not met. No payment was made and Sato Kogyo called on the bond on 18 October, seeking payment of the bond amount by 21 October 2016. Tactic then applied for an injunction, which was granted on the same day. The High Court set aside the injunction subsequently, which led to Tactic's appeal.

The issues before the High Court were:

- (a) Whether Sato Kogyo could include another sum of money owed by Tactic to Sato Kogyo under another project to set-off against the bond; and
- (b) Whether Sato Kogyo's computation of the back charges was unconscionable.

Before examining the substantive issues, the High Court recounted the relevant principles relating to the issue of unconscionability from previous case authorities:

- (a) Parties were expected to "abide by the deal they have struck" and courts "should be slow to upset the status quo and disrupt the allocation of risk which the parties had decided upon for themselves".
- (b) An applicant had to establish a strong *prima facie* case of unconscionability, and the "threshold is a high one". A finding of unconscionability must be supported by "the whole context of the case" and a "prima facie strong piece of evidence does not make a strong prima facie case".
- (c) The concept of unconscionability imported notions of unfairness and bad faith. Where there was a genuine dispute, it could not be said that there was unconscionability because a party was "entitled to protect [its] own interest".
- (d) It was not necessary for the court to carry out a detailed examination of the minutiae and "engage in a protracted consideration of the merits of the case". In such proceedings, the focus was on "breadth rather than depth" and the court's role was simply to "be alive to the lack of bona fides".
- (a) Whether Sato Kogyo could include another sum of money owed by Tactic to Sato Kogyo under another project to set-off against the bond

The High Court found that Tactic did not have persuasive arguments on this issue. Firstly, the bond was taken out in consideration of Sato Kogyo releasing the Retention Monies and secondly, the parties had agreed to set-off the sum owed from the other project against the Retention Monies.

## (b) Whether Sato Kogyo's computation of the back charges was unconscionable

The argument that the back charges were unconscionable was also dismissed by the High Court on the basis that Tactic had failed to make out a strong *prima facie* case of unconscionability. Instead, the High Court held that the back charges were not so excessive and abusive as to establish that it was unconscionably bloating the numbers to justify the call on the bond. The High Court held that Tactic appeared to be clutching at straws to make out a case by disputing various components of Sato Kogyo's claim. There was a genuine contractual dispute that could not be resolved simply by a claim of unconscionability.



## **Comments**

This case reiterates that the courts will not easily prevent the calling on performance bonds and demonstrated that the burden lies on the applicant to make out a strong *prima facie* case.

 Whether a term of due diligence and expedition should be implied in fact into construction contracts

In CAA Technologies Pte Ltd v Newcon Builders Pte Ltd [2017] SGCA 53, the Court of Appeal rejected the High Court's decision to imply terms of due diligence and expedition though it chose to leave the issue open as to whether it will ever be permissible to imply such terms into construction contracts.

Previously, the High Court held that Newcon Builders Pte Ltd ("Newcon") was entitled to terminate a subcontract with the CAA Technologies Pte Ltd ("CAA") on the basis that CAA was in breach of an express term of the subcontract relating to the contractual delivery schedule as well as breaches of implied terms to proceed with due diligence and expedition. In particular, the High Court held that CAA had breached an implied term of due diligence and expedition and another implied term that time was of the essence in relation to the former implied term.

CAA was ordered to pay various heads of damages including the entire sum of liquidated damages which was paid by Newcon to the employer of the Project, Jurong Town Corporation notwithstanding the fact that Newcon was unable to directly link the liquidated damages to CAA's breaches. CAA's claims for damages were dismissed though its claims for payments were allowed up to the date of termination.

The Court of Appeal had to consider two issues:

- a) Whether Newcon was justified in terminating the sub-contract, and relatedly, whether the High Court was entitled to imply the disputed terms in the context of the sub-contract; and
- b) Whether the High Court had erred in its award of damages.
- (a) Whether Newcon was justified in terminating the subcontract, and relatedly, whether the High Court was entitled to imply the disputed terms in the context of the subcontract

## Whether Newcon was justified in terminating the subcontract

Firstly, the Court of Appeal held that while Newcon had purported to terminate the subcontract pursuant to the LOA, the LOA was found by the High Court to be of no contractual effect such that Newcon could not have relied on the LOA to terminate the subcontract. Nonetheless, the Court of Appeal held that it was established in *Alliance Concrete Singapore Pte Ltd v Comfort Resources Pte Ltd* [2009] 4 SLR(R) 602 (CA) that any ground of termination which existed at the time of election may subsequently be relied upon.

The Court of Appeal was also satisfied that Newcon had made out its case for terminating the subcontract on account of CAA's breach of cl 2 of the LOI. However,



the Court of Appeal disagreed with the High Court that cl 2 was a condition of the sub-contract on the basis that late delivery would not and did not in fact "prove fatal to Newcon's ability to meet its obligations" to the main contractor.

Nevertheless, the Court of Appeal affirmed the High Court's decision that Newcon was deprived of substantially the whole benefit of the subcontract as a result of CAA's breach of cl 2. In particular, the Court of Appeal noted that the late delivery of the required materials had directly contributed to the delay in the main contract works since those materials were on the critical path of Newcon's main contract works.

## **Implied Terms**

The High Court's decision to imply terms of due diligence and expedition as well as that time was of the essence was rejected by the Court of Appeal because "terms cannot be implied in fact in order to give a party a specific remedy which the parties did not expressly provide for". Instead, the termination must be justified at common law, which was what the High Court had in fact decided anyway on the basis that Newcon was deprived substantially of the full benefit of the sub-contract without having to resort to implying terms in fact.

On principle, the Court of Appeal also noted that there are several reasons for the courts' reluctance to imply a term of due diligence in the construction context. Of particular pertinence, the Court of Appeal pointed out firstly the ability of parties to make such terms an express term of the contract and secondly the presence of a main contractual obligation to complete by a certain date. These two points relate to the test for implying a term in fact, such that on the first point, there would be no "gap" to fill through inference and on the second, there is no business necessity for implying such a term to give the contract efficacy.

## (b) Whether the High Court had erred in its award of damages

The Court of Appeal allowed CAA's appeal and held that the High Court had erred in allowing Newcon's claim for liquidated damages for the late completion of the project, because Newcon has not discharged its burden of proving that Newcon's late completion of the project was caused by CAA's breaches. The burden rests with Newcon to prove that CAA was solely responsible for Newcon's payment of liquidated damages to JTC.



### **Comments**

While this case did not reach a conclusive decision on whether it will ever be permissible to imply such terms into construction contracts, it raised important points on the drafting of construction contracts:

- (a) As parties are able to make due diligence an express term of the contract, they should do so if they wish to rely on such a clause. The courts are unwilling to imply such a term given that due diligence clauses are commonly found in standard form construction contracts in Singapore and the absence of such a clause may be taken to mean that parties elected not to include such terms.
- (b) Where there is a contractual obligation to complete by a certain date, the courts are similarly unwilling to imply a term of due diligence such implied terms being unnecessary because the contract already provides a mechanism for parties to specify interim and final completion dates.



## Of completion dates, implied duty of fitness for purpose and set-off of counterclaims

In Smile Inc Dental Surgeons Pte Ltd v OP3 International Pte Ltd [2017] SGHC 246, the High Court was invited to examine whether OP3 International Pte Ltd ("OP3") had breached its duty in contract and tort to Smile Inc Dental Surgeons Pte Ltd ("Smile") for both late completion and damages caused by two flooding events on the premises.

Smile is a Singapore-incorporated company that is in the business of providing dental services. Smile operates several dental clinics in Singapore. OP3 is a Singapore-incorporated company that provides, inter alia, interior design and fitting out services.

Smile sued OP3 for damages and losses, including damages for loss of management time and effort and wasted expenses and overheads, on three grounds: (a) OP3's failure to exercise a reasonable standard of care, skill and diligence in executing the works and its failure to ensure the works were designed and carried out in such a manner that the Suntec Clinic would be fit for its purpose; (b) OP3's delay in completing the works; (c) OP3's failure to provide as-built drawings and documents to Smile, which caused Smile's fitting-out deposit to be forfeited.

Smile also contended that OP3's defective design and construction of the Suntec Clinic resulted in two episodes of flooding at the Suntec Clinic. After the first flooding incident, Smile also contended that OP3 did not properly investigate the cause of flooding and failed to carry out the necessary rectifications to the design and construction of the drainage system despite being given the opportunity to do so, resulting in a second flooding.

OP3 counterclaims for the unpaid balance sum for the works and the unpaid sum for the variation works.

The High Court had to consider two issues:

- (a) Was there a delay in the completion of the works?
- (b) Whether, and to what extent, is OP3 entitled to claim for variations?

#### (a) Whether there was a delay in the completion of the works

The contractual completion date was 31 August 2013 though parties had extended it to 11 September 2013 over email correspondence. However, OP3 argued that 11 September 2013 was only a targeted handover date, and not a contractual completion date. Further, it added that Smile had agreed to extend the completion date to 25 September 2013.

The High Court rejected both contentions advanced by OP3. Firstly, on the facts, it held that Smile was under pressure to be opened in time for the Grand Opening of the Suntec City Mall. As such, it would not have agreed to a completion date later than the date of the Grand Opening. Secondly, the argument was raised only in OP3's closing and reply submissions which the High Court was not prepared to accept as an unpleaded allegation. In any case, the High Court held that the facts did not support the contention that Smile had accepted 25 September 2013 as the expected completion date, being the result of a unilateral amendment by OP3 which Smile did not agree to.

OP3's defence that the completion of the works was delayed by Smile was rejected by the High Court. OP3 alleged that the completion of the works was delayed by Smile because the final revised drawings were only provided to OP3 on 11 September 2013. However, Smile disputed OP3's argument on the basis that the reason that the final revised drawings were provided only on 11 September 2013 was a result of

Smile's own fault. The High Court accepted Smile's argument and found against OP3.

## (b) Whether, and to what extent, is OP3 entitled to claim for variations

The High Court held that to sustain a claim for variation works, OP3 must prove on the balance of probabilities that: (a) Smile gave instructions, expressly or implicitly, to OP3 to carry out the variation works; (b) the works were additional works not covered under the original agreement; and (c) these works were completed in accordance with the instructions given. In addition, in relation to variations, the burden rests on OP3 to show that the disputed variations constitute work items falling outside the original scope of the works.

On the facts, the High Court held that OP3 had not discharged this burden for many of the disputed variation items and after discussing each claim in detail, awarded OP3 a set-off against Smile's damages on the basis that the counterclaim was closely linked to Smile's claim since they both arise out of the same agreement.



## **Comments**

This highly fact-centric case reiterated several relevant principles of law:

- (a) A contractual completion date can be varied with proof of agreement by both parties otherwise, it would merely be a unilateral amendment; and
- (b) A contractor generally owes several duties to the employer, such as an implied duty of fitness for purpose; an implied contractual duty of care (if expressly provided for in the contract); and a tortious duty of care.

# (b) Statutory adjudication under the Building and Construction Industry Security of Payment Act ("SOP Act")

## Scope of an adjudication review

Under section 18 of the SOP Act, a respondent who is aggrieved by an adjudication determination may lodge an application for the review of the determination. However, there is nothing in the SOP Act that explicitly spells out the scope of an adjudication review. Is a review adjudicator entitled to review the entire adjudication determination? Or is the adjudication review restricted only to issues raised by the respondent?

In Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd [2017] SGHC 09, the High Court considered for the first time the scope of an adjudication review.

The Defendant, Corporate Residence Pte Ltd ("CR") engaged the Plaintiff, Ang Cheng Guan Construction Pte Ltd ("ACG") to carry out works in a construction project.

On 18 March 2016, ACG took out an adjudication application in relation to a payment claim dated 22 February 2016. The adjudicator determined five issues in the adjudication:

- a) the payment claim was not served out of time and the adjudication application was not invalid;
- b) the payment responses provided by CR in response to the payment claim were valid;

- c) ACG was entitled to an additional extension of time ("EOT") of 133 days for only one of the four delay events alleged by ACG (ACG was not entitled to any additional EOT for the other three delay events);
- d) in light of the EOT granted by the adjudicator, CR was not entitled to impose liquidated damages for late completion; and
- e) ACG was entitled to certain amounts for work done and for variations / prolongation claims.

On 19 May 2016, CR was dissatisfied with the adjudication determination and lodged an adjudication review application seeking a review of 2 of the adjudicator's determinations – i.e., that ACG was entitled to EOT of 133 days; and that CR was not entitled to impose liquidated damages.

What was notable is that, at the same time, ACG was also dissatisfied with the adjudication determination and submitted the following issues to the review adjudicator:

- a) whether the adjudicator should have granted further EOT for two other delay events; and
- b) whether the adjudicator should have determined that time had been set at large

(collectively, the "ACG's Issues").

The review adjudicator found in favour of CR. In the course of his decision, the review adjudicator formed the view that his jurisdiction was limited to the determination of the issues raised by CR in the adjudication review – and therefore did not hear parties on ACG's Issues. Subsequently, ACG commenced proceedings in the High Court in respect of this view by the review adjudicator.

The High Court had to consider the question of the scope of an adjudication review. The High Court noted that the adjudication review procedure is unique to Singapore and is not found in other jurisdictions with similar regimes to expedite payments in the construction industry.

ACG submitted that a review adjudicator is entitled to review the entire adjudication determination (the "Broad Interpretation"). However, CR submitted that an adjudication review is restricted to only the issues raised by the respondent (the "Narrow Interpretation") because:

- a) under section 18 of the SOP Act, only the respondent in an adjudication determination is entitled to apply for an adjudication review; and
- b) the adjudication review process is analogous to an appeal in court proceedings, where it is well established that the respondent is not permitted to raise any matter on appeal unless he has filed a cross-appeal.

#### (a) Adjudication Review versus Court Appeal

The High Court quite quickly dismissed the second argument and held that it is incorrect to draw an analogy between the adjudication review process and appeals in court proceedings. The former is a creature of the SOP Act, which establishes an entirely new regime for the purpose of providing a fast but interim means for resolving payment disputes in the construction industry. The latter, however, is governed by different legislation and provide for a final decision arrived at after a comprehensive process that ensures that all relevant facts and legal arguments are fully ventilated.





## (b) Interpreting the provisions in the SOP Act

Instead, the High Court held that the correct approach was to consider the provisions in the SOP Act and its regulations, as well as the policy behind the SOP Act.

First, the High Court held that the operative words in section 18(2) of the SOP Act are "the review of the determination". Prima facie, this refers to the entire adjudication determination and supports the Broad Interpretation.

Further, section 19(6)(a) of the SOP Act states that the review adjudicator shall only have regard to the matters in sections 17(3)(a) to (h) of the SOP Act and the adjudication determination under review. The High Court held that if the Narrow Interpretation were intended, either section 17(3) or section 19(6) of the SOP Act could have easily inserted, in either provision, words to the effect (i.e. that, in an adjudication review, only matters raised by the respondent may be considered). However, the draftsman did not do that.

In addition, section 19(5) of the SOP Act states that an adjudication review shall determine the adjudicated amount (if any) to be paid by the respondent to the claimant; and that if this is different from the amount determined at first instance the review adjudicator shall determine "the date on which the difference in amount is payable". The High Court held that section 19(5) of the SOP Act leaves it open to the review adjudicator to increase the adjudicated amount - which militates against the Narrow Interpretation.

Finally, the High Court observed that while section 18(2) of the SOP Act provides that only the respondent in an adjudication is entitled to apply for an adjudication review, it does not state that such a review is limited to the issues raised by the respondent.

## (c) Policy

On policy reasons, the High Court held that it was conceivable that the legislature deemed it necessary that once an adjudication review is set in motion, the entire adjudication determination is open for review and not just the parts that the respondent is dissatisfied with.

