

Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd
[2017] SGHC 9

Case Number : Originating Summons No 774 of 2016
Decision Date : 24 January 2017
Tribunal/Court : High Court
Coram : Lee Seiu Kin J
Counsel Name(s) : Edwin Lee, Yong Boon On, Jasmine Chan and Amanda Koh (Eldan Law LLP) for the applicant; Chuah Chee Kian Christopher, Tan Li Hsiang Pamela, Chen Hong Lynn and Jin Shan (WongPartnership LLP) for the respondent.
Parties : Ang Cheng Guan Construction Pte Ltd — Corporate Residence Pte Ltd

Building and construction law – Dispute resolution – Adjudication

24 January 2017

Judgment reserved.

Lee Seiu Kin J:

1 In this originating summons, the applicant, Ang Cheng Guan Construction Pte Ltd (“ACG”), seeks to set aside the adjudication review determination dated 13 July 2016 (“the Adjudication Review Determination”) in adjudication review application no SOP/ARA 03 of 2016 (“the Adjudication Review Application”). After hearing submissions from counsel for the parties on 20 September and 28 October 2016, I reserved judgment. I now give my decision.

Background

2 The respondent, Corporate Residence Pte Ltd (“CR”), had engaged ACG to carry out works in a construction project. On 18 March 2016, ACG took out adjudication application no SOP/AA 102 of 2016 (“the Adjudication Application”) in relation to a payment claim dated 22 February 2016 (“the Payment Claim”). Five issues (“the AA Issues”) were determined by the adjudicator (“the Adjudicator”) in the resulting adjudication (“the Adjudication”):

- (a) Whether the Adjudication Application was invalid in that the Payment Claim was served out of time (“the 1st AA Issue”).
- (b) Whether the first and second payment responses provided by CR in response to the Payment Claim (“the Payment Responses”) were valid (“the 2nd AA Issue”).
- (c) Whether ACG was entitled to extension of time (“EOT”) in excess of what was granted by the architect (“the 3rd AA Issue”).
- (d) Whether the delay certificate dated 27 November 2015 issued by the architect against ACG was invalid and of no effect and therefore liquidated damages were wrongfully imposed (“the 4th AA Issue”).
- (e) Whether any, and if so what, amounts were payable to ACG for work done and for variations/prolongation claims (“the 5th AA Issue”).

3 In relation to the 1st AA Issue, the Adjudicator found in favour of ACG and determined that the Payment Claim was not served out of time. With respect to the 2nd AA Issue, the Adjudicator found that the Payment Responses were valid. On the 3rd AA Issue, ACG had claimed that it was entitled to EOT for four delay events characterised as: (a) "Piles Removal Delay"; (b) "Piles Re-Casting Delay"; (c) "Drawings Delay"; and (d) "ERSS Delay". The Adjudicator determined that ACG was entitled to an additional EOT of 133 days beyond what was granted by the architect for the first delay event (*ie*, "Piles Removal Delay"), but did not award any additional EOT for the remaining three delay events. As for the 4th AA Issue, the Adjudicator determined that he did not have the power to overturn the delay certificate and to declare it invalid. However, he also found that in light of the additional EOT he had granted, CR was not entitled to impose liquidated damages for late completion. With regard to the 5th AA Issue, the Adjudicator found that ACG was entitled to certain amounts under various heads.

4 The net result was that CR was found liable to pay ACG the sum of \$467,428.69 ("the Adjudicated Amount"). The Adjudicator also awarded interest and ordered that CR bear 70% of the costs of the Adjudication.

5 On 19 May 2016, CR lodged the Adjudication Review Application pursuant to s 18(2) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). In compliance with s 18(3) of the Act, CR paid the Adjudicated Amount to ACG prior to the lodgement. A review adjudicator ("the RA") was appointed by the Singapore Mediation Centre.

6 At the adjudication review ("the Adjudication Review"), CR sought a review of two of the Adjudicator's determinations:

- (a) In relation to the 3rd AA Issue, that ACG was entitled to EOT of 133 days in addition to the EOT granted by the Architect.
- (b) In relation to the 4th AA Issue, that CR was not entitled to impose liquidated damages.

