

Singapore High Court Gives Further Guidance on Key Provisions in 2020 Revised Edition of SOPA

The 2020 Revised Edition of the Building and Construction Industry Security of Payment Act 2004 (“**SOPA**”) incorporates all amendments up to and including 1 December 2021 and came into operation on 31 December 2021. The SOPA seeks to codify existing case law and now sets out, among other things, an exhaustive list of permitted modes of service (which include service by email) as well as a non-exhaustive list of grounds upon which an adjudication determination may be set aside. The General Division of the High Court (“**High Court**”) recently had the opportunity to elucidate the interpretation of some of these key provisions: *LJH Construction & Engineering Co Pte Ltd v Chan Bee Cheng Gracie* [2022] SGHC 230.

This update takes a look at the High Court’s decision.

Background

In 2015, the defendant owner, Gracie Wee Bee Cheng, engaged the plaintiff contractor, LJH Construction & Engineering Co Pte Ltd, to construct a two-storey detached dwelling house (“**Project**”). The contractor’s offer was accepted by the owner’s architects, Lua Architects Associates Pte Ltd, on behalf of the owner (the resulting contract, “**Contract**”). The acceptance of the offer was subject to, among other things, the following conditions:

- (a) The Singapore Institute of Architects, Articles and Conditions of Building Contract (Lump Sum Contract, 9th Ed, Re-Print August 2011) was to be the form of contract (“**SIA Conditions**”).
- (b) The Project was to be completed within ten calendar months from the Contract commencement date, which was the date of issue of the “Permit to Carry Out Demolition Works” by the Building and Construction Authority or “30 days from the date of Possession of Site”, whichever was earlier.
- (c) The contractor was entitled to progress payments based on a monthly periodical valuation of the works. The progress payments were “subject to 10% retention for value of work done and 20% for properly protected unfixed materials and goods delivered to the Site, but subject to a Limit of Retention equivalent to 5% of [the] Contract Sum”.

Construction of the Project

After ten months had elapsed from the Contract commencement date, the Project was still not completed. In 2016, the contractor informed the owner that it did not have any workers and resources to complete the works and the parties agreed that the owner should make payment directly to the contractor’s sub-contractor, Dong Cheng Construction Pte Ltd. Based on this agreement, the owner paid a sum of monies to the sub-contractor. However, in or around February 2017, as the works were still not completed, the owner proceeded to engage a replacement contractor, Yong Chow Construction Pte Ltd, and made payments to it directly. The Temporary Occupation Permit was obtained on 22 May 2019.

Adjudication Proceedings

Almost two years later, on 30 April 2021, the contractor sent an email containing payment claim no. 21 (“**PC 21**”) to the architects, with the owner copied in the email *via* a Hotmail and a Gmail address. The contractor claimed the sum of S\$686,380.21 in respect of works under the Contract and variation works. The owner failed to issue a payment response within 21 days from the date when PC 21 was emailed to her (as required by the SIA Conditions).

The contractor then lodged its adjudication application on 3 June 2021, and this was sent by the Singapore Mediation Centre to the owner *via* the aforesaid two email addresses. The owner did not lodge an adjudication response. It is undisputed that the owner did not know about the adjudication proceedings until her meeting with the architects on 15 June 2021, which was arranged by the architects after receiving an email from the adjudicator.

On 18 June 2021, the adjudicator rendered his decision and awarded the sum of S\$694,696.76 (inclusive of Goods and Services Tax (“**GST**”)) to the contractor.

