

# CASE UPDATE



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**Singapore Court of Appeal confirms that claimants in adjudication only need to establish a *prima facie* case and that a respondent can show that there are patent errors which the adjudicator has failed to recognize in order to set aside the determination.**

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## Introduction

1. In *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] SGCA 19, the Court of Appeal held that Section 17(3) of the Building and Construction Industry Security of Payment Act (Cap. 30B) ("**the Act**") is both restrictive and prescriptive as to the matters that an adjudicator is required to have regard to in his determination.
2. The adjudicator is therefore required to be satisfied that the claimant has established a *prima facie* case that the work which is the subject of the payment claim has been completed and if so, what its value is. This is even if the respondent has not filed a payment response or an adjudication response.
3. For a respondent who has failed to file a payment response, and wishes to challenge the payment claim, the respondent is entitled to highlight to the adjudicator patent errors in the material properly before the adjudicator.
4. A patent error is an error that is obvious, manifest or otherwise easily recognizable, and the category of patent errors is an extremely narrow and limited one.
5. Further, since Section 17(3) of the Act is a mandatory provision, the adjudicator's breach of Section 17(3) renders his determination liable to be set aside. The respondent can show that there are patent errors which the adjudicator failed to recognize to show that the adjudicator has breached Section 17(3).
6. In this case, the appellant who is the respondent to the payment claim, failed to identify any patent errors and the appeal to set aside the determination is therefore dismissed by the Court of Appeal.

## Facts

7. Comfort Management Pte Ltd ("**Comfort**") engaged OGSP Engineering Pte Ltd ("**OGSP**") as a sub-contractor for a project. OGSP issued a payment claim to which no payment response was filed by Comfort.
8. Subsequently, OGSP commenced adjudication and obtained a determination in its favour. Comfort then proceeded to apply to set aside the determination.

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9. The High Court dismissed Comfort's application to set aside the determination and Comfort appealed to the Court of Appeal.

## **Section 17(3) and the adjudicator's duty to adjudicate**

10. Section 17(3) of the Act reads:

*(3) Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:*

*(a) the provisions of this Act;*

*(b) the provisions of the contract to which the adjudication application relates;*

*(c) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto;*

*(d) the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto;*

*(e) the results of any inspection carried out by the adjudicator of any matter to which the adjudication relates;*

*(f) the report of any expert appointed to inquire on specific issues;*

*(g) the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication; and*

*(h) any other matter that the adjudicator reasonably considers to be relevant to the adjudication.*

11. As a matter of statutory interpretation, the Court of Appeal held that Section 17(3) both prescribes the matters that an adjudicator must consider and restricts his consideration for that purpose to only those matters set out in that provision.

12. The effect of the aforesaid interpretation is that the adjudicator must address his mind to the true merits of the claim and must at a minimum determine whether the construction work in the payment claim has been carried out and, if so, what its value is. The adjudicator should not simply rubber-stamp any payment claim that is unchallenged but must be satisfied that the claimant has established a *prima facie* case.

13. In deciding that the *prima facie* standard applies, the Court of Appeal rejects the 2 other standards raised by the parties, namely:-

(a) The absence of patent errors in the payment claim and its supporting materials; and

(b) Proof on a balance of probabilities that facts supporting the payment claim are made out.

14. In other words, the adjudicator's duty to be satisfied that the claimant has established a *prima facie* case under Section 17(3) is independent of whether there is a payment response or adjudication response. Therefore, the respondent is entitled to highlight patents errors to the adjudicator even if it cannot rely on any reason for withholding payment, or cannot make a jurisdictional objection (because the respondent has waived its right to do so and/or is estopped from doing so).

### ***Setting aside an adjudication determination because of patent errors***

15. The Court of Appeal held that Section 17(3) of the Act is a mandatory provision such that a breach of Section 17(3) by the adjudicator can result in the determination being set aside subsequently.

16. In deciding whether an adjudication determination should be set aside on account of a breach of Section 17(3), the court cannot consider the merits of the adjudication determination.

17. Instead, the existence of a patent error serves as a test for the court to determine whether Section 17(3) has been breached by the adjudicator. A determination that was made in favour of the claimant despite the existence of a patent error in the payment claim and its supporting material leads inexorably to the inference that the adjudicator had failed to recognize that patent error, and in so failing, the adjudicator also have failed to discharge his duty under Section 17(3).

18. In this case, the Court of Appeal found that the each of the following does not constitute patent errors:

- (a) Comfort argued that OGSP had produced no evidence that the variation works had been ordered by Comfort and no evidence that OGSP had performed the variation works.

The Court found that the true substance of this argument was that OGSP produced insufficient documentation to support its claims for variation works, and that the adjudicator erred in nevertheless allowing the claim.

This is not allowed as it is tantamount to asking the court to review the adjudicator's decision on the merits.

- (b) Comfort then argued that the adjudicator did not provide any review or analysis for OGSP's claim for payment for the cost of materials.

The Court found that there was no patent error which the adjudicator may be said to have ignored in arriving at his conclusion on this claim.

- (c) Comfort lastly argued that OGSP produced no evidence to support its claim for the balance contract sum and release of retention monies.

The Court found that the adjudicator did consider what he regarded to be the relevant evidence for these two claims.

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In so far as the adjudicator might have erred as to the relevance and sufficient of this evidence, that is at most an error of substance which the court will not review.

## **Conclusion**

19. Since Comfort did not identify any patent errors which the adjudicator had failed to consider, Comfort's appeal was dismissed.

20. As stated by the Court of Appeal at [98], the lesson is that "*it is overwhelming in a respondent's interest to file a payment response, so that he is not confronted with the difficult task of demonstrating that the adjudicator has failed to identify a patent error*".

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