7 In connection with the review of these two determinations, CR framed the following issues for determination by the RA ("CR's Issues"):

- (a) Whether the Adjudicator had erred in determining that the "Contract Variation Notice" constituted a valid and/or proper notice in compliance with cl 23(2) of the Conditions of Contract ("CR's 1st Issue").
- (b) Whether the Adjudicator had erred in determining that ACG was entitled to 133 days of EOT for "Piles Removal Delay" ("CR's 2nd Issue").

8 In respect of CR's 1st Issue, the RA found that the "Contract Variation Notice" did not constitute a valid and/or proper notice which complied with cl 23(2) of the Conditions of Contract. On CR's 2nd Issue, the RA found that the Adjudicator was wrong to have found that ACG was entitled to an additional EOT of 133 days. In consequence of this finding, the RA held that CR had validly imposed liquidated damages on ACG for delayed completion.

9 At the same time, ACG was *also* dissatisfied with the Adjudicator's determinations in relation to some of the AA Issues. At the Adjudication Review, ACG submitted the following issues for the RA's determination ("ACG's Issues"):

- (a) Whether the Adjudicator should have granted further EOT for "Piles Re-Casting Delay" and

“Drawings Delay”.

(b) Whether the Adjudicator should have determined that time had been set at large (“ACG’s 2nd Issue”).

(c) Whether the Adjudicator should have allowed ACG’s claim for: (a) all preliminaries expended during the original 24 months; (b) all additional preliminaries and/or prolongation costs incurred as a result of extensive delays due to CR; and (c) all idling costs incurred by ACG.

10 However, the RA formed the view that his jurisdiction was limited to the determination of the issues raised by CR in the Adjudication Review (*ie*, CR’s Issues). It is principally in respect of this view taken by the RA that ACG has taken out the present originating summons. The RA further determined that:

(a) Subject to certain observations on ACG’s 2nd Issue, ACG’s Issues were completely separate and distinct from CR’s 1st Issue and CR’s 2nd Issue and were not inextricably linked to either CR’s 1st Issue or CR’s 2nd Issue.

(b) In relation to ACG’s 2nd Issue:

(i) The issue of whether or not the Adjudicator should have determined that time had been set at large by reason of “Piles Re-Casting Delay”, and/or “Drawings Delay”, and/or “ERSS Delay” was an issue which was completely separate and distinct from CR’s 1st Issue and CR’s 2nd Issue and was not inextricably linked to CR’s 1st Issue or CR’s 2nd Issue.

(ii) The issue of whether or not the Adjudicator should have determined that time had been set at large by reason of “Piles Removal Delay” was inextricably linked to CR’s 1st Issue and CR’s 2nd Issue.

Scope of an adjudication review

11 This is the first time that the question of the scope of an adjudication review has come up before the High Court. As noted in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 (“*SEF Construction*”) (at [24]), the adjudication review procedure is unique to Singapore and is not found in other jurisdictions with similar regimes to expedite payments in the construction industry. As such, no guidance is available from precedent cases whether from Singapore or abroad.

12 At the heart of the matter is the question: what is the scope of an adjudication review? ACG submitted that a review adjudicator is entitled to review the entire adjudication determination (“the Broad Interpretation”). On the other hand, CR submitted that an adjudication review is restricted to only the issues raised by the respondent (“the Narrow Interpretation”) because of the following factors:

(a) Under the Act, only the respondent in an adjudication determination is entitled to apply for an adjudication review.

(b) The adjudication review process is analogous to an appeal in court proceedings, where it is well established that the respondent is not permitted to raise any matter on appeal unless he has filed a cross-appeal.

13 It is convenient at this point to dispose of the second factor submitted by CR. The adjudication

regime is a creature of the Act, which establishes an entirely new regime for the purpose of providing a fast but interim means for resolving payment disputes in the construction industry. It is therefore incorrect to draw an analogy to appeals in court proceedings which are not only governed by different legislation but, more importantly, provide for a final decision arrived at after a comprehensive process that ensures that all relevant facts and legal arguments are fully ventilated. These are two entirely different processes. The correct approach to resolving the question in the present case is to consider the provisions in the Act and the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the Regulations"), secondary materials such as Parliamentary debates, as well as the policy behind the Act.

14 With this in mind, I turn to consider the provisions in the Act and the Regulations which relate to adjudication review. They are found in ss 18 and 19 of the Act and reg 10 of the Regulations.

