CHANGAROTH CHAMBERS LLC

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ADJUDICATION: WHETHER MULTIPLE CLAIMS FOR THE SAME REFERENCE PERIOD IN THE SAME MONTH ARE PERMISSIBLE

***Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2015] SGHC 279**

In Summary

This Singapore High Court decision of 27 October 2015 discussed the issue of whether *Section 10(1)* of the *Building and Construction Industry Security of Payment Act* ("*SOP Act*") permitted a claimant to serve in the same payment claim period multiple payment claims, each for different reference periods.

Facts

The parties entered into a contract by way of a Letter of Acceptance dated 4 September 2014 (the "Contract") for the Defendant as sub-contractor to provide the supply of labour, materials, plant and equipment for the civil and structural works, and wet trade finishes for a project at Singapore Polytechnic (the "Project") for a contract sum of S$ 385,030.00.

The Defendant issued 3 payment claims – Payment Claim 3 dated 5 December 2014 ("PC3"), Payment Claim 3 (Revised) dated 26 December 2014 ("PC3R") which was issued to replace PC3, and Payment Claim 4 dated 31 December 2014 ("PC4"). PC3 and PC3R were for work done up to end November 2014, whilst PC4 was for work done up to end December 2014, covering different reference periods.

On 6 January 2015, the Plaintiff issued Payment Response 3 to PC3R ("PR3"), and asserted therein that PC3R was invalid and/or served out of time. On 13 January 2015, PR3 was replaced by Payment Response 3 Revised ("PR3R").

On 9 January 2015, the Plaintiff responded to PC4, where the Plaintiff held that the Contract did not permit the Defendant to serve two or more payment claims in the same payment claim period, and therefore PC4 was alleged to be invalid as it was served second in time to PC3R in the same payment claim period.

On 16 January 2015, the the Defendant wrote to the Plaintiff to asserting that PC4 was served on 30 December 2014 and the Defendant would therefore be proceeding with an adjudication application on PC4, and served its Notice of Intention o Apply for Adjudication Application on that day, and lodged its Adjudication Application on 23 January 2015.

Holding of the Adjudicator

The Adjudicator awarded the the Adjudicated Sum to the Defendant, on the basis that PC4 was not invalid in light of PC3R since PC3R and PC4 covered claims for different months and therefore different reference periods. The Plaintiff thus made an application to the High Court to have the Adjudication Determination set aside.

Issue before the High Court

Whether, inter alia, PC4 was valid notwithstanding that it was served second in time to PC3R in the same payment claim period, because it covered a different reference period from PC3R; and

Holding of the High Court

Whether PC4 was Invalid

Whilst the Court of Appeal case of *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 ("Chau Say Eng") held unequivocally that *Section 10(1)* read with *Regulation 5(1)* restricted the claimant to a maximum of one payment claim a month in respect of a progress payment. However, the High Court considered whether this holding Chua Say Eng closed the door to service of multiple payment claims *for different reference periods* in the same payment claim period – did this mean one payment claim *a month*, or one payment claim for *a reference period* a month, in respect of a monthly progress payment?

The Honourable Kannan Ramesh JC disagreed with the Adjudicator's conclusions on the holding in Chua Say Eng, in that the Court of Appeal shut the door to service of multiple payment claims in the same payment claim period, regardless of whether the claims are for different reference periods or otherwise. The Court of Appeal in *Chua Say Eng* held that the SOP Act does not compel the claimant to make monthly payment claims, allowing the claimant to hold over his payment claims. However the claimant is restricted to a maximum frequency of one payment claim per progress payment per month, regardless of whether it holds over the payment claims or not, by virtue of *Section 10(1)* read with *Regulation 5(1)* of the *Building and Construction Industry Security of Payment Regulations ("SOP Regulations")*.

On the above holding, Kannan Ramesh JC held that the Court of Appeal in *Chua Say Eng* was in fact contemplating a scenario where payment claims were held over, and suggested that the the Court of Appeal went so far as to offer a solution as to how such a scenario should be resolved - where the claimant holds over, the payment claim ought to specify a longer reference period reflecting the enlarged period of work covered by the claim. Therefore, instead of multiple payment claims, the Court of Appeal was of the view that there should be one payment claim covering a longer reference period.

