

Adjudication Application Filed Before The Expiry Of The Dispute Settlement Period Held to be Valid

Introduction

1. The Assistant Registrar in *Newcon Builders Pte Ltd v Sino New Steel Pte Ltd* [2015] SGHCR 13, made a distinction between an adjudication application that is filed late *and* an adjudication application that is prematurely filed. An adjudication application that is filed late is invalid. This is uncontroversial and has been held consistently by past Singapore cases.
2. On the other hand, the Court held that an earlier decision, *Taisei Corp v Doo Ree Engineering & Trading Pte Ltd* [2009] SGHC 156 ("*Taisei*"), was "*wrong to assume that a premature adjudication application resulted in the breach of a mandatory time limit*". Instead, the Court decisively held that an adjudication application that is prematurely filed (i.e., filed *after* the dispute settlement period set out in section 12 of the Building and Construction Industry Security of Payment Act has started but *before* the dispute settlement period has expired) is valid. The Assistant Registrar therefore disagreed with the earlier decision of another Assistant Registrar in *Taisei* which had suggested that a premature application was invalid.
3. However, if a claimant files a premature adjudication application, there is a risk that it may be penalized in terms of costs by the adjudicator. If a settlement would have been likely had the adjudication application not been made prematurely, the adjudicator can make an appropriate costs order to reflect that finding.

Facts

4. The case concerned an adjudication commenced under the Building and Construction Industry Security of Payment Act ("*SOP Act*"). Sino New Steel Pte Ltd, the sub-contractor ("*the Claimant*"), served a payment claim on Newcon Builders Pte Ltd, the main contractor ("*the Respondent*").
5. The Claimant served a Notice of Intention to Apply for

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Adjudication and the Adjudication Application when the dispute settlement period, prescribed under the SOP Act, was still ongoing and yet to expire.

6. The Respondent served its payment response before the expiry of the dispute settlement period but the adjudicator nevertheless went on to award a sum in favour of the Claimant.
7. The adjudicator found that the terms of the main contract between the Respondent, the main contractor, and the Owner (stipulating when a payment response has to be served) were not incorporated into the contract between the Respondent and the Claimant. Therefore, the adjudicator did not find that the adjudication application was filed prematurely.
8. Dissatisfied, the Respondent applied to the High Court to set aside the adjudication determination principally on the basis that the adjudication application had been made prematurely.

The High Court's Supervisory Function Is Highly Restricted

9. The Court acknowledged that its supervisory jurisdiction is highly restricted, and that the SOP Act is silent on the circumstances in which the High Court's supervisory jurisdiction may be invoked. Following the seminal Court of Appeal decision in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng* [2013] 1 SLR 401, the Court affirmed the principle that whether an act which breaches a provision of the SOP Act affects the validity of the adjudicator's appointment depends on whether it goes against legislative intent to allow that act to be valid.

It Is Not Against Legislative Intent To Allow A Premature Adjudication Application To Be Valid

10. In distinguishing between adjudication applications submitted late and adjudication applications submitted prematurely, the Court considered the following factors :-

Factors considered	Late Adjudication Application	Premature Adjudication
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CASE UPDATE



		Application
<p>Language of the governing provisions in the SOP Act</p>	<p>Section 13(3)(a) provides that an adjudication application shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12.</p> <p>Section 16(2) also prescribes that any adjudication application made in breach of section 13(3)(a) shall be rejected.</p>	<p>On the other hand, Section 12(2)(b) merely states that a claimant is entitled to lodge an adjudication application after the end of the dispute settlement period. This language is permissive and not mandatory.</p> <p>Further, Section 16(2) does not require the rejection of any application made in breach of Section 12(2).</p>
<p>Legislative intent</p>	<p>Stipulating a mandatory deadline by which an adjudication application must be submitted is integral in achieving the aim of providing for “a fast and low cost adjudication system to resolve payment disputes”.</p>	<p>While the SOP Act prescribes the dispute settlement period to allow sufficient time for parties to attempt to amicably resolve the dispute, the objective of providing for a fast, timeline-driven adjudication system is paramount.</p> <p>If all adjudication applications lodged prematurely are invalid, this would run counter to the overriding objective of creating an expedited adjudication process to facilitate cash flow.</p>

11. The Court decided that premature adjudication applications were not invalid and declined to set aside the adjudication determination.
12. The respondent also cannot argue that there has been a breach of natural justice due to the premature filing of the adjudication application because:
 - (a) The claimant is required to notify the respondent of his intention to apply for adjudication and upon being served with such a notice of intention, the respondent can immediately provide a payment response; and
 - (b) In any case, the respondent ought to have served a payment response within the time stipulated under Section 11 of the SOP Act and not wait until the dispute settlement period to do so.
13. Lastly, the Court went on to find that the adjudicator was within his powers to take into account the fact that parties in fact agreed to a different set of rates other than the one initially settled upon even though this fact was not found in the payment claim nor the payment response.

Conclusion

14. This decision means that a respondent can no longer safely rely on a “second chance” to serve its payment response during the 7-day dispute settlement period (in section 12 of the SOP Act) should it fail to do so earlier. There is the risk that a claimant may simply file for adjudication on the first day of the dispute settlement period (for example), although the claimant in filing such a premature adjudication may be penalized in costs.