15 Sections 18 and 19 of the Act provide as follows:

Adjudication review applications

18.—(1) This section shall apply to a respondent who is a party to an adjudication if the adjudicated amount exceeds the relevant response amount by the prescribed amount or more.

(2) Subject to subsection (3), where a respondent to whom this section applies is aggrieved by the determination of the adjudicator, the respondent may, within 7 days after being served the adjudication determination, lodge an application for the review of the determination with the authorised nominating body with which the application for the adjudication had been lodged under section 13.

(3) Where the respondent is required in consequence of the adjudication determination to pay an adjudicated amount to the claimant, the respondent shall not lodge any application for the review of the determination unless he has paid the adjudicated amount to the claimant.

(4) An adjudication review application —

(a) shall be made in writing addressed to the authorised nominating body requesting it to appoint one or more review adjudicators to determine the application;

(b) shall contain such information or be accompanied by such documents as may be prescribed; and

(c) shall be accompanied by such application fee as may be determined by the authorised nominating body.

(5) The authorised nominating body shall, upon receipt of an adjudication review application —

(a) serve —

(i) a copy thereof on the claimant; and

(ii) a notice in writing that the application has been made on the principal (if known) and the owner concerned; and

(b) subject to subsection (7) and in accordance with the prescribed criteria, appoint a review adjudicator or a panel of 3 review adjudicators.

(6) The authorised nominating body shall, within 7 days after receipt of the adjudication review application, serve a notice in writing confirming the appointment of the review adjudicator or the panel of review adjudicators, as the case may be, on the parties to the adjudication review, the principal (if known) and the owner concerned.

(7) For the purpose of subsection (5)(b) —

(a) section 14(1) and (2) shall apply with the necessary modifications; and

(b) the authorised nominating body shall not appoint an adjudicator whose determination is the subject of the adjudication review.

Adjudication review procedures, etc.

19.—(1) An adjudication review commences on the date immediately after the appointment of the review adjudicator or the panel of review adjudicators, as the case may be, is confirmed by the authorised nominating body under section 18(6).

(2) The review adjudicator or the panel of review adjudicators, as the case may be, shall reject any adjudication review application that is not made —

(a) within the period referred to in section 18(2); or

(b) in accordance with section 18(4)(a) or (b).

(3) The review adjudicator or the panel of review adjudicators, as the case may be, shall determine the adjudication review application within 14 days after the commencement of the adjudication review or within such longer period as may have been requested by the review adjudicator or the panel of review adjudicators, as the case may be, and agreed to by the claimant and the respondent.

(4) In relation to any adjudication review application, a review adjudicator or a panel of review adjudicators, as the case may be, may —

(a) substitute the adjudication determination that is the subject of the adjudication review for any other determination as is considered appropriate; or

(b) refuse the adjudication review application.

(5) A review adjudicator or a panel of review adjudicators, as the case may be, shall determine under subsection (4)(a) —

(a) the adjudicated amount (if any) to be paid by the respondent to the claimant;

(b) where the adjudicated amount referred to in paragraph (a) is different from the amount that the respondent has paid to the claimant under section 18(3), the date on which the difference in amount is payable;

(c) the interest payable on any such amount; and

(d) the proportion of the costs of the adjudication review payable by each party to the

adjudication review,

and shall include, in the determination, the reasons therefor.

(6) In determining an adjudication review application, the review adjudicator or the panel of review adjudicators, as the case may be —

(a) shall only have regard to the matters referred to in section 17(3)(a) to (h) and the adjudication determination that is the subject of the adjudication review; and

(b) shall not be bound by any payment response, or any assessment in relation to the progress payment, that is provided in the contract to be final or binding on the parties thereto, whether subject to any term or condition or otherwise.

(7) Where a panel of review adjudicators is appointed to determine an adjudication review application, the determination shall be decided in accordance with the opinion of the majority of the review adjudicators on the panel.

(8) Sections 16(3) to (8) and 17(5) to (9) shall apply, with the necessary modifications, in relation to adjudication review applications.

And reg 10 of the Regulations provides as follows:

Adjudication review applications

10.—(1) A respondent who is a party to an adjudication shall be entitled to lodge an application for the review of the determination of the adjudicator under section 18 of the Act if the adjudicated amount exceeds the relevant response amount by \$100,000 or more.

