Sentosa Building Construction Pte Ltd *v* DJ Builders & Contractors Pte Ltd [2015] SGHCR 18

Case Number	: Originating Summons No 920 of 2014 (Summons No 352 of 2015)
Decision Date	: 24 August 2015
Tribunal/Court	: High Court
Coram	: Colin Seow AR
Counsel Name(s)	: John Lim (Malkin & Maxwell LLP) for the plaintiff; Steven Lam (Templars Law LLC) for the defendant.
Parties	: SENTOSA BUILDING CONSTRUCTION PTE LTD — DJ BUILDERS & CONTRACTORS PTE LTD

Building and Construction Law – Setting Aside of Order Setting Aside Adjudication Determination

Civil Procedure – Consent Orders

24 August 2015 Judgment reserved.

Colin Seow AR:

Introduction

1 "This is a case of much interest to practitioners. It concerns the effect of an order which has been drawn up and expressed to be "by consent"". Those were the opening words of Lord Denning MR in his leading judgment in *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185 ("*Siebe Gorman*") – and words indeed which are about to be echoed yet again by this court nearly three and a half decades later, thousands of miles away from the courts of England and Wales.

The background

2 The parties are companies incorporated in Singapore. Sentosa Building Construction Pte Ltd ("the Plaintiff") is a general contractor whose principal activities are building construction, including major upgrading works, and renovation works. DJ Builders & Contractors Pte Ltd ("the Defendant") is a building and construction contractor.

3 The Plaintiff has taken out an application to set aside an Order of Court ("ORC 7785/2014"), expressed to be made "by consent" before an Assistant Registrar ("the AR") in Originating Summons No 920 of 2014 ("OS 920/2014"). ORC 7785/2014 reads as follows:

> […]
>
> Date of Order: 20-November 2014
>
> Upon the application of the Plaintiff in this action coming on for hearing this day and UPON READING the 1st affidavit of Yang Caihua filed on 6 June 2014, the 1st affidavit of Wong Yew Fai filed on 4 July 2014 and the 1st affidavit of John Lim Kwang Meng filed on 16 October 2014, and upon hearing counsel for the Plaintiff and counsel for the Defendant,

It is ordered that:

1. That the Adjudication Determination dated 28 May 2014 of the Adjudicator Mr. Simon Lee Fun in Adjudication Application No. SOP/AA148 of 2014 be set aside *by the consent of the Parties*, pursuant to Section 27 of the Building and Construction Industry Security of Payment Act and O. 95, r. 3 of the Rules of Court; and

2. That the Defendant do pay the Plaintiff $700 (inclusive of disbursements) being the costs of the present application in OS920/2014 and in OS755/2014.

[emphasis added]

4 The undisputed facts leading to ORC 7785/2014 can be summarised as follows.

5 The Plaintiff was contractually engaged by the Defendant in 2012 to carry out certain works for a residential construction project undertaken by the Defendant. A dispute subsequently arose between the parties in relation to certain alleged overdue payments for the Plaintiff's work done under its contract with the Defendant.

6 The dispute between the parties eventually culminated in the Plaintiff lodging Adjudication Application No SOP/AA148 of 2014 ("the Adjudication Application") on 2 May 2014 with the Singapore Mediation Centre ("SMC") pursuant to the provisions of the Building and Construction Industry Security of Payments Act (Cap 30B, 2006 Rev Ed) ("the SOPA"). The Adjudication Application was served by the SMC on the Defendant on 5 May 2014. On 29 May 2014, an adjudicator ("the Adjudicator") issued an Adjudication Determination dated 28 May 2014, in the Defendant's favour.

7 On 9 June 2014, the Plaintiff filed Originating Summons No 170 of 2014 ("OSS 170/2014") in the State Courts, seeking an order on the following prayers:

[…]

Let all parties concerned attend for the hearing on an application by the Plaintiff(s) that[:]

1. That the Adjudication Determination dated 28 May 2014 of the Adjudicator Mr Simon Lee Fun in Adjudication Application No. SOP/AA148 of 2014 be set aside pursuant to Section 27 of the Building and Construction Industry Security of Payment Act (Cap 30B) and O. 95, r. 3 of the Rules of Court;

2. Costs against the Defendant;

3. Such further or other relief as this Honourable Court deems fit; and

4. Liberty to apply.

8 In the affidavit supporting the application in OSS 170/2014, the Plaintiff argued that the Adjudication Determination should be set aside because, *inter alia*:

73 […] the Adjudicator's conduct in the Adjudication is clearly **a breach of natural justice, contrary to Section 16(3)(c) of the [SOPA]** . The Plaintiff was **denied the right to be heard** , was **not** told of the Adjudicator's concerns, and was **not** given a chance to address those concerns. The Adjudicator had acted in a very irresponsible manner.