The owner applied to set aside the adjudication determination on various grounds. She also contended that the contractor, being an unlicensed builder, was prohibited from recovering any money in court by section 29B(4) read with section 29B(2)(a) of the Building Control Act 1989 (2020 Rev Ed) (“**BCA Issue**”). Given that the High Court decided that the adjudication determination should be set aside in its entirety, and its tentative views on the BCA Issue were expressed in *obiter*, this update will focus on the issues relating to the grounds for setting aside the adjudication determination, which were summarised by the High Court as follows:

- (a) Whether PC 21 was properly served on the owner by the contractor’s email of 30 April 2021;
- (b) If PC 21 was properly served on the owner:
 - (i) Whether the adjudication determination should be set aside because it was tainted by fraud;
 - (ii) Whether the adjudication determination should be set aside because the adjudicator failed to recognise patent errors; and
 - (iii) If parts of the adjudication determination were impugned by fraud or patent errors, whether they may be severed from the rest of the adjudication determination, or whether the adjudication determination should be set aside entirely; and
- (c) Whether the adjudication determination should be set aside for breaches of the rules of natural justice.

The High Court's Decision

The High Court set aside the adjudication determination in its entirety. In doing so, it considered the five issues summarised below.

Issue 1: Whether PC 21 was validly served on the owner

Section 37(3) of the SOPA provides that, for documents to be served by email, they must be sent either to the last email address given by the addressee to the sender (section 37(3)(a)), or the last email address of the addressee known to the sender (section 37(3)(b)). Section 37(3)(a) was inapplicable in this case since the owner never gave her email address to the contractor for the service of documents.

In relation to the validity of service on the addressee's last email address known to the sender under section 37(3)(b), the High Court affirmed the propositions in *Progressive Builders Pte Ltd v Long Rise Pte Ltd* [2015] 5 SLR 689 and held that service of a payment claim by email would only be valid if it is likely to be effective in bringing the claim to the attention of the addressee in a reasonably prompt manner, and the sender has the onus of proving this. The sender must have an objectively ascertainable basis to believe that the last known email address is one which the addressee currently uses, or at least, regularly checks. It is insufficient that the sender has some subjective belief, without any proper basis, that the last known email address would be one that the addressee would check regularly. Such a requirement is consistent with a contextual requirement of section 37 of the SOPA and is sensible as a matter of practicality, especially in light of the strict timelines and the draconian consequences that flow from a failure to respond to a payment claim.

Here, with respect to the owner's Gmail address, the High Court noted that the contractor had not made submissions or provided evidence to show that it was regularly used or checked by her in 2021. As for the owner's Hotmail address, the High Court found that the contractor did not have an objectively ascertainable basis to believe that the owner used or regularly checked the same for the following reasons:

- (a) First, prior to PC 21, the contractor had never served any payment claims to the owner by email. Instead, the payment claims were previously served only on the architects by email, who would then forward the payment claims to the owner. As such, the owner would likely have been operating under the assumption that any payment claims would not be served on her directly, and there was no reason for her to check her emails regularly to look out for such payment claims.
- (b) Second, apart from two emails sent by the owner in 2016, there was no evidence of the owner using the Hotmail address regularly after 2016, let alone in 2021. Further, the owner's unchallenged evidence was that the architects had updated her about the Project through telephone or in-person meetings, and would provide her with hard copies of documents to be shown to her. There was therefore no reason for the owner to check her emails in 2021 to retrieve correspondence about the Project.

Accordingly, the contractor's service of PC 21 was invalid for the purposes of section 10(1)(a) of the SOPA and the contractor was not entitled to make an adjudication application under section 13(1) read with section 12(2) of the SOPA. The adjudication determination was therefore invalid and should be set aside under section 27(8)(a) of the SOPA.

Issue 2: Whether the adjudication determination was tainted by fraud

Section 27(6)(h) of the SOPA provides that a party to an adjudication may commence proceedings to set aside an adjudication determination where the making of the adjudication determination was induced or affected by fraud or corruption.

The High Court affirmed the two-step test set out by the Court of Appeal in *Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd* [2020] 2 SLR 1125 for determining whether an adjudication determination should be set aside on the ground of fraud:

- (a) In the first step, the innocent party would have to establish: (i) the facts which were relied on by the adjudicator in arriving at the adjudication determination; (ii) that those facts were false; (iii) that the claimant either knew or ought reasonably to have known them to be false; and (iv) that the innocent party did not, in fact, subjectively know or have actual knowledge of the true position throughout the adjudication proceedings.
- (b) In the second step, the innocent party must establish that the facts in question were material to the issuance of the adjudication determination. Facts would be material if there was a real prospect that the outcome of the adjudicator's determination might have been different had he known of the true state of affairs, i.e., the facts must have been an operative cause in the issuance of the adjudication determination at the time it was made.