In any event, the terms of the contract indicated that parties contemplated only one Payment Claim in each payment claim period, to be served no later than the 30th of the month, with the Payment Response due within 10 days. The Adjudicator unfortunately did not touch on the terms of the contract in his Adjudication.

Based on the above, the High Court held that PC3R was the relevant claim for the payment claim period for the progress payment in December 2014, and with PC4 coming after PC3R in the same month (the payment claim period in this case), would not have been a valid claim under *Section 10(1)* of the *SOP Act*. Since PC4 was invalidated by PC3R, the Adjudication Determination was set aside.

The High Court also held that disallowing multiple claims in the same reference period acted as a necessary safeguard against abuse by claimants by preventing claimants from "banking" their claims.

Concluding Views

This case demonstrates the Singapore Court upholding the true legislative intent of the SOP Act, which was brought into force to facilitate cash flow of the construction industry by creating a a statutory right of payment for claimants through an expeditious process that requires strict adherence to timelines.

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ARBITRATION: SETTING ASIDE AN INTERNATIONAL ARBITRAL AWARD

***Mount Eastern Holdings Resources Co. Ltd v H&C S Holdings Pte Ltd and another matter* [2016] SGHC 1**

In Summary

This Singapore High Court decision of 12 January 2016 discussed the grounds for setting aside an International Arbitral Award, and explores the conditions that need to be satisfied in order to show a breach of natural justice by the tribunal in making the award.

Facts

The parties entered into 2 agreements – one for the Claimant to supply iron ore to the Defendant in July 2013, and the other for the Defendant to supply 90,000 wet metric tonnes of iron ore to the Claimant in August 2013 (the "August Contract"). However the Defendant did not make such delivery under the August Contract, which resulted in the Plaintiff commencing arbitral proceedings against the Defendant for a claim for contractual damages pursuant to *Clause 13.1.1* of the August Contract.

At the arbitral proceedings, the Defendant put forward the defence that the Plaintiff was required to establish an anticipatory breach of the contract before it could claim for damages pursuant to *Clause 14.2* of the August Contract and that anticipatory breach had not been pleaded by the Claimant at the arbitration.

On 18 June 2015, the arbitral tribunal rendered an Award rejecting the various defences put forward by the Defendant and ordered the Defendant to pay the Claimant contractual damages of US$ 1,527,660.00. Thereafter, the Plaintiff made an application to the court for leave to enforce the Award under *Section 19* of the *International Arbitration Act*, and whilst the Plaintiff obtained leave to do so, the Defendant did not make payment of the Award sum. The Defendant instead made an application to the court to set seeking an extension of time for the application to set aside the Award. This application for extension of time was dismissed.

The next day, the Defendant filed an application on an *ex parte* basis to set aside the Award pursuant to *Section 24(b)* of the *International Arbitration Act*. The Defendant set out 3 grounds for setting aside the Award:

(a) That the Arbitral tribunal had granted the Plaintiff an Award that was not specifically pleaded – whereby the Plaintiff had failed to rely on *Clause 14.2* of the August Contract for claim of damages, under which the Plaintiff was required to plead anticipatory breach.

(b) That the Arbitral tribunal failed to give the Plaintiff a fair hearing – as the tribunal had concluded that the establishment of the termination of the August Contract was not crucial to the Claimant's claim for damages, the Defendant raised the question as to whether the issue had even been considered by the tribunal, thus did not sit well with the Defendant's opportunity to be heard; and

(c) Based on the above, there was a breach of natural justice.

Issues before the High Court

(a) Whether the Arbitral tribunal had granted the Plaintiff an Award that was not specifically pleaded;

(b) Whether the Arbitral tribunal failed to give the Plaintiff a fair hearing; and

(c) Whether there was a breach of natural justice

Holding of the High Court

The Honourable Quentin Loh J cited the case of *Soh Bee Teng & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 in setting out what must be established by a party challenging an arbitration award on the basis of breach of natural justice, namely (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights.

Furthermore, the essence of the two pillars of natural justice are the principle of *nemo judex in causa sua* (*ie*, an adjudicator must be disinterested and biased), and secondly, the principle of *audi alteram partem* (*ie*, parties must be given adequate notice and an opportunity to be heard). Quentin Loh J determined that the Defendant's challenge was based on the second principle.

