

Recent Developments Concerning Adjudication Under the Building and Construction Industry Security of Payment Act

Introduction

1. The Singapore Courts in 3 recent judgments have provided important clarifications on the adjudication regime under the Building and Construction Industry Security of Payment Act (“SOP Act”).
2. In *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] SGCA 42 (“*Citiwall*”), the Court of Appeal decided that the Singapore Mediation Centre (“SMC”) has powers under the SOP Act to enact rules that restricted the lodgement of documents on a particular day to certain hours. Further, the Court of Appeal clarified that the *de minimis* rule does not apply – even a document lodged 2 minutes late will be considered to be lodged out of time.
3. In *Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd* [2015] SGHC 220 (“*Lau Fook Hoong*”), the High Court decided that a Respondent in an adjudication application can apply to the Court to challenge the adjudication application even *before* the adjudication determination is issued. However, the court application does not put a stop to the adjudication process. If an adjudication determination is issued before the court application is heard, the Respondent must still provide the requisite security to Court, as required under s.27(5) of the SOP Act. If the security is not provided, the court application will be dismissed.
4. Finally, in *Sentosa Building Construction Pte Ltd v DJ Builders & Contractors Pte Ltd* [2015] SGHC 18 (“*Sentosa Building*”), the Assistant Registrar decided that the SMC has power under s.28 of the SOP Act to decide issues pertaining to the refund of an adjudicator’s fee or expense. There is no requirement for a court determination, or a court order setting aside an adjudication determination.

27 August 2015

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Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd – Documents must be lodged with the SMC within the prescribed time under the SMC Adjudication Procedure Rules (“SMC Rules”).

5. In the case of *Citiwall*, the High Court below had decided that the SMC does not have powers under the SOP Act to enact rule 2.2 of the SMC Rules. Rule 2.2 prescribes that:

*All documents to be lodged with SMC shall be lodged **during the opening hours of 9am to 4.30pm** from Monday to Friday (except public holidays) and 9am to 12.00noon on the eves of Christmas, New Year and Chinese New Year. **Documents which are submitted after opening hours shall be treated as being lodged the next working day.***

(1 December 2012 edition)

6. Since rule 2.2 was invalid, the High Court decided that as long as a document is lodged on or before 11.59pm, it was lodged within that day and not the next day. The Respondent’s Adjudication Response was thus not out of time when it was lodged at 4.32pm on the last day that it was due. The adjudication determination was then set aside by the High Court on the basis that the adjudicator has breached the rules of natural justice by treating the Adjudication Response as being lodged out of time and failing to consider it.
7. The Court of Appeal disagreed with the High Court’s decision. It decided that the SMC has powers under the SOP Act to make rules that restricted the lodgement of documents on a particular day to 4.30pm. On the facts, the adjudication determination (that was made by the adjudicator on the basis that the Adjudication Response was filed out of time) was upheld and not set aside.
8. Due to the temporary finality undergirding the SOP Act, the Court of Appeal also held that timelines have to be strictly complied with. This includes timelines prescribed by the SMC. Although the Respondent’s Adjudication Response was only filed 2 minutes late (at 4.32pm), it was still considered out of time. The draconian nature of the SOP Act is mitigated by the fact that parties will have another chance to obtain redress by

filing a substantive suit on the merits, or have the matter submitted to arbitration.

9. The Court of Appeal also suggested that if the due date for the lodgement of a document with the SMC falls on a Saturday or Sunday when the SMC is closed, the provisions of the Interpretation Act may apply. S.51(c) of the Interpretation Act provides that:

“when any act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day”.

This may mean that the document can be lodged on Monday instead.

Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd – The Respondent may apply to Court to challenge an adjudication application before the adjudication determination is issued.

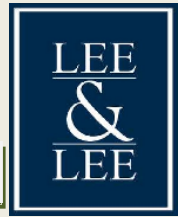
10. Following the seminal Court of Appeal decision in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering)* [2013] 1 SLR 401, the High Court in *Lau Fook Hoong* decided that there is nothing wrong with a court application challenging an adjudication application that is made prior to the issuance of the adjudication determination.
11. Such an application may possibly not require the provision of any security in the absence of an adjudication determination.
12. However, if the adjudication determination is subsequently issued *after* the court application has been filed, the Respondent still has to provide the requisite security under s.27(5) of the SOP Act or risk having its court application dismissed. In other words, the Respondent cannot avoid putting up the statutorily required security on the sole basis that his court application was filed prior to the issuance of the adjudication determination.

13. Further, the court application does not put a stop to the adjudication process. Otherwise, this would lead to the possibility of respondents adopting dilatory tactics by mounting jurisdictional challenges prior to the issuance of an adjudication determination.

Sentosa Building Construction Pte Ltd v DJ Builders & Contractors Pte Ltd – The SMC has power to decide issues pertaining to the refund of an adjudicator’s fee or expense.

14. In *Sentosa Building*, the adjudicator was found to have breached the rules of natural justice by the Complaints Panel of the SMC. The parties thereafter entered into a “by consent” court order to set aside the adjudication determination issued. However, the “by consent” court order did not deal with the refund of the Adjudicator’s fees.
15. The Claimant then forwarded the “by consent” court order to the SMC and asked for a full refund of the Adjudicator’s fees. The SMC replied to state that it has no basis or power under the SOP Act to refund the Adjudicator’s fees when the adjudication determination has been set aside. Dissatisfied, the Claimant then applied to court to set aside the “by consent” court order that was made.
16. The Court focused on whether the consent order should be set aside and the distinction between “a consent order of a ‘no objection’ kind” or “a binding contract type of consent order”.
17. On the facts, the “by consent” court order was found to be “a consent order of a ‘no objection’ kind”. However, the Court found that the Claimant’s basis – to secure a refund of the Adjudicator’s fees – was insufficient to set aside the “by consent” court order.
18. The Court held that the Claimant’s request for a refund should be taken up with the SMC (as the Claimant did in this case).
19. The Court disagreed with the SMC’s reasoning that it has no basis or power under the SOP Act to refund the Adjudicator’s fee when the adjudication determination is set aside. It also held that the adjudicator’s disentitlement to be paid or retain

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any fee or expense need not be preceded by a court determination to such effect or even a court order setting aside the adjudication determination.

20. Nevertheless, the Court did not order that the SMC make the refund of the adjudicator's fee to the Claimant.