In this case, out of the five instances of fraud alleged by the owner, the High Court found that fraud had been established in respect of the two instances delineated below. The other three instances of alleged fraud were dismissed on the basis that there was a lack of or insufficient evidence to establish the falsity of the facts or representations relied on.

The contractor's claim for payment for variation works done by the replacement contractor

The adjudicator relied on quotations from the replacement contractor in awarding S\$60,322 for 17 items of variation works. However, the contractor had not proved it had paid, or was liable to pay, those sums. The evidence showed that: (a) the owner had engaged the replacement contractor directly in or around February 2017 to carry out the variation works; (b) the replacement contractor had issued invoices to her for those works; and (c) she had paid the replacement contractor directly for those works.

The contractor knew, or ought reasonably to have known, that the facts relied on by the adjudicator in making his determination (i.e., that the contractor was entitled to payment in respect of the 17 items of variation works done by the replacement contractor) were false. The contractor could not have genuinely believed that it was under any actual or potential liability to the replacement contractor for those sums, or that it was entitled to claim the same from the owner. It was not disputed that the contractor was not under any contractual liability to pay the replacement contractor for those works and that no such payments had been made.

The owner did not have subjective knowledge or actual knowledge of the true position throughout the adjudication proceedings. She was informed of the adjudication proceedings on 15 June 2021, appointed solicitors on 16 June 2021 and received the adjudication determination on 18 June 2021. There would not have been enough time for her to review the adjudication application, much less detect any fraud in the claims advanced by the contractor.

The false fact in question (i.e., that the contractor was liable to pay the replacement contractor for the variation works) was also material to the adjudicator's decision to allow the contractor's claim for the same. Had the adjudicator known the truth, the outcome of his determination would have been different.

The contractor's representations as to the amounts previously paid by the owner

The contractor represented in PC 21 that the total amount previously paid by the owner was S\$929,777.95, being amounts certified under payment certificates no. 1 to no. 12 and no. 16. However, this representation was false because the contractor subsequently accepted in the setting-aside proceedings that it had omitted to include: (a) direct payments to its sub-contractor amounting to S\$108,077 for works certified under payment certificates no. 13 and 14; and (b) payment to itself amounting to S\$104,465.94 for works certified under payment certificate no. 15.

The correspondence between the contractor and its sub-contractor showed that the contractor was fully aware of, and in fact acquiesced to, direct payments made by the owner to the sub-contractor in respect of payment certificates no. 13 and 14, and had expressly clarified that the amount certified under payment certificate no. 15 was not to be paid directly to the sub-contractor. Even if the contractor had been grossly negligent, it ought to have known about the previous payments made to its sub-contractor and itself under payment certificates no. 13 to 15. A statement made recklessly without care as to its truth is made fraudulently.

The owner did not have actual knowledge of the contractor's false representation as she would not have had sufficient time to properly review the adjudication application.

The false representation was also material to the adjudicator's determination since the adjudicator had relied on the same to deduct previous payments of S\$929,777.95 from the sum awarded to the contractor in the adjudication determination.

In the circumstances, the High Court found that the adjudication determination was tainted by fraud and was liable to be set aside under section 27(8)(a) of the SOPA.

Issue 3: Whether the adjudication determination should be set aside for patent errors

Section 27(6)(e) of the SOPA provides that a party may apply to set aside an adjudication determination where an adjudicator has failed to comply with the provisions of the SOPA in making the adjudication determination.