(2) Every adjudication review application shall —

(a) contain proof of payment of the adjudicated amount to the claimant pursuant to section 18(3) of the Act; and

(b) be accompanied by a copy of the adjudication determination that is the subject of the application.

(3) An authorised nominating body shall, upon receipt of an adjudication review application —

(a) appoint one review adjudicator if the adjudicated amount exceeds the relevant response amount by \$100,000 or more but less than \$1 million; or

(b) appoint a panel of 3 review adjudicators if the adjudicated amount exceeds the relevant response amount by \$1 million or more.

16 The first point to note is that there is nothing in the Act that explicitly spells out the scope of an adjudication review. However, the operative words in s 18(2) of the Act are “the review of the determination”. *Prima facie*, this refers to the entire adjudication determination and supports the Broad Interpretation. I accept that the sentence containing those words opens with “where a respondent ... is aggrieved by the determination of the adjudicator”. However, I do not think that this, in itself, detracts from the generality of the operative words. From this starting point, I turn to examine the other provisions to discover the legislative intention.

17 From the provisions set out above, the following are the salient points concerning adjudication reviews:

- (a) Adjudication review is only available if the adjudicated amount exceeds the response amount by \$100,000 or more (s 18(1) of the Act read with reg 10(1) of the Regulations).
- (b) Only the respondent in an adjudication may apply for adjudication review (s 18(2) of the Act). There is no provision for the claimant to apply.
- (c) The respondent must pay the adjudicated amount to the claimant before he is entitled to apply for adjudication review (s 18(3) of the Act).
- (d) The review adjudicator may:
 - (i) substitute the adjudication determination for any other determination as is considered appropriate (s 19(4)(a) of the Act); or
 - (ii) dismiss the adjudication review application (s 19(4)(b) of the Act).
- (e) Under s 19(4)(a) of the Act, the review adjudicator shall determine:
 - (i) the adjudicated amount (if any) to be paid by the respondent to the claimant (s 19(5)(a) of the Act);
 - (ii) if the adjudicated amount is different from the amount that the respondent has paid to the claimant under s 18(3) of the Act, the date on which the difference in amount is payable (s 19(5)(b) of the Act);
 - (iii) the interest payable on any such amount (s 19(5)(c) of the Act); and
 - (iv) the proportion of the costs of the adjudication review payable by each party (s 19(5)(d) of the Act).
- (f) In conducting the adjudication review, the review adjudicator shall only have regard to the matters in s 17(3)(a) to (h) of the Act and the adjudication determination under review (s 19(6)(a) of the Act).

18 What is clear is that the Act does not state that an adjudication review is limited to the issues raised by the respondent; nor does it state that it is not limited to these issues. What it does state, in s 19(6)(a) of the Act, is that the review adjudicator shall only have regard to the matters in s 17(3)(a) to (h) of the Act and the adjudication determination under review. Section 17(3)(a) to (h) of the Act provides as follows:

- (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.

19 This provision sets the boundaries of the matters that a review adjudicator can consider. If the Narrow Interpretation were intended, either ss 17(3) or 19(6)(a) of the Act would have been an appropriate place to set that boundary marker. In other words, the draftsman could have easily inserted, in either provision, words to the effect that, in an adjudication review, only matters raised by the respondent may be considered. No such marker was set, and instead s 19(6)(a) of the Act states the matters which a review adjudicator may have regard to, one of which is the adjudication determination under review. Furthermore, it is a reference to the adjudication determination, not a part of it. As for the matters in s 17(3)(a) to (h) of the Act, these include the payment claim, the payment response and the submissions and responses of the parties to the adjudication. Again, these are not expressed in such a way that regard may only be had to part of these matters. There is therefore no indication in s 19(6)(a) of the Act that an adjudication review is limited to the issues raised by the respondent and the language is broad enough to cover the entire adjudication determination. This is consistent with the Broad Interpretation.

20 Another important indicia of the scope of an adjudication review is found in s 19(5) of the Act. This states, in effect, that an adjudication review shall determine the adjudicated amount (if any) to be paid by the respondent to the claimant and, if this is different from that determined by the first instance adjudicator, the review adjudicator shall also determine "the date on which the difference in amount is payable". If the Narrow Interpretation were intended, it would be a simple matter to specify at this point that any difference is payable by the claimant. However, s 19(5) of the Act does not expressly restrict a review adjudicator to simply maintaining or decreasing the adjudicated amount. Rather, the provision leaves it open to him to increase it. Once again, this is consistent with the Broad Interpretation.