The High Court elaborated that in many adjudication determinations, there will be parts where the adjudicator gets it right and parts where he gets it wrong. To permit a respondent to cherry-pick the parts which he is unhappy with, without a corresponding right on the part of the claimant to seek a review of the parts where the adjudicator may have gotten it wrong, could also be unfair.

The High Court concluded that the Narrow Interpretation would tend to encourage respondents to apply for an adjudication review as there would be nothing to lose, but everything to gain.

## (d) Should the Adjudication Review Determination be set aside

After holding that the Broad Interpretation is preferred, the High Court considered whether the Adjudication Review Determination should be set aside.

It is interesting to note that the High Court disagreed that the Adjudication Review Determination should be set aside on the basis that there was a breach of natural justice - because "[h]aving formed [the view that an adjudication review was limited to issues raised by the respondent]. there was no point in the review adjudicator hearing arguments concerning [ACG's Issues] because even if [the review adjudicator] agreed with those arguments [concerning ACG's Issues], it would not have made a difference to his decision".

Instead, the High Court decided to set aside the Adjudication Review Determination because the adjudicator had misdirected himself as to the law by deciding that

he could only consider issues raised by the respondent. In doing so, the review adjudicator had failed to consider relevant issues.



## **Comments**

Based on an interpretation of the SOP Act and its underlying policy, the High Court held in favour of the Broad Interpretation. From a policy perspective, this decision makes eminent sense.

It is now clear that in an adjudication review, the entire adjudication determination may be reviewed by the review adjudicator. Therefore, an aggrieved respondent in any adjudication determination should carefully consider the merits of its claims before deciding to proceed with an application to review the determination.

Further, the High Court's decision that an adjudication determination can be set aside on the basis of misdirection as to the law raises the potential for interesting developments. Parties trying to set aside an adjudication decision may push the ambit of what may be considered as a misdirection as to the law.

# A Court may set aside part of an adjudication determination

The SOP Act 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 Rong Shun Engineering & Construction Pte Ltd v C.P. Ong Construction Pte Ltd [2017] SGHC 34, the High Court considered for the first time whether the High 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.

The Respondent, C.P. Ong Construction Pte Ltd (the "CP Ong"), 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 "Rong Shun"), submitted two written quotations in two separate documents, to which CP Ong made a counter-offer for each of the two written quotations. Rong Shun accepted the counter-offer.

On 20 January 2016, Rong Shun submitted a progress claim for all electrical and fire alarm works done from the commencement of works till 20 January 2016. CP Ong did not pay the progress claim; neither did it provide a payment response.

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

The adjudicator awarded Rong Shun:

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

Rong Shun sought to enforce the determination in the same manner as a

judgment and an order that judgment be entered against CP Ong in terms of the determination.

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

- a) CP Ong invited separate tenders for each scope of work;
- b) Rong Shun submitted separate quotations for each scope of work; and
- c) Rong Shun submitted separate progress claims for each scope of work prior to disputes that arose in the construction project.

CP Ong also argued that the adjudicator had no power to determine the retention sum claim because it was not part of Rong Shun's payment claim.

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

The High Court had to consider the three alternative grounds raised by CP Ong 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;
- The adjudicator exceeded his jurisdiction by adjudicating upon Rong Shun's claim to recover the retention sum when Rong Shun did not advance that claim in the payment claim; and
- c) The adjudicator breached the rules of natural justice by determining this retention sum claim without hearing from CP Ong.

CP Ong argued further that, if any one of these grounds is upheld, the High Court has no power to set aside only that part of the determination and that the entire determination must be set aside.

## **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.

# (a) Whether the adjudicator exceeded his jurisdiction by adjudicating upon a claim for payment which did not arise from a single contract

The High Court held that it is possible under the SOP Act 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 SOP Act and held that the SOP Act mandates that a "payment claim" within the meaning of section 10 of the SOP Act 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 Rong Shun'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 SOP Act.

# (b) Whether the adjudicator exceeded his jurisdiction by adjudicating upon Rong Shun's claim to recover the retention sum when Rong Shun did not advance that claim in the payment claim

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 SOP Act 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.

## (c) Whether the adjudicator breached the rules of natural justice by determining this retention sum claim without hearing from CP Ong

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

## (d) Whether the High Court has the power to set aside part of an adjudication determination

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 Rong Shun's payment claim, but had no statutory authority to adjudicate upon Rong Shun'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 SOP Act. 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 SOP Act.

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".



#### **Comments**

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 SOP Act is severable for jurisdictional error:

- the severance should not undermine the interim finality and enforceability of the remainder of the determination under the SOP Act;
- 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);
- 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
- 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.

Adjudication determinations can be set aside in part - but only where the severed part must still be textually severable and substantially severable from the remainder of the determination.

## Whether an adjudicator is in breach of natural justice when he communicates with one party unilaterally

Under section 16(3) of the SOP Act, an adjudicator is obliged to "act independently, impartially and in a timely manner" as well as to "comply with the principles of natural justice". In Metropole Pte Ltd v Designshop Pte Ltd [2017] SGHC 45, the Singapore High Court discussed the requirements for breaches of natural justice to warrant the setting aside of adjudication determinations.

Metropole Private Limited ("Metropole"), engaged Designshop.Architects LLP to provide architectural services. Clause 2.3(3) of the contract obliged Metropole, upon termination of the contract, to pay Designshop.Architects LLP a minimum of two-thirds of the fee for a particular stage of work if Designshop.Architects LLP had carried out any work at all for that stage, even in part.

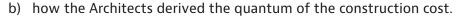
Designshop Pte Ltd (the "Architects") then took over the performance of all ongoing projects handled by Designshop.Architects LLP - including Metropole's project.

The Architects served a payment claim on Metropole including fees for the stages of work which the Architects believed were completed, disbursements which the Architects had incurred on Metropole's behalf as well as fees under Clause 2.3(3) of the contract for certain stages of work which were not complete.

Metropole subsequently served its payment response disputing the claim by the Architects. The Architects took up an adjudication application.

However, before the adjudicator issued his determination, the adjudicator telephoned the Architect's solicitors to ask two questions:

a) whether the Architects had issued a second tender evaluation report; and



The adjudicator asked the Architects to respond to the two questions by email copied to Metropole.

Metropole's solicitors took the position that the adjudicator's private communication with the Architect's solicitors had occasioned a breach of the rules of natural justice.

The High Court had to consider the following issues:

- a) Whether the adjudicator breached the rule of impartiality by displaying apparent bias in communicating privately with the Architects' solicitors;
- Whether the adjudicator breached the fair hearing rule in that where an adjudicator communicates with just one party, the absent party must be told the substance of what has been said and afforded an opportunity to comment upon it;
- c) Whether the adjudicator disregarded some of Metropole's defences without considering their merits or without making any *bona fide* effort to understand them;
- d) If the adjudicator had breached the rules of natural justice, whether the breach was sufficiently material to warrant setting aside the adjudication determination; and
- e) Whether the adjudicator acted in excess of his jurisdiction.

## (a) Whether the adjudicator breached the rule of impartiality

On the facts, the High Court found that the adjudicator did not breach the rule of impartiality when he communicated privately with the Architects' solicitors.

The High Court held that the test for apparent bias is "whether there are circumstances which would give rise to a reasonable suspicion that the decision-maker was biased in a fair-minded, reasonable person with knowledge of the relevant facts".

The adjudicator did not act in such a way as to expose himself to a reasonable suspicion of bias in favour of the Architects or against the Metropole.

The High Court found that although the adjudicator did not expressly ask Metropole for its response to his two questions or to the Architects' answers to his questions, the High Court could not find a reasonable suspicion of bias against Metropole (i.e., that the adjudicator would have rejected any response which Metropole might have taken upon itself to offer or any request by Metropole for an opportunity to do so).

## (b) Whether the adjudicator breached the fair hearing rule

However, the High Court held that the adjudicator had breached the fair hearing rule when he communicated privately with the Architects' solicitors.

The High Court stated that under the fair hearing rule, the adjudicator is required to receive both parties' submissions and consider them. In this case, the adjudicator had a private telephone conversation with the Architects' solicitors - which should not have happened.

Once it happened, it was incumbent on the adjudicator himself to convey to Metropole the substance of the conversation so that Metropole could be aware from the adjudicator the potential significance of that conversation to the adjudicator's determination. However, this did not happen in this case.





# (c) Whether the adjudicator disregarded some of Metropole's defences without considering their merits or without making any bona fide effort to understand them

With regard to Metropole's allegations that the adjudicator disregarded some of Metropole's defences, the High Court held that the fact that this adjudicator did not find it necessary to discuss his reasoning and explicitly state his conclusions in relation to the defences does not inevitably lead to the conclusion that he did not have regard to those submissions at all.

The High Court held that the mere failure to address issues in an adjudication determination explicitly, without more, is insufficient on its own to establish that there has been a breach of natural justice. In this case, Metropole had not provided further evidence to suggest that the adjudicator indeed disregarded its submissions in respect of its defences.

# (d) If the adjudicator had breached the rules of natural justice, whether the breach was sufficiently material to warrant setting aside the adjudication determination

Having found that the adjudicator acted in breach of natural justice by breaching the fair hearing rule, the High Court turned to the issue of materiality and prejudice.

The High Court held that not all breaches of natural justice warrant the setting aside of an adjudication determination - there must be a material breach of natural justice. In this case, the High Court was of the view that the breach was not sufficiently material as to cause prejudice to Metropole.

As a preliminary point, the High Court dismissed any comparisons between the power to set aside an arbitration award and the power to set aside an adjudication determination. The High Court held that unlike the case in an arbitration award, the power to set aside an adjudication determination is not a statutory power. Further, the High Court noted that an adjudicator's determination has only temporary finality.

Accordingly, the High Court held that a court hearing an application to set aside an adjudication determination for a breach of the rules of natural justice has less reason to intervene in adjudication than in arbitration.

Turning back to the facts of the case, the High Court highlighted that the adjudicator's questions did not relate to anything that was in issue. Had it been so, the unilateral communication may well have been material.

The High Court was therefore of the view that the adjudicator's breach of the fair hearing rule was not sufficiently material so as to cause any prejudice whatsoever to Metropole. The breach was insufficient to warrant setting aside the adjudication determination.

### (e) Whether the adjudicator acted in excess of his jurisdiction

Metropole argued that the adjudicator acted in excess of his jurisdiction by:

- a) determining that the Architects were entitled to recover sums for work not carried out (pursuant to Clause 2.3(3) of the contract) as such claims did not fall within the SOP Act;
- b) failing to independently assess the work that the Architects claimed to have done; and
- c) failing to determine whether a written contract existed between the parties and to identify the terms therein.

The High Court rejected all three arguments raised by Metropole.

The High Court clarified that the scheme of the SOP Act does not contemplate that a contractor is entitled to payment only after all the work under the parties' contract is completed. A contractor is entitled to payment for work done partially, as long as the event or date arises for such payment. It is then up to the parties to decide how much payment a contractor is entitled to following the event or date.

The High Court also held that the adjudicator was entitled to readily find in favour of the Architects on the merits of their claim. The High Court was not convinced that the adjudicator in this case simply accepted the Architects' case without assessing its merits.

Finally, the High Court held that the adjudicator did and was entitled to make a finding that the parties had entered into a contract in writing. The High Court also agreed with the adjudicator that a written contract existed between Metropole and the Architects - as can be inferred from Metropole's conduct that it impliedly consented to the Architects taking over all of the rights and obligations of Designshop. Architects LLP under the contract and on precisely the same terms.

## **Comments**

An applicant wishing to set aside an adjudication determination on the basis of a breach of natural justice not only has to demonstrate that such a breach had occasioned - but also that the breach was sufficiently material so as to cause prejudice to the applicant.

## Interim Certifications are not binding on parties and are subject to adjustment on completion

In construction contracts, parties often include a re-measurement clause providing for subcontract sums to be subject to re-measurement and re-calculation when drawing up the final account. This may sometimes result in parties disagreeing over the recalculated sum. In *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] SGHC 41, the High Court considered whether interim certificates can nullify the effect of a re-measurement clause by an estoppel of convention on the basis that the final re-measurement subsequently excluded certain measurements that were originally contained in interim certificates. The High Court also discussed the merits of a claim for costs and expenses arising from adjudication determinations and the resulting litigation.

In December 2012, the main contractor awarded to Mansource Interior Pte Ltd ("Mansource") a subcontract for interior fitting out works. Mansource, in turn, entered into two re-measurement contracts with CSG Group Pte Ltd ("CSG") for wall finishes and joinery works. These two re measurement contracts expressly provided that they were back-to-back with the main contract. As such, CSG was only allowed to advance a variation claim under either subcontract with the authorisation and approval of the variation by the main contractor.

On 5 August 2013, CSG served a payment claim on Mansource for each of the subcontracts. Subsequently, Mansource certified significantly lower sums that resulted in CSG taking out adjudication applications under the SOP Act for the difference in the amounts between its payment claims and Mansource's certificates. CSG obtained adjudication determinations in its favour on both subcontracts.

Mansource initiated court proceedings to seek judgment for the overpayment on the ground that the final account between the parties showed that it had overpaid CSG more than what CSG was contractually entitled to. CSG counterclaimed for monies allegedly due from Mansource under both subcontracts, which included 2.5% of retention sum held by Mansource under both subcontracts as well as a sum arising from excess back charges deducted by Mansource. CSG also sought damages in the form of costs and expenses incurred by CSG incurred in the adjudication applications and the resulting litigation.

The High Court had to consider several issues:

- a) Whether Mansource is bound by its interim certificates and, in particular, whether Mansource is estopped from relying on the re-measurement clause in each subcontract:
- b) Whether Mansource waived the requirement under the parties' subcontracts that any variation works carried out by CSG had to be authorised and approved by the main contractor;
- c) Whether 9 of the SOP Act renders void any of the contractual provisions on which Mansource relies; and
- d) Whether CSG could claim for costs and expenses arising from the adjudication determinations and resulting litigation.

# (a) Whether Mansource is bound by its interim certificates and, in particular, whether Mansource is estopped from relying on the re-measurement clause in each subcontract

The High Court rejected CSG's argument that Mansource was bound by its previous interim certificates which included the dimensions of the openings and therefore estopped from relying on the re-measurement clause in the wall finishes subcontract. Mansource had excluded the openings only in the final re-measurement.

The High Court cited the Court of Appeal's judgment in *MAE Engineering Ltd v Fire-Stop Marketing Services Pte Ltd* [2005] 1 SLR(R) 379, which set out the requirements for estoppel by convention: (i) that there must be a course of dealing between the two parties in a contractual relationship; (ii) that the course of dealing must be such that both parties must have proceeded on the basis of an agreed interpretation of the contract; and (iii) that it must be unjust to allow one party to go back on the agreed interpretation.

On the facts, the High Court found that the parties' course of dealing did not suggest that they proceeded on the understanding that the interim certificates would be final measurements that were not subject to re-measurement. This was particularly since the subcontract was expressly a re-measurement contract.

Further, the High Court noted that CSG was relying on estoppel as a counterclaim for payment rather than as a shield against repayment to Mansource. Given that Singapore law has yet to accept the view of using estoppel as a cause of action, the High Court held that CSG's position would subvert the law of contract and it could not use the doctrine of estoppel as a sword.

# (b) Whether Mansource waived the requirement under the parties' subcontracts that any variation works carried out by CSG had to be authorised and approved by the main contractor

CSG argued in its Defence and Counterclaim that Mansource had, by its conduct and actions in respect of the variations, waived strict compliance with the variations clause. However, the High Court held that such an argument would not advance



CSG's contractual right to payment as the sole basis for its counterclaim.

The High Court opined that while it may be unjust for Mansource to secure the benefit of the variations *ex gratia*, CSG had failed to plead *quantum meruit* as an alternative basis for its counterclaim and the court cannot award compensation to CSG on a cause of action which it did not plead.