On the first ground of the pleading issue, Quentin Loh J held that the Plaintiff pleaded its case on the basis of *Clause 13.1.1* and the tribunal applied this exact clause to reach its decision, and held that there was no need for Mount Eastern to plead or rely on anticipatory breach or *Clause 14.2* of the August Contract to support its claim. Even if the tribunal was wrong on its construction of or conclusions in relation to *Clause 13.1.1* and *Clause 14.2*, that is clearly not a ground on which a court is entitled to set aside the Award. Therefore there was no basis for the Defendant to allege a breach of natural justice on the ground that the tribunal had considered an issue outside the pleadings.

On the second ground of the fair hearing issue, it was evident that the tribunal had given due consideration to the objections raised by the Defendant. Quentin Loh J did not agree with the Defendant's line of

argument that by concluding that the question of termination was not crucial to the Plaintiff's claim for damages, the tribunal failed to properly consider this issue. Even if the Defendant was right that the tribunal had erred in its interpretation of the August Contract, that is a question on the merits and was not something which the Court was entitled to scrutinise.

As such, the Court held that there was no breach of natural justice and accordingly dismissed the Defendant's application to set aside the Award.

Concluding Views

This case demonstrates the Singapore Court's dismissal of unmeritorious claims to set aside an Award, and emphasised the high threshold for proving a breach of natural justice by a tribunal. It also demonstrates the Court's reluctance to intervene in decisions of tribunals unless absolutely necessary, upholding the finality of arbitral awards.

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LAW: CONTRACT – CONTRACTUAL PENALTY CLAUSE – TEST TO DETERMINE WHETHER A CONTRACTUAL PROVISION IS PENAL AND THEREFORE UNENFORCEABLE

***Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis (Consumers' Association intervening)* [2015] UKSC 67**

In Summary

This UK Supreme Court decision of 4 November 2015, which considered a combined appeal of 2 separate cases, reviewed the principles underlying the law relating to contractual penalty clauses, and provided a clearer and updated rule on how parties can identify if a clause is an unenforceable penalty clause.

Facts

This case involves 2 appeals which address the same issue.

First Case: Cavendish Square Holding BV v Talal El Makdessi ("Cavendish")

Following extensive negotiations in which both sides were represented by highly experienced commercial lawyers, the Respondent agreed to sell to the Appellant a controlling interest in his advertising and marketing company. The agreement contained 2 clauses which states that if the Respondent was to breach the agreement, he would forfeit the final two installments of the deferred payment of around $44 million payable by the Appellant (*Clause 5.1)* and the Appellant would have the option of purchasing the remaining shares at a price which disregarded goodwill (at a reduced price) (*Clause 5.6)*.

When the Respondent breached the agreement, the Appellant sought a declaration that the Respondent was not entitled to further payments (pursuant to *Clause 5.1*) and was obliged to sell his shares to the Appellant (pursuant to *Clause 5.6*). The Respondent contended that *Clauses 5.1 and 5.6* were penal and therefore unenforceable.

Second Case - ParkingEye Ltd v Beavis (Consumers' Association intervening) ("ParkingEye")

In the second case, the Respondent parked his car in a privately-owned shopping centre car park which was managed by the Appellant. Notices displayed at the car park stipulated that parking was free up to two hours and £85 would be charged for those who stayed longer. The Respondent parked for almost 3 hours and was charged the £85 by the Appellant. The Appellant brought this action to recover the £85. The Respondent claimed, among other contentions, that the charge was a penalty.

Issues

The main issue that the UK Supreme Court had to deal with in relation to the 2 cases was the question of when would a clause and/or sanction in an agreement be considered penal and therefore unenforceable.

Another issue that the UK Supreme Court considered in relation to the *ParkingEye* case was whether the charge was unenforceable under the *UK Unfair Terms in Consumer Contracts Regulations 1999*. However, these said *Regulations* do not apply in Singapore, and therefore, subsequent discussion in this article will focus solely on the main issue of penalty clauses.

Holding of the UK Supreme Court

The decision of majority (with Lord Toulson) dissenting in the *ParkingEye* case) was that the clauses in the *Cavendish* case were not penalties and the charge in the *ParkingEye* case were not unlawful penalties, and therefore, both the clauses and the charges were enforceable.

Decision of the Leading Judgment

In the leading judgment by Lord Neuberger and Lord Sumption (with Lord Carnwath concurring), the law on contractual penalty clauses was reviewed mainly based on the following 2 questions:

(a) In what circumstances is the penalty rule engaged?