21 On this last point, I note that there is a statement in *SEF Construction* that, at first blush, appears to suggest that the review adjudicator cannot increase the adjudicated amount. In that case, the High Court stated (at [26]):

... the only section of the SOP Act that deals with the court's powers in relation to an adjudication determination is s 27(5) which provides:

Enforcement of adjudication determination as a judgment debt, etc

27. — ...

(5) Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap. 332, R 5), pending the final determination of those proceedings.

Whilst the section refers to “any party”, it is obvious from the condition precedent imposed that in fact the only party who has a right under the section to apply for a setting aside of the adjudication application is the respondent since the respondent is the party who would have to pay into court the unpaid portion of the adjudicated amount at the time of commencing the application. *The claimant has to live with the quantum of the adjudicated amount determined by the adjudicator and has no recourse either before the review adjudicator or the court to claim an increase of the same.*

[emphasis added]

22 This statement was made in relation to s 27(5) of the Act, which deals with the enforcement of an adjudication determination. Seen in that context, it is clear that the statement contemplates a claimant who is dissatisfied with the adjudication determination and, with no right to apply for a review, “has to live with the quantum ... determined by the adjudicator”. Furthermore, the High Court was not dealing with the specific issue of the scope of an adjudication review.

23 The only part of the Act that CR can rely on for the Narrow Interpretation is s 18(2) of the Act, which provides that only the respondent in an adjudication is entitled to apply for an adjudication review. In my view, all that s 18(2) of the Act does is to establish the right of an aggrieved respondent to apply for an adjudication review. Crucially, it does not state that such a review is limited to the issues raised by the respondent. It is a leap of logic to conclude from the fact that only the respondent is entitled to apply for a review that the ensuing review is limited to only the issues raised by the respondent.

24 CR relied on the following passage from Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) (at para 17.2):

An adjudication review ... is not, strictly speaking, an appeal against the first instance adjudication determination, nor should it be considered as a *de novo* adjudication of the original dispute. *Under the Act, an adjudication review is essentially an adjudication of the extent to which 'the adjudicated amount exceeds the relevant response amount'.* [emphasis added]

The footnote to the italicised sentence above refers to s 18(1) of the Act. However, that provision does not state what an adjudication review is, and it certainly does not do so in those terms. As was shown earlier, s 18(1) of the Act merely sets out the situation under which a review is available, *ie*, if the adjudicated amount exceeds the response amount by the prescribed amount (which, under reg 10(1) of the Regulations, is \$100,000) or more.

25 CR also relied on the following part of the speech of the Minister of State for National Development at the second reading of the Building and Construction Industry Security of Payment Bill 2004 (Bill 54 of 2004) (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1137):

... When the adjudicator rules in favour of the claimant, the claimant is then entitled to the payment by a certain ... date. In such a case, the respondent may feel aggrieved and opined

[sic] that the adjudication determination is unfair. Therefore, we have stipulated that for amounts where the difference is larger than \$100,000, a right of review by the respondent is covered in the Bill, and this is really to be fair to all parties.

26 This passage does not go as far as CR would like to take it because all it does is affirm that the right to apply for review is only available to the respondent (in cases where the adjudicated amount exceeds the response amount by \$100,000 or more). It does not quite go so far as to say that an adjudication review is restricted to the issues raised by the respondent.

27 The last matter to consider is policy. The objective of the Act is to establish a mechanism for speedy and low-cost adjudication of disputes over payment claims, so as to ensure cash flow in the cash-sensitive construction industry. An adjudication determination has "temporary finality" in that the respondent is obliged to pay any sum ordered, but parties are not bound by the findings of the adjudicator in any subsequent arbitration or court proceedings. I examine whether the competing positions of the parties are in contradiction with the policy of the Act.

28 CR pointed out that the Broad Interpretation would mean that an aggrieved respondent could be liable to pay a higher sum upon an adjudication review even though he is the only party entitled to seek a review. CR submitted that the adjudication review procedure was established to balance the potential unfairness suffered by a respondent in the adjudication process, given the fact that the claimant has the benefit of deciding the time to initiate the adjudication process and is therefore typically better prepared, as well as the potential risk to the respondent if an adjudication determination is found to be substantively wrong.