## (c) Whether s 9 of the SOP Act renders void any of the contractual provisions on which Mansource relies

The High Court dismissed CSG's argument that clause 17 which provided that each sub-contract was on a back-to-back basis to the main contract was void under s 9 of the SOP Act. That provision renders void a "pay when paid" clause. However, Mansource did not rely on such a clause for any contractual effect by incorporating the terms of the main contract into the subcontract.

## (d) Whether CSG could claim for costs and expenses arising from the adjudication determinations and resulting litigation

The High Court also dismissed CSG's other counterclaims for costs and expenses arising from adjudication applications and the resulting litigation on the basis that the recovery of costs of previous legal proceedings as damages is prohibited insomuch as costs which were unrecovered previously cannot be recovered in a subsequent claim for damages as between the same parties.



## **Comments**

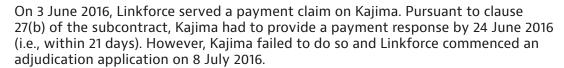
Firstly, this case highlights that interim certificates cannot be relied on to estop a party from relying on the re-measurement clause where the parties have expressly contracted for the contract to be subject to re-measurement and recalculation. In addition, it is consistent with the current position in Singapore against using estoppel as a sword to found a cause of action.

Secondly, claims for costs and expenses arising from preceding adjudication determinations and the resulting litigation are prohibited on the basis that claims that are unrecovered previously cannot be recovered in a subsequent case involving a claim for damages between the same parties.

# Representations must be clear, unambiguous and unequivocal

Where a party has varied the date of service of a payment claim in one instance, does it allow the other party to then assume that the date of service is accordingly varied for subsequent payment claims? In *Linkforce Pte Ltd v Kajima Overseas Asia Pte Ltd* [2017] SGHC 46, Kajima Overseas Asia Pte Ltd ("Kajima") did not submit a payment response on the basis that the relevant payment claim had been lodged prematurely. However, Linkforce Pte Ltd ("Linkforce") argued that the date of service had been varied based on an earlier e-mail regarding a payment claim from a previous month. Does this suffice as a representation that Linkforce can rely on to make out an argument of estoppel or waiver?

Linkforce was appointed by the Kajima to carry out works in relation to the installation of a fire protection system. This Subcontract was pursuant to a main contract between Kajima and Mediacorp Pte Ltd for a larger project.



On 18 July 2016, Kajima lodged an adjudication response objecting to the adjudication application on the basis that it was lodged prematurely. It highlighted clause 32(b) and 27(a) of the subcontract which provide that the contractually stipulated deadline for a payment claim was the last day of each month. As such, the relevant payment claim should only have been served on 30 June 2016 instead of 3 June 2016. Accordingly, a payment response from Kajima was not due on 24 June 2016 – which rendered the adjudication application premature.

The Adjudicator disagreed with Kajima and found that the adjudication application had been lodged on time – and dismissed Kajima's jurisdictional objection on the basis that there was waiver or variation of the subcontract based on an e-mail dated 25 August 2014 sent by Kajima's project manager, which stated that the progress claim was to be submitted by 5 October 2014.

The High Court considered one main issue: whether the adjudication application was lodged prematurely, thereby breaching s 13(3)(a) of the SOP Act and invalidating the adjudication determination.

## The High Court's Decision

The High Court held that the test for setting aside an adjudication determination is based on whether there has been a breach of a provision that is so important that it is the legislative purpose that an act done in breach of the provision should be invalid. It then held that s 13(3)(a) was such a provision, the breach of which would invalidate the adjudication determination as timelines under the SOP Act were to be strictly followed. As such, it was both appropriate and necessary for the High Court to examine the merits of the Adjudicator's decision as to whether the adjudication application was indeed lodged prematurely.

The question then turned to whether there was estoppel, waiver or variation of the contract such that Kajima could no longer insist that the payment claims be served on the last day of the month.

An estoppel by representation is made out when three elements are satisfied: a clear and unambiguous representation of fact (which could have been in the form of words or conduct), reliance and detriment. A waiver by estoppel applies where a party has made an unequivocal, clear and unambiguous representation that it would not enforce its legal rights against the other party.

On the facts, the High Court held that Linkforce had failed to clear even the preliminary hurdle of proving such a representation on the basis of the e-mail by Kajima's project manager. The High Court found the language in the e-mail to be haphazard and ambiguous. In addition, Kajima had not consistently provided payment responses to Linkforce within 21 days of the payment claims being served, which intimated that the e-mail was not intended to apply to progress claims after October 2014.

As such, the Court held that neither the e-mail nor the parties' conduct had the effect of estoppel, waiver or variation to the contract such that the deadline for the service of payment claims was no longer the last day of each month. The payment claim in question was therefore served prematurely, resulting in a correspondingly premature adjudication application. The Court to set aside the adjudication



determination and the Order of Court granting leave to Linkforce to enforce the adjudication determination.



## **Comments**

This case highlights that to establish a variation to the date of service of payment claims, the representation relied on must be clear, unambiguous and unequivocal. An e-mail that the date of service has been changed in relation to a specific payment claim would not be sufficient to satisfy those requirements, as demonstrated by the facts in this case.

# Standard of proof for setting aside an adjudication determination

Under Singapore law, what is the standard of proof in a setting-aside application or in an enforcement application in respect of adjudication determinations? In *Vinod Kumar Ramgopal Didwania v Hauslab Design & Build Pte Ltd* [2017] 1 SLR 890, the Court of Appeal examined this question for the first time and discussed the regimes in the United Kingdom and Singapore.

In 2013, Vinod Kumar Ramgopal Didwania ("Vinod") entered into a contract with a contract with Hauslab D&B Pte Ltd ("D&B"). The claim was brought by Hauslab Design & Build Pte Ltd ("Hauslab"). Although D&B and Hauslab have similar names and are related, they are, in fact, separate entities. The contract required D&B to design and build on his property a two-storey detached house with an attic and an open roof terrace.

Subsequently, the director of D&B produced a draft novation agreement which purported to novate the Contract from D&B to Hauslab and handed it to either Vinod or his wife. The parties disagreed over whether there was an agreement to novate the Contract.

In 2015, Hauslab served a payment claim ("PC 18") on Vinod for work done but Vinod's wife informed Hauslab that Vinod's contract was with D&B and not Hauslab. As a result, neither Vinod nor his wife provided a payment response or make any payment in respect of the PC 18.

The parties' dispute was eventually determined by an adjudicator who issued his adjudication determination in favour of Hauslab and ordered Vinod pay the entire sum in PC 18 together with interest. Vinod applied to the High Court to set aside the adjudication determination and the order issued by the High Court granting leave to enforce the adjudication determination. The High Court dismissed the application, and Vinod appealed against the High Court's decision.

The Court of Appeal had to consider:

- (i) what the standard of proof is in an application to set aside an adjudication determination or an order giving leave to enforce an adjudication determination; and
- (ii) whether Vinod had discharged his burden of proof on the question of whether there was a contract between himself and Hauslab within the meaning of s 4 of the SOP Act.

## The Court of Appeal's Decision

The Court of Appeal agreed with the High Court that the appropriate burden of proof was on a balance of probabilities. However, it diverged slightly from the High Court in terms of the reasoning. The High Court had based its decision on the distinction between the adjudication regimes in England and in Singapore, specifically on the fact that the former is contractual in nature while the latter is founded on statute. In contrast, the Court of Appeal held that the more important distinction was in terms of the way an adjudication determination may be enforced under each regime.

In England, an adjudication determination is enforced by issuance of a writ seeking payment of the sum in question followed by an action for summary judgment – which may be granted by the court if it considers that the defendant has "no real prospect of successfully defending the claim or issue". If the respondent is able to raise a triable issue as to the adjudicator's jurisdiction, then summary judgment will not be granted to enforce the adjudicator's award and the parties' dispute on the issue in respect of which a triable issue has been raised will have to proceed to trial.

On the other hand, the Singapore regime allows a claimant to directly enforce an adjudication determination in the same manner as a judgment or order of the court to the same effect. As such, the courts' review of adjudication determinations in Singapore was a limited one compared to the English regime.

The Court of Appeal held that the concept of temporary finality undergirded Singapore's adjudication regime. The SOP Act created an intervening, provisional process of adjudication that was final and binding on parties until their differences were ultimately and conclusively determined or resolved by arbitration or litigation.

As such, the Court of Appeal held that:

- (a) the court's determination on all questions, including on the terms and existence of a contract and hence on the adjudicator's jurisdiction, is subject to the same constraints of temporary finality;
- (b) these issues can subsequently be revisited at arbitration, trial or any other dispute resolution proceeding brought to reopen or set aside those decisions;
- (c) it is within those confines that the court makes a decision on whether the grounds to set aside the adjudication determination have been established; and
- (d) when it does, it must be satisfied as to the facts, on the basis of the material before it, on a balance of probabilities.

On the facts, the Court of Appeal agreed with the High Court that the parties had agreed to novate the Contract from D&B to Hauslab – and accordingly, that the adjudicator did not exceed his jurisdiction when he determined the dispute arising from PC 18.



## **Comments**

This case highlighted that the standard of proof in a setting-aside application or in an enforcement application in respect of adjudication determinations is on a balance of probabilities.

## Apparent bias, contractual interpretation and procedural breach

When will an adjudicator's prior association with one of the parties result in apparent bias? Should a statutory definition be applied to interpret a contractual term? Is a procedural breach sufficient to set aside an adjudication application? These were questions that the High Court was invited to answer in *UES Holdings Pte Ltd v KH Foges Pte Ltd* [2017] SGHC 114.

On 25 August 2016, KH Foges Pte Ltd ("KH Foges") served a payment claim on UES Holdings Pte Ltd ("UES") for work done under a subcontract with UES. In response, UES's payment response indicated that KH Foges was instead liable to pay UES. KH Forges commenced adjudication and an adjudicator was appointed. The adjudicator rendered an adjudication determination in KH Foges' favour and ordered UES to pay KH Foges the adjudicated amount. UES sought to set aside the adjudication determination on three alternative grounds:

## **Issues before the High Court**

Three issues were brought before the High Court:

- a) Whether the adjudicator had violated s 16(3)(a) and/or s 16(3)(c) of the SOP Act due to apparent bias on his part;
- b) Whether the adjudication application had been lodged out of time; and
- c) Whether KH Foges's notice to UES of its intention to apply for adjudication failed to comply with Reg 7(1)(f) of the SOP Regulations and was therefore defective.

## (a) Whether the adjudicator had violated s 16(3)(a) and/or s 16(3)(c) of the SOP Act

The High Court held that Section 16(3)(a) of the SOP Act codified the rule against the natural justice rule against bias. As an offshoot of this rule, the doctrine of apparent bias therefore applies under the SOP Act as well. The applicable test is the "reasonable suspicion" test.

Where the test is made out, the court may then set aside the adjudication determination. The High Court however left open the question as to whether or how the material breach requirement applies when the test is made out against an adjudicator.

## Tribunal's relationship with a party or a party's representative

The High Court held that factors such as the duration, intensity and nature of the tribunal's relevant associations and the last renewal of the associations are relevant in determining whether there is a rational link between a tribunal's associations and the prospect of bias. Apparent bias is established if there is reason to hold, upon analysing the tribunal's associations through the prism of these factors, that those associations might influence the tribunal's decision. Failure to disclose the tribunal's associations may also give rise to apparent bias where these associations were sufficiently material or significant. Where disclosure should be made, the tribunal should make full disclosure because partial disclosure is likely to reduce public confidence in the administration of justice.





## Relevance of a tribunal's responses to a party's inquiries for information regarding its associations

The High Court also held that a tribunal's responses to a party's inquiries for information about its associations can lend weight to a reasonable suspicion of bias. However, the evidence must be carefully sifted and weighed to determine whether the tribunal's replies support a finding of apparent bias based on factors such as the detail, speed and tone of the tribunal's responses.

#### Waiver

Finally, the High Court clarified that waiver of the right to challenge the adjudication determination on the basis of apparent bias must be by free and informed choice where the party waiving is aware of all the material facts, of the consequences of the choice open to him, and given a fair opportunity to reach an unpressured decision. On the first requirement that the party waiving be aware of all material facts, the High Court added that it is up to the party waiving to decide whether to request the tribunal to elaborate on relevant facts after it has been put on notice that an issue of apparent bias may lie. If it fails to do so, it would be deemed to have had sufficient knowledge.

A party is put on notice when sufficient information was given though whether sufficient information was given is heavily fact-sensitive with two relevant considerations. Firstly, the tribunal's disclosure must not misrepresent the material facts and secondly, where the party to whom the disclosure is made did not have legal representation, a higher threshold would have to be surpassed to establish that the party had sufficient information to put it on notice.

On the facts, the High Court held that UES had failed to satisfy the reasonable suspicion test given that the adjudicator's association with KH Foges' representative was neither strong nor close and was relatively remote in time. Even if UES satisfied the test, it had waived the right to challenge the adjudication determination on the basis of apparent bias since the adjudicator had sufficiently disclosed his association prior to the adjudication process and UES was put on notice for which it did not make further inquiries.

## (b) Whether the adjudication application had been lodged out of time

Under the Subcontract, UES was required to submit its payment responses "within twenty-one (21) days" from the submission of payment claims. The parties disagreed over when the payment response deadline was supposed to be because they differed over whether public holidays are included in determining the deadline. The adjudicator held that "days" excluded public holidays.

The High Court held that when parties contract with the provisions of a statute in mind, and when the terms of those statutory provisions are defined by that statute, then generally, if the contract uses the same terms, the terms should be interpreted in accordance with the statutory definitions, unless the context yields a different interpretation.

On the facts, since the parties had contracted with s 11(1) of the SOP Act in mind and s 11(1) used the word "days" defined in s 2 of the SOP Act to exclude public holidays, the use of the word "days" should therefore be interpreted in accordance with the definition under the SOP Act.

## (c) Whether KH Foges's notice to UES of its intention to apply for adjudication failed to comply with Reg 7(1)(f) of the SOP Regulations

The High Court found that Reg 7(1)(f) of the SOP Regulations was not a key provision that merited the setting aside of an adjudication application for a breach of that provision alone – since a breach would not impede the adjudication process and still serve its core function under the SOP Act to communicate the claimant's intention to the respondent. Further, by the time the notice is served, the respondent would also have received the payment claim which would provide sufficient information to decide whether to pursue settlement or adjudication. As such, any failure by KH Foges to comply with Reg 7(1)(f) would not cause UES any prejudice.



## **Comments**

This case laid down several principles regarding the doctrine of apparent bias, contractual interpretation of a term and the requirements for setting aside an adjudication application for failure to comply with procedural requirements.

Where the adjudicator was associated with any party or a party's representative, the other party is taken to be put on notice when it has received sufficient information. It is deemed to have waived its right to challenge on the basis of apparent bias if it fails to make further enquiries at that stage.

When parties contract with the provisions of a statute in mind, and when the terms of those statutory provisions are defined by that statute, then generally, if the contract uses the same terms, the terms should be interpreted in accordance with the statutory definitions, unless the context yields a different interpretation.

A procedural breach of a regulation will not move the court to set aside an adjudication application unless that regulation is so important that it is the legislative purpose that an act done in breach of the provision should be invalid or the breach materially affects the other party's rights.

## Can respondents raise set-offs against adjudication amounts found to be payable under adjudication determinations?

Does the SOP Act permit a respondent to raise a set-off against an adjudicated amount found to be payable under an adjudication determination? The High Court in AES Façade Pte Ltd v WYSE Pte Ltd [2017] SGHC 171 was invited to decide on this issue and discussed the statutory object and purpose of the SOP Act.

AES Façade Pte Ltd ("AES"), was engaged as a subcontractor by WYSE Private Limited ("WYSE"), in respect of certain façade works. AES served a payment claim on WYSE, but WYSE filed its payment response out of time. AES commenced adjudication proceedings and the adjudicator gave an adjudication determination in favour of AES.