74 Clearly, the Adjudicator had sometime during the Adjudication realized that he made a major mistake as regards the commencement date of the Adjudication Application, and he raced to publish his Determination without seeking **a single clarification** from the Plaintiff. [note: 1]

[emphasis in bold and underline in original]

9 OSS 170/2014 was later transferred to the High Court upon the Plaintiff's application in Originating Summons No OS 755 of 2014, thereby giving rise to OS 920/2014 which contained prayers identical to those set out in OSS 170/2014 (see [7] above). OS 920/2014 was fixed for hearing on 20 November 2014 before the AR.

10 At the hearing of OS 920/2014, the AR granted, *inter alia*, a "by consent" order-in-terms of the first prayer in OS 920/2014. It is not disputed that the AR had granted the order as such after the parties drew the AR's attention to a report of a Complaints Panel in the SMC released on 5 August 2014 finding the Adjudicator to be in breach of the principles of natural justice as alleged by the Plaintiff (see [8] above). The report of the Complaints Panel was issued following a complaint lodged earlier by the Plaintiff against the Adjudicator for his alleged conduct in arriving at the Adjudication Determination.

11 The originating process which began in OSS 170/2014 and later transferred to OS 920/2014 thus concluded in those circumstances.

12 Thereafter, convinced that the order of the AR in OS 920/2014 would warrant a full refund of the Adjudicator's fee in respect of the Adjudication Application, the Plaintiff's solicitors forwarded a copy of ORC 7785/2014 to the SMC by way of an email dated 24 November 2014, requesting a full refund of the Adjudicator's fee in the sum of $4,815.00. [note: 2]

13 On 25 November 2014, the SMC responded to the Plaintiff's solicitors by way of an email, seeking clarification as to the provision of the SOPA upon which the request for the refund was being sought, given that ORC 7785/2014 on its face stated that the Adjudication Determination had been set aside "by consent of the parties". [note: 3]

14 The Plaintiff's solicitors replied with a fairly detailed explanation to the SMC by email on 3 December 2014, stating as follows:

[…]

1. I refer to your email below.

2. The words "*by consent of the Parties*" in the Order of Court dated 20 November 2014 was inserted pursuant to the Court's direction on even date. A copy of the Court's direction is attached. The Adjudication Determination dated 29 May 2014 was set aside by consent because the Defendant, DJ Builders & Contractors Pte Ltd consented to the setting-aside application. During the hearing, [the AR] informed parties there would be no written grounds of decision unless the setting-aside application was contested vigorously. The setting aside application was not contested.

3. The grounds upon which the Plaintiff (i.e. "Claimant" in SOP/AA148 of 2014) relies on for seeking the refund are as follows:

(a) Section 30(2) of the [SOPA]: Section 30(2) states that a determination must decide on the party who shall pay the costs of the adjudication, and where applicable, the amount of contribution by each party. In the present instance, the Adjudication Determination dated 28 May 2014 has been set aside. There is no longer any determination deciding on the party who shall be liable for the costs of the adjudication. The refund is therefore due;

(b) Section 31(2) of the [SOPA]: Section 31(2) states that an adjudicator is not entitled to be paid, and shall not retain, any fee or expenses in relation to an adjudication application if he fails to make a determination on the application within the time allowed by Section 17 (or 19, as the case may be). In the present instance, the Adjudication Determination dated 28 May 2014 was not rendered within the time allowed by Section 17, and so, the adjudicator is not entitled to be paid. Further and/or alternatively, following on from sub-paragraph (a) above, the refund is due because there is no longer any determination deciding on the party who shall be liable for the costs of the adjudication; and

(c) Section 16(3)(c) of the [SOPA], which states that an adjudicator shall comply with the principles of natural justice. Since the Complaints Panel has ruled the adjudicator to be in breach of natural justice, the Court is satisfied that the Adjudication Determination dated 28 May 2014 should be set aside, and has set aside the Determination. The entitlement to be paid only crystallises when a determination is made. As there is no longer any determination, the adjudicator is consequently not entitled to his fees.

4. On this note, the Plaintiff is of the view that this is not the case where Section 31(4) of the [SOPA] is applicable. Section 31(4) provides that in cases where an adjudication application is "withdrawn" or "terminated", the adjudicator is entitled to his fees. The word "terminated" in Section 31(4) should be read as referring to termination on winding up of a party, etc. In such situations, the adjudicator is not at fault and is entitled to his fees. In the present instance, the adjudication was not terminated. Instead, the adjudicator published an adjudication determination which was subsequently set aside by the Order of Court dated 20 November 2014. Section 31(4) and (5) of the [SOPA] are therefore inapplicable.

5. Thank you. [note: 4]

[…]

[emphasis in original]

15 To this, the SMC responded by way of an email on 9 December 2014, rejecting the Plaintiff's request for the refund of the Adjudicator's fee. The material parts of the SMC's response read as follows:

[…]

I refer to your email below.

