

Updates in Case Law (2021)

Building & Construction Industry

Security of Payment Act

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Overview

1. Entitlement to Adjudicate

Can an Adjudication Application be made after termination of the construction contract?

2. Section 17(2A)

Do the requirements under Section 17(2A) apply to Liquidated Damages?

3. Setting Aside Adjudication Determinations

Adjudication Determination can be set aside on grounds of fraud

4. Enforcement of Adjudication Determinations

Can an Adjudication Determinations be enforced by a winding-up application?

Entitlement to Adjudicate

Can an Adjudication Application be made after termination of the construction contract?

***Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd*
[2021] 1 SLR 791**

***Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd*
[2021] 4 SLR 862**

Entitlement to Adjudicate

Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd **[2021] 1 SLR 791**

Facts:

- Orion-One engaged Dong Cheng as the Main Contractor for a project. The contract incorporated the REDAS Conditions (3rd edition).
- Before the completion of the project, Orion-One terminated Dong Cheng's employment by way of a notice of termination.
- Following this, Dong Cheng served a payment claim and commenced adjudication proceedings. Dong Cheng's claim was allowed in part by the adjudicator.
- Orion-One applied to set aside the determination on the basis that Dong Cheng was not entitled to serve a payment claim post-termination, and the determination was therefore invalid.
- The High Court dismissed the setting aside application, but granted a stay of execution of the determination pending the disposal of ongoing arbitration proceedings between the parties.

Entitlement to Adjudicate

Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd [2021] 1 SLR 791

Decision:

- The Court of Appeal allowed Orion-One's appeal and set aside the determination.
- The starting point is the contractor's entitlement to receive progress payments under the contract: Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd and Shimizu Corp v Stargood Construction Pte Ltd
- Under the REDAS Conditions, the contractor has no entitlement to progress payments following the termination of his employment. Accordingly, Dong Cheng was not entitled to serve a payment claim and make an adjudication application.
- The Court of Appeal also observed that Dong Cheng's adjudication application was made more than 2 years following its termination, and arbitration had already commenced. In such circumstances, the Court of Appeal commented that parties ought to conduct a proper cost-benefit analysis before deciding to pursue adjudication under the SOP Act regime.

Entitlement to Adjudicate

Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd [2021] 4 SLR 862

Facts:

- Frontbuild engaged JHJ as its sub-contractor for reinforcement concrete works for a project.
- On 12 March 2020, Frontbuild issued a notice of termination of the sub-contract.
- Clause 9(b) of the sub-contract provides that in the event of termination, payments shall be suspended until the completion of the Main Contract works.
- JHJ served a payment claim for works carried out up to the point of termination.
- In his determination, the adjudicator awarded an amount of \$204,210.67 to JHJ.
- Frontbuild applied to set aside the determination, on the basis that the adjudicator did not take into account clause 9(b), and this amounted to a patent error. Frontbuild also relied on section 4(2)(c) of the SOP Act which states that the SOP Act shall not apply where the contract permits payments to be suspended in the event of termination of the contract.
- On the other hand, JHJ argued that clause 9(b) offends section 9 of the SOP Act as it is a 'pay when paid' provision. JHJ further argued that section 9 of the SOP Act should take precedence over section 4(2)(c).

Entitlement to Adjudicate

Frontbuild Engineering & Construction Pte Ltd v JHJ Construction Pte Ltd [2021] 4 SLR 862

Decision:

- The High Court agreed that clause 9(b) of the sub-contract was an unenforceable ‘pay when paid’ provision.
- The main issue was therefore the interplay between sections 4(2)(c) and 9 of the SOP Act. In this regard, the High Court found that a “*harmonious construction*” should be applied, and section 4(2)(c) cannot be considered in isolation. Given the SOP Act’s overarching purpose of facilitating cashflow, the High Court held that that section 4(2)(c) does not “*take primacy*” over section 9, and an adjudicator should consider whether a clause such as clause 9(b) is a ‘pay when paid’ provision.
- On the facts of the case, the High Court found that the adjudicator did in fact consider the interplay between sections 4(2)(c) and 9 of the SOP Act. Accordingly, there was no failure by the adjudicator to recognise any patent errors, and the application to set aside the determination was dismissed.