WYSE refused to pay AES the Adjudicated Amount and AES successfully applied for leave of Court to enforce the adjudication determination as a judgment or order of court ("Enforcement Court Order"). WYSE sought to set aside the Enforcement Court Order and included an alternative prayer to stay all proceedings related to the Enforcement Court Order pending the conclusion of arbitral proceedings between the parties.

Two issues were brought before the court:

(a) Whether the SOP Act permitted a respondent to raise a set-off against an

- adjudicated amount found to be payable under an adjudication determination ;and
- (b) Whether, if the Enforcement Court Order was not set aside, the Court should grant a stay of execution of the Enforcement Court Order: (i) pending the determination of arbitral proceedings between the parties regarding AES' liability for liquidated damages; and/or (ii) pending any appeal against the High Court's decision by WYSE.
- (a) Whether the SOP Act permitted a respondent to raise a set-off against an adjudicated amount found to be payable under an adjudication determination

The High Court held that this question required the examination of two provisions under the SOP Act: first, whether s 27 contained an implied prohibition, and second, whether s 36 (the provision against contracting out) would render void the contractual provisions on which WYSE's set-off depended.

Section 27 was held to implicitly prohibit a disputed and unadjudicated set-off from being raised against an adjudicated amount as the language of the provision implies a payment and not discharge of the adjudicated amount by way of a purported set-off. In addition, since the object and purpose of the SOP Act is to protect cash flow in the construction industry and to create a quick and efficient means of providing temporary finality to any disputes that may arise, discharge by way of a disputed set-off would undermine the scheme of the SOP Act.

Furthermore, WSYE's attempt to raise a set-off against the adjudicated amount could not be said to be akin to a repeat claim for a premature or untimely payment claim. While a repeat claim is specifically permitted under s 10(4) of the SOP Act, there was nothing in the statute specifically permitting what WYSE was attempting to do.

As for s 36, a contractual clause that purports to confer on WYSE the right to raise a set-off even after an adjudication determination had been handed down would contravene s 36(2)(a) as such an outcome would allow for unacceptable delaying tactics and subvert the object and purpose of the SOP Act. Further, the High Court held that that contractual clause which WYSE was relying on should not be interpreted to extend to the post-adjudication context since the court would not readily interpret a provision as being intended to contravene a statute. In principle, after an adjudication determination is made, the obligation to pay the adjudicated amount is no longer merely an obligation arising under the underlying contract. It may have derived from the obligations contained in the underlying contract, but it has by virtue of the adjudicator's decision acquired an additional status as a statutory obligation imposed by s 22(1) of the SOP Act, which mandates that the respondent has to pay the adjudicated amount to the successful claimant.

(b) Whether, if the Enforcement Court Order was not set aside, the Court should grant a stay of execution of the Enforcement Court Order: (i) pending the determination of arbitral proceedings between the parties regarding AES' liability for liquidated damages; and/or (ii) pending any appeal against the High Court's decision by WYSE

The High Court held that the SOP Act was intended to ensure that successful claimants will be paid without undue delay given that the purpose of the SOP Act was to avoid and guard against pushing building and construction companies over



the financial precipice.

Based on case authorities, the court will grant a stay of enforcement in two instances only where there is clear and objective evidence of the successful claimant's actual present insolvency, or where the court is satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body.

On the facts, the High Court held that WYSE's double-barrelled approach to frustrate AES's attempts to be paid the Adjudicated Amount should be construed as an abuse of the process of court.

The High Court also rejected WYSE's application to stay the order of the present suit pending the outcome of WYSE's intended appeal on the basis that courts should be wary of construing any provision in a manner that would defer payment to successful claimants. In addition to the absence of Parliament's intent to allow a statutorily prescribed stay of execution pending appeal, the High Court also noted that there was no good reason on the facts why AES should be deprived of the money for any longer.



## **Comments**

This case reiterates the importance for respondents to include all reasons for withholding payments in their payment responses - including all set-offs under the relevant contractual provisions.

An adjudicated amount cannot be discharged by way of a set-off even if it was a contractually conferred right because such a right would undermine the statutory purpose of SOP Act.

The court is slow to grant a stay on execution and will only do so in very specific circumstances so as to give effect to the statutory object of the SOP Act.

## Validity of payment claims and breaches of natural justice

What are the grounds for invalidating a payment claim and is the failure of an adjudicator to consider claims not included in a PR a breach of natural justice? In *Kingsford Construction Pte Ltd v A Deli Construction Pte Ltd* [2017] SGHC 174, the High Court reiterated several principles relating to the validity of a payment claim and the scope of an adjudicator's scrutiny.

A Deli Construction Pte Ltd ("A Deli") was a subcontractor appointed by Kingsford Construction Pte Ltd ("Kingsford") to supply labour, small tools and equipment for wet trades in respect of construction works at Hillview Peak. There were two subcontracts between the parties.

On 20 January 2017, A Deli served two payment claims under both subcontracts on Kingsford. Kingsford did not issue any payment responses in respect of both claims. Accordingly, A Deli issued notices of its intention to apply for adjudication in respect of both payment claims under both subcontracts.

Subsequently, in both adjudication determinations, Kingsford was ordered to pay A Deli various sums of money. Kingsford failed to make any payment, and

A Deli applied to the High Court to obtain leave to enforce both adjudication determinations. In response, Kingsford sought to set aside both adjudication determinations.

Two issues were brought before the court:

- (a) Whether the two payment claims were invalid and the adjudicators thus had no jurisdiction to adjudicate the payment claims; and
- (b) Whether there was a breach of natural justice as the adjudicators had failed to consider Kingsford's set-off and counterclaim.

## (a) Whether the two payment claims were invalid

The High Court affirmed that a payment claim is valid as long as it fulfils the formal requirements set out in s 10 of the SOP Act and the Regulation 5 of the SOP Regulations. On the facts, the adjudicators had already allowed Kingsford to argue that the payment claims were invalid and came to the conclusion that they were valid as they were in compliance with the statutory requirements. The High Court agreed with the adjudicators' decisions that they were valid.

The argument raised by Kingsford was that both payment claims were invalid because they were issued after the "final" claims under both contracts. However, the High Court held that there was nothing in the contracts that provided for final payment claims or a mechanism for determining which payment claims were "final". As such, the argument could not stand and the payment claims were accordingly held to be valid.

# (b) Whether there was a breach of natural justice as the adjudicators had failed to consider Kingsford's set-off and counterclaim

Kingsford argued that there was a breach of natural justice as the adjudicators did not give it an adequate opportunity to be heard by disregarding its arguments that it had a valid set-off and counterclaim against the two payment claims.

The High Court dismissed this argument as Kingsford had not filed any payment responses – which precluded the adjudicators from considering those arguments based on its purported set-off or counterclaim. Nevertheless, the High Court conceded that adjudicators could consider whether there were "patent errors" relating to payment claims – which the adjudicators did. The adjudicators had also considered Kingsford's claims relating to backcharges and set-off but rightfully precluded them as they were not found in any payment responses and were therefore disallowed by s 15(3)(a) of the SOP Act.



#### **Comments**

This case reiterates that the courts will not deem a payment claim invalid as long as it fulfils the formal requirements set out in s 10 of the SOP Act and the Regulation 5 of the SOP Regulations. It is therefore important for claimants to be familiar with these formal requirements to ensure full compliance.



Many construction projects involve multiple contracts between parties. In *Hua Rong Engineering Pte Ltd v Civil Tech Pte Ltd* [2017] SGHC 179, the High Court considered the question of whether in an adjudication under the SOP Act, a respondent is entitled to raise, and an adjudicator is entitled to consider, cross-claims, counterclaims and set-offs which arise outside of the context of the particular contract which is the subject of the payment claim in question.

Hua Rong Engineering Pte Ltd ("HRE") had entered into two contracts with Civil Tech Pte Ltd ("CTP") to supply labour for construction relating to two separate projects: the T211 project and the C933 project.

On 6 December 2016, HRE submitted a payment claim in respect of the T211 contract. However, in CTP certified a negative value in its payment certificate. CTP alleged in its payment certificate that HRE had made false and fraudulent payment claims under the C933 contract when HRE had not in fact performed those works. As a result, CTP claimed that it had overpaid HRE in respect of the C933 contract and sought to withhold a sum of over \$1.4 million.

HRE lodged an adjudication application after giving due notice. CTP relied on the same grounds and argued that the fraud and overpayment (in the C933 contract) entitled it to set off the \$1.4 million sum from HRE's payment claim under the T211 contract. The adjudicator ruled in favour of HRE and held that as a matter of law CTP was not entitled to set off a counterclaim based on another contract – on the basis that the SOP Act only allowed him to take into consideration cross-claims, counterclaims and set-offs arising under the same construction contract. CTP appealed to the High Court.

The High Court had to consider three issues:

- a) Whether the Adjudicator was right to confine his deliberation to matters concerning the T211 contract, to the exclusion of the C933 contract;
- b) Whether the Adjudicator breached s 17(3) of the SOP Act (which set out the matters which an adjudicator shall consider);
- c) Whether CTP's allegations of fraud and unjust enrichment are made out.

## (a) Whether the Adjudicator was right to confine his deliberation to matters concerning the T211 contract, to the exclusion of the C933 contract

The High Court held that when looked at from a broad perspective with its object and purpose in mind, it is clear that Parliament had intended to limit the adjudication procedure to a single construction contract.

The High Court first laid down the purpose of the SOP Act to aid its purposive interpretation of s 15(3). Citing WY Steel Construction Pte Ltd v Osko Pte Ltd [2013] 3 SLR 380, the High Court held that the SOP Act was introduced by Parliament to provide the construction industry with a low-cost, efficient and quick process for the adjudication of payment disputes so that main contractors do not unfairly or unreasonably delay or withhold payment from their sub-contractors.





It also noted that in another recent High Court decision of Vinodh Coomaraswamy J in Rong Shun Engineering & Construction Pte Ltd v C.P. Ong Construction Pte Ltd [2017] SGHC 34, the High Court had concluded that a rule of "one payment claim, one contract" applied after considering ss 2, 5, 10 and 12 of the SOP Act. Essentially, Parliament's consistent use of the phrase "a contract" and variations similarly adopting the singular form indicate that adjudications under the SOP Act were both intended to be confined to a single contract.

In relation to s 15(3) and s 17(3)(b), the issue was whether the language used indicates that Parliament intended that the same position which applies to payment claims applies as well to withholding reasons which can be considered in an adjudication under the SOP Act – namely, that they must arise out of a single contract only.

The High Court held that logically, this must be the case since the language used is fundamentally identical. In addition, there is a convincing policy reason for such an interpretation since the alternative would imply that there is no limit to the scope of matters an adjudicator must consider as potentially valid withholding reasons in an adjudication determination. This would undermine the purpose of the SOP Act and the practical limitations of adjudication.

## (b) Whether the Adjudicator breached s 17(3) of the SOP Act

The High Court noted that s 17(3) prescribes the scope of the adjudicator's jurisdiction. In particular sub-sections (b) and (d) require the adjudicator to focus on the provisions of the contract to which the adjudication application relates and the payment response respectively. However, under s 17(3)(d), the consideration of the respondent's payment response and adjudication response is subject to s 15(3) which concerns the kinds of withholding reasons which may be raised and considered in an adjudication. On the facts, the court held that the adjudicator had comprehensively summarized and considered the allegation of fraudulent claims in his adjudication determination. However, the court noted that consideration does not mean that the adjudicator had to accept those contentions. As such, the High Court dismissed CTP's argument and held that the adjudicator had properly considered the contents of the payment response and the adjudication response.

## (c) Whether CTP's allegations of fraud and unjust enrichment are made out

Since the High Court found that the adjudicator was right to confine his deliberation to the T211 contract, the alleged fraud and unjust enrichment regarding the C933 contract were rendered immaterial and it was thus unnecessary to consider those issues.



## Comments

Respondents are not allowed to withhold the payment of claimed amounts on the basis of withholding reasons which arise outside of the context of the particular contract (being the subject of the payment claim in question).

# Proper role of the Court in reviewing adjudication determinations

In Mataban Development Pte Ltd v Black Knight Warrior Pte Ltd [2017] SGHCR 12, the High Court reiterated the limited role of the court in reviewing the decision of an adjudicator in light of the purpose of the SOP Act.

Black Knight Warrior Pte Ltd ("Black Knight") applied to the High Court to set aside an Order of Court and its preceding adjudication determination and for Mataban Development Pte Ltd ("Mataban") to pay for the costs of the application. Black Knight had contracted with Mataban to perform some renovations for its hotpot restaurant premises.

The grounds for setting aside are twofold: firstly for breach of the rules of natural justice and secondly for "jurisdictional error" committed by the adjudicator. In particular, a major contention was the validity of Black Knight's payment response in the SOP Act adjudication proceedings.

The High Court had to consider three issues:

- a) Whether the court has a role, under section 27(5) of the SOP Act, to review the merits of the adjudicator's finding that the payment response was invalid? ("Issue (a)")
- b) If the answer to Issue (a) is "yes", did the adjudicator incorrectly find that the Payment Response was invalid? ("Issue (b)");
- c) If the answer to Issue (b) is "yes", did the adjudicator commit any breach of the rules of natural justice or "jurisdictional error" in disregarding the Adjudication Response in the Adjudication Determination, such that the Adjudication Determination should be set aside? ("Issue (c)").

#### Issue (a)

In deciding this issue, the High Court examined several authorities before coming to the conclusion that the court should play a limited role and therefore that it should not embark on a review of the adjudication determination relating to the validity of the PR without any valid reason.

Firstly, the High Court considered its own decision in SEF Construction Pte Ltd v Skoy Connected Pte Ltd [2010] 1 SLR 733 ("SEF Construction") which was endorsed by the Court of Appeal in Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal [2013] 1 SLR 401 ("Lee Wee Lick Terence").

In SEF Construction, which was concerned with the setting aside of an adjudication determination, it was held that the court cannot look into the parties' arguments before the adjudicator to determine whether the adjudicator arrived at the correct decision. Instead, the court's role must be limited to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to and that the process of the adjudication, rather than the substance, is proper.

On that authority which the High Court did not find appropriate to deviate from, the High Court held that the question regarding the validity of a payment response was not one which would affect the validity of the appointment of an adjudicator



under the SOP Act adjudication regime. Further, whether a payment response is valid is not a question of jurisdictional fact. A jurisdictional error would be one where an adjudicator decides to proceed with adjudication where no payment claim existed at all, which was not the case on the facts.

The High Court also held that Black Knight had failed to satisfy the court that the adjudicator's decision on the validity of a PR is one which would render the resulting adjudication determination null and void as a matter of "legislative purpose". Black Knight did not provide any parliamentary material to assist the court to come to such a conclusion.

In relation to the allegation of a breach of the rules of natural justice, the High Court held that the allegation was a misconceived one. This was because it was wrong to characterize the adjudicator's refusal to permit Black Knight to make submissions on particular points as a breach of natural justice. Instead, it was within the jurisdiction of the adjudicator to determine that those points were outside the scope of an adjudication.

## Issue (b) and (c)

Based on its decision on issue (a), the High Court held that it would not make no specific finding in relation to the other issues. However, the High Court reiterated that there was no basis for the Defendant to launch a challenge premised on a "jurisdictional error" or a breach of the rules of natural justice.



## **Comments**

This case highlights that the role of the court is a limited one confined only to certain basic requirements that relate to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to and that the process of the adjudication, rather than the substance, is proper.

## Can an adjudication determination be set aside for fraud?

Can an adjudication determination be set aside for fraud? In OGSP Engineering Pte Ltd v Comfort Management Pte Ltd [2017] SGHC 247, the High Court was invited to consider this question as well as what "patent errors" entailed.

OGSP Engineering Pte Ltd ("OGSP") was hired by Comfort Management Pte Ltd ("Comfort") as a subcontractor for its project. A dispute arose between OGSP and Comfort, as a consequence of which OGSP issued a payment claim against Comfort for certain work done. Comfort did not file a payment response.

