

# CASE UPDATE



## Recent Cases Concerning Building and Construction Law in Singapore

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### Introduction

1. This case update discusses 3 recent Singapore High Court (“SGHC”) cases that concern issues relating to building and construction.

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### ***Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd [2019] SGHC 4***

2. In ***Crescendas Bionics Pte Ltd v Jurong Primewide Pte Ltd [2019] SGHC 4***, the SGHC dealt with the issue of delay caused by an employer in the context of a construction contract that did not contain an Extension of Time clause (“EOT clause”). The SGHC decided that the contractor was still liable for delays that were not caused by the employer.
3. The Court decided, *inter alia*, that the following would apply where there is no EOT clause and the employer commits an act of prevention:
  - a. The contractor is no longer bound by the original contractual completion date;
  - b. The contractor is under an obligation to complete the project within reasonable time and failure to do so will render the contractor liable for general damages; and
  - c. Any liquidated damages clause entered into between the parties is rendered inoperative.

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### Facts and Parties’ Arguments

4. The Plaintiff is a property developer who signed a Letter of Intent (“LOI”) with the Defendant contractor to employ the Defendant for the construction of a seven-storey multi-user business park. Both parties agreed that the terms of the LOI was legally binding on them.
5. The LOI contained a clause specifying the date of completion and a liquidated damages clause but did **not** include an EOT clause. The project was then only certified to be completed **after** the completion date as specified in the LOI. The Plaintiff thus sued the Defendant for, *inter alia*, liquidated damages for the delay in completion.
6. In its Defence, the Defendant argued that, since the Plaintiff was responsible for delays to the project and there was no EOT clause in the LOI, time was therefore at large and accordingly, the Defendant only needed to complete its works within reasonable time.

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## Issues

7. On the specific question of delay, the following issues arose for the court to decide:

- a. Whether the Plaintiff committed any acts of prevention;

Acts of prevention are said to be committed by the employer of a contract when the employer himself is responsible for causing actual delay to the completion of the project. Here, the SGHC found that the Plaintiff did commit acts of prevention.

- b. If the Plaintiff did commit acts of prevention, whether time was at large such that the Defendant only needed to complete within reasonable time; and

Here, the SGHC held that time was at large and that the Plaintiff can only claim for general damages and not for liquidated damages because the following two conditions were fulfilled:

- i. The employer commits an act of prevention; and
  - ii. There is no EOT clause.
- c. If time was at large, what is a reasonable time and whether the Defendant did complete within reasonable time.

The SGHC applied the following principles in deciding what is reasonable time:

- i. What constitutes a reasonable time is a question of fact.
- ii. When determining reasonable time, the court must strike an appropriate balance between the 2 considerations:
  1. Not allowing the employer to take advantage of its own fault and
  2. Not giving the contractor any other additional time other than that caused by the employer's delay; and
- iii. The method of determining reasonable time – by simply adding the employer's delay to the contractual completion time – is merely a guide on calculating reasonable time which meets the above two considerations.

Furthermore, the court must also consider holistically all the facts which includes but not limited to the following:

- i. The actual conduct of the parties that caused the delay;
- ii. Whether the parties' initial agreed time frame to complete the Project was reasonable;

- iii. The experts' opinions of the parties on the timelines in the light of the actual scope of work involved in the construction project; and
- iv. The actual delay caused by the contractor.

Here, the contractual completion date was on 22 January 2010. The SGHC found that the acts of prevention caused the project to be delayed by a total of  $173 + 25 = 198$  days. After considering all the abovementioned factors, the SGHC decided that the contractor was entitled to another 198 days after 22 January 2010 i.e 8 August 2010 (“**the extended completion date**”).

However, the project was only certified to be completed on 12 January 2011 – which was about 5 months after the extended completion date. As such, the Defendant was held liable to pay general damages for the delay after the extended completion date.

8. It is therefore important to the employer to include an appropriately worded EOT clause in a construction contract. In the event that the employer commits any act of prevention, an appropriately worded EOT clause will (1) prevent time from being set at large and (2) preserve the employer's right to seek liquidated damages.

#### ***Sito Construction Pte Ltd (trading as Afone International) v PBT Engineering Pte Ltd [2019] SGHC 7***

9. In ***Sito Construction Pte Ltd (trading as Afone International) v PBT Engineering Pte Ltd [2019] SGHC 7***, the SGHC confirmed the legal position in two earlier Singapore Court of Appeal (“**SGCA**”) cases that:
  - a. A respondent under the Building & Construction Industry Security of Payment Act (“**SOP Act**”) will be taken to have waived its right to raise jurisdictional objections if it failed to raise these objections in the payment response; and
  - b. The party, who waived its right to raise objections but is now seeking to set aside an AD, can only raise patent errors in the adjudication determination (“**AD**”) but the court will not review the merits of the AD.

