

LAW: ADJUDICATION – COURT’S ROLE IN SETTING ASIDE AN ADJUDICATION DETERMINATION

Newcon Builders Pte Ltd v Sino New Steel Pte Ltd [2015] SGHCR 13

In Summary

This Singapore High Court decision of 11 June 2015 explored whether an adjudication application could be made within the Dispute Settlement Period; the Court’s role in an application to set aside an Adjudication Determination and whether the grounds raised fell within the High Court’s supervisory function.

Facts

The Plaintiff and Defendant were respectively the main contractor and sub-contractor engaged to erect a house. A dispute arose between them regarding a progress payment that the Defendant claimed from the Plaintiff and the Defendant commenced Adjudication under *the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)* (“**SOP Act**”) and obtained an Adjudication Determination. However, the Plaintiffs was dissatisfied with the award made by the adjudicator and sought to set aside the determination.

Issues

The parties alleged:

- (a) The Adjudication application was made prematurely; and
- (b) The Adjudicator had acted beyond his powers in allowing the Defendant to lower its claim during the adjudication.

The Court’s primary concern was thus whether these issues were in the purview of the High Court’s supervisory function and whether the Adjudicator had acted beyond his powers.

Holding of the High Court

The High Court was of the opinion that the Court’s supervisory function is highly circumscribed but what remains in its jurisdiction remains uncertain. The first issue, of whether an Adjudication application was filed prematurely was decided to be beyond the High Court’s purview. While the Court possessed the jurisdiction to decide whether the Adjudicator had acted beyond his powers, the application and grounds provided by the Plaintiff did not justify the exercise of the Court’s supervisory jurisdiction.



Court's Role in Setting Aside an Adjudication Determination

The High Court firstly illustrated the Court's general position with regards to such applications. The Court recognised that it has been long held under common law that superior courts possess an inherent jurisdiction to control any inferior dispute settlement tribunal or body. This control is exercised through the Court's supervisory jurisdiction.

When the Court exercised its control over tribunals in this manner, it is not to be seen as usurping a jurisdiction that does not belong to it. It is only exercising a jurisdiction, which it has always possessed. The expression 'supervisory jurisdiction' is a term of art. It is the inherent power of the superior courts to review the proceedings and decisions of inferior courts and tribunals or other public bodies discharging public functions.

This supervisory function extends to the adjudication regime under the Act that may be inferred from *Section 27(5) of SOPA*. Citing *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797. The Court acknowledged the lack of clarity with regards to the power of the High Court, within the relevant provisions of *SOP Act* (Section 27(5)) and the *Rules of Court* (Order 95) which stipulate the requirements for filing of an application to set aside an adjudication determination. However, the Court was of the opinion that this unaddressed area need not be expressly spelt, as the power of the High Court was inherent.

The *SOP Act* is silent about the circumstances under which this supervisory function may be invoked because it is trite that the High Court's supervisory jurisdiction is highly circumscribed. First, the restricted nature of the Court's supervisory jurisdiction is one of the main distinguishing features that sets it apart from the Court's revisionary jurisdiction. Second, Adjudication was never intended to be the final determination of a party's rights.

Therefore, the only surety is that the Court's function is a narrow one but to what extent and in what manner it is circumscribed is entirely uncertain. Strict observance of common law principles would not suffice; after all, the supervisory power is being exercised within the context of a statutory regime. It is then left to the Court to decide on a case-by-case basis.

Adjudication Application Made During the Dispute Settlement Period

On the issue of whether an adjudication application made during the Dispute Settlement Period was valid, the Court emphasised the significance and importance of the Dispute Settlement Period, in that it provides the Respondent with an opportunity to amend or submit its payment response before the adjudication and/or gives parties a chance to reach a settlement. In deciding whether the Adjudication Application is invalid, the Court has to consider whether Parliament intended for the provision in the *SOP Act* that was breached to be strictly observed, and not whether the breach resulted in prejudice suffered by the Respondent, in this case whether the Respondent was prejudiced in its chance to make an offer to settle during the Dispute Settlement Period.

Is it in the Court's Jurisdiction? – Premature Applications

First, the Court noted that the Plaintiff rested upon a mistaken premise by relying heavily on YTL Construction, a case which had to do with a late adjudication application and submitted that that decision was binding on this Court. The Court also noted that whether an adjudication application was filed prematurely was not an issue that fell to be considered by the High Court in a setting aside application.

The Court then sought to fulfill legislative intent regarding the relevant provisions in the *SOP Act*. Section 12(2) of the *SOP Act* stipulating the time before which an adjudication application ought not to be made, balances 2 competing interests. It almost encourages Adjudication applications to be filed if certain events have come to past (in furtherance of the aim of establishing a fast adjudication system to deal with construction disputes). It also provides that an entitlement to lodge an Adjudication application only arises after the end of the dispute settlement period. This is to allow sufficient time (7 days) for parties to attempt to amicably resolve the dispute privately. Where an adjudication application is filed prematurely, the period allowed for settlement is truncated but parties proceed to adjudication sooner.

Thus, it would not be the legislative intent for a breach of Section 12(2) to be *ipso facto* (by the fact itself) invalid. The objective of providing for a fast, timeline-driven Adjudication system is paramount. If the Plaintiff's position is correct and all Adjudication applications lodged before the expiry of the dispute settlement period are *ipso facto* invalid, this would run counter to the overriding objective of creating an expedited adjudication process to facilitate cash flow.

Instead of rendering premature adjudication applications *ipso facto* invalid, the correct position should be that a premature adjudication application is something that the Adjudicator can consider in his determination of the costs payable for the Adjudication. The main prejudice suffered by the respondent in such a scenario would be a loss of a chance to settle the dispute. If it was determined that settlement during the dispute settlement period would have been likely had the adjudication application not been made prematurely, an appropriate costs order may be made to reflect that finding.

In considering the operation and language of the Act holistically, the Court decided that Section 12(2) was not "so important that it is the legislative purpose that an act done in breach of the provisions should be invalid". To render a premature adjudication application *ipso facto* invalid would be to run counter to the objective of providing for an expedited adjudication process. Instead the fact of a premature adjudication application is one that the adjudicator may consider in his determination of cost.

***Is it in the Court's Jurisdiction? –
Whether the Adjudicator Acted
Beyond His Powers***

The Plaintiff raised the argument that it was deprived of an opportunity to settle the claim because the payment claim was overstated.

However, the Court pointed the party to the fact that the SOP Act did allow the Adjudicator to take into account the fact that parties agreed to a different set of rates other than the one initially settled upon. One of the other items that an Adjudicator may have regard to under section 17(3) of the SOP Act is “any other matter that the Adjudicator reasonably considers to be relevant to the Adjudication”. It cannot be reasonably argued that a variation in the agreement between parties as to price is not a relevant consideration for the Adjudicator.

The Court was of the opinion that the Plaintiff's claim was in fact asking the Courts to examine the merits of an Arbitrator's decision, which was not within the Court's purview.

Concluding Views

The Court stands adamant with regards to interfering with Adjudication determinations. This is likely due to the fact that if Courts frequently pry into the jurisdiction of Adjudicators, then the latter's decision would gradually lose authority, thus defeating the purpose of the SOP Act and Adjudication.

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