2 We would like to draw your attention to Section 31(2) of the [SOPA], the relevant portion reproduced below for the ease of reference:

[…] *An adjudicator is not entitled to be paid, and shall not retain, any fee or expenses in relation to an adjudication application if he fails to make a determination on the application within the time allowed* […].

3 The [SOPA] does not provide for any other instances under which the Adjudicator would not be entitled to his fees.

4 As the Order of Court dated 20 November 2014 states that the Determination had been set aside by consent of the parties, [SMC] has no basis or power under the [SOPA] to withhold all or part of the Adjudicator's Fee. [note: 5]

[…]

[emphasis in original]

16 This eventually led to the filing of the present application by the Plaintiff on 22 January 2015 in Summons No 352 of 2015 ("the Application"), wherein the Plaintiff prayed for the following:

[…]

Let all parties concerned attend before the Court on the date and time to be assigned for a hearing of an application by the Plaintiff for the following order(s):

1. That the Order of Court dated 20 November 2014 made by [the AR] by consent of parties in Originating Summons No. 920/2014, setting aside the Adjudication Determination dated 28 May 2014 of the Adjudicator Mr. Simon Lee Fun in Adjudication Application No. SOP/AA148 of 2014, be set aside.

2. That the Adjudication Determination dated 28 May 2014 of the Adjudicator Mr. Simon Lee Fun in Adjudication Application No. SOP/AA148 of 2014 be set aside pursuant to Section 27 of the Building and Construction Industry Security of Payment Act (Cap. 30B) and O. 95, r. 3 of the Rules of Court.

3. A declaration that the Adjudicator Mr. Simon Lee Fun failed to determine Adjudication Application No. SOP/AA148 of 2014 pursuant to Section 17(1)(b) of the Building and Construction Industry Security of Payment Act (Cap. 30B).

4. A declaration that the Plaintiff is entitled to a refund of the Adjudicator Fee of $4,815.00 (including GST), alternatively, that the Defendant bear 50% of the costs of the adjudication amounting to $2,728.50.

5. Further or other relief as the Honourable Court deems just and equitable in the circumstances.

17 For completeness, section 17(1)(b) of the SOPA, which is referred to in prayer 3 of the Application, states as follows:

Determination of adjudicator

17.—(1) An adjudicator shall determine an adjudication application —

[…]

(*b*) in any other case, within 14 days after the commencement of the adjudication or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent.

18 The Application came before me for hearing on two separate dates, during which counsel – to their credit – addressed me extensively on their submissions on the relief sought by the Plaintiff. Judgment was reserved, and I now render my decision with the grounds attached.

The issues

19 In essence, the Plaintiff's ultimate goal in taking out the Application is to obtain a court order that would guarantee the Plaintiff's refund of the Adjudicator's fee pursuant to section 31(2) of the SOPA which provides:

> An adjudicator is not entitled to be paid, and shall not retain, any fee or expenses in relation to an adjudication application *if he fails to make a determination on the application within the time allowed by section 17 or 19, as the case may be, otherwise than because the application is withdrawn or terminated or the dispute between the claimant and respondent is settled*. [emphasis added]

20 In order to achieve that outcome, the Plaintiff would necessarily have to succeed in the following two important regards which in turn define the issues to be disposed of in this court:

> (a) firstly, to have ORC 7785/2014 set aside ("the first threshold"); and
>
> (b) in addition to the first threshold, to make good its case before this court that the Adjudicator had indeed failed to determine the Adjudication Application pursuant to section 17(1)(b) of the SOPA which required the Adjudicator to determine the Adjudication Application "within 14 days after the commencement of the adjudication" ("the second threshold") (see [17] above).

The decision

The nature of "by consent" orders

21 It is trite that a consent judgment or consent order is generally binding and cannot be set aside save for exceptional reasons (see *Poh Huat Heng Corp Pte Ltd and others v Hafizul Islam Kofil Uddin* [2012] 3 SLR 1003 ("*Poh Huat Heng Corp*") at [18]). However, it has also been accepted that genuine issues may arise as to whether a consent judgment or consent order is in truth "a consent order of a "no objection" kind" or "a binding contract type of consent order" (see *Bakery Mart Pte Ltd v Ng Wei Teck Michael* [2005] 1 SLR(R) 28 ("*Bakery Mart*") at [13]), with the implication that a consent order of the former type may arguably be set aside on relatively wider grounds.

