

LAW: ADJUDICATION – POWERS OF AN ADJUCATOR

JRP & Associates Pte Ltd v Kindly Construction & Services Pte Ltd [2015] SGHC 86

In Summary

The Singapore Court of Appeal decision on 1 April 2015 explored the scope of an Adjudicator's powers.



Facts

Kindly Construction & Services Pte Ltd was the main contractor for a project and had engaged JRP & Associates Pte Ltd as the sub-contractor to carry out, among others, the "supply and installation of metal roofing system/roof gutters/translucent roof system and metal cladding system". In the course of the project, JRP made certain payment claims for progress payments and Kindly Construction paid accordingly. However, the project was delayed with the cause of delay disputed.

The parties' relationship soured and JRP stopped work without completing the project. Kindly wrote to JRP stating that they would be engaging other contractors and would seek JRP's indemnification. JRP submitted a payment claim to Kindly pursuant to *Section 10* of the *Building and Construction Industry Security of Payment Act* (the "SOP Act") for work done, Kindly sent a payment response stating there was no monies owed and instead JRP owed them money. JRP lodged its Adjudication application pursuant to *Section 13(1)* of the SOP Act.

The Adjudicator decided that Kindly did owe JRP the contractual materials and labour costs and found that liquidated damages, warranty and other set-off and back charges that Kindly was counterclaiming were not adequately substantiated and were beyond the ambit of the Adjudication.

Issues

The key issues involving an Adjudicator's Powers were:

- (a) Whether the Adjudicator exceeded his powers under the Act by calling for an Adjudication conference before the commencement of the Adjudication;
- (b) Whether the Adjudicator had failed to comply with principles of natural justice because of the remarks he made during the Adjudication;
- (c) Whether the Adjudicator failed to comply with principles of natural justice because he did not afford parties the opportunity to address him on the method of valuation; and
- (d) Whether the Adjudicator breached his duty to avoid incurring unnecessary expense.

Holding of the Court of Appeal

It was held in the High Court that the Adjudication Determination stands, as the Adjudicator in the current circumstance made the Adjudication Determination from the primary facts and evidence before him and the Determination reasonably flowed from parties' arguments.

Court's Role in Setting Aside an Adjudication Determination

Before deciding whether the Adjudicator had acted within his powers, the Court reminded that it had a limited role in setting aside an Adjudication determination made under the *SOP Act* because of the speedy and economical nature of the Adjudication procedure. It is not the Court's primary role in such matters to look into parties' arguments before the Adjudicator and determine for itself whether the Adjudicator arrived at the correct decision.

It was not for the Court to analyse whether the Adjudicator had used an appropriate method of computation or to set aside the Adjudication Determination simply because the Court is of the view that the Adjudicator's method is not appropriate or is incorrect.

Role of an Adjudicator

The Court drew parallels between the role of an Adjudicator and the role of an Arbitrator. An Arbitrator is entitled to embrace a middle path in making a determination as long as it is based on evidence that is before the arbitrator. He should not be subject to allegations of breach of natural justice as long as the determination is one which reasonably flows from the parties' arguments and conclusions drawn from the evidence and primary facts before him. The rules of natural justice must be applied in the context of the *SOP Act* and the need for a quick method of Adjudication to facilitate cash flow.

Should an Adjudication Determination be Set Aside

In light of the similar roles of an Adjudicator and an Arbitrator, the Court was of the opinion that the touchstone for determining if an adjudication determination should be set aside for breach, is whether the provision(s) breached is/are so important that it is legislative purpose that the act done in breach should be invalid.

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Concluding Views

The Court was clear in setting boundaries for Courts intending to interfere in Adjudication matters. Given that Courts serve a limited and supervisory role in setting aside an Adjudication determination, Courts were clear in the level of proof required to set aside a determination. It is likely that the fact that the Adjudication was made in relation to SOP Act compelled Courts to remain distant from Adjudication determinations so as to uphold the expedient nature of the procedures.

LAW: PERFORMANCE BONDS – Unconscionability Exception

CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd and another and another appeal and another matter [2015] SGCA 24

In Summary

This decision by the Singapore Court of Appeal on 22 April 2015 examined policy and various factors that determine whether a Performance bond could be restrained.



Facts

Asplenium Land Pte Ltd (Respondent) employed CKR Contract Services Pte Ltd (Appellant) as the main contractor for the construction of a condominium along Seletar Road. The main contract required the Appellant to furnish an on-demand performance bond in the Defendant's favour for 10% of the contract sum. Clause 3.5.8 of the Preliminaries to the main Contract stated that the Appellant was not entitled to restrain the Defendant from calling on the performance bond on any ground except in the case of fraud. There was no dispute on the Preliminaries being incorporated into the Contract.

Holding of the Lower Court

Clause 3.5.8 was unenforceable because:

- (a) *Clause 3.5.8* was an attempt to oust the jurisdiction of the Court and a severe incursion into the Court's freedom to grant injunctive relief on the significant ground of unconscionability
- (b) The power to grant injunctions emanated from the Court's equitable jurisdiction which cannot be curtailed or circumscribed by contract
- (c) The unconscionability exception was based on policy considerations which could not be brushed aside by agreement

Issue

Whether the on-demand Performance Bond in question could be restrained on grounds of unconsciability and/or fraud.

Holding of the Court of Appeal

Asplenium was able to call on the Performance Bond because *Clause 3.5.8* did not oust the jurisdiction of the Court, though it did attempt to restrict or limit a contracting party's right to an injunction in equity, albeit in a much more specific context relating to calls on performance bonds. *Clause 3.5.8* could still be subject to the scrutiny of the Court pursuant to the relevant provisions of *Unfair Contract Terms Act* and neither party has been denied access to the Court.