Section 17(2) of the SOPA provides that the adjudicator must determine the adjudicated amount, the date on which such amount is payable, the interest payable on such amount and the proportion of adjudication costs payable by each party to the adjudication. Section 17(4) presently in force further provides an exhaustive list of the considerations that an adjudicator “may only have regard” to in his adjudication determination. The High Court highlighted that this means that the adjudicator is bound to consider *all* the matters listed, but is limited to considering *only* those matters. The decisive test for whether the adjudicator has breached his duty under section 17(4) is whether there are patent errors which the adjudicator has failed to recognise. Such failure will lead to the conclusion that the adjudicator has breached his duty to adjudicate, i.e., his duty to be satisfied on a *prima facie* basis of the completion and proper value of the construction work which forms the subject of the payment claim.

As for the definition of patent errors, the High Court affirmed the Court of Appeal decision in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 and reiterated that these are errors that are: (a) obvious, manifest or otherwise easily recognisable; and (b) manifest from the adjudication materials that are properly before an adjudicator.

In this case, the High Court found that the following instances constituted patent errors:

- (a) The absence of evidence that the variation works which the contractor claimed for in PC 21 were carried out and completed. Apart from third party contractors’ quotations that were not accepted by the contractor and a single progress claim submitted by the sub-contractor that was not signed by the contractor, there were no photographs, drawings, plans or other documentary proof showing that the variation works were completed;
- (b) The multiple inconsistent quotations for particular items of variation works that contradict the claimed amount.
- (c) The contractor’s failure to deduct the retention sum from the claimed amount in PC 21 despite the fact that no “Completion Certificate” and “Maintenance Certificate” had been issued under the SIA Conditions – the description in the summary indicated that the retention sum was to be deducted but the claimed amount did not reflect such deduction.

As the adjudicator had failed to recognise the aforesaid patent errors, the High Court ruled that he had breached his duty prescribed by sections 17(2) and 17(4) of the SOPA to adjudicate the payment claim. Accordingly, the adjudication determination was liable to be set aside under section 27(8)(a) of the SOPA.

Issue 4: Whether the impugned parts of the adjudication determination may be severed

Section 27(8)(a) of the SOPA provides that a court may, in any proceedings commenced by a respondent to set aside an adjudication determination, set aside an adjudication *in whole or in part*.

The High Court affirmed the test for determining the severability of an adjudication determination set out in *Rong Shun Engineering & Construction Pte Ltd v CP Ong Construction Pte Ltd* [2017] 4 SLR 359:

- (a) A part of an adjudication determination is severable if it is *both* textually severable and substantially severable from the remainder of the determination.

- (b) A part of a determination is textually severable if, after disregarding the textual elements of the adjudicator's determination on that part (including his reasons in writing supporting that part given under section 17(2) of the SOPA read with section 16(10) of the SOPA (formerly section 16(8) of the 2006 Revised Edition of the SOPA)), what remains of the adjudicator's determinations is still grammatical and coherent.
- (c) A part of a determination is substantially severable if the remainder of the determination which is to be upheld as valid, and which is to carry interim finality and be enforced, may be identified in terms of liability and quantum, without the need for adjustment or contribution to the content of the remainder by the court.
- (d) The court may modify the text of the adjudicator's determination 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.

In this case, on the basis that the adjudication determination was tainted by fraud (see Issue 2 above), the High Court held that the adjudication determination should be set aside in its entirety, and declined to exercise its discretion to sever the same. The fraud did not relate to a discrete component of the contractor's claim. Moreover, the quantum of the claim affected by the fraud could not be considered *de minimis* given that at least S\$337,949.40 (being S\$60,322 plus S\$277,627.40) had been tainted by fraud, and this amounted to around 48.6% of the adjudicated amount of S\$694,696.76 (inclusive of GST). Further, it was clear from the contractor's conduct that it had abused the SOPA regime. It had attempted to serve PC 21 on the owner by email when it had never done so in the past, with the hope that she would be taken by surprise and have no time to react. It had also waited almost two years after it last did work on the Project in 2019 before attempting to serve PC 21 on 30 April 2021, which indicated that cash flow could not be said to be crucial to it.