22 The distinction between "a consent order of a "no objection" kind" and one which is of "a binding contract type" has its roots tracing back to *Siebe Gorman* (see [1] above), where the English Court of Appeal essentially held that despite their terminology, orders expressed to be made "by consent" are not invariably orders born out of a "real contract" between the parties concerned (per Lord Denning MR at 189F):

> We have had a discussion about "consent orders." It should be clearly understood by the profession that, when an order is expressed to be made "by consent," it is ambiguous. There are two meanings to the words "by consent." That was observed by Lord Greene M.R. in *Chandless-Chandless* v. *Nicholson* [1942] K.B. 321, 324. One meaning is this: the words "by consent" may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. *The other meaning is this: the words "by consent" may mean "the parties hereto not objecting." In such a case there*

is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without objection? [emphasis added]

23 The case of *Siebe Gorman* has been reported in the Singapore Law Reports as having been followed in several local decisions, such as *Poh Huat Heng Corp* (see [21] above), *Wiltopps (Asia) Ltd v Drew & Napier* [1999] 1 SLR(R) 252 ("*Wiltopps*") and *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 ("*Wellmix*"), although I should note that in *Poh Huat Heng Corp* at [18], the Court of Appeal held as follows:

18 […] A consent judgment or consent order is binding and cannot be set aside save for exceptional reasons […] To constitute a consent order, there must be a real agreement between the parties, *which is to be contrasted with the scenario where a party merely does not object to a course of action* (see *Siebe Gorman & Co Ltd v Pneupac Ltd* [1982] 1 WLR 185 at 189F-189G, which was followed in *Wiltopps* at [18] and *Wellmix Organics (International) Pte Ltd v Lau Yu Man* [2006] 2 SLR(R) 117 ("*Wellmix*") at [29], and distinguished in *Bakery Mart* at [13]). [emphasis added]

24 At first blush, it would appear that the italicised words in the quoted passage above run counter to the maintaining of a distinction between "a consent order of a "no objection" kind" and "a binding contract type of consent order". However, as is patent in the same quote, the Court of Appeal in *Poh Huat Heng Corp* did at the same time refer to Lord Denning MR's observations in *Siebe Gorman* with approval as *the* basis for its holding.

25 In my view, it is possible for the quoted passage in *Poh Huat Heng Corp* to be reconciled with *Siebe Gorman* in the following manner. In *Poh Huat Heng Corp*, the Court of Appeal in adopting the terminology "consent judgment" and "consent order" was referring to a scenario where a judgment or an order has been *obtained* by the consent of the parties concerned. That is different from referring to a situation where a judgment or an order has been *expressed* to be made "by consent" of the parties – a situation which, as contemplated in *Siebe Gorman* (and for that matter, *Bakery Mart* as well (see [21] above)), may arise from either (a) the parties consenting in the true and literal sense to the making of the judgment or order, or (b) the parties not objecting to the making of the judgment or order.

26 That the Court of Appeal in *Poh Huat Heng Corp* was discussing the state of the law in the context of the following statement it made earlier in its judgment furthers my view in [25] above:

[…] It is well established that a judgment or order obtained by consent is final and can form the basis for the application of the doctrine of *res judicata* […] [emphasis in underline added]

27 In any case, I note that the distinction between "a consent order of a "no objection" kind" and one which is of "a binding contract type" still appears to be drawn from time to time by our courts post-*Poh Huat Heng Corp* (see, *eg*, a recent decision in *Airtrust (Singapore) Pte Ltd v Kao Chai-Chau Linda* [2014] 2 SLR 693 ("*Airtrust*") at [22]-[23], where the High Court used the term "contractual consent order" in its analysis). I am therefore convinced on the whole that such a distinction as outlined in *Siebe Gorman* remains to be good law in Singapore today. The corollary of this conclusion is that it is still acceptable practice for orders of a "no objection" kind to be expressed to be made "by consent" of the parties when such orders are formally drawn up and extracted – although, speaking for myself, such practice should ideally be minimised as much as possible to avoid any

potential confusion at a later time.

The nature of the "by consent" order in OS 920/2014

28 Based on the foregoing analysis, the question that must be addressed is whether the "by consent" order in OS 920/2014 is that of a "no objection" kind or that which is of "a binding contract type" (hereafter referred to in shorthand as "uncontested consent order" and "contractual consent order" respectively). Put in another way, the issue is whether there was a true contractual foundation underlying the AR's order in OS 920/2014.

29 In order for an order expressed to be made "by consent" to be found to have a true contractual foundation, the order must satisfy the ordinary requirements for the formation of a valid and binding contract. As explained in David Foskett, *The Law and Practice of Compromise* (7ed, Sweet & Maxwell, 2010) at para 3-01:

> Since a compromise is merely a contract, the ordinary principles of contract law apply with as much force as in other contractual contexts. Under the ordinary law a contract will not be found to have arisen unless:
>
> (i) consideration exists;
>
> (ii) an agreement can be identified which is complete and certain;
>
> (iii) the parties intend to create legal relations; and
>
> (iv) in some cases, certain formalities have been observed.

