

**LAW: ADJUDICATION – SETTING ASIDE AN ADJUDICATION DETERMINATION**

***Quanta Industries Pte Ltd v Strategic Construction Pte Ltd [2015] SGHC 2***

**In Summary**

The Singapore High Court decision on 6 January 2015 explored the scope of an adjudicator's powers in relation to an adjudication determination in Section 17 of the *Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)* ("**SOP Act**"); the effect of "live issues" of parties on an application to set aside an adjudication determination; whether the Plaintiff in the present case had a right to make an application to set aside an adjudication determination; and the court's supervisory jurisdiction in hearing and determining an application to set aside an adjudication determination. The Defendant is currently awaiting appeal of this decision.



**Facts**

The Plaintiff (Claimant in the Adjudication engaged as a sub-contractor by the Defendant) made an application to set aside the Adjudication Determination made pursuant to the SOP Act in favour of the Defendant (Respondent in the Adjudication). The Plaintiff lodged an adjudication application (method of alternative dispute resolution for parties to a construction contracts to expeditiously recover outstanding sums under a payment claim) to recover S\$ 561, 693.14 as per its payment claim of 7 July 2014, to which the Defendant issued a payment response for the amount of negative S\$ 155,891.63.

The Adjudication Determination of 11 September 2014 determined that:

- (a) The Plaintiff was to pay the Defendant the adjudicated sum of S\$ 141,508.56 (the "Sum");
- (b) Costs of the Adjudication to be borne by the Plaintiff and Defendant in the proportion of 80:20 respectively; and
- (c) A simple interest at the rate of 1% per annum was to run from 29 August 2014 on any part of the Sum which remain unpaid.

**Issues**

The issues raised before the Court in relation to setting aside the Adjudication Determination were:

- 1) whether the adjudicator acted *ultra vires* (outside the scope of his powers) in making a determination in favour of the Defendant (Respondent in the Adjudication) that the Plaintiff (Claimant) should make payment to the Defendant;
- 2) whether the fact that there were no live issues between the parties precluded the Adjudication Determination from being set aside; and
- 3) whether the Plaintiff in this case was precluded from making an application to set aside the Determination in accordance with *Section 27(5)* of the SOP Act.

### **Holding of the High Court**

The Honorable Justice Chan Seng Onn J set aside the Determination on the basis that:

- a) the Adjudicator, in making the Determination against the Plaintiff (who lodged the Adjudication Application), acted *ultra vires*, or acted in excess of the powers conferred on him by *Section 17* of the SOP Act; and
- b) a supervisory jurisdiction is conferred on the courts by the SOP Act to hear and determine an application to set aside an Adjudication Determination, as set out in the case of *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2014] SGCA 61.

### **Adjudicator Acted Ultra Vires**

The Honourable Chan Seng Onn J adopted a strict, literal interpretation of the wordings in *Section 17* of the SOP Act to hold that the adjudicator acted in excess of the powers conferred upon him by the Act by making a Determination that the Claimant should make payment to the Respondent. The correct outcome should be that either the Claimant gets a nil amount or he gets paid. In any event, this applies even when the set-offs and counterclaims of the Respondent exceed the amount determined in favour of the Claimant. In essence, the Adjudicator has no power to determine that the Plaintiff is to refund the Defendant for the amount that the latter allegedly overpaid the former.

### **Plaintiff's Right to Make Application**

In relation to the Defendant's second argument that it is only the Respondent in an Adjudication Application that is permitted to file an application to set aside an Adjudication Determination under *Section 27(5)* of the SOP Act, Chan Seng Onn J cited the case of *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2014] SGCA 61 to hold that it is unthinkable for the supervisory jurisdiction of the court to only be exercisable when the Respondent makes the application, and in any event, the language of *Section 27(5)* makes it clear that "any party to an adjudication" may apply to set aside an Adjudication Determination.

For completeness, Chan Seng Onn J also addressed the issue on whether the Plaintiff has to make payment into the court as security for the unpaid portion of the Sum pursuant to *Section 27(5)* of the *Act*, to which he concluded that any sums to be paid by the Claimant to the Respondent would not constitute the “*adjudicated amount*” referred to in *Section 27(5)* to be paid into court. Hence the Plaintiff in this case was not required to make such payment for security.