Although Comfort eventually filed an adjudication response during the adjudication proceedings, the adjudication response was invalid as it was out of time. Hence, OGSP obtained an adjudication determination in its favour. OGSP applied to the High Court to enforce the adjudication determination as a judgment debt while Comfort applied to set aside the adjudication determination.

Two issues were brought before the court:

a) whether the adjudicator failed to consider any patent error in OGSP's claim such that the adjudication determination should be set aside; and

# Singapore



- a) whether an adjudication determination may be set aside on the basis of fraud and if so, whether there was a fraudulent conspiracy between OGSP and certain third parties to present inflated invoices to Comfort.
- (a) Whether the adjudicator failed to consider any patent error in OGSP's claim such that the adjudication determination should be set aside

The High Court affirmed the Court of Appeal's definition of patent errors in *WY* Steel Construction Pte Ltd v Osko Pte Ltd [2013] 3 SLR 380 as "errors manifest from the material that was properly before the adjudicator". In the present case, the High Court held that that the search for patent errors must be limited to the face of the relevant documents and found that the adjudicator did not fail to consider any alleged patent errors.

Comfort argued that the adjudicator had failed to spot a patent error as he did not consider the contractual provisions before him as required by s 17(3) of the SOP Act. However, the High Court held that the provision does not prescribe what the adjudicator must consider. Rather, it sets out the outer limits of what the adjudicator can consider, i.e., the adjudicator cannot consider anything outside what is stated in s 17(3) of the SOP Act.

The High Court noted that it was very unfortunate that Comfort took a condescending approach when it replied to OGSP's payment claim. Accordingly, Comfort could not use the High Court as a forum to ventilate its arguments as to the merits, having chosen to sit on its hands when it could have lodged a payment response – it could not attempt to introduce its arguments on the merits of its case by the back door to the High Court.

Further, on the assumption that the adjudicator had overlooked some patent error, whether the High Court would set aside the adjudication determination would also depend on the seriousness and extent of the patent errors. This is in line with the overall purpose and objective of the SOP Act.

(b) Whether an adjudication determination may be set aside on the basis of fraud and if so, whether there was a fraudulent conspiracy between OGSP and certain third parties to present inflated invoices to Comfort.

The High Court affirmed the tentative position that an adjudication determination obtained by fraud that did not pertain to the adjudicator may be set aside under the SOP Act although this was not statutorily provided. However, on the facts, the High Court did not find any evidence of fraud on the facts of the case.



## **Comments**

This case highlights that in relation to patent errors, it must be manifest from the material before the adjudicator. Even if the adjudicator had failed to take into account patent errors, the court will not easily set aside an adjudication determination, and much will depend on the seriousness and extent of the patent errors.

Furthermore, it also reaffirmed the tentative position laid down in previous cases that an adjudication determination may be set aside for fraud.

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## Grounds for setting aside an adjudication review determination

In CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd [2017] SGHC 263, the High Court examined whether the principles are the same between setting aside an adjudication determination and setting aside a review determination?

### **Background**

The dispute arose out of a contract in which CMC Ravenna ("CMC") was engaged by LTA to be the main contractor while CGW Construction & Engineering (S) Pte Ltd ("CGW") was engaged by CMC as its subcontractor.

CGW served a payment claim for works done up to and including 31 October 2016. CMC served a payment response for a negative amount of \$\$735,378.93. CGW then commenced an adjudication application. While the adjudication determination was initially rendered in favour of CGW, the review determination was rendered in favour of CMC – determining that there was no amount payable. CMC then sought leave from the High Court to enforce the review determination as an order of court, which was granted and served on CGW. Subsequently, CGW applied to set aside the review determination.

Two issues were brought before the High Court:

- a) Whether the review determination should be set aside because a panel of three review adjudicators instead of a sole review adjudicator should have been appointed to hear and determine the review application; and
- b) Whether the review determination should be set aside because the review adjudicator had misdirected himself on a point of law.

### The High Court's Decision

Prior to discussing the substantive issues, the High Court affirmed that the principles relating to the setting aside of an adjudication determination apply equally to the setting aside of a review determination.

(a) Whether the review determination should be set aside because a panel of three review adjudicators instead of a sole review adjudicator should have been appointed to hear and determine the review application

The High Court held that the review adjudicator had the jurisdiction to hear and determine the review application. This turned on whether the difference between the adjudicated amount and the relevant response amount was less than \$\$1 m pursuant to Reg 10(3) of the SOP Regulations.

The High Court agreed with CMC that the "relevant response amount" under Reg 10(3) of the SOP Regulations cannot carry a negative value. This is based on the plain and literal reading of the definition of "response amount" under s 2 of the SOP Act, which defines a "response amount" as "the amount that a respondent proposes to pay to a claimant in a payment response". This interpretation would also read harmoniously alongside Reg 6(1)(c) of the SOP Regulations, which provides that every "payment response provided in relation to a construction contract shall ... state 'nil' where the respondent does not propose to pay any part of the claimed amount and the reasons therefor".

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In addition, from the Second Reading of the SOP Bill 2004, Parliament had intended the response amount for the purposes of an adjudication review application to be the amount that the respondent is willing to pay in his response to the claimant.

Accordingly, the SMC had rightfully appointed a single review adjudicator to hear and determine the Review Application under Reg 10(3) of the SOP Regulations (the difference between the adjudicated amount and the relevant response amount being less than S\$1 m) and there was accordingly no jurisdictional ground to set aside the review determination.

## (b) Whether the review determination should be set aside because the review adjudicator had misdirected himself on a point of law

The High Court held that courts should be precluded from evaluating whether a review adjudicator had misdirected himself on a point of law, especially one that relates to the manner of his substantive determination of the quantum of the adjudicated amount. The court held that reviewing an adjudication review determination for a misdirection on a point of law or fact (as the case may be) that affects the quantification or assessment of the adjudicated amount would amount to an impermissible intrusion of the court into a review of the merits of the review adjudicator's decision.



### **Comments**

The High Court affirmed that the principles relating to the setting aside of an adjudication determination apply equally to the setting aside of a review determination.

The "relevant response amount" under reg 10(3) of the SOPR cannot carry a negative value. Every payment response provided in relation to a construction contract shall state 'nil' where the respondent does not propose to pay any part of the claimed amount and the reasons therefor.

The courts are preclude from considering whether a review adjudicator has misdirected himself on a point of law, especially one that affects the review adjudicator's substantive determination of the quantum of the adjudicated sum.









The Malaysian construction industry is facing interesting legal developments following the recent Federal Court decision in View Esteem on statutory adjudication (the first on adjudication) which expanded the possibilities in challenging adjudication decisions, the Court of Appeal's decision in Geohan which declined to follow its decision in Qimonda on retention sums, the High Court's decision in Mudajaya which has granted a contractor with the right to claim arbitral proceeds by way of an action under unjust enrichment and/or constructive trust together with the High Court's decision in Usahasama which considers the effects of a failure to refer a dispute to an S.O. for decision prior to arbitration proceedings. In addition, the Society of Construction Law (Malaysia) has launched a Delay and Disruption Protocol (Malaysian Supplement).

## (a) Statutory Adjudication

Jurisdiction, Setting Aside and Stay

View Esteem Sdn. Bhd. v Bina Puri Holdings Bhd [2017] MLJU 1852 is a landmark decision and is the first case handed down by the Federal Court on the Construction Industry Payment and Adjudication Act 2012 (CIPAA). This decision brings a significant change to the law relating to CIPAA.

The questions posed to the Federal Court can be considered under the following heads:

- a) Whether a jurisdictional challenge under Section 41 of CIPAA as to the applicability of CIPAA can be made any time by way of application, and the scope of such a challenge ("Issue (a)").
- b) Whether a party may raise matters not raised in Payment Response during the filing of the Adjudication Response and whether the failure to consider such matters amounts to a denial of natural justice under section 15 of the CIPAA ("Issue (b)").
- c) What is the test to be applied for a stay of an adjudication decision under section 16 of CIPAA, and when should such application be made ("Issue (c)").

### **The Federal Court's Decision**

## Issue (a)

Section 41 of CIPAA excludes from its application a payment dispute that had been commenced in any Court of arbitration as at the date of coming into operation of CIPAA. The High Court in *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor* [2015] 5 CLJ 527 had held that CIPAA applies to construction contracts entered into before the coming into force of CIPAA and also to payment disputes that arose before the enforcement of CIPAA.

Both the Adjudicator and the High Court held that Section 41 of CIPAA did not exclude the present claim whereas the Court of Appeal took a procedural view that an application under Section 41 should be brought with an application under Section 15 of CIPAA to set aside the adjudication decision.

The Federal Court disagreed with the Court of Appeal and held that a jurisdictional challenge on the application of CIPAA can be made at any time by way of application. Section 41 deals with the situation where CIPAA does not apply at all whereas Section 15 deal with the situation where CIPAA applies albeit with a compliant on "excess of jurisdiction".

In addition, the Federal Court recognised that in the construction industry, progress claims (on which interim certificates are issued) are cumulative in nature and do not exist in separate standalone compartments.





### Issue (b)

The Adjudicator had declined to consider 3 defences by the Respondent as there were not stated as reasons in the payment response and was only mentioned in the Adjudication Response In doing so, the Adjudicator relied on Section 27 of CIPAA which provides as follows:

- "1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6 (i.e. Payment Claim and Payment Response).
- 2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator..."

The High Court (and Court of Appeal) had agreed with the Adjudicator, and further held that sections 5 and 6 (i.e. the Payment Claim and Payment Response) are determinative of jurisdiction. The High Court justified its conclusion on the basis that the adjudication pleadings under section sections 9- 11 (i.e. the Adjudication Claim, Response and Reply) of CIPAA are merely manifestations of the matters in sections 5 and 6 of CIPAA.

The Federal Court disagreed with the approach taken by the courts below on the following basis:

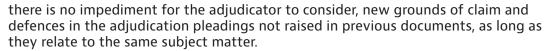
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The Federal Court disagreed with the approach taken by the courts below on the following basis:

- (i) The non-paying party's requirement to raise "the reason for the dispute" in the Payment Response (section 6(2)) is different from the requirement to "answer the adjudication claim" in the Adjudication Response (section 10(1)). The latter is in the nature of a legal response and means a real opportunity to defend a claim as opposed to something illusory.
- (ii) There is no express power given to the adjudicator to reject "new" defences because they did not appear in the payment response, unlike, for example Singapore and Australia.
- (iii) Section 6(4) provides that if a non-paying party fails to respond to a payment claim served on him, he is "deemed to have disputed the entire payment claim".
- (iv) Section 27(1) relates to the subject matter of the claim (i.e. the cause of action) and does not relate to grounds of the claim or the reasons for opposing the claim.

Accordingly, the Federal Court held that the duty to comply with principles of natural justice pursuant to section 24(c) of CIPAA would oblige the adjudicator to consider all defences raised by View Esteem in its Adjudication Response as a matter of fairness and impartiality. An adjudicator who wrongly rules out considering a defence presented to him would be in breach of natural justice.

The Federal Court held that the limitations on "jurisdiction" under section 27(1) relates to the subject matter of the payment claim, which is the cause of action identified by a claimant by reference to the relevant clause of construction contract, rather than the actual content of the pleadings. Parties may therefore include, and



### Issue (c)

The High Court (and Court of Appeal) had decided that an application for stay would only be allowed in exceptional circumstances, limited to "the financial aspects of payment or repayment.". The High Court took into account the object and purpose of CIPAA to provide for quick payment and that this approach is favoured by the courts in England, Australia and Singapore. Much emphasis was placed on the Singapore Court of Appeal decision in WY Steel Construction Pte. Ltd.

The Federal Court disagreed with the approach taken by the courts below on the following basis:

- (i) Section 16 of CIPAA contains no such limiting requirement or intent.
- (ii) The scheme in each jurisdiction is different. Other jurisdictions do review of the adjudication awards and a stay application is made only when the other avenues are exhausted. The approach therefore is restrictive.

The Federal Court held that the right to apply for stay should be treated as a safeguard to a likely wrongful adjudication decision, which empowers the court to find a suitable middle ground in cases where there has been clear and unequivocal errors. The courts in Malaysia are allowed greater flexibility under CIPAA to stay the adjudication award where there are clear errors or to meet the justice of the individual case.

The Court further held that it would be appropriate for an application for stay under section 16 of CIPAA to be filed together with an application to set aside the award under section 15 of CIPAA as a matter of practical utility for the High Court to make an appropriate order in a joint consideration of both.



### **Comments**

The Federal Court's decision has expanded the supervisory powers of the Courts to review adjudication decision on errors of law and merits, and the powers to grant a stay. It is queried by the industry players whether the legal pendulum has now swung in favour of the non-paying party or is this merely a correction of the state of affairs which was seen to be too much in favour of the unpaid party. The effect of the Court's decision remains to be seen.

## (b) Building and construction contracts

### Retention Sums

It is common to find a provision in construction contract which allows an employer to retain and hold a specified percentage of the amount certified in an interim certificate of payment for the work done and materials supplied by the contractor to ensure repair of defective works by the contractor within the defect liability period.

The Courts of Appeal in *Qimonda Malaysia Sdn Bhd v Sediabena Sdn Bhd & Anor* [2011] 8 CLJ 269 ("Qimonda") and *Geohan Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd* [2017] 1 LNS 1257 ("Geohan") differed on the issues of :

(a) whether a trust can be implied where a contract does not contain an explicit provision that the retention monies be held on trust by the employer and

the nature of such sums ("Issue (a)") and;

(b) whether a plaintiff would be entitled to claim for the release of retention sums which had not been set aside in a separate account prior to the defendants' liquidation ("Issue (b)").

In both these cases, the Certificate of Practical Completion had been issued and there were no complaints on defective works carried out by the plaintiffs.

The differing approaches taken by the Court of Appeal in both cases will be explored here.

## Qimonda Malaysia Sdn Bhd v Sediabena Sdn Bhd & Anor [2011] 8 CLJ 269

### **Background**

Sediabena Sdn Bhd and Anor ("SA") sought a declaration in the High Court that the retention sums held by Qimonda Malaysia Sdn Bhd ("QM") under the contract had been held in trust by QM for SA. SA were contracted by QM, as contractor and subcontractor, for a project known as the 'Design and Build for Qimonda Global Module House Project in Senai, Johor' ("Contract").

It was agreed in the Contract that the retention monies ("Retention Monies") were to be deducted for value of work already done and materials supplied (Clause 22.1.3), and QM shall release one half of the Retention Monies to SA upon the issuance of the handing over certificate, and release the second half of the Retention Monies upon the issuance of the maintenance certificate or after the issuance of the certificate of statutory completion for the works by the relevant authority, whichever is later (Clause 23.1 - 23.2). However the contract did not expressly state that the Retention Monies were held on trust by QM for SA, nor were the Retention Monies set aside in a separate from QM's funds prior to liquidation. The Retention Monies amount to RM 6,127,884.50.

QM went into voluntary liquidation before the Retention Monies could be released to SA.

#### Issue (a)

The Court of Appeal held that it is implied by law in construction contracts that retention monies are held on trust by the main contractor for the benefit of the sub-contractors, i.e. irrespective of whether the terms of the contract stipulate the intention to have these monies on trust, expressly or impliedly.

The Court of Appeal relied on the Supreme Court's dicta in *Geh Cheng Hooi* & *Ors v Equipment Dynamics Sdn Bhd* [1991] 1 CLJ 464 ("*Geh Cheng Hooi*") for the proposition that the Court could and should consider all the facts to determine whether a fiduciary relationship existed in the circumstances. The Court held that the question was whether in substance, a sufficient intention to create a trust had been manifested. The Court would consider the circumstances governing the relationship between the parties and the arrangements as to how monies were deducted from the progress payments under the contract. The Court of Appeal relied on Megarry J's dicta in *Re Kayford* [1975] 1 All ER 604 that states that a trust can be created without using the words "trust" or "confidence" or other such expressions.