#### ***Facts and Procedural History***

10. The Respondent company, PBT Engineering Pte Ltd, was a subcontractor for construction works relating to Singapore Changi Airport. The Respondent in turn engaged the Applicant, Afone International, a sole proprietorship, to carry out part of these works.
11. Thereafter, the Applicant issued a payment claim to the Respondent seeking payment for works done but no payment response was filed by the Respondent.
12. The Applicant proceeded with adjudication and obtained an AD in its favour. Since the Respondent still did not pay, the Applicant filed an originating summons under Section 27 of the SOP Act and was granted leave by the SGHC to enforce the AD as a court judgment.

13. The Respondent then applied to set aside both the court order granting leave to enforce the AD and the AD itself.

Legal Issues

14. The issues that arose for the court's consideration included:
  - a. Whether the Respondent was estopped from raising jurisdictional objections at the application to set aside the AD after failing to raise it at the Adjudication proceedings; ("**the estoppel issue**"); and
  - b. Whether there was a patent error committed by the Adjudicator when he made a finding that there was no settlement agreement ("**the settlement agreement issue**").
15. For the estoppel issue, the SGHC held that the law on estoppel in the context of the SOP Act was "well laid out" in the SGCA case of ***Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd [2018] 1 SLR 317*** ("***Audi Construction***"). Since it was not disputed that the Respondent did not file a payment response, the SGHC held that the Respondent was estopped from raising the jurisdictional objections in the adjudication and the setting aside application.
16. For the settlement agreement issue, the SGHC firstly accepted the Applicant's argument that the Respondent was actually asking the court to review the merits of the AD and the SGHC refused to go into the merits of the AD. Next, the SGHC referred to the SGCA case of ***Comfort Management Pte Ltd v OGSP Engineering Pte Ltd [2018] 1 SLR 979*** ("***Comfort Management***") which held that a party who failed to file a payment response may still nonetheless raise patent errors to the reviewing court when applying to set aside the AD. However, the SGHC found that the Adjudicator did not make any patent errors when deciding that there was no settlement agreement.
17. This case emphasises the consequences of the failure to file a payment response. In particular, failure to file a payment response will mean that the Respondent is only allowed raise patent errors in both the adjudication and in the setting aside applications.

***Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd and another and another matter [2019] SGHC 11***

18. In ***Ryobi Tactics Pte Ltd v UES Holdings Pte Ltd and another and another matter [2019] SGHC 11*** ("***Ryobi Tactics***"), the SGHC granted a subcontractor an injunction to restrain the main contractor from calling on performance bonds which were unrelated to the dispute between the main contractor and subcontractor.
19. The Court decided, *inter alia*, that:
  - a. Where a performance bond arises expressly out of a particular contractual relationship, calls made on the basis of **other** contractual relationships would clearly fall outside of the scope of the performance bond. This is because it would not have been within the contemplation of parties at the time of contracting unless the terms of the contract specifically allowed for it; and
  - b. Calls on performance bonds can be restrained on grounds of unconscionability if:

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- i. The call of the performance bond was based on a breach of an underlying contract induced by the party calling for the bond or there was a lack of honest belief; or
- ii. There was no honest belief that there was any non-performance in respect of the underlying contract.

## Facts and Parties' Arguments

20. The Plaintiff was a subcontractor engaged by the 1<sup>st</sup> Defendant main contractor for 3 different construction projects for which 4 different subcontracts were entered into by parties. Under each of the subcontracts, performance bonds had to be furnished by the Plaintiff to the 1<sup>st</sup> Defendant. The 4 performance bonds were issued by the 2<sup>nd</sup> Defendants.
21. Of the projects, there was a dispute between the parties in only one of the projects, namely the Chestnut Project. In May 2018, the 1<sup>st</sup> Defendants wrote to the 2<sup>nd</sup> Defendants to call for the full value of all 4 performance bonds. The 1<sup>st</sup> Defendant argued that the Plaintiff was liable for damages to the 1<sup>st</sup> Defendant under one of the subcontracts and hence, it had a right under the contract to call on the other performance bonds in exercise of its right of set off against moneys due from the 1<sup>st</sup> Defendant to the Plaintiff.
22. The 1<sup>st</sup> Defendant relied on a clause in the underlying subcontract to call on the other performance bonds. The relevant clause in the underlying subcontract reads as follows:

### *17. Right of Set-off*

*17.1 The Main Contractor shall notwithstanding anything contained in this Sub-Contract Agreement be entitled to deduct from or **set-off against any monies due or become due to the Sub-Contractor under the Sub-Contract (including without limitation any Retention Sum) or under any other contract whatsoever between the Main Contractor and the Sub-Contractor for any sum or damage..., charges, expense..., liability, debt or financial loss suffered by the Main Contractor due to or arising from the negligence, default, breach or omission of the Sub-Contractor arose [sic] under the Sub-Contract or any other contract whatsoever between the Main Contractor and the Sub-Contractor.***

23. Subsequently, the Plaintiff brought these proceedings to restrain the 1<sup>st</sup> Defendant's actions and argued that the calls should be restrained on the basis that:
  - a. the performance bonds were project specific and there was no right to call on other performance bonds in other subcontracts to set off the damages suffered under the Chestnut Project and/or
  - b. the call for performance bonds were unconscionable.

## Issues

24. The issues that arose for the court's consideration included:
  - a. Whether the terms of the performance bond in the Chestnut Project entitled the 1<sup>st</sup> Defendant to call on other performance bonds ("**the cross-call issue**"); and

- b. Whether the calls were unconscionable (“**the unconscionability issue**”).

### The Cross-Call Issue

25. On the cross-call issue, the court held that where a performance bond arises expressly out of a particular contractual relationship, calls made on the basis of other contractual relationships would clearly fall outside of the scope of this performance bond because this would not have been within the contemplation of parties at the time of contracting unless the terms of the contract specifically allowed for it.
26. The court then turned its attention to the terms of the performance bonds in question to ascertain if the performance bonds entered into by the parties specifically allowed for calling on other performance bonds in the event of default under one.
27. The SGHC applied the principle in an earlier SGCA case of **Chip Hua Poly-Construction Pte Ltd v Housing and Development Board [1998] 1 SLR(R) 544** at paragraph [13] that “the terms of the bond should be construed, where the words are clear, within the four corners and in the context of that instrument” and concluded that the 1<sup>st</sup> Defendant was not entitled to call on other performance bonds just because there was a dispute regarding one of the projects.
28. First, the terms of each of the performance bonds were similarly worded and it was clear that they were each issued in respect of a particular project only and had its subject as the project name of the corresponding project only. Furthermore, there were “repeated references to the specific subcontract and project to which each performance bond related, [and] there was also clearly no mention of any right of the first defendant to call on the bond in satisfaction of sums due under other subcontracts”.
29. Second, since the terms of the performance bonds were not ambiguous, there was no room for the subcontracts themselves to expand the scope of the performance bonds. In any case, the SGHC found that clause 17.1 of the subcontracts which allows the 1<sup>st</sup> Defendant to set off monies **due to the Plaintiff** did not apply in this case. This is because the monies under the performance bonds are **due to the 1<sup>st</sup> Defendant**. Therefore, even if clause 17.1 were applicable, it did not apply to the current scenario.

### The Unconscionability Issue

30. The SGHC referred to the SGCA case of **Dauphin Offshore Engineering & Trading Pte Ltd v The Private Office of HRH Sheikh Sultan bin Khalifa bin Zayed Al Nahyan [2000] 1 SLR(R) 117** which held that it would be unconscionable to allow a beneficiary to make a call based on a breach of an underlying contract induced by their own default.
31. Thus, given that the express wording of the performance bonds that the performance bonds be called when the 1<sup>st</sup> Defendant had reason to believe that the corresponding subcontracts had been breached, allowing the call in circumstances other than this would be to condone the breach of the relevant subcontract.
32. Furthermore, the SGHC opined that the calls on other 3 performance bonds were unconscionable because the 1<sup>st</sup> Defendant was in essence attempting to dip into the security of other projects when it only had the belief that it had legitimate claims in respect of the Chestnut project. Allowing the 1<sup>st</sup>

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Defendant to treat the separate performance bonds as parts of a bigger whole would be to allow it to circumvent the restrictions on quantum in the performance bond for the Chestnut project.

33. In conclusion, parties to a performance bond should note that performance bonds can only be called upon in accordance with the contractual relationship under which it was made and not otherwise.

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