### **Concluding Views**

This case demonstrates that the High Court, in exercising its supervisory jurisdiction conferred on it by the *SOP Act* by holding the Adjudicator's Determination as *ultra vires*, will take a strict and literal interpretation of the provisions of the *SOP Act* in order to uphold and protect a Claimant's right to be paid sums owed to it by the Respondent. This is in line with the spirit of the *SOP Act* : ensuring security of payment and effectively alleviating cash flow problems in the Construction industry.

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**LAW: PERFORMANCE BONDS**

***JK Integrated (Pte Ltd) v 50 Robinson Pte Ltd and another [2015] SGHC 57***

**In Summary**

This decision of the Singapore High Court on 4 March 2015 considered whether an *ex parte* injunction on the ground of unconscionability should be set aside.



**Facts**

Robinson Pte Ltd (the First Defendant) engaged JK Integrated (Pte Ltd) (the Plaintiff) as its main contractor for the construction of a residential-cum commercial building at Robinson Road. Under the Contract, the Plaintiff was to provide the First Defendant with a Performance Bond to secure the performance of the Plaintiff's obligations. The bond was issued by ABE Insurance (international) limited (the Second Defendant), in favour of the First Defendant for the sum of \$ 4.7 million, being 10% of the contract sum. The fact that the Performance Bond was in the nature of an on-demand Performance Bond was not disputed.

As works were delayed after the first few months, the Plaintiff made substantive applications for extensions of time but the First Defendant did not grant any. The Plaintiff also encountered financial difficulties and requested for the First Defendant to make two advance payments to alleviate the issue pursuant to a Supplemental Agreement, to which the First Defendant agreed to. However, delays persisted and the First Defendant wrote to the Second Defendant demanding payment of the full amount under the Performance Bond. The Plaintiff commenced proceedings to restrain the First Defendant from receiving payment under the Performance Bond, the *ex parte* injunction was initially granted but the First Defendant applied to set aside the injunction. *Clause 31(13)* provided that the certificate of the Architect under the Contract may not be final if there is fraud.



The Plaintiff alleged that :

- (a) The First Defendant's conduct in the course of the Contract caused financial and other difficulties to the Plaintiff in performing its obligations. Specifically, the First Defendant certified and paid amounts that deviated significantly from what the Plaintiff originally claimed and also caused the delays to the works;
- (b) The First Defendant's conduct in the course of the Supplemental Agreement was unjustified with pressure exerted on the plaintiff to comply with the First Defendant's demands. The First Defendant also continued to make it difficult for the Plaintiff to continue with works and thus impeded the progress during the term of the Supplemental Agreement;
- (c) The First Defendant had also frequently used the threat of non-payment to control the Plaintiff

## Issue

Whether an ex parte injunction on the ground of unconscionability against the First Defendant's call on an on-demand Performance Bond should be set aside.

## Holding of the High Court

It was held in the High Court that the First Defendant's call on the Performance Bond was not unconscionable as it had called on a fair estimate of the amount of damages or expenses that it has incurred or would be likely to incur.

## **Strong Prima Facie Case of Unconscionable Conduct**

On the issue of whether the call on the Performance Bond was unconscionable, the Court was of the opinion that:

- (a) The Plaintiff must show a strong *prima facie* (obvious on the face of it) case of unconscionable conduct on the First Defendant's part such that the First Defendant should continue to be restrained from calling upon the Performance Bond - what constitutes unconscionability depends on the facts of the case.
- (b) Mere breaches of contract by the beneficiary or genuine disputes between the parties are insufficient to constitute unconscionability.
- (c) Citing *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352, the Court was of a similar opinion that even if the beneficiary was mistaken in adopting the position that the obligor was in breach of the underlying contract, its call on the bond can still be legitimate if the mistake was genuinely made and the beneficiary honestly believed that the obligor was in breach.

## Concluding Views

This case reiterated the Court's general stance towards the standard of proof of actions to restrain a party from calling upon a Performance Bond. A strong prima facie case is required to constitute unconscionable conduct. The purpose appears simple - to allow lower standards of proof may bring about frivolous and desperate claims by parties who are seeking any possible method to prevent a lawful call upon the Performance Bond.

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*If you would like more information on this or any other area of law, you may wish to contact us.*

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