30 In relation to the requirement of offer and acceptance in contract-making, it is apposite to refer to Templeman LJ's concurring judgment in *Siebe Gorman* (see [1] above) where he expressed the view that service of a summons "was not an offer and was not intended to create or result in a contractual relationship", explaining thus (at 192G-193B):

> … If the [respondents] had written back to the [applicants] announcing that they would consent to the order sought by the [applicants], the announcement would not and could not have constituted acceptance of a non-existent offer or be capable of creating a contractual relationship. The announcement would have been no more than the intimation of an intention on the part of the [respondents] not to argue against the grant of the relief sought by the [applicants] but to submit to an order in the terms of the summons. If, for example, the [respondents] had subsequently before the hearing of the summons written again to the [applicants], saying that they had just seen counsel and had been advised to withdraw their consent and intended on the hearing to oppose the grant of the relief sought by the summons, it seems to me unarguable that the [respondents] would have thereby repudiated any contract. If the [applicants] were then embarrassed by a late change of mind on the part of the [respondents], they might have been entitled to an adjournment of the summons and they might have been entitled to some favourable order as to costs; but that would not have prevented the [respondents] from changing their minds.

31 What, then, is capable of constituting an offer and acceptance in the current context? As case law would suggest, the answer must necessarily depend on the facts of each case.

32 In *Siebe Gorman* (see [1] above), for instance, the defendant had taken out a summons

against the plaintiff seeking specific discovery of documents. In the summons, the defendant included a prayer for an order that the plaintiff "do within ten days from the date of such order make and file an affidavit", and that "in default of complying with the order the plaintiffs' claim against the defendants be struck out". On the date of the hearing of the summons and prior to entering the door to the master's chamber, counsel for the parties apparently had a brief oral discussion amongst themselves and apparently agreed to an arrangement whereby the plaintiff was to file the affidavit requested by the defendant within 10 days "from the date of the mutual inspection of documents" (presumably in general discovery) instead. Before the master in chamber, an order was granted on those terms with apparently no mention of the 'unless' order described earlier. The defendant thereafter drew up and extracted the master's order as a "by consent" order with the 'unless' order included. The plaintiff defaulted on the 10-day deadline and a dispute arose as to whether the plaintiff's action ought to be struck out pursuant to the master's order as extracted.

33 On appeal to the Court of Appeal, Lord Denning MR (with whom Eveleigh and Templeman LJJ concurred) had this to say (at 190D):

> […] It often happens in the Bear Garden [note: 6] that one solicitor or legal executive says to the other, "Give me 10 days." The other agrees. They go in before the master. They say, "We have agreed the order." The master initials it. It is said to be "by consent." But there is no real contract. All that happens is that the master makes an order without any objection being made to it. It seems to me that that is exactly what happened here. The solicitors for the plaintiffs were saying, "We do not object to the order. Give us the extra 10 days from the time of inspection, and that is good enough." It seems to me quite impossible in this case to infer any contract from the fact that the order was drawn up as "by consent."

34 In an earlier case of *Purcell v FC Trigell Ltd and another* [1971] 1 QB 358 ("*Purcell*"), the plaintiff sued the defendants seeking damages for skull and spinal injuries he sustained from a workplace accident where he fell from a height. The defendants failed to answer certain court-sanctioned interrogatories within time. The plaintiff took out a summons seeking judgment to be entered on the basis of the defendants' default. This was followed by a series of letters being exchanged between the parties' solicitors, wherein the defendants' solicitors invited the plaintiff to agree to having an 'unless' order entered with a deadline of 14 days for the defendants to answer the interrogatories instead. The plaintiff's solicitors wrote back to indicate that the plaintiff would be prepared to agree to an 'unless' order entered with a seven-day deadline. A telephone conversation ensued between the solicitors, and parties finally arrived at a landing to have an 'unless' order entered with a 10-day deadline. The order was entered accordingly in court. After the defendants provided what were allegedly inadequate answers to the interrogatories within the 10-day deadline, the plaintiff sought and obtained judgment against the defendants. Events that followed eventually led to the defendants succeeding before a judge in obtaining an extension of time to appeal the original 'consent' order. The plaintiff appealed to the Court of Appeal.

35 In allowing the appeal, Lord Denning MR (with whom Winn and Buckley LJJ) paid heed to the letters exchanged between the parties' solicitors and held that the 'consent' order "was deliberately made, with full knowledge, with the full agreement of the solicitors on both sides" (see *Purcell* at 362B-D and 364A-B).

36 Coming now to the present case, it appears from the court records in OS 920/2014 that the Defendant (through its solicitors) did make an offer to the Plaintiff's solicitors to, *inter alia*, have the Adjudication Determination set aside provided that each party bore its own costs in the court proceedings. In a letter addressed to the Plaintiff's solicitors on 22 August 2014, the Defendant's solicitors wrote:

> Purely with a view of an amicable settlement of this matter, and without admission to liability to the claims made by your client to date, our client is prepared to consent to the transfer of proceedings and also the setting aside of the determination, provided that your client consents that each party is to pay its own costs and disbursements for the transfer application and the application to set aside. [note: 7]