29 While CR's submission may have some merit, the problem is that it does not appear to be supported by the manner in which the pertinent provisions of the Act are drafted. Further, for every good argument that CR may make, there is a counter-argument that can be made for the other side. The Act was enacted to establish a quick and inexpensive regime for the resolution of disputes over payment claims that would facilitate cash flow in the construction industry. Adjudication determinations would have "temporary finality" so that cash can flow quickly and smoothly, and parties are to finally resolve all disputes between them in arbitration or court proceedings after the construction works are completed. The introduction of an additional layer of review runs the risk of protracting proceedings further. If construction works are still in progress, this could be an unwelcome distraction for the parties. Hence, the legislature deemed it necessary to limit the right to apply for review to cases where the difference between the adjudicated amount and the response amount is large. Presently, this is set at \$100,000. It is also conceivable that the legislature deemed it necessary to place a further restraint in that once an adjudication review is set in motion, the entire adjudication determination is open for review and not just the parts that the respondent is dissatisfied with. It must be borne in mind that in many adjudication determinations, there will be parts where the adjudicator gets it right and parts where he gets it wrong. To permit a respondent to cherry-pick the parts which he is unhappy with, without a corresponding right on the part of the claimant to seek a review of the parts where the adjudicator may have gotten it wrong, could also be unfair. Indeed, the Narrow Interpretation would tend to encourage respondents to apply for an adjudication review as there would be nothing to lose, but everything to gain.

30 It can therefore be seen that the policy of the Act is ambivalent as to which interpretation is to be preferred. On an analysis of the relevant provisions of the Act, the Broad Interpretation is indicated. In view of the foregoing, I hold that the Broad Interpretation is the correct one. I therefore hold that in an adjudication review, the entire adjudication determination is liable to be reviewed by the review adjudicator.

Whether the Adjudication Review Determination is liable to be set aside

whether the Adjudication Review Determination is liable to be set aside

31 Having found as such, the next question is whether the Adjudication Review Determination is liable to be set aside.

ACG's submission on breach of natural justice

32 ACG said that the RA had refused to hear its arguments relating to ACG's Issues and by so doing had breached the rules of natural justice. It submitted that the Adjudication Review Determination should be set aside on this basis. Specifically, ACG relied on s 16(3)(c) of the Act and submitted that an "established example" of conduct amounting to a breach of natural justice is where the adjudicator takes an erroneously restrictive view of his own jurisdiction, with the result that he decides not to consider an important element of the dispute that has been referred to him. A number of foreign authorities were cited in support of this proposition.

33 In *CJP Builders Limited v William Verry Limited* [2008] EWHC 2025 (TCC), the adjudicator had determined that he had no discretion to extend time for service of the response and therefore excluded it from his consideration. The English High Court held (at [79]) that the adjudicator did in fact have such a discretion and was satisfied (at [84]) that the adjudicator had "failed to apply the rule of natural justice that each party has a right to be heard and to have its evidence and arguments considered by the tribunal". In *Pilon Limited v Breyer Group Plc* [2010] EWHC 837 (TCC), the English High Court held (at [22.2]) that:

If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice ...

Among the cases cited as authority for this proposition were two further cases relied on by ACG: the decision of the Outer House of the Scottish Court of Session in *Ballast Plc v The Burrell Company (Construction Management) Limited* [2001] BLR 529 and the decision of the English High Court in *Thermal Energy Construction Limited v AE & E Lentjes UK Limited* [2009] EWHC 408 (TCC). I note, however, that it is not clear if these two cases were even decided on the basis of a breach of natural justice. Finally, ACG also referred to the decision of *Reiby Street Apartments Pty Ltd v Winterton Constructions Pty Ltd & Anor* [2006] NSWSC 375, where the New South Wales Supreme Court held (at [62]) that the adjudicator's failure to consider certain material meant that he had failed to afford the respondent the measure of natural justice prescribed by the New South Wales Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (NSW) ("the NSW Act").