The High Court also opined in *obiter* that in deciding whether parts of an adjudication determination affected by the adjudicator's failure to recognise patent errors are severable, the considerations applicable to adjudication determinations tainted by fraud may provide helpful guidelines. Such considerations include the nature of the patent error(s), the quantum of the claim affected by the patent error(s), and the requirements of textual and substantial severability.

Issue 5: Whether the adjudication determination should be set aside for breaches of natural justice

Section 16(5)(c) of the SOPA provides that an adjudicator must comply with the principles of natural justice. Further, section 27(6)(g) provides that a party may apply to set aside an adjudication determination on the ground that a breach of the rules of natural justice has occurred in connection with the making of the adjudication determination.

The High Court summarised the relevant principles gleaned from case law as follows:

- (a) There are two facets to the principles of natural justice. First, the parties to the adjudication must be accorded a fair hearing ("**fair hearing rule**"). Second, the adjudicator must have been independent and impartial in deciding the dispute ("**no bias rule**").

- (b) The standard of proof to be met to establish a breach of the rules of natural justice is that of a balance of probabilities. In particular, the party seeking to set aside the determination must show, on a balance of probabilities, that there has been a *material* breach of natural justice which caused it to suffer prejudice. Importantly, the prejudice to be demonstrated is conceptually distinct from the fact of the breach.

The High Court held that the fair hearing rule had been breached. The core of a party's right to be heard is its right to present its case and to respond to the case against it. The owner was deprived of a fair and reasonable opportunity to be heard by reason of: (a) the adjudicator's failure to ask the owner and her solicitors whether she wished to respond to the new materials adduced by the contractor (in particular the contractor's response to the adjudicator's query on 16 June 2021 regarding how past payment claims were served, and the contractor's second set of submissions on 16 June 2021 containing cross-references to documents pertaining to the variation works claimed); and (b) relatedly, the adjudicator's failure to request an extension of time to render his determination in order to receive further submissions from the owner or to convene an adjudication conference to hear the parties. The owner was also prejudiced because she could, if given the opportunity, have highlighted, among other things, the patent errors in the contractor's claim for variation works.

The High Court, however, ruled that the no bias rule had not been breached, noting that an adjudicator's failure to invite a party to respond to certain matters would not normally constitute apparent bias.

Concluding Observations

This decision provides the following useful guidance for claimants seeking to commence adjudication proceedings:

- (a) **Service of payment claims:** While it is not uncommon to do so by way of email, it would be prudent to ensure that the email address is given by the respondent for the service of documents, and if not, is one that the respondent currently uses, or at least, has regularly checked in the recent months leading up to the service of the payment claim. Any attempt to serve the payment claim *via* an email address obtained online that was created some time ago and may no longer be in use will likely result in invalid service and such conduct will likely be regarded as an abuse of the SOPA regime.
- (b) **Claims for variation works:** It is crucial to ensure that the completion of such works is substantiated by documentary proof such as as-built drawings or plans, photographs, delivery orders, inspection reports and/or test reports in addition to proof of actual payments made. Without such documents, mere quotations obtained from third-party contractors and progress claims submitted by the claimant's sub-contractors that have not been accepted and/or signed by the claimant will be regarded as wholly insufficient. Even if the adjudicator awards an amount in respect of the variation works, the adjudication determination is liable to be set aside on the basis that the absence or dearth of evidence on the completion of variation works constitutes a patent error that the adjudicator failed to recognise. The claimant cannot contend that the court should not review the merits of an adjudicator's decision in this regard.

- (c) **Calculation of amount claimed in the payment claim and adjudication application:** The claimant must ensure that the total sum of previous payments made by the respondent is accurately calculated and deducted, and that the amount claimed does not include an amount representing the release of retention monies where such monies are not due under the contract (e.g., where the completion certificate has not been issued). Any failure to do so is likely to result in the setting aside of an adjudication determination obtained in favour of the claimant on the basis that these are patent errors that the adjudicator failed to recognise, or even worse, that the adjudication determination is tainted by fraud where the circumstances show that the statement or representation was made recklessly without care as to its truth.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:



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