(b) What makes a contractual provision penal?

Question 1: In what circumstances is the penalty rule engaged?

The law relating to penalty clauses is to prevent a plaintiff recovering a sum of money in respect of a breach of contract committed by a defendant which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant. Therefore, the penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves.

This means that where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty. However, if the contract does not impose an obligation to perform the act, but simply provides that if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.

Question 2: What makes a contractual provision penal?

The 4 tests as enunciated by Lord Dunedin in the 1915 *Dunlop Case* became the tests that were used by many subsequent cases in determining whether a contractual provision is penal, and they are:

(a) The provision would be penal if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach;

(b) The provision would be penal if the breach consisted only in the non-payment of money and it provided for the payment of a larger sum;

(c) There was a "presumption (but no more)" that it would be penal if it way payable in a number of events of varying gravity; and

(d) It would not be treated as penal by reason only of the impossibility of precisely pre-estimating the true loss

However, it is stated in the leading judgment of this present case that the 4 tests are problematic as they were not meant to be rules but only considerations in a case involving the law of penalties; that Lord Dunedin himself acknowledged that the essential question was whether the clause impugned was "unconscionable" or "extravagant"; and none of the other 3 Law Lords in the *Dunlop Case* expressly agreed with Lord Dunedin's reasoning.

After reviewing many different cases subsequent to the *Dunlop* Case, it was held that the true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance.

In the case of a straightforward damages clause, the interest will rarely extend beyond compensation for the breach.

However, compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations and there may be cases in which the provisions were meant to protect other further legitimate interest of the innocent party. The penal rule is an interference with freedom of contract and the court should not be astute to descry a 'penalty clause'.

Nevertheless, the circumstances in which the contract was made are not entirely irrelevant. In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach.

Decision of the Lord Hodge (with Lord Clarke and Lord Toulson agreeing in part)

Lord Hodge produced a similarly worded judgment and decided that the correct test for a penalty was whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract.

Application of Law to Cavendish Case

The Court looked at the circumstances that led to the formation of the agreement and the various clauses within in the agreement itself and came to the conclusion that both *Clause 5.1 and 5.6* were not penalty clauses.

Clause 5.1 was a price adjustment clause, which was among the provisions which determined the Appellant's primary obligations, i.e. those which fix the price, the manner in which the price is calculated and the conditions on which different parts of the price are payable. Its effect is that the Respondent earn the consideration for their shares not only by transferring them to the Appellant, but by observing the restrictive covenants.

While *Clause 5.1* has no relationship with the measure of loss attributable to the breach, the Appellant had a legitimate interest in the observance of the restrictive covenants which extended beyond the recovery of that loss.

With regard to *Clause 5.6* the Court decided that the logic of the price formula for the sale of the retained shares under *Clause 5.6* is similar to that of the price adjustment achieved by *Clause 5.1* for the sale of the transferred shares. Also, the same legitimate interest which justified *Clause 5.1* justified *Clause 5.6* also.

Application of Law to ParkingEye Case

The Court determined that the charge of £85 had two main objects. One was to manage the efficient use of parking space in the interests of the retail outlets nearby, and of the users of those outlets who wish to find spaces in which to park their cars. This was to be achieved by deterring commuters or other long-stay motorists from occupying parking spaces for long periods or engaging in other inconsiderate parking practices.

Second, it was to provide an income stream to enable ParkingEye to meet the costs of operating the scheme and make a profit from its services.

In this case, the Court reviewed the facts of the case and held that while the penalty rule is plainly engages, the £85 charge was not a penalty as ParkingEye was not liable to suffer losses as a result of overstaying motorists; it had legitimate interest in charging them which extended beyond the recovery of any loss. There is not reason to suppose that the £85 was out of all proportion to ParkingEye's interest.

Concluding Views

The clarification by the UK Supreme Court is a welcome clarification, especially in the Building and Construction Industry wherein liquidated damages clauses are rather prevalent. The redefined test places greater emphasis on contractual freedom of parties. However, on the flipside, it is also arguable that there is now less certainty because the test is broader than the 4 so-called 'tests' enunciated by Lord Dunedin in the Dunlop case.

Be that as it may, it still remains to be seen as to whether the Singapore Courts will adopt the reformulated tests as stated in this case.

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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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