The Court took into account that the Retention Monies were already earned by the contractor and that purpose of the deductions to Retention Monies were specifically to make good the defects. The Court surmised that the fact that the word "deduction" was used indicated that the parties recognized the Retention Monies were SAt's monies. Furthermore, the Court of Appeal stated that the whole purpose of what had been done was to ensure the monies remained in the beneficial ownership of SA.

### Issue (b)

The Court of Appeal went on to hold that by virtue of a trust being implied by law, it was not necessary for an employer or a main contractor to set aside a sum equal to the retention monies in a separate fund. The Court of Appeal declined to follow the English case of *Rayack Construction Ltd v Lampeter Meat Co Ltd* [1979] BLR 34. Their Lordships held that the apex court of Malaysia in *Geh Cheng Hooi* had recognised the principle laid down in *Re Kayford Ltd* and noted that this principle had been followed by the Malaysian Courts in *Syarikat Pembinaan Woh Heng Sdn Bhd v Meda Property Services Sdn Bhd (unreported) and Merino O.D.D. Sdn Bhd v PECD Construction Sdn Bhd* [2009] MLJU 671.

In particular, for *Geh Cheng Hooi*, the court stated that "the money was also intended to be banked in a common fund and this did not have the effect of the money losing its character of being trust money".

The Court recognised the hardships that contractors would face if a requirement was imposed that the retention monies must be kept in a designated account during pendency of the contract. Such an onerous obligation would not reflect the commercial reality of the construction industry, particularly in the Malaysian context.

## Geohan Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd [2017] 1 LNS 1257

## **Background**

Pembinaan Legenda Unggul Sdn Bhd ("UN"), a contractor engaged Geohan Sdn Bhd ("GH") as its sub-contractor ("The Contract").

The Contract states that the first half of the retention sums ("Retention Monies") shall be released by UN to GH upon issuance of the Certificate of Practical Completion of the Main Contract Works and the second half of the Retention Monies be released upon issuance of the Certificate of Completion of Making Good Defects of the Main Contract Works. Although the Certificate of Practical Completion was issued by UN in January 2014, UN has refused to release the first half of the Retention Monies. The Retention Monies amount to RM 886.723.00.

UN went into voluntary liquidation before the Retention Sums could be released to GH.

### Issue (a)

The Court of Appeal declined to follow Qimonda.

In the absence of an express clause creating a trust or a clear intention of the parties to create a trust, it cannot be implied in law that a trust subsists in cases where the construction contract provides for retention monies to be held by an employer. In other words, it would require an express clause or a clear intention manifested by the parties to construe the subsistence of a trust in relation to retention monies.

Here, the provisions of the contract did not support the existence of a trust. Instead, it is the nature of a debt owed by the main contractor to the sub-contractor.

## Issue (b)

The Court of Appeal declined to follow *Qimonda*.

Relying on Fawziah Holdings Sdn Bhd v Metramac Corporation Sdn Bhd & Another Appeal [2006] 1 CLJ 996 (CA) ("Metramac"), the Court held all three constituent elements of a trust must be present to conclude that the Retention Monies are trust monies. This would therefore necessitate the setting aside of the retention monies



in a separate fund so that the corpus of the trust is clearly identified, failing which it would be void for uncertainty.



#### **Comments**

Pending a decision by the Federal Court, the law on retention sums and the nature of such sums (in the absence of clear express provisions) in Malaysia remains in a state of flux, and contractors uncertain as to the recovery of retention sums from the general funds of the employer.

It would appear that Qimonda has been followed by the High Court cases of KWH Technologies Sdn Bhd v Warga Hikmat Kejuruteraan Sdn Bhd (In Liquidation) & ORS [2013] 1 LNS 1131, Ng Siok Meng v Plant & Offshore Technology Sdn Bhd [2015] 1 LNS 796 and IJM Construction Sdn Bhd v Lingkaran Luar Butterworth (Penang) Sdn Bhd [2017] 1 LNS 1268 whereas Geohan have yet to be referred to by the High Courts in Malaysia.

## Unjust enrichment and breach of constructive trust in construction disputes

The case of Madu Jaya Development Sdn. Bhd. v Kosbina Konsult (K) Sdn. Bhd. [2017] 1 LNS 1509 ("Madu Jaya") is authority that a plaintiff who is no longer able to claim for breach of contract because of the expiry of the limitation period, may instead bring an action for unjust enrichment and/or constructive trust, so long as the requirements for bringing those actions are satisfied.

### **Background**

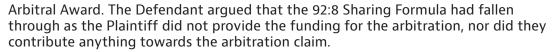
Kosbina Konsult (K) Sdn. Bhd. ("the Defendant") was appointed as the Main Contractor by the Government of Malaysia for upgrading a certain stretch of highway ("the Project"). The Defendant awarded the Subcontract to Madu Jaya Enterprise Sdn. Bhd. ("MJE"), a separate entity to Madu Jaya Development Sdn. Bhd. ("the Plaintiff"). Under the Subcontract, the relevant terms are summarised as follows:

- (i) MJE would carry out the works;
- (ii) The Defendant would receive 8% commission of all the payments received from the Government of Malaysia with the balance of 92% to be paid to MJE ("the 92:8 Sharing Formula"); and
- (iii) MJE would be paid once the Defendant is paid by the Government. In the event of a dispute between the Defendant and the Government which is referred to arbitration, MJE would bear the bill for fees, costs and expenses of such arbitration.

In fact, the works were carried out by the Plaintiff and the Plaintiff was the party that corresponded with the Defendant.

Subsequently, the Government of Malaysia terminated the Main Contract with the Defendant. The Plaintiff and Defendant could not agree on the way forward in commencing the arbitration claim and as regards to the fees of the arbitration. Therefore, the Defendant proceeded with the arbitration claim on its own with its own resources.

After obtaining an Arbitral Award in the sum of RM 20,173,709.80 in its favour, the Defendant refused to provide the Plaintiff with any share in the proceeds of the



#### First Suit

MJE brought an action against the Defendant for the work done and the amounts due under the 92:8 Sharing Formula.

In that suit, the Judge held that MJE was not the proper party to bring the action given that the works were in fact done by the Plaintiff. The Subcontract had been abandoned by conduct of the parties and a new agreement was entered between the Plaintiff and the Defendant on the same terms as the Subcontract. The Judge dismissed the arguments of collateral contracts and lifting of corporate veil made by MJE and, in any event, found that MJE's claims were time-barred.

### Second Suit

The Plaintiff brought a claim against the Defendant under the common law action of unjust enrichment and further or in the alternative, for breach of constructive trust.

## The High Court's Decision

### Issue (a)

The Judge relied on, inter alia, the Federal Court case of *Dream Property Sdn. Bhd. v Atlas Housing Sdn. Bhd.* [2015] 2 MLJ 441 ("Dream Property"), which set out the ingredients for the cause of action in unjust enrichment. Dream Property established that a cause of action in unjust enrichment can give rise to a right to restitution where the following requirements are satisfied:

- (a) the defendant has been enriched;
- (b) the enrichment was gained at the plaintiff's expense;
- (c) the defendant's enrichment at the plaintiff's expense was unjust; and
- (d) there was no special defences to the claim.

On the present facts, the High Court held that the ingredients for unjust enrichment were satisfied given that:

- (a) the Defendant was enriched by the retention of the whole of the Arbitral Award sum;
- (b) the enrichment was gained at the Plaintiff's expense as the Plaintiff had effectively funded the Project from the supply of labour, equipment, machinery and material; and
- (c) it would be 'totally unconscionable and grossly unfair and most unreasonable' if the Defendant was to keep the whole of the Arbitral Award sum to themselves.

The Court held that the limitation period for unjust enrichment starts running from the date the defendant is enriched (and not from the reach of contract) and therefore the Plaintiff's claim was well within the limitation period.

In deciding the quantum of restitutionary relief to be awarded to the Plaintiff, the judge took into account, inter alia, the following factors:

(a) The Defendant had to assume risks in proceeding with the Arbitration as the outcome of Arbitral proceedings are never guaranteed. The Defendant had to carry on with the risks that if they fail in the Arbitration and are held liable to pay the Government of Malaysia, they would first have to bear



the fees, costs and expenses, and the liability of paying the Government of Malaysia, before seeking an indemnity from the Plaintiff to recover the sums paid.

(b) On the other hand, the Defendant would not have succeeded in the Arbitration claim if the Plaintiff had not properly and diligently executed the Works to completion.

Therefore, the judge held that it would be 'fair, reasonable and just' for the Defendant to retain 50% of the Arbitral Award and the balance of 50% to be released to the Plaintiff.

## Issue (b)

The High Court held that '[a] constructive trust arises by operation of law, whenever the circumstances are such that is unconscionable for a party to assert beneficial rights over property and in the course of it, to deny beneficial rights of the rightful party.'

Referring to the Court of Appeal case of *Qimonda Malaysia Sdn. Bhd. v Sediabena Sdn. Bhd. v Anor* [2011] 8 CLJ 269 ("Qimonda"), the judge held that there is no good reason why a trust should only be confined to retention sums and not to certified progress claims sums or sums in the Arbitral Award which are quantified, final and binding.

The judge held that it was an incontrovertible truth that the Plaintiff had carried out the works done and they did not do so gratuitously. The judge asserted that it would be 'unconscionable, unfair and unjust' for the Defendant to keep the whole of the proceeds from the Arbitral Award.

Therefore, the High Court held in favour of the Plaintiff in their claim for breach of constructive trust. The judge decided that a portion of the Arbitral Award sum was held on constructive trust for the benefit of the Plaintiff. The judge applied the equitable maxim of equity tends towards equality. It was held that an equal apportionment of the proceeds of the Arbitral Award would meet the demands of 'reasonableness, fairness, justice and equity'.



## **Comments**

This decision is authority that unjust enrichment and/or constructive trust may be resorted to in certain situations when a claim is time-barred in contract/ tort. In addition, this decision widens the possibility of trust situations to apply to not only retention sums (which is currently in issue based on *Geohan*), but also to certified progress claims sums or sums in an Arbitral award. This decision approach has yet to be scrutinised by the higher courts and its effects remain to be seen.

The Effect and Enforceability of Multi-tiered Dispute
Resolution Clauses (or Escalation Clauses) in Construction
Contracts

The High Court's decision in *Usahasama SPNB- LTAT Sdn Bhd v Abi Construction Sdn Bhd* WA-24C (ARB)-1-01/2016/ [2016] 7 CLJ 275 provides guidance on the approach adopted by the Malaysian Courts in construing multi-tiered dispute resolution clauses in Malaysia, also known as escalation clauses.

#### **Background Facts**

Usahasama SPNB- LTAT Sdn Bhd ("Usahasama"), an employer, entered into a PWD 203 contract with Abi Construction Sdn Bhd ("Abi"), the contractor to perform certain works for a construction project, more particularly described as "Cadangan"



Pembangunan Keperluan Perumahan Anggota Tentera dan Kakitangan Awam, Kem Sungai Besi, Kuala Lumpur- Keq' a Bangunan di Zon C" ("the Contract"). Usahasama subsequently terminated the Contract.

Abi proceeded to issue a notice of arbitration and an arbitrator was duly appointed.

#### Issues

Disputes arose on the construction of Clause 54 of the Contract which provides for a multi-tiered dispute resolution mechanism, also known as escalation clauses. Usahasama took the position that the notice of arbitration issued by Abi was premature as Clauses 54(a) and (b) provides that the dispute should first be referred to the Superintending Officer ("SO") prior to arbitration and hence the arbitrator had no jurisdiction to decide the dispute between parties. Abi, on the other hand, contended that there had been sufficient compliance with Clause 54 and Usahasama had waived this requirement and was estopped from objecting on the basis that it had not raise this issue when it first received the notice of arbitration.

The relevant parts of Clause 54 reads as follows:

"54. Arbitration

Reference to S.O. for a decision.

- (a) If any dispute shall arise between the Government and the Contractor, either during the progress or after completion of the Works, or after the determination of the Contractor's employment, or breach of this Contract, as to:
  - (i) The construction of this Contract, or
  - (ii) Any matter or thing of whatsoever nature arising under this Contract, or
  - (iii) The withholding by the S.O. of any certificate to which the Contractor may claim to be entitled, then such dispute or difference shall be referred to the S.O.

S.O.'s decision to be binding until completion of Works.

(b) S.O.'s decision which is to be in writing shall subject to sub-clause (e) hereof be binding on the parties until the completion of the Works ...

Reference to arbitration.

(c) If the S.O. fails to give a decision for a period of forty-five (45) days after being requested to do so by the Contractor of if the Contractor be dissatisfied with any decision of the S.O., then in any such case the Contractor may within forty-five (45) days after the expiration of forty-five (45) days after he had made his request to the S.O., or forty-five (45) days after receiving the decision of the S.O., as the case may be, require that such dispute or difference be referred to arbitration..."

### **Decision of the Arbitral Tribunal**

The arbitrator heard parties on this issue and decided that he did have jurisdiction to decide the dispute between parties. Dissatisfied, Usahasama appealed to the High Court under Section 18(8) of the Arbitration Act 2005 to challenge the jurisdiction of the arbitral tribunal.

On appeal by Usahasama, three questions were posed to the High Court, namely:

- 1. Whether an appeal under Section 18(8) is by way of a rehearing or a review;
- 2. Whether a reference to the SO under Clause 54(a) and (b) of the Contract was a precondition or condition precedent to arbitration under Clause 54(c);
- 3. If so, whether Abi had substantially fulfilled this condition precedent; and
- 4. Whether Usahasama had waived this condition precedent.

### **Decision of the Arbitral Tribunal**

The High Court decided that an appeal under Section 18(8) is by way of a rehearing and that Clauses 54(a) and (b) were preconditions to arbitration. The High Court took into account the various letters, series of meetings and negotiations between parties however decided that Abi had not sufficiently complied with the preconditions given that there was no specific reference to the SO.

The following guidelines were established by the High Court:

- (i) A precondition or a condition precedent is a condition that has to be fulfilled before a right accrues. Once it is contractually agreed upon, parties should be held to the bargain unless prohibited by law or that it is too vague for enforcement. The intention of the parties as well as public interest would operate to constrain the courts to enforce such a clause.
- (ii) In determining whether the precondition has been complied with, one must ask whether there has been "sufficient compliance" in all the circumstances of the case whilst appreciating that substance must prevail over form. One is confined to events and correspondence before the reference to arbitration and/or litigation and there must be sufficient specificity with reference to the disputes or differences and an invocation of the said clause calling for nothing short of a decision.
- (iii) There can be no estoppel against a statute. A challenge to jurisdiction may be made in setting aside or in recognition and enforcement proceedings pursuant to Section 37 of the Arbitration Act 2005.

The High Court accordingly allowed the Usahasama's appeal.



## **Comments**

The High Court's decision in *Usahasama* is helpful as it provides guidance on the approach adopted by the Malaysian Courts in construing multi-tiered dispute resolution clauses in Malaysia, also known as escalation clauses. It would appear that the Malaysian courts would respect the parties' choice of such clauses, where sufficiently clear and allowed by law, as preconditions to be complied with before the commencement of any legal proceedings.

The approach by the Malaysian courts highlight the importance of meeting all the pre-conditions set out in a multi-tiered dispute resolution mechanism before initiating legal proceedings. The failure to comply with such clauses may result in a challenge to the arbitral tribunal's jurisdiction. In the worst case scenario, one might even be faced with a successful arbitral award later being challenged for lack of jurisdiction in a setting aside application or an opposition to enforcement.

In the event one is minded to incorporate a multi-tiered dispute resolution mechanism in a contract, it is crucial to draft such clauses with clarity and sufficient detail. It is advised to have a clearly defined process with the inclusion of the relevant representatives and obligations which are not too onerous with a time limit for compliance.