Granting Injunctive Relief to Restrain a Performance Bond

The Court of Appeal reiterated two circumstances in which the Court will grant injunctive relief to restrain a call on an on-demand Performance bond – when the call is made fraudulently or where the call is made unconscionably.

Whilst freedom of contract is the norm, the Court of Appeal affirmed that Courts are, on occasion, prepared to override the contractual rights of parties concerned if to do so would give effect to the greater public good but these occasions will be rare. One such category held to be contrary to public policy concerns contracts that oust the jurisdiction of Courts.

The Court of Appeal warned Courts to be careful not to apply this category of illegality and public policy to every or most contracts where there are limitations placed on rights and remedies of the contracting parties concerned.

Unconscionability Doctrine – Concepts of Policy

In *obiter dicta*, the Court explained that the particular conception of policy that formed the basis for the unconscionability doctrine is quite different from the concept of public policy which underpins that category of contracts that are void and unenforceable as being contrary to public policy and as such, seek to oust the jurisdiction of the Court.

Concluding Views

While respecting parties right to the freedom of contract, the Court of Appeal in this case was clear to establish that the Court still plays an active role when there is indeed convincing evidence to render the Courts to restrain a party from calling on a Performance Bond. This is possibly to reassure parties that the Court is still an avenue of relief if their rights are infringed. By also acknowledging policy factors that influence decisions, the Court had further clarified their position with regard to such challenges to Performance Bonds - the Court will not allow parties to make use of grey areas in the law for their personal benefit.

LAW(ENGLISH): BREACH OF WARRANTY CLAUSE

MT Hojgaard A/S v EON Climate Renewables UK Robin Rigg East Ltd [2015] EWCA Civ 407

In Summary

In the decision of the English Court of Appeal on 30 April 2015 concerned whether the agreement between the parties was a contract which contained specifications and standards the contractor had to comply with; whether the contract imposed an obligation to comply with J101 standards (international standard for the design of offshore wind turbines) and to fulfil the “fitness for purpose” obligation.



Facts

The contract between the parties was for the design, construction and installation of 60 wind turbine bases. The conditions required the contractor to complete the works using reasonable skill and care in accordance with good industry practice, including compliance with an international standard for the design of offshore wind turbines (J101). The employer’s requirements contained an obligation that the design would ensure “a lifetime of 20 years for the foundations in every respect without planned replacement” (‘fitness for purpose’ obligation). Unfortunately, the wind turbines had failed after 3 years because of a calculation error in the J101 standard that the contractor followed and the cost of remedial works amounted to 26 million in Euros.

Issue

Whether the contract imposed an obligation on the contractor to comply with the specific standards and to fulfil the “fitness for purpose” obligation and thus had to ensure a lifetime of 20 years for the foundations.

Holding of the Court of Appeal

The Court of Appeal held that a reasonable person in the position of the parties would know that the normal standard required in the construction of offshore wind farms was compliance with J101 and such compliance was expected but not absolutely guaranteed to produce a life of 20 years. The contractor was not obligated to ensure a lifetime of 20 years for the foundations.

Interpreting the Contract

Citing *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, the Court of Appeal adopted a reasonable person's point of view when interpreting the contract. The key question was what a reasonable person (having all the background knowledge available to the parties) would have interpreted the language in the contract to mean. Where there is tension between different provisions within contractual documents, Lord Mance in *Re Sigma Corp (in administrative receivership)* [2009] UKSC 2 said that the resolution of a construction issue is an iterative process, which involves checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences.

Referring further to *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, the Court was reminded that if there are two possible interpretations of a provision, the Court is entitled to prefer the construction which is consistent with business common sense. A Court seeking to construe the contract must postulate a reasonable person having all the knowledge available to those parties. The Court must accept that there are likely to be ambiguities and inconsistencies within the documents.

It must not allow itself to be led astray by those ambiguities and inconsistencies.

When applying the law to the facts at hand, the Court was of the opinion that if one adopted a repetitive approach to the construction of the paragraphs in the contract, it would not make sense to regard them as overriding all other provisions of the contract and converting it to one with a guarantee of 20 years life. The Court warned future Courts against being "led astray" by such inconsistencies within the contract.

Construction Contracts in General - Use of Words

It was acknowledged that it is not unknown for construction contracts to require the contractor to comply with particular specifications and standards and to achieve a particular result. Such contracts, if worded with sufficient clarity may impose a double obligation upon the contractor, where the contractor would then, as a minimum, comply with the relevant specifications and standards. He would also then be obligated to take such further steps as are necessary to ensure that he achieves the specified result. In other words, he must ensure that the finished structure conforms with that which he has warranted.

In application to the case, the Court held that the use of the words "design life", "minimum" and "ensure" in the clauses show that the provisions cannot convert a requirement for a design life into a requirement for a guaranteed operational life.

If a structure has a design life of 20 years, that does not mean that inevitably it will function for 20 years (although it probably will).

In addition, the clause requiring the works as a whole to be “fit for purpose” is qualified by the phrase “as determined in accordance with the specification using Good Industry Practice”. It meant that the obligation required the exercise of reasonable skill and care as well as compliance with J101 (international standard for design of offshore wind turbines) but did not require or impose any form of warranty as to the length of operational life.

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Concluding Views

The Court was wary of multiple possible interpretations of the contract and therefore meticulously read the contract holistically before arriving at their decision. This is likely influenced by the fact that such construction contracts may often seem inconsistent when clauses are viewed individually. Further, the Court seemed reluctant to impose a 20-year warranty on the wind turbines just based on the words “ensure”, “design life” and “minimum”. The Court seem to have adopted a similar approach as that of Singapore Courts in the implication of terms - the business efficacy test and the officious bystander test.

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