Challenging an Adjudication Determination
The Extent of the Court’s Supervisory Role

The scope and extent of the Court’s supervisory role over an Adjudicator’s jurisdiction to hear and determine a Payment Claim under the Building & Construction Industry Security of Payments Act (“SOPA”) has been the subject of several recent decisions by the Courts in Singapore. The purpose of this article is to examine the different approaches adopted by the courts in deciding whether the validity of a payment claim under the SOPA affected the Adjudicator’s jurisdiction to adjudicate on a dispute.

The Adjudication Process under the SOPA

The SOPA came into effect on 1 April 2005. Its stated objective was the implementation of changes to payment obligations across the construction industry and to ensure the smooth completion of construction projects in Singapore through the improvement of cash flow. The mechanism by which this stated objective was to be achieved was the statutory adjudication process.

Adjudication under the SOPA is “clearly intended to be a process distinguishable from arbitration”\(^1\). The statutory process places great emphasis on the quick resolution of payment disputes in construction projects. It stipulates short timelines and a failure to comply with these timelines means that the defaulting party will have to face dire consequences. The process is commenced by the Claimant serving a payment claim on the Respondent. After receiving this payment claim, the Respondent will prepare and serve a payment response which sets out the reasons that entitle the Respondent to withhold payment to the Claimant. Upon receipt of the Payment Response, the Claimant will have to decide whether to refer the dispute to an Adjudicator. If it decides to do so, it will file and serve an Adjudication Application and the Respondent will in turn answer the claim by way of an Adjudication Response.

The Adjudicator’s role under the SOPA is to determine the dispute which has been referred to him. He will do so by examining the merits of the payment claim, the circumstances in question and come to a determination as to the viability of the payment claim. This is known as the Adjudication Determination.

Section 21 of the SOPA provides for a party dissatisfied with the Adjudication Determination to apply to the High Court to set aside the determination. At the outset, it is important to note that a challenge against the Adjudication Determination is not an appeal against the determination to the Court. The SOPA provides its own procedures whereby an aggrieved party may apply to the appointing authority for the Adjudication Determination to be reviewed. Once the review is determined, the determination is binding on both parties to the Adjudication unless a court refuses to enforce the Adjudication determination or the dispute is finally resolved in subsequent court proceedings or arbitration or the parties have decided to settle the dispute.

A challenge against an Adjudication Determination under Section 21 of the SOPA is typically advanced on grounds of the Adjudicator’s jurisdiction to determine the dispute or on grounds that the Adjudicator had failed to observe the principles of natural justice.

Traditional Approach

Traditionally, the Courts have adopted a limited or restrictive approach towards interfering with an Adjudicator’s Determination. The statutory process of adjudication was intended to be a quick and cost effective resolution to disputes arising in the course of a construction project. The parties’ substantive right to revisit the dispute in subsequent court or arbitration proceedings is expressly preserved. The objective was for the claimant to obtain quick interim relief rather than wait for the completion of the project. Given this objective and the preservation of the parties’ rights to revisit the issue in dispute at the end of the project, the Courts have declined to inquire into the substance of the Adjudicator’s determination.

In determining whether a challenge to an Adjudication determination falls within this limited supervisory role of the courts, a distinction is drawn between jurisdictional errors

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and non-jurisdictional errors. Errors of fact or law made by the Adjudicator which impact upon his jurisdiction to hear the dispute are regarded as jurisdictional errors. Conversely, errors of fact or law which do not affect the Adjudicator’s jurisdiction to hear the dispute are considered non-jurisdictional errors. Where the error is jurisdictional in nature, the courts have been willing to intervene and set aside the adjudicator’s determination. Where the error is non-jurisdictional in nature, that is to say an error with regard to the substance of the dispute, the courts have declined to intervene. As Judith Prakash J in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 observed –

“After all, in any case, even if the adjudicator does make an error of fact or law in arriving at his adjudication determination, such error can be rectified or compensated or compensated for in subsequent arbitration or court proceedings initiated in accordance with the contract between the claimant and the respondent and intended to resolve all contractual disputes that have arisen.”

This distinction between jurisdictional and non-jurisdictional errors is not without its difficulties in practice. The challenge is in identifying which of an Adjudicator’s errors affects his jurisdiction to hear the dispute and which do not. As the New South Wales Court of Appeal observed in the recent case of *Chase Oyster Bar V Hamo Industries* [2010] NSWCA 190 – “There is no single test or theory or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined.”

This practical difficulty was recently highlighted by a string of cases involving the validity of Payment Claims made under the SOPA. The form and content of a Payment Claim is prescribed in the SOPA and the Regulations issued under the Act. Section 10(3) of the SOPA provides that a Payment Claim shall state the claimed amount and shall be made in such form and manner and contain such information as prescribed. Rule 5(2) of the Building and Construction Industry Security of Payment Regulations [RG1, 2006 Rev Ed] (“the Regulations”) prescribe that a payment claim shall simply be in writing, identify the contract to which the claim relates and contain details of the claimed amount.

Where a payment claim does not comply with the form and content prescribed in the SOPA and the Regulations, the question is whether an adjudication determination on the validity of such a payment claim could be considered as a determination that impacts upon the adjudicator’s jurisdiction to hear the dispute.