34 Notwithstanding the cases cited by ACG, I do not agree with ACG's submission that the Adjudication Review Determination should be set aside on the basis that there was a breach of natural justice. The cry for natural justice has an attractive ring to it. But all too often it is used mistakenly, perhaps because of its innate appeal to emotion. In the present case, the RA had formed the view that an adjudication review was limited to the issues raised by the respondent, *ie*, he was persuaded that the Narrow Interpretation applied. Critically, this view was formed "[a]fter very careful consideration of [ACG's] submissions and a re-examination of the authorities cited to [the RA] on this subject". Having formed this view, there was no point in the RA hearing arguments concerning ACG's Issues because even if he agreed with those arguments, it would not have made a difference to his decision. Therefore, once the RA had decided that it was not open to ACG to challenge the parts of the adjudication determination that CR did not seek to review, it was absolutely correct for him to refuse to permit ACG to make submissions on those points. Indeed, it was incumbent upon the RA to refuse to do so in order to avoid a waste of time and costs. It is wrong to characterise this as a

breach of natural justice because ACG was heard on the preliminary question concerning the scope of an adjudication review. The RA then determined that what ACG wanted to submit was outside the scope of an adjudication review and it was pointless to go beyond that. There was clearly and emphatically no breach of natural justice in this case. To the extent that the foreign authorities relied on by ACG appear to suggest otherwise, I respectfully disagree with them for this reason.

Misdirection

35 The jurisdiction and powers of an adjudicator and a review adjudicator are derived from the Act. As such, their orders are susceptible to judicial review. This is envisaged by s 27(5) of the Act (see [21] above), as well as s 21(3) of the Act, which provides as follows:

(3) This section shall not affect the right of any party to challenge an adjudication determination or an adjudication review determination in any proceeding before a court ...

36 In *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459 ("*Sungdo*"), I held (at [29]) that the High Court has the power of judicial review over statutory tribunals by virtue of s 18(2) read with para 1 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). The Court of Appeal in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 endorsed this position when it held (at [30]) that:

... If there is no payment claim or if a payment claim is not served on the respondent, then the power of the [authorised nominating body] to nominate an adjudicator would not have arisen, and an appointment made in such circumstances would not be valid. The power of nomination under s 14(1) of the Act is predicated on the existence of a payment claim and the service thereof on the respondent. An acceptance of an invalid nomination would not clothe the acceptor with the office of adjudicator. It is in this sense that an adjudicator appointed in such circumstances is said to have no jurisdiction in the matter because he has not been validly appointed under the Act. Any issue arising in relation to the validity of the appointment of the adjudicator is a jurisdictional issue which must be reviewable by the court. This was the kind of issue that Lee J was concerned with in *Sungdo*.

37 In *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797, the Court of Appeal held (at [48]) that applications to set aside adjudication determinations and/or judgments under s 27 of the Act are akin to judicial review proceedings. In such applications, the court is exercising its supervisory jurisdiction (at [51]).

38 The RA accepted the Narrow Interpretation. He therefore did not hear the parties' arguments on ACG's Issues. This would not be wrong if his view of the law was correct. However, this was not the case. Consequently, the RA had not taken into consideration a very relevant matter.

39 In *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223, the English Court of Appeal held that a wrong direction as to the law could affect the validity of a decision. The court stated (at 229) that:

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, *a person entrusted with a discretion must, so to speak, direct himself properly in law. He must*

call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." ... [emphasis added]

40 The italicised part of the passage above was cited with approval by Lord Hodson in the decision of the House of Lords in *Padfield and Others v Minister of Agriculture, Fisheries and Food and Others* [1968] AC 997 ("*Padfield*") (at 1046). In that case, the Minister concerned had refused to refer a complaint from milk producers in a particular region to a committee of investigation under s 19 of the UK Agricultural Marketing Act 1958 (c 47) (UK). Lord Hodson said (at 1046) that:

... The authority must not ... allow itself to be influenced by something extraneous and extrajudicial which ought not to have affected its decision.

41 In the same case, Lord Morris of Borth-y-Gest held (at 1041) that an order of mandamus could only be made against the Minister if it was shown that in some way he acted unlawfully, *ie*:

... if it were shown (*a*) that the Minister failed or refused to apply his mind to or to consider the question whether to refer a complaint or (*b*) that he misinterpreted the law or proceeded on an erroneous view of the law or (*c*) that he based his decision on some wholly extraneous consideration or (*d*) that he failed to have regard to matters which he should have taken into account.