Section 17(2A)

Do the requirements under Section 17(2A) apply to Liquidated Damages?

Range Construction Pte Ltd v Goldbell Engineering Pte Ltd [2020] SGHC 191

Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd [2021] 1 SLR 791

Range Construction Pte Ltd v Goldbell Engineering Pte Ltd [2021] 2 SLR 91

Section 17(2A) - Liquidated Damages

Section 17(2A) of the SOP Act:

In determining an adjudication application, an adjudicator must disregard any part of a payment claim or a payment response related to damage, loss or expense that is not supported by –

(a) any document showing agreement between the claimant and the respondent on the quantum of that part of the payment claim or the payment response; or

(b) any certificate or other document that is required to be issued under the contract.

Section 17(2A) - Liquidated Damages

Range Construction Pte Ltd v Goldbell Engineering Pte Ltd [2020] SGHC 191

Facts:

- Range Construction was engaged by Goldbell Engineering as the Main Contractor for a project.
- The contract provides for liquidated damages to be paid by Range Construction in the event that the Project is not completed in time.
- Range Construction served a payment claim and commenced adjudication proceedings. Goldbell Engineering sought to set off liquidated damages due to delay on the part of Range Construction. Section 17(2A) did not apply as the payment claim was served on 2 December 2019, before the amendments to the SOP Act took effect.
- In his determination, the adjudicator awarded liquidated damages in favour of Goldbell Engineering.
- Range Construction applied to set aside the determination on the basis that the adjudicator had no jurisdiction to award liquidated damages.

Section 17(2A) - Liquidated Damages

Range Construction Pte Ltd v Goldbell Engineering Pte Ltd [2020] *SGHC 191*

Decision:

- The High Court dismissed the application.
- Justice Lee Seiu Kin considered that the contractor’s “*loss and expense claims*” were “*the true targets*” of the amendments in s 17(2A) of the SOP Act,.
- Justice Lee then stated that he “*did not consider the introduction of s 17(2A) of the SOP Act to be any signal of parliamentary disapproval of adjudicators considering liquidated damage claims under the SOP regime*”.
- Following *Range*, various adjudicators have interpreted Justice Lee’s statement as authority that Section 17(2A) of the SOP Act does not apply to claims/set-offs for liquidated damages.

Section 17(2A) - Liquidated Damages

Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd [2021] 1 SLR 791

Pending the appeal of *Range Constrcution*, the Court of Appeal considered the matter peripherally in *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd*

The Court of Appeal reinforced the view that Section 17(2A) of the SOP Act was intended to exclude claims for “*complicated prolongation costs, damages, losses or expenses*”

- such claims “[*went*] beyond the original scope of the [SOPA], which [*was*] intended to cover claims for work done or goods and services supplied” .
- While *Orion-One* did not directly address the decision in *Range* on the inapplicability of Section 17(2A) to liquidated damages, the Court of Appeal’s comments suggest that the SOP Act was only intended to cover claims for work done or goods/services supplied, and not claims for damages (including liquidated damages), which would be caught by Section 17(2A).

Section 17(2A) - Liquidated Damages

Range Construction Pte Ltd v Goldbell Engineering Pte Ltd

[2021] 2 SLR 91

This issue appears to have finally been settled by the Court of Appeal.

- The Court of Appeal upheld the High Court's decision.
- Based on this decision, it is clear that under the pre-amendments SOP Act, liquidated damages may be included in a payment response and considered by the adjudicator.
- Was the law changed through the introduction of section 17(2A), such that an adjudicator can no longer consider liquidated damages in the absence of an agreement on quantum or certificate issued under the contract?