37 On 25 August 2014, the Plaintiff's solicitors replied by way of letter stating, *inter alia*, that "[o]ur clients do not accept your clients' proposal". [note: 8] This was followed by a response letter from the Defendant's solicitors on 27 August 2014 which stated, *inter alia*, the following:

> […] in the light of the position taken by your client in this matter, we would file our client's reply affidavit and raise the issue to the attention of the Court at the hearing of the application for the transfer, including the fact that our client has stated that it is prepared to consent to the setting aside application and the transfer, provided that each party are to pay their own costs of the matter, which offer has been rejected by your client. [note: 9]

38 This prompted a further reply letter from the Plaintiff's solicitor on 27 August 2014 stating, *inter alia*, the following:

> […] Our clients acted as they did in reliance of your clients' position. In light of the findings of the Complaints Panel published on 5 August 2014, your clients' intention to consent to the setting-aside application is again, expressed with the benefit of hindsight, and an afterthought.
>
> […] On 6 August 2014, after the findings of the Complaints Panel was made known, you verbally informed the undersigned that your clients might be prepared to consent to OS 170/2014. We did not hear from your clients until your letter dated 22 August 2014. […] [note: 10]

39 At the hearing of OS 920/2014 before the AR, no resistance whatsoever was put up by the Defendant's solicitors against an order to set aside the Adjudication Determination. In fact, the Defendant's Skeletal Arguments filed on 17 November 2014 stated in no uncertain terms that the Defendant was still prepared to consent to the setting aside of the Adjudication Determination, provided that each party bore its own costs in the court proceedings. [note: 11] The following are excerpts from the certified transcripts of the proceedings before the AR in OS 920/2014:

> Ct: Read your submissions. Shall we just deal with the issue of costs?
>
> PC/DC: No objections to an order-in-terms of prayer 1 by consent.
>
> [parties made submissions on costs]
>
> Ct: […] the plaintiff should obtain costs for the setting aside proceedings up until 21 or 22 August when the defendant final agreed not to contest the setting aside proceedings.
>
> On the whole, and on the representation that the affidavits and submissions for the setting aside proceedings had already been prepared by 22 August, I order the defendant to pay costs of $700 (all in) to the plaintiff. By consent, Order-In-Terms prayer (1).

40 Given the account of what had transpired in the course of proceedings leading up to the AR's

decision in OS 920/2014, there is absolutely no doubt in my mind that the "by consent" order in OS 920/2014 is in the nature of an uncontested consent order as opposed to a contractual consent order. Indeed, I would in reliance of the authority of *Purcell* (see [34]-[35] above) have very much been prepared to rule otherwise if the Plaintiff's solicitors had in writing accepted the Defendant's offer contained in the letter dated 22 August 2014 (see [36] above). But that was not what happened here. The offer was expressly rejected in writing by the Plaintiff's solicitors, and the "by consent" order in OS 920/2014 was entered on the basis of the Defendant *not contesting* the setting aside of the Adjudication Determination.

Whether the "by consent" order in OS 920/2014 should be set aside

41 Having found that the "by consent" order in OS 920/2014 is in the nature of an uncontested consent order as opposed to a contractual consent order, the question that is now to be determined is whether the order as such should be set aside. But before I proceed any further, I think it is appropriate to touch briefly on one procedural point for completeness.

42 In the course of the hearings before me, counsel was asked to confirm if there was any dispute between the parties in respect of the manner in which the present Application was taken out against the Defendant, in particular whether the Application should have been made by way of commencing a fresh legal action instead of a summons in OS 920/2014. This query was posed to counsel because of the holding of the High Court in *Wiltopps* (see [23] above) which stated as follows (per Lee Seiu Kin JC (as he then was) at [23]):

> 23 […] A judgment or order by consent is binding until it is set aside *and fresh proceedings must be commenced if it is sought to be set aside a consent order*. […] [emphasis added]

43 Counsel for the parties unequivocally indicated in their responses that they have no disputes in that regard, and that in any event they would prefer for the court to instead focus directly on the substantive arguments relating to the setting aside of the "by consent" order. The query thus became moot in the present case in those circumstances.

44 With that, I now move on to address the merits relating to the Application seeking to set aside what I have found to be essentially an uncontested consent order.

45 In its submissions, the Plaintiff takes the position that the AR's order in OS 920/2014 is in the nature of an uncontested consent order. Counsel for the Plaintiff made the following arguments:

> [after referring to, *inter alia*, *Siebe Gorman*]
>
> 13. In the present case, the Defendant consented to the application to set aside the Adjudication Determination. This meant that the parties concerned, and in particular the Defendant did not object to the application. It followed that there was no real contract between the parties, and the Order of Court dated 20 November 2014 could be set aside by the Honourable Court *in the exercise of judicial and residual discretion*, without the parties' consent. [note: 12]
>
> […]
>
> 15. On this note, the Plaintiff submits that even in the case of a contractual consent order (which is denied), the Honourable Court nevertheless retains the residual discretion to vary its terms **where this is necessary to prevent injustice** . In the Singapore High Court case of

[*Airtrust* (see [27] above)], it was held at [22]:

> "Nevertheless, it is reasonably clear that *even in the case of a contractual consent order, the court retains the residual discretion to vary its terms where this is necessary to prevent injustice*. **This is especially so where the court is dealing with a "consent unless" order, which if not adhered to, will deprive a party of its rights** ."