## (c) Delay and Disruption Protocol (Malaysian Supplement)

On 20 January 2017, the Society of Construction Law (Malaysia) ("SCL (Malaysia)") launched a Malaysian supplement ("First Malaysian Supplement") of the Second Consultative Draft Delay and Disruption Protocol in the United Kingdom ("Second Consultative Draft Protocol"). This article will provide an overview of the Protocol, its reception by the courts and the First Malaysian Supplement.

## **Background**

The Society of Construction Law ("SCL") was founded in the United Kingdom ("SCL (UK)") in 1983 to promote for the public benefit, education, study and research in the field of construction law and related subjects, both in the United Kingdom and overseas. SCL (UK) has international links with similar SCLs in Europe (consisting of 21 national SCLs), the Caribbean, the Gulf States, Australia, Hong Kong, New Zealand, Singapore and Malaysia. SCL (Malaysia) was formed in 2003 to cater for members in Kuala Lumpur and Selangor and expanded to become a national society, admitting members from all states of Malaysia in 2009. SCL (Malaysia) has since become part of SCL-International, the world-wide federation or alliance of national or regional SCL organizations.

The First Edition of the Protocol was published by SCL (UK) in 2002. The object of the Protocol then (as now) is to provide useful guidance on some of the common delay and disruption issues that arise in construction projects. In July 2015, the review committee of the Protocol published 'Rider 1' which reviewed the Protocol against a backdrop of developments in law and technology. In 2016, the review committee appointed by the Council of SCL (UK) produced the Second Consultative Draft Protocol for public consultation. The Second Edition of the Protocol was recently published in February 2017 and supersedes the First Edition and Rider 1.

Since the publication of the Protocol, judicial recognition to it has been diverse. For example,

- (i) In England, the courts have taken judicial notice of the existence of the Protocol. This can be seen from the cases of Adyard Abu Dhabi v SD Marine Services [2011] EWHC, Mirant Asia-Pacific Construction (Hong Kong) Limited v Ove Arup [2007] EWHC 918 and Great Eastern Hotel Company Ltd v John Laing Construction Ltd [2005] EWHC 181.
- (ii) In Hong Kong, judicial notice was given to a method of delay analysis recommended by the Protocol in *Leighton Contractors (Asia) Limited Stelux Holdings Ltd* [2004] HKCFI 804.
- (iii) In Australia, a greater recognition is accorded to the Protocol. In Alstom Ltd v Yokogawa Australia Pty Ltd & Anor (No 7) [2012] SASC 49, the Supreme Court of South Australia rejected an expert's method of delay analysis on the basis that it was not a method featured in the Protocol nor was it in any text on construction law. Examples of other cases in Australia citing the Protocol include SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd (No 3) [2012] VSC 557 and 620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd [2006] VSC 490.





## Malaysia

In 2016, SCL (Malaysia) formed a legal and technical committee to propose a Delay and Disruption Protocol in Malaysia. The committee eventually decided to draft a Malaysian Supplement to the Protocol with the intention of making the Supplement a "living document", that is, a document with improvements being continuously made to its contents based on regular feedback from industry players. The committee envisaged that SCL (Malaysia) would eventually publish a Delay and Disruption Protocol in Malaysia.

A draft of the First Malaysian Supplement was then circulated to individuals and eminent organisations such as the Construction Industry Development Board, Master Builders Association Malaysia, Chartered Institute of Building, Institute of Engineers Malaysia, Pertubuhan Akitek Malaysia, Royal Institute of Chartered Surveyors, Royal Institute of Surveyors Malaysia and Wanita Industri Binaan Malaysia for review and comments.

On 20 January 2017, SCL (Malaysia) launched the First Malaysian Supplement to the Second Consultative Draft Protocol. The Second Consultative Draft Protocol was used as the Second Edition of the Protocol had not been published.

SCL (Malaysia) has since launched a series of workshops on handling delay and prolongation claims.

Contents of the First Malaysian Supplement

Read together with the Second Consultative Draft Protocol, the First Malaysian Supplement consists of 21 core principles and seven guidance sections relating to areas such as delay damages, extension of time claims, delay analysis, acceleration of work, global claims, disruption claims and valuation of variation claims.

There are three main differences between the First Malaysian Supplement and the Second Consultative Draft Protocol in relation to the areas of liquidated ascertained damages ("LAD"), claims for extension of time ("EOT") and the Malaysian statutory adjudication regime under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA").

## LAD

The First Malaysian Supplement takes heed that such damages are governed by Section 75 of the Contracts Act 1950 which deals with penalty clauses in contracts. Based on the Federal Court's decisions in *Selva Kumar a/I Murugiah v Thiagarajah a/I Retnasamy* [1995] 1 MLJ 817 and *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445, actual loss claimed in respect of LAD must usually be proven.

#### **EOT**

The First Malaysian Supplement sets out the general requirements in dealing with EOT claims. Such considerations include the following:

- (1) What would be considered as comprising adequate particulars or necessary submissions to be included in an EOT application;
- (2) How a contract administrator should deal with EOT and delay/disruption issues; and
- (3) How to deal with "condition precedent" situations.

The First Malaysian Supplement emphasises that the relevant information would be easily obtainable and readily available if the project records are kept in proper order. Principal sources of such information include official works records, progress reports, site diaries, letters, instructions, emails, drawings, photographs and other records.

CIPAA (statutory adjudication)

The First Malaysian Supplement highlights the provisions of CIPAA which affect the timing of a project, such as the entitlement to suspend works or reduce the rate of progress where a contractor is successful in adjudication and has not been paid.



## **Comments**

The First Malaysian Supplement is not a contractual document nor does it purport to take precedence over the express terms of a contract or be a statement of the law. It represents a scheme to deal with delay and disruption issues, whilst recognising that some issues may not have absolute answers. The Malaysian Courts have yet to comment on the usage of this Supplement.





## **Hong Kong**



In 2017, the Hong Kong Court of First Instance had the opportunity to consider the issues of what the applicable rate of payment for works under work orders would be where no contractual rate had been specified, and whether a "re-measurement" clause had been incorporated into the contract and, if so, how it should be interpreted.

## (a) Construction sub-contracts

- What is the applicable rate of payment for works under work orders where no contractual rate had been specified?
- "Re-measurement" clauses.

In Chan Chi Lam v Lam Woo & Co Ltd [2017] HKEC 493, the Hong Kong Court of First Instance ("CFI") considered the applicable rate of payment for works under work orders where no contractual rate had been specified. The CFI also considered whether a "re-measurement" clause had been incorporated into the contract of this case and the interpretation and meaning of that clause.

The Defendant, Lam Woo-Preussag Joint Venture ("JV"), was the Main Contractor of the Water Supplies Department ("WSD") under Contract No. 22/WSD/02 ("Contract") for the replacement and rehabilitation of certain water mains. The Plaintiff, Chan, was one of JV's Subcontractors for water mains works.

The Plaintiff claimed HK\$4.8 million against the JV for work done as one of JV's subcontractors for water mains works under the Contract, in relation to 58 work orders. The JV counterclaimed against Chan for certain contra charges in the amount of HK\$6.195 million.

Two main issues were brought before the CFI:

- what was the rate for assessing payment to the Plaintiff in respect of the work orders without contractually specified rates; ("Issue (a)")
- whether a "re-measurement" clause had been incorporated into the contract between the Plaintiff and Defendant in respect of the works orders without agreed rates, and the interpretation and meaning of the re-measurement clause; ("Issue (b)")

## Issue (a)

The JV's case was that those work orders without contractually specified rates should be assessed on a *quantum meruit*, or reasonable sum basis. On the other hand, the Plaintiff claimed that he had agreed with the JV that the works would be assessed "in accordance with the agreed rates of similar works items in other works orders".

Firstly, the CFI held that the starting and determinative point must be the pleaded case of the parties. As the Plaintiff did not submit any evidence (except for his assertion in his witness of this position) in support of this, the CFI did not accept the Plaintiff's argument.

Secondly, expert evidence indicated that there was no consistent standard of agreed rates, even for work orders where rates had been contractually specified. The CFI accepted the single joint expert's Agreed Rates Schedule. The expert had arrived at standardized and reasonable agreed rates by discounting the agreed rates without further adjustment or discount factors, averaging the agreed rates to one standard

## **Hong Kong**

rate for each of them, excluding unreasonably high or low rates, and fine-tuning the rates to make them consistent with each other. The CFI also accepted the expert's explanation that these rates could be used both as rates on quantum meruit or reasonable sum basis, and as rates for the Similar Works Rate Basis where no rates were specifically agreed between Chan and the JV. The CFI considered that this approach resulted in reasonable market rates.

### Issue (b)

It was not disputed that the Plaintiff had issued quotations for 16 work orders, that the applicable rates had been agreed on, and the re-measurement clause included in the terms and conditions applied. The CFI considered that the re-measurement clause had been incorporated into the contract since, contrary to the Plaintiff's claim that he did not understand English, the quotations included handwritten notes in Chinese and had been signed by both parties.

On the interpretation of the re-measurement clause, the Plaintiff claimed that the clause meant only that the same "method of measurement" provided under the main contract between WSD and the Defendant would be adopted for the contract between the Plaintiff and the Defendant. The relevant clause read as follows:

"Method of Measurement: as per the Main Contract. All the BQ quantities are provisional and subject to remeasurement as based on back-to-back basic (sic). The quantities shown in the attached Bill of Quantities may be substantially decreased, Subcontractor cannot claim additional cost for this issue"

The CFI held that the "back-to-back" basis of the contract to the main contract referred to both the re-measurement method and the quantities, which were stated to be provisional only. Referring to *Arnold v Britton* [2015] AC 1619 at 1628H, the CFI considered that the Plaintiff's declaration of his understanding of the re-measurement clause was neither relevant nor admissible.



## **Comments**

The Court's interpretation of the "re-measurement" clause demonstrates that the precise meaning of the term "back to back" can only be ascertained after consideration of all the circumstances in each individual case. The term is a common one used in construction sub-contracts as a convenient and 'shorthand' way to pass the obligations of the main contractor under the main contract to the sub-contractor. However, this precise meaning of this term is fact sensitive and as a matter of prudence, should be avoided where possible in favour of properly drafted sub-contracts.











## Court strikes down clause as a penalty in agreement between Landlord and Tenant

In this case, the Court considered whether terminating a side letter that allowed a tenant to pay a reduced rent amounted to a penalty that was accordingly unenforceable.

The tenant, the claimant, had rented retail premises from the landlord, the defendant. The lease was for a period of 15 years commencing 18 November 2009, at an initial rent of £110,000 per annum, subject to review every 5 years. Parties entered into a side letter at the time the lease was entered into. The side letter allowed the tenant to pay a reduced rent to the landlord. The side letter could be terminated by the landlord if the tenant breached the terms of the side letter and/or the lease. Upon termination, rent payable would be as set out in the lease, as if the side letter had never existed. In June 2015, the tenant failed to pay rent. The landlord asserted that the side letter had been terminated and the rent, at the rate in the lease, was payable.

The court applied the test set out by the UK Supreme Court in *Cavendish v Makdessi* [2015] UKSC 67 to determine if: (a) the obligation imposed is a secondary obligation which kicks in upon a breach of a primary obligation, attracting the rule of penalties; or (b) a breach of a conditional primary obligation, which depends on events that are not breaches of contract. The former would be a penalty if it imposes on the defaulting party a detriment out of all proportion to any legitimate interest of the innocent party in the performance of the primary obligation.

The tenant argued that the primary obligation was to pay the reduced rent set out in the side letter. On breach of any of the terms of the side letter and/or the lease, a secondary obligation would be imposed on the tenant, i.e. to pay the higher rent as set out in the lease. The landlord argued that the primary obligation was to pay rent as set out in the lease. The side letter gave the claimant a discount which was conditional on the claimant's performance of its obligations in the lease and the side letter.

The court preferred the tenant's argument, finding that the true bargain reached by the parties was that the landlord would accept a reduced rent in exchange for having a tenant of the claimant's stature. Reading the lease and the side letter together, the tenant was obliged to pay the lower amount of rent and comply with all the obligations of the lease. Accordingly, the primary obligation was to pay rent at the lower rate, and the obligation to pay rent at the higher rate was a secondary obligation engaged on a breach.

The court then considered whether such obligation was a penalty. Insofar as the side letter permits a greater obligation upon the occurrence of any breach of any obligation of the lease, that secondary obligation is capable of being a penalty. The secondary obligation is justified if the legitimate interest extends beyond pecuniary compensation for any loss caused by the particular breach. The court did not find any such legitimate interest.

The court then considered how onerous the obligation to pay higher rent was, to determine if such obligation was exorbitant or unconscionable. On the facts, the judge found that the obligation to pay rent at a higher rate retrospective to the commencement of the lease, regardless of the nature and consequence of the breach, was out of proportion to the landlord's legitimate interest and penal in nature.



### **Comments**

While the courts are slow to infer a penalty into a contract that has been freely negotiated by two advised parties of equal bargaining power, it will do so when the provisions are out of all proportion to one parties' legitimate interest in having another party comply with its obligations.

Contract clauses should be carefully drafted to mitigate against the risk of the clause being struck out for being a penalty.

 The TCC provides guidance on the circumstances when the Court will consider a Part 8 Claim on the enforcement of an adjudicator's decision

Ordinarily, the fact that one of the parties thinks that the adjudicator was wrong will be irrelevant to any enforcement decision. If the adjudicator has broadly acted within his jurisdiction and in accordance with the rules of natural justice, his decision will be enforced.

There are two exceptions:

- (i) Where there is an error which is admitted and accepted by all parties including the adjudicator.
- (ii) Where there is an issue of timing, categorisation and description of the relevant application for payment, payment notice or pay less notice.

The defendant should issue a Part 8 Claim where the disputed issue cannot be resolved by parties' consent. To avoid abuse of the court process, a defendant who brings an unsuccessful Part 8 claim will typically be ordered to pay the claimant's costs of the entire action on an indemnity basis.

Wilson had engaged Hutton to carry out residential conversion works at a property in Chelmsford, Essex. A dispute arose in relation to the claimant's application for payment no. 24 issued on 17 August 2016. In October 2016, Hutton commenced adjudication. On 15 November 2016, a decision was issued in Hutton's favour. Wilson did not pay the award sum. In December 2016, Hutton commenced enforcement proceedings. Wilson notified Hutton that it intended to resist enforcement but did not specify the grounds.

On 16 February 2017, Wilson issued a Part 8 claim form. Wilson did not raise any issue as to the adjudicator's jurisdiction. There was also no allegation of a breach of natural justice. Wilson sought to resist enforcement on the grounds that the adjudicator's conclusion was wrong and that there should be no judgment in favour of Hutton.

The judge noted that Wilson's stance is an "increasingly common one against those who are dissatisfied with an adjudicator's decision". The judge set out the conditions that must be satisfied by defendants who issue Part 8 Claims to resist enforcement proceedings:

- there must be a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;
- that issue requires no oral evidence, or any other elaboration beyond that which
  is capable of being provided during the interlocutory hearing set aside for
  enforcement;
- the issue is one which would be unconscionable for the court to ignore on a summary judgment application.

On the facts, the judge observed that Wilson's solicitors' correspondence, witness statement and belatedly filed Part 8 claim did not make clear its basis for resisting enforcement. Wilson was clearly seeking to re-run all the issues in the adjudication, alongside matters not previously raised. Wilson cannot be allowed to shoehorn into the time available at the enforcement hearing, the entirety of the adjudication dispute. This would lead to the situation where instead of adjudication being the de facto dispute resolution regime in the construction industry, it would simply become the first part of a two-stage process. This cannot be permitted.

Accordingly, the judge found for Hutton, who should be entitled to the fruits of its victory.



