

## Case Law:

*Reena Rajamohan, ChangAroth Chambers LLC*

The case of *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd [2014] SGHC 254* dealt with timelines for service of payment claims and payment responses, particularly when there was conflict or inconsistency between clauses in the contract of the parties and the Singapore Institute of Architects Conditions of Sub-Contract (“SIA Conditions”); the issue of premature Adjudication Applications; and whether a “repeat claim” was permitted. The dismissal by the Learned AR of the Defendant’s application to set the Adjudication Determination aside, resulted in this appeal with the High Court having to deal with 3 issues (a) whether the Adjudication Application, following the timelines set out in the SIA Conditions, was premature because the “dispute settlement period” under Section 12(2) of the Building and Construction Industry Security of Payment Act (“SOP Act”) had not lapsed; (b) whether the Final Payment Claim was a “repeat claim” made in breach of Section 10(1) of the SOP Act; and (c) whether the dispute between the parties had been substantially settled by way of negotiations between parties such that the Plaintiff was not entitled to make the Adjudication Application. The High Court on Appeal dismissed the Defendant’s appeal on the grounds that (a) the contractual provision setting out the timelines for the Payment Claims and Responses took precedence over clauses of the SIA Conditions; (b) pursuant to Sections 11(1)(a) and 10(2)(a) of the SOP Act, the Payment Response should be served on the earlier of the 2 possible dates stated in those Sections – namely the date stated in the contract and 21 days after the Payment Claim was served; (c) to allow repeat claims would not be contravening Section 10(1) (“SOP Act”); and (d) there was no settlement agreement reached between parties in relation to backcharges that formed part of the Final Payment Claim that was included in the Adjudication Application, but merely inconclusive negotiations.

The case of *Ng Boo Han & Koo Oi Lian Audrey-Ann v Teo Boon Hiang Edward [2014] SGHC 267* sets out the principles for construing the extent and limitation of free-hand rights clauses in building and construction contracts. The case concerned a “free-hand rights” clause in the contract between the Appellants (Defendants) and the Respondent (Claimant), and whether there was bad faith and/or unconscionable behaviour on the part of the Appellants in their dealings with the Respondent during the course of the work done. The District Judge found in favour of the Respondent by holding that the Appellants had agreed to give the Respondent a free-hand to build a “rustic style” house, and could not complain that the materials used and work done was not up to industry standards, insofar as they reflected the parties’ agreed “rustic style”. The High Court had to consider the following issues raised: (a) whether the parties had agreed on building a “rustic country-type” house similar to that of the Respondent’s; (b) whether the Appellants had substantially failed to prove that the rectification works were carried out; (c) whether the Appellants, in refusing to sign the Defects List, had unreasonably prevented the Respondent from rectifying the defects. The Honourable Edmund Leow JC found in favour of the Appellants and overturned the District Court’s decision on the following grounds: (a) the Appellants were impressed not so much by the rusticity of the Respondent’s house, but rather its efficient use of space and unique façade. The parties did not come into an agreement to build a “rustic” style house; (b) the “free-hand rights”



clause did grant the Respondent wide discretion in designing and building the house, thus allowing him to build the house in a “rustic” style manner as he so wished, however the “rustic” concept could not be used by the Respondent to whitewash the defects in his work. The items that were in breach of building regulations, were a result of poor workmanship or were flawed on a functional level would clearly constitute defects that should be rectified; (c) There was no need to prove that the Appellants had carried out and/or paid for the rectification works and the Judge awarded damages of two-thirds of the amount paid by the Appellants to a third party contractor to rectify the defects amounting to S\$ 99,250 (of S\$ 150,000).

The case of *Quanta Industries Pte Ltd v Strategic Construction Pte Ltd [2015] SGHC 2* explored the scope of an adjudicator’s powers in relation to an adjudication determination in Section 17 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“SOP Act”); the effect of “live issues” of parties on an application to set aside an adjudication determination; whether the Plaintiff in the present case had a right to make an application to set aside an adjudication determination; and the court’s supervisory jurisdiction in hearing and determining an application to set aside an adjudication determination. The Defendant is currently awaiting appeal of this decision. The issues raised before the Court in relating to setting aside the Adjudication Determination were: (1) whether the adjudicator acted ultra vires in making a determination in favour of the Defendant (Respondent in the Adjudication) that the Plaintiff (Claimant) should make payment to the Defendant; (2) whether the fact that there were no live issues between the parties precluded the Adjudication Determination from being set aside; and (3) whether the Plaintiff in this case was precluded from making an application to set aside the Determination in accordance with Section 27(5) of the Act. The Honorable Justice Chan Seng Onn J set aside the Determination on the basis that: (a) the Adjudicator, in making a Determination that the Claimant should make payment to the Respondent had acted ultra vires, or acted in excess of the powers conferred on him by Section 17 of the SOP Act - where the Claimant either gets a nil amount or he gets paid; the Adjudicator has no power to determine that the Plaintiff is to refund the Defendant for the amount that the latter allegedly overpaid the former; and (b) Supervisory jurisdiction is conferred on the courts by the SOP Act to hear and determine an application to set aside an Adjudication Determination, as set out in the case of *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd [2014] SGCA 61*.

The case of *Chin Ivan v H P Construction & Engineering Pte Ltd [2015] SGCA 14* addressed a novel point of law - whether only part of an architect’s certificate has been found to be valid with the certificate being partly tainted by fraud, thereby only according temporary finality to part of the architect’s certificate. It sets the precedent for a party’s claim for stay of proceedings on the grounds of fraud, since there have not been any decided case in the Singapore High Court on such issue. The issue raised before the Court of Appeal in relation to the granting of partial stay of proceedings were whether the Court could enforce in part an Architect’s certificate that had been tainted by fraud and/or that it had not been issued in accordance with Clause 31(13) of the SIA Conditions by granting summary judgment in respect of only part of the sum certified in the certificate. The High Court in establishing that there was a bona fide dispute as to fraud on a prima facie basis (namely that there was credible evidence or fraud as opposed to mere allegations) decided on whether the court should stay the whole of the Plaintiff’s claim, or grant the



Defendant a partial stay of proceedings. The High Court held that a partial stay should be granted on the basis that there was no indication that the other items not being disputed were tainted by fraud, and as such could simply be certified on a different certificate. The Court of Appeal overturned the High Court's decision to grant partial stay of the Plaintiff's claim based on the facts where the Court of Appeal found no basis under the parties' contract to warrant the conclusion that the Disputed Certificates were severable or divisible. The purpose of according temporary finality to the Architect's certificates is to minimise undue cash flow problems that may affect contractors, pursuant to Clause 31(13) of the SIA Conditions. However, such temporary finality under the SIA Conditions is conferred on an Architect's certificate as a whole. Thus, if the certificate is tainted by fraud or improper pressure or interference, the certificate ceases to attract any finality in its entirety. Further, there is nothing in the SIA Conditions that would permit a court in such circumstances to substitute its assessment for that of the Architect, and in effect conjure up a new certificate.