16. Thus, the Honourable Court retains discretion to even set aside a contractual consent order (which is denied), in cases of injustice.

17. *We invite the Honourable* [sic] *to concur that the Plaintiff would suffer injustice if the consent order in the Order of Court dated 20 November 2014 was not set aside, to enable the issue of whether the Adjudication Determination was late to be determined and ventilated. The injustice lies in the fact that the Plaintiff would be deprived the chance of redress, and of the refund of the Adjudicator's Fee.*

[emphasis in bold and underline in original; emphasis in italics added]

46 I find no reason to depart from the holding in *Airtrust* that the court retains a residual discretion – even in the case of a contractual consent order – to vary the terms of the order where this is necessary to prevent injustice. This stated principle of law is eminently justified by O 92 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") which provides that "nothing in [the ROC] shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court" (see also *Airtrust* at [23]). In my view, the same position should in principle *a fortiori* hold true vis-à-vis uncontested consent orders.

47 However, it must at the same time be appreciated that *application* of the principle enunciated in *Airtrust* does not invariably lead to a uniform outcome in all cases. This point can be illustrated by referring to the earlier case of *Bakery Mart* (see [21] above) where the High Court refused to interfere with a consent summary judgment simply on a ground argued by the defendant that an unfairly prejudicial result had since arisen as a result of the defendant having obtained unconditional leave to run essentially the same defence in a related parallel court proceeding (see *Bakery Mart* at [9]). At [20], the High Court held (per Belinda Ang J):

> The alleged unfairly prejudicial result in itself is not sufficient to justify the setting aside of a judgment to which [the defendant] knowingly consented in order to avoid further legal costs. It is not for the court to interfere with the consent judgment, to undo that which the parties freely agreed with each other, when the only basis for inviting interference is that after [the defendant's] success before the Court of Appeal in [the related parallel proceeding], the consent judgment turned out to be a bad decision for one side.

48 Coming back to the present case, the Plaintiff is effectively seeking a setting aside of an order which it had previously obtained by its very own application in OS 920/2014. The reason for the taking of this latest course of action is so that the Plaintiff can secure a refund of the Adjudicator's fee pursuant to section 31(2) of the SOPA (see [19] above), after it has failed to convince the SMC to acquiesce in the said refund by barely relying on the "by consent" order extracted in OS 920/2014 (see [12]-[15] above).

49 It is true that the Plaintiff's supporting affidavit in OS 920/2014 did raise arguments contending that the Adjudicator had failed to determine the Adjudication Application pursuant to section 17(1)(b)

of the SOPA which required the Adjudicator to determine the Adjudication Application "within 14 days after the commencement of the adjudication" (*ie*, arguments relating to the second threshold (see [20(b)] above)). [note: 13] Indeed, this contention also occupied a significant portion of the Plaintiff's skeletal submissions for the hearing before the AR in OS 920/2014. [note: 14]

50 The Defendant, in turn, also made relatively extensive arguments in relation to the second threshold in the skeletal submissions which it tendered for the hearing of OS 920/2014. [note: 15] However, as gleaned from the certified transcripts of the proceedings before the AR in OS 920/2014 (see [39] above), the second threshold did not at all turn out to have been contentiously argued by the parties before the AR. This is confirmed by the Plaintiff's email to the SMC dated 3 December 2014 stating, *inter alia*, that "[d]uring the hearing, [the AR] informed parties there would be no written grounds of decision unless the setting-aside application was contested vigorously. The setting aside application was not contested." (see [14] above)

51 Having regard to the totality of the circumstances leading to the "by consent" order in OS 920/2014, I find that there is insufficient basis for me to conclude that the "by consent" order is of the type envisaged in *Bakery Mart*, *viz*. one that "turned out to be a bad decision for one side" (see [47] above). I fail to see how better the Plaintiff could have done in getting the AR to render a determination on the second threshold when such a need was obviously obviated by its adversary in OS 920/2014 (*ie*, the Defendant) not contesting the setting aside of the Adjudication Determination (given the SMC Complaints Panel's report finding the Adjudicator to be in breach of the principles of natural justice (see [10] above)).