Similarly, Lord Upjohn held (at 1058) that:

The Minister in exercising his powers and duties, conferred upon him by statute, can only be controlled by a prerogative writ which will only issue if he acts unlawfully. Unlawful behaviour by the Minister may be stated with sufficient accuracy for the purposes of the present appeal: (*a*) by an outright refusal to consider the relevant matter, or (*b*) by misdirecting himself in point of law, or (*c*) by taking into account some wholly irrelevant or extraneous consideration, or (*d*) by wholly omitting to take into account a relevant consideration.

42 Subsequently, the House of Lords famously held in *Anisminic Ltd v Foreign Compensation Commission and Another* [1969] 2 AC 147 ("*Anisminic*") (at 171) that:

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. *It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.* I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. ... [emphasis added]

43 This doctrine is well established in Singapore: see, for instance, *Re Fong Thin Choo* [1991] 1 SLR(R) 774, *Attorney-General v Venice-Simplon Orient Express Inc Ltd* [1995] 1 SLR(R) 533 and *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779, where the Court of Appeal (at [80]) classified the doctrine under the “illegality” head of review. MP Jain, in *Administrative Law of Malaysia and Singapore* (LexisNexis, 4th Ed, 2011) observed (at pp 419–420) that:

It is the function of courts to assess whether an authority has taken into account irrelevant considerations, or ignored relevant considerations, in making orders in the exercise of its discretion. Interpretation of statutes is a judicial function. Therefore, it is the courts which can determine whether administrative power conferred by an [act] has been exercised for relevant or irrelevant reasons. This gives an additional dimension to judicial review.

If the statute itself spells out the criteria which must be taken into account in exercising power, then the courts’ task is relatively straightforward: they have only to assess whether the statutory considerations have been applied and others not taken into account. But, usually, statutes are not sufficiently explicit. A statute may confer power almost in unlimited terms without spelling out the criteria for its exercise. In such a case, the courts may, by looking into the purpose of the statute, assess whether relevant or irrelevant considerations have been applied by the authority. As the House of Lords emphasised in [*Padfield*], the legislature confers discretion on an authority intending it should be used to promote the policy and objectives of the [relevant act], and these must be determined by construing the [relevant act] as a whole. ...

44 Having found that the Broad Interpretation is the correct one (see [30] above), it follows that the RA had misdirected himself in a point of law and ACG’s Issues were relevant considerations that he had failed to take into account. Accordingly, the Adjudication Review Determination must be set aside on this basis.

45 My conclusion is furthermore reinforced by a number of decisions of the New South Wales Supreme Court which were cited by ACG and which have applied the doctrine in the context of the NSW Act. In *Joseph Musico (aka Giuseppe Musico), Rosemary Musico, Luigi Genua and Rose Genua v Philip Davenport and Grosvenor Constructions (NSW) Pty Ltd [Administrators appointed]* [2003] NSWSC 977, the court referred (at [50]) to the following passage from *Craig v The State of South Australia* (1995) 184 CLR 163 (“*Craig*”) (at 179):

... If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal’s exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

The court then went on to state as follows (at [52]):

I therefore conclude that, where the determination of a dispute submitted to an adjudicator under the [NSW] Act requires the adjudicator to consider issues of law, the adjudicator will not fall into jurisdictional error simply because he or she makes an error of law in the consideration and determination of those issues. It would be otherwise, as the High Court pointed out in [*Craig*] (echoing, I think, what Lord Reid said in [*Anisminic*]), if the error of law causes the adjudicator to make one or other (or more) of the jurisdictional errors that the court identified: in such a case, relief would lie, subject to any relevant discretionary considerations.

46 A similar approach was taken in *Multiplex Constructions Pty Limited v Jan Luikens and Lahey Detailed Joinery Pty Ltd* [2003] NSWSC 1140, where it was held (at [34]) that relief will be granted where an adjudicator's determination is the result of jurisdictional error, which will arise where, for example, the adjudicator's decision, *inter alia*, did not take into account something which the NSW Act required to be taken into account or was based upon something which the NSW Act prohibited from being taken into account.

Conclusion

47 In these premises, the Adjudication Review Determination is set aside, with costs to be paid by CR to ACG. Costs are to be taxed if not agreed.

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