### **Comments**

This decision firmly reiterates out the TCC's stance towards defendants who seek to get a second bite of the cherry at the enforcement stage. The judge was at pains to highlight that the TCC was being saddled with many applications of this nature made by disgruntled defendants abusing the court process. The TCC works to ensure that there is an enforcement hearing within about 28 days of commencement of proceeding and it does not have the resources to allow defendants to re-run large parts of an adjudication at a disputed enforcement hearing.

 Court of Appeal finds that natural meaning of subcontract provisions prevails over the potential unfairness which may arise.

The Court of Appeal upheld the TCC's decision in *Carillion Construction Limited v Woods Bagot Europe Limited and others* [016] EWHC 905 (TCC). The Court of Appeal held that a sub-contractor's extension of time for a 'Relevant Event' which occurred after the pre-agreed completion date should run concurrently from the pre-agreed contractual date for completion, rather than from the later date on which the impact of the delay event was felt.

Carillion was engaged as the main contractor to construct the High Court Rolls Building in Fetter Lane London for an initial contract sum of £70,130,000. Carillion engaged Emcor Engineering Services Limited as a mechanical and electrical subcontractor. The sub-contract was the standard form of Domestic Sub-Contract called DOM/2 (the "Sub-Contract"). Under the Sub-Contract, Emcor was required to complete the works by 28 January 2011, being also the date for practical completion under the main contract.

Carillion only completed the works until 29 July 2011. It blamed Emcor for the delay and sought to recover the loss and damage caused by Emcor's delay under the Sub-Contract. Carillion argued that the extension of time granted under the Sub-Contract did not have to commence on what was previously the due date for completion, but could instead be added non-contiguously. In its defence, Emcor argued that it was entitled to relief from liability by way of an extension of time under the Sub-Contract.

The court had to decide the issue of when the extension of time started running - from the agreed completion date (a contiguous extension of time), or the later date when the impact of the 'Relevant Event' was felt (a non-contiguous extension of time).

The Court of Appeal dismissed the appeal, agreeing with the TCC that the contract provided for a contiguous time extension. The natural meaning of the wording of cl 11.3, when read in context, was that any extension of time granted would be added contiguously to the end of the current period, within which period the sub-contractor is required to complete the work. The clause is concerned with lengthening the period for completion, and not with creating a distinct period of time to reflect specific delay events created by the Main Contractor.

This interpretation is also in line with commercial common sense; the court also noted that no previous cases (either in England or abroad) appeared to have considered the possibility of discontinuous extensions of time.



### **Comments**

This decision evidences the method by which the TCC and the Court of Appeal will approach questions of contractual interpretation. It also dealt with an issue that had not been previously considered, i.e. whether extensions of time can and should be added non-contiguously in various blocks, rather than contiguously from a date previously fixed for completion.

This case also reiterates that the court will not depart from the natural meaning of the words of the contract even if certain anomalies would otherwise arise.

## TCC restricts situations in which conduct can be said to amount to a variance

The court considered the interpretation of parties' contractual position where no formal contract was entered into. In this case, parties agreed that they were operating under some form of contractual arrangement. The most useful evidence available was outdated letters of intent which parties' subsequent conduct had contradicted. The court had to decide whether upon expiry of the letters of intent, the same terms continued to apply but with no cap or time limit, or whether the contract was fundamentally changed to one where agreed works were to be carried out for a fixed price.

An initial letter of intent referred to 'off-site prefabrication of materials' pending execution of a formal contract. It also stated that the claimant, MH, would be

reimbursed the costs incurred pursuant to the letter, up to a sum of £330,000. The letter further provided that if a binding contract is entered into by the parties, the works authorised by the letter would be treated as work performed under that contract. A subsequent letter of intent raised the reimbursable sum to £430,000. It also pushed back the expiry date of the letter of intent. MH carried out the works, and continued to do so beyond the expiry of the letter of intent. The Defendant, ML, continued to pay for work done on a monthly basis.

An adjudicator subsequently found that by this stage, parties had agreed on a contract sum pursuant to which payments were being made. Such payments exceeded the cap set out in the letters of intent. ML subsequently sought to terminate the contract on the basis that the MH had failed to proceed regularly and diligently with the sub-contract works.

Parties entered into multiple adjudications where the claimant's payment claims were upheld. On the date of the final adjudication, ML initiated its own adjudication. It sought a declaration of the 'final amount'. MH issued the present part 8 proceedings seeking declarations as to the interpretation of the parties' contractual relationship. MH sought a declaration that it was entitled to be paid its costs wholly and necessarily incurred on the project. It argued that parties' conduct evidenced an agreement to extend the application of the various letters of intent beyond their expiry dates and in excess of the payment cap. Consequently, following termination, it was entitled to be paid the costs it had incurred in carrying out the work.

ML argued that the parties' conduct evidenced an agreement to carry out the works on the basis of a contract setting out the scope and the price. MH's entitlement to any payment was by a valuation for the works carried out prior to termination, according to the contract sum.

The court declined to grant MH's declarations. The proper interpretation of the parties' conduct was that they had agreed that MH would continue to be paid, in excess of the cap, on the basis of the contract sum which had been agreed; not on the costs it had incurred. The court also found no evidence for MH's proposition that parties had agreed to remove the cap on costs. The only evidence in this regard is of applications for payment being made for the value of the works in excess of the cap, and such payments consequently being paid out. It is too far to infer that parties had agreed to dispense with the requirement to agree in writing if payment was to be on the basis of costs incurred. The court also found that it would not be appropriate, at this stage, for it to go further to make declarations determining the parties' contractual relationship.



### **Comments**

This is a case where parties agreed at the outset that there was some form of contract that applied to the works. The question before the court was what the terms of that contract were. The court's decision highlights its reluctance to enforce limits or caps in letters of intent if they have been willingly exceeded by the contractor with the employer's knowledge and agreement.



 TCC provides guidance on tactical withdrawals from adjudication and repeat adjudication on identical issues

The Claimant ("Jacobs") had been engaged by the Respondent ("Skanska") to provide design services for street lighting project. A dispute arose as to the adequacy of the design provided, and Skanska commenced adjudication, filing its notice of intention on 8 February 2017. The parties thereafter took steps to prepare for the adjudication. Skanska's counsel subsequently became unavailable and Skanska withdrew its adjudication on 7 April 2017, by which time Jacobs had incurred substantial costs in preparing for the same. Skanska then commenced fresh adjudication proceedings, along substantially the same lines as the previous one, on 21 June 2017.

Jacobs applied to court for an injunction restraining Skanska from continuing with, and ordering it to withdraw from, the fresh adjudication - along with the wasted costs on the initial adjudication. Jacobs argued that it "had a right to a resolution process which was fair to both parties and did not confer an uncovenanted advantage on the referring party beyond that implicit in the rough and ready adjudication process." Skanska on the other hand argued that "there is no concept of abuse of process in adjudication and a referring party is free to obtain whatever tactical advantage it can."

The court found that (a) there was no restriction on the withdrawal of adjudication and such withdrawal does not preclude the same claim from being pursued in a subsequent adjudication; (b) the principle of abuse of process does not apply to adjudication; and (b) the court nevertheless had the power to grant such an injunction where the adjudication is unreasonable and oppressive, although the fact that a claim is being pursued by way of adjudication rather than litigation may affect the court's view as to whether or not it amounts to unreasonable and oppressive behaviour.

On the facts, the court held that Skanska's withdrawal was unreasonable as the unavailability of counsel was not a good excuse, especially as Skanska controlled the timing and scope of adjudication. The court, however, found that the withdrawal was not oppressive as Jacobs will be able to rely on its previously prepared materials for the fresh adjudication. The court did, however, order Skanska to pay the wasted costs of the initial adjudication (insofar as such costs would not have been incurred in the fresh adjudication); this was on the basis that it had breached the parties' agreement on the rules and timelines of the adjudication.



### Comments

Subject to the payment of wasted costs, parties are generally free to abandon adjudication proceedings and to bring such proceedings afresh if, in our experience for example, they perceive a tactical advantage in doing so or as a bargaining chip in negotiations. The court will, however, restrain further adjudications that are unreasonable and oppressive. Some examples include where the claims in the further adjudication are vexatious or have been decided upon, or where the claimant has flouted previous adjudication orders for payment or costs.



 TCC provides guidance on tactical withdrawals from adjudication and repeat adjudication on identical issues

This is a decision that reaffirms the extent of the duty of good faith that can sometimes be expressly imposed in standard form construction contracts, in this case the NEC3 form.

The Plaintiff ("Costain") engaged the Defendant ("Tarmac") to supply concrete for motorway safety barriers. It was agreed by parties that the concrete supplied by Tarmac was defective but parties disputed the scope of the appropriate remedial work.

The subcontract between the parties incorporated, amongst other things, the NEC Framework Contract (the "Framework Contract") and the NEC Supply (Short) Contract (the "Supply Contract"). The Supply Contract required an aggrieved party to notify the other of a dispute within 4 weeks of becoming aware of it; the dispute could then be referred to an adjudicator within 4 weeks. If parties were unsatisfied with the adjudicator's decision, they could refer the dispute to arbitration. On the other hand, under the Framework Contract there was no time bar nor was there an arbitration clause, and parties could refer their disputes to adjudication at any time. The subcontract also contained the NEC standard clause 10.1, which required parties to "act as stated in this contract and in a spirit of mutual trust and cooperation".

Tarmac commenced adjudication, arguing that Costain was out of time to pursue its additional claim for remedial works; it was successful. Costain then commenced proceedings before the Technology and Commercial Court and Tarmac issued an application to stay in favour of arbitration. Tarmac took the position that, while there were two dispute resolution clauses, disputes that related to the Framework Contract would be governed by the clause therein, and vice versa for disputes relating to the Supply Contract. The court accepted this interpretation.

Costain argued that Tarmac could not rely on the arbitration agreement as it had breached clause 10.1 in failing to point out to Costain the time bar under the Supply Contract. The court held that Clause 10.1, "at its highest", meant that Tarmac was obliged (a) not to mislead Costain into believing that the time bar was non-operative or would not be relied on; and (b) to "correct a false assumption obviously being made by [Costain]". These obligations do not go further as "otherwise the provision would have required [Tarmac] to put aside its own self-interest." On the facts however, the court found that Tarmac had done nothing to mislead Costain and that there was no reason to consider that Costain was failing to have regard to the time bar.



## Comments

This case highlights the importance of drafting clear and sharply-defined dispute resolution clauses. While the court will apply common sense in deciding between competing dispute resolution clauses, situations may arise in which the choice between such clauses is unclear.

While the court will usually not imply a term of good faith in construction contracts, the court will enforce express terms requiring good faith. This case is instructive as to the standard of behaviour required of parties in such situations, where there is such an express term.



 Court reaffirms importance of following timelines in adjudication and rejects collateral attack on adjudication determination

The Claimant ("Kersfield") engaged the Respondent ("Bray") to do certain works under an amended JCT Design and Build Contract 2011 form. Bray issued monthly payment applications, and the subject of the proceedings was Payment Application 19, filed on 5 August 2016. Kersfield did not serve a payment notice or pay less notice in time (i.e. by 14 August 2016, a Sunday), as it had filed its notice after hours on 12 August 2016, the Friday prior - the notice was thus deemed, under the contract between Kersfield and Bray, to have been served on 15 August 2016. Bray then issued an invoice for a portion of Payment Application 19, which Kersfield paid. Bray commenced adjudication proceedings for the remainder, arguing that it should have the full payment on Payment Application 19 as Kersfield had failed to serve a payment or pay less notice. Kersfield disagreed and further argued that Payment Application 19 did not clearly or unambiguously set out how the sum claimed had been calculated and was thus invalid. The adjudicator granted Bray's application for the full sum. Kersfield refused to pay and Bray sought to enforce the adjudication determination by way of summary judgment.

Kersfield brought the present proceedings for a substantive determination on the above and for a declaration that it was entitled to have the underlying dispute (i.e. over valuation) referred to further adjudication. The court found that (a) Payment Application 19 was valid; (b) if it had been invalid, Bray could not have relied on parties' past conduct to establish an estoppel; (c) as Kersfield had failed to serve a payment or pay less notice in time, it had to pay the full amount on Payment Application 19. The court also rejected Kersfield's request to refer the valuation of Payment Application 19 to further adjudication – as Payment Application 19 had already been adjudicated upon and there was no further dispute to be referred to adjudication.



### **Comments**

This case serves as a poignant reminder of two important issues in adjudication. The first is to be clear of timelines and to serve documents in accordance with such timelines. Adjudicators and the courts will not usually be sympathetic to tardy behaviour. The second is that the courts will hold parties to the principle of temporary finality and will be wary of collateral attacks (such as the one in this case) on adjudication determinations.



## Court upholds allegedly ambiguous liquidated damages clause for sectional completion

The Claimant ("Vinci") engaged the Respondent ("Beumer") to carry out works in relation to baggage handling systems. The contract was based on the NEC Engineering and Construction Subcontract, Third Edition. It provided for sectional completion of the works (in dispute are the "Baggage" and the "Remaining Works" sections, both of which were not defined in the contract) - and liquidated damages for each section. The project went into delay and parties executed a settlement agreement to extend the sectional completion date. A dispute then arose as to the operation of the liquidated damages clauses for the sectional completion dates. The dispute was referred to adjudication and the adjudicator found the provisions to be uncertain, inoperable and unenforceable. The Claimant then brought the present proceedings for a declaration otherwise.

The court granted the declaration, finding that the sections, while not expressly defined in the contract, could be identified from an objective reading of the same - "Baggage" would refer to any works that are required to make the baggage handling system operational while "Remaining Works" would refer to other works, i.e. redundant baggage equipment from the existing baggage hall and disconnection of temporary carousels.



### **Comments**

This case shows that courts are generally reluctant to strike down clauses for uncertainty, especially where the contract has been partially or completely performed. Instead, where a clause is ambiguous, courts will employ commercial common sense, taking into account the facts surrounding the entire contractual scheme, including the provisions of the contract, its purpose and the facts and circumstances known or assumed by the parties at the time of contract.



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## **Training Subject Categories**

- A. Essentials of Construction Contracts
- B. Claims Management and Contract Administration
- C. Dispute Resolution and Management
- D. International Arbitration
- E. Construction Industry Overview

Within each subject category is a list of topics on which we can provide specific training, as illustrated in the menu listing below. Please feel free to contact us if you would like to discuss our training menu in more detail.

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#### A. Essentials of Construction Contracts

- 1. Introduction to construction law and practice:
  - · The contracting process
  - · Negotiating construction contracts
  - · Drafting and interpretation of construction contracts
  - · Managing time, cost and performance
  - · Variations and change orders
  - Payment issues
  - Termination issues
- Managing claims
- 2. Insurance and indemnities
- 3. Drafting complex contracts/clauses
- 4. Counterparty insolvency
- 5. Joint venture agreements

#### **B. Claims Management and Contract Administration**

- Identifying, making, responding to and mitigating claims
- 2. Developing effective claims management protocols
- 3. Contract mapping and contract administration
- Practical approaches to risk assessment and management
- Managing and negotiating claims -- strategies for commercial success

#### C. Dispute Resolution and Management

- 1. Contractual interpretation
- 2. Jurisdiction in international disputes
- Arbitration v. litigation as a means of international dispute resolution
- 4. Effective records management and data retention: minimizing liability and risk
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## D. International Arbitration

- 10 biggest misconceptions about international arbitration
- 2. Arbitration walk-through
- 3. Selecting an arbitral institution and arbitral rules
- 4. Construction arbitration
- 5. Dispute resolution in emerging markets
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- 7. Interim measures from courts and tribunals
- 8. Enforcement of arbitral awards and recovery of costs
- 9. Investment protection planning

#### E. The Construction Industry

- 1. Planning and procurement strategies
- 2. Choice of contract forms
- 3. Introduction to EPC contracts
- EPC contracts: Procurement strategies, risk allocation and other key issues
- 5. EPC and construction contract workshop
- 6. Construction disputes: Law and practice



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