52 However, at an even more fundamental level, I am equally unable to detect any injustice or unfairly prejudicial result arising from the "by consent" order made in OS 920/2014 which is of such character that it properly ought to be considered as warranting the Plaintiff to seek the court's interference via the commencement of a proceeding *against the Defendant*. Issues pertaining to the refund of an adjudicator's fee or expense pursuant to section 31(2) of the SOPA (see [19] above) are, in my view, matters that can and should properly be taken on by the party requesting the refund *with* the SMC in its capacity as the authorised nominating body under section 28 of the SOPA, of which subsection (4) reads:

> An authorised nominating body shall, in relation to its authorisation under subsection (1) –
>
> (a) establish and maintain a register of adjudicators;
>
> (b) establish and administer codes of conduct or practice;
>
> (c) provide training for the persons who are on the register of adjudicators;
>
> (d) establish a schedule of fees for adjudication services provided under or by virtue of this Act, including an adjudicator's fees;
>
> (e) facilitate the conduct of adjudication under this Act, including the establishing of rules therefor not inconsistent with this Act or any other written law, and provide general administrative support therefor; and
>
> (f) undertake such other functions or duties as may be imposed under this Act or as may be directed by the Minister.

53 That nothing in section 31(2) of the SOPA stipulates that an adjudicator's disentitlement to be

paid or retain any fee or expense must be preceded by a court determination to such effect (or for that matter, even a court order setting aside an adjudication determination) lends support to this view. Indeed, in the present case, the SMC Complaints Panel's report (see [10] above) did consider the Plaintiff's contentions relating to the second threshold (see [20(b)] above) – *ie*, contentions which clearly would have had a direct consequential impact on the question of refund. But instead of rejecting those contentions on the ground that such matters were categorically not within the SMC's competency to determine, the SMC Complaints Panel stated the following:

> *We do not think that in the context of the complaints proceedings it is necessary for the panel to express a view on the determination of the last day for the making of the adjudication determination*. The issue for the panel is whether in arriving at the wrong commencement date for the adjudication, the Adjudicator has conducted himself in a manner which is inconsistent with the requirements [of] the Code of Conduct. [note: 16] […] [emphasis added]

54 To the Plaintiff's credit, it did subsequent to the SMC Complaints Panel's report raise a request directly with the SMC for the refund of the Adjudicator's fee (see [12]-[14] above). However, the Plaintiff's request for the refund was roundly rejected by the SMC on essentially the ground that the SMC "has no basis or power under the [SOPA] to withhold all or part of the Adjudicator's Fee" (see [15] above). With the greatest of respect, this explanation does not seem to square well with the observations made in [53] above, and as such I regret to say that this court is not able to endorse the SMC's views on this score.

55 In sum, the Plaintiff may feel that an unfairly prejudicial result has been occasioned by the SMC's refusal to grant the refund of the Adjudicator's fee. But however aggrieved the Plaintiff may feel towards the stance adopted by the SMC, I do not see any injustice or unfairly prejudicial result of a kind that has arisen which merits the Plaintiff to now invite the court to reopen and revisit the AR's "by consent" order in a proceeding which names *the Defendant* as the respondent – all with a view towards possibly bringing about a change of the SMC's mind as to whether the refund of the Adjudicator's fee should be allowed.

56 Accordingly, I hold that neither the holding in *Airtrust* nor the holding in *Bakery Mart* (as distinguished) (see [46]-[47] above) comes in aid of the Plaintiff when applied to the present Application.

Conclusion

57 For the reasons given above, the Plaintiff fails to cross the first threshold (see [20(a)] above), thereby rendering it needless for this court to express any substantive view on the matters relating to the second threshold (see [20(b)] above). The Application is dismissed.

58 I will hear parties on the issue of costs.

[note: 1] Yang Caihua's affidavit (6 June 2014), at [73]-[74].

[note: 2] Yang Caihua's affidavit (22 January 2015), at [32] and p 54.

[note: 3] Yang Caihua's affidavit (22 January 2015), at p 55.

[note: 4] Yang Caihua's affidavit (22 January 2015), at pp 59-60.

[note: 5] Yang Caihua's affidavit (22 January 2015), at p 59.

[note: 6] The Bear Garden is, for the most part, the UK equivalent of the lawyers' waiting area outside chambers at level 2 of the Singapore Supreme Court Building.

[note: 7] Defendant's Skeletal Arguments in OS 920/2014 at Annex A.

[note: 8] Defendant's Skeletal Arguments in OS 920/2014 at Annex B.

[note: 9] Defendant's Skeletal Arguments in OS 920/2014 at Annex C.

[note: 10] Defendant's Skeletal Arguments in OS 920/2014 at Annex D.

[note: 11] Defendant's Skeletal Arguments in OS 920/2014, at pp 2 and 5.

[note: 12] Plaintiff's Written Submissions (4 March 2015), pp 17-19.

[note: 13] Yang Caihua's affidavit (6 June 2014), at [77].

[note: 14] Plaintiff's Skeletal Submissions in OS 920/2014, at [11]-[48].

[note: 15] Defendant's Skelatal Arguments in OS 920/2014, at [18]-[41].

[note: 16] Yang Caihua's affidavit (22 January 2015), at p 31.