Section 17(2A) - Liquidated Damages

Range Construction Pte Ltd v Goldbell Engineering Pte Ltd

[2021] 2 SLR 91

- the Court of Appeal rejected the Appellant’s argument that the 2019 amendments, in particular Section 17(2A) of the SOP Act, was merely declaratory of the pre-existing position, and “*simply clarified but did not change the legal position under the pre-amendment SOPA*”.
- While the case ultimately concerned the pre-amendment SOP Act (and specifically whether set-offs for liquidated damages could be claimed), the broader significance lies in the Court of Appeal’s explicit holding that the introduction of Section 17(2A) and the amendments to Section 15(3), did indeed change the position on set-offs for claims related to damage and loss and expense.
- However, by not directly addressing Justice Lee’s statement on the applicability of Section 17(2A) to liquidated damages, the Court of Appeal left a sliver of ambiguity on this issue, especially given its residual comment (at [53]) that the exclusion of complicated claims for damages, loss or expense from payment responses was not a “foregone” conclusion.

Setting Aside of Determination

Adjudication Determination can be set aside on grounds of fraud

Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd [2020] 2 SLR 955

Setting Aside of Determination

Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd [2020] 2 SLR 955

Facts:

- The Main Contractor, Mero Asia Pacific, engaged Façade Solution as the sub-contractor for the fabrication, delivery and installation of 864 window panels.
- The window panels were fabricated by Façade Solution's supplier in China.
- Façade Solution commenced adjudication proceedings for storage costs of 489 window panels that it claimed were fabricated and ready to be delivered.
- The adjudicator determined an amount of \$830,938.73 as being payable to Façade Solution, which included \$671,080.01 for storage costs of the undelivered window panels.
- Mero Asia Pacific subsequently found out that 169 of the window panels were still in China and the supplier refused to deliver the same to Façade Solution.
- Mero Asia Pacific applied to set aside the determination on the ground of fraud, as the adjudicator was given the false impression that the 169 window panels were in Façade Solution's warehouse in Singapore and ready to be delivered.
- The High Court granted the application to set aside the determination on the ground of fraud.

Setting Aside of Determination

Façade Solution Pte Ltd v Mero Asia Pacific Pte Ltd [2020] 2 SLR 955

Decision

- The Court of Appeal upheld the High Court’s decision, accepting that fraud is a valid ground under common law to set aside a determination.
- *“there is little or no public interest in allowing a litigant who has cheated justice to retain the fruits of his or her fraud”*
- Test:
 - The determination must be based on facts which the party seeking the claim know or ought reasonable to have known were untrue
 - The facts in question must be material to the issuance of the determination
- The Court of Appeal found that Façade Solution had fraudulently misrepresented that it had control over all of the undelivered panels, and this was material to the adjudicator’s determination.
- The Court of Appeal also recognised that it has the discretion to set aside (sever) part of the determination, but declined to do so in this case as the entire determination was tainted by fraud

Enforcement of Determination

Can an Adjudicator Determination be enforced by a winding-up application?

***Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Pte Ltd*
[2021] SGCA 61**

Enforcement of Determination

Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Pte Ltd [2021] SGCA 61

Facts:

- Diamond Glass obtained an adjudication determination in its favour against Zhong Kai Construction.
- Diamond Glass thereafter obtained leave to enforce the determination, and served on Zhong Kai a statutory demand.
- When Zhong Kai did not pay the adjudicated amount, Diamond Glass filed a petition to wind up Zhong Kai.
- Zhong Kai applied for the winding up petition to be stayed or set aside, on the basis that it had a genuine cross-claim against Diamond Glass under a separate suit.
- The High Court found that Zhong Kai had a valid and *bona fide* cross-claim, and ordered the winding up petition to be stayed pending the determination of the separate suit.

Enforcement of Determination

Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Pte Ltd [2021] SGCA 61

Decision:

- The Court of Appeal upheld the High Court’s decision.
- The Court of Appeal recognised that although an adjudication determination has ‘temporary finality’ and can form the basis of a winding up petition, this is to be balanced against the serious effects and consequences of a winding up order.
- In a case where the contract has been completed or terminated, a “*practical and workable solution*” is for the Court to grant a stay if there is a justiciable cross-claim on a *prima facie* standard of review, and provided that the cross-claim is not being raised in an abuse of the Court’s process.
- It is also just in such circumstances to order that the adjudicated amount be paid into Court pending the final resolution of the dispute.



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