This question was first considered by the court in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658. Here, the Respondent had argued that the Adjudicator’s jurisdiction depended upon whether the Claimant had complied with all the statutory requirements governing the form and content of the payment claim. Judith Prakash J ruled as follows:-

“I took the view that the Adjudicator’s jurisdiction, in the sense of his power to hear and determine the adjudication, could not depend on such adventitious elements. It appeared to me that, as the claimant submitted, the Adjudicator’s jurisdiction arose from his appointment by an authorized body under section 14(1) of the SOP Act and from his acceptance of such appointment. Whether the payment claim was in proper order or not would not have an impact on the Adjudicator’s jurisdiction, though of course if it was not in order, the Adjudicator would be able to throw out the claim on that basis.” (emphasis added)

In a subsequent decision on the same issue, *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733, Judith Prakash J further observed as follows:-

“Accordingly, instead of reviewing the merits (in any direct or indirect fashion), it is my view that the court’s role must be limited to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to and that the process of the adjudication, rather than the substance, is proper. After all, in any case, even if the adjudicator does make an error of fact or law in arriving at his adjudication determination, such an error can be rectified or compensated for in subsequent arbitration or court proceedings initiated in accordance with the contract between the claimant and the respondent and intended to resolve all contractual disputes that have arisen.”

A Different Approach

The question of whether the validity of a payment claim affected the jurisdiction of the Adjudicator therefore appeared to be settled until the decision in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459.

In Sungdo, the issue was whether the purported claim document in that case constituted a valid payment claim under the SOPA even though the said document had complied with all of the requirements as to form and content prescribed in the SOPA and the Regulations.

Lee Seiu Kin J found that the document did not constitute a payment claim under the SOPA since the claimant did not communicate its intention to the respondent that the document
was intended to constitute a payment claim under the SOPA. The learned Judge observed that intention is a necessary element and that a document which complies with all the prescribed requirements will still not be considered a payment claim if the maker of the document does not intend the document to be a payment claim.

More significantly, for present purposes, Lee Seiu Kin J disagreed with the approach adopted in the earlier cases of Chip Hup Hup Kee and SEF Construction. The learned Judge observed that the validity of a payment claim did in fact affect the Adjudicator’s jurisdiction to determine the dispute. This was because the power of the authorised body to appoint an Adjudicator stemmed from the receipt by that body of an adjudication application from a claimant. That application was predicated by the service of a valid payment claim on the respondent. If the claimant had failed to serve on the respondent a valid payment claim, there cannot be a valid adjudication application and the power to appoint the Adjudicator therefore did not arise. The learned Judge went on to say that if the validity of the payment claim affects the Adjudicator’s jurisdiction, there was no reason why a court should be precluded from setting aside the Adjudication determination.

Nevertheless, despite his disagreement in principle with the approach adopted by the court in Chip Hup Hup Kee and SEF Construction, Lee Seiu Kin J ruled that in practice, where a document purports to be a payment claim under the SOPA, the courts should only review the Adjudicator’s determination on the validity of such a payment claim on the basis of unreasonableness as defined in the English case of Associated Provincial Picture Houses, Limited v Wednesbury Corporation [1948] 1 KB 223.

That case was concerned with a complaint by the owners of a cinema in Wednesbury that it was unreasonable of the local authority to licence performances on Sunday only subject to a condition that ‘no children under the age of 15 years shall be admitted to any entertainment whether accompanied by an adult or not’. Lord Greene MR in that case summarized the principle of unreasonableness as follows:-

“The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere.” [emphasis added].

This principle of unreasonableness which is often referred to as “Wednesbury unreasonableness”, is a public law concept particularly adopted by the courts in the judicial review of decisions and actions of public authorities or statutory bodies. Here, it is significant to note that the principle of unreasonableness may be applied to all aspects of a public authority’s decision or the exercise of its statutory powers. It is not limited solely to the issue of jurisdiction. The introduction of this public law concept in applications to challenge an adjudication determination on disputes between two private entities or individuals was therefore an unprecedented development.

In the most recent decision on this issue, Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) v Lee Wee Lick Terence (alias Li Weili Terence) [2011] SGHC 109, the court revisited the different judicial approaches on the effect of an invalid payment claim on the Adjudicator’s jurisdiction. That case involved a reconstruction of a two-storey residential house into a three-storey house. During the progress of the works, the relationship between the claimant, the contractor, and the respondent owner had soured and this led to the respondent terminating the building contract and demanding that the claimant vacate the construction site. The claimant subsequently submitted a “Payment Claim No. 6” to the respondent. The respondent failed to serve a payment response. The claimant then made an adjudication application and an Adjudication Determination was subsequently made in the claimant’s favour for S$125,450.40.

The respondent challenged the Adjudication Determination. The issues before the court were two-fold, namely, whether Payment Claim No. 6 was a valid payment claim under the SOPA and whether Payment Claim No. 6 was served out of time. Before proceeding to consider these two issues, the court dealt with the preliminary question of whether the court ought to even review the Adjudicator’s decision on these two issues. Tay Yong Kwang J, after carrying out an exhaustive review of the earlier cases on this issue, agreed with the statements made by Lee Seiu Kin J in Sungdo, that in principle, the court may review an Adjudicator’s decision on whether a document properly constitutes a payment claim under the SOPA and that such a review should only be made on the basis of Wednesbury unreasonableness.
Commentary

The introduction of the principle of Wednesbury unreasonableness in applications to challenge an Adjudication determination under the SOPA is a result of the continuing conflict between two very important principles bearing upon the court’s intervention in adjudication determinations. In Chua Say Eng, Tay Yong Kwang J succinctly described the conflict as follows:-

“To what extent should the court interfere with an adjudicator’s determinations? A liberal approach would invite more setting aside applications and undermine the statutory purpose of creating a speedy and low cost adjudication process .... while turning away from putting right erroneous adjudication determinations could create the impression that the court countenances injustice.”

In this sense, the principle of Wednesbury unreasonableness is viewed as a compromise between the need to ensure that the statutory objective behind adjudication is not undermined on the one hand and the court’s role in preventing injustice in appropriate cases is preserved, on the other. The new approach appears to be that, in general, an Adjudicator’s decision on the validity of a payment claim under the SOPA will not be reviewed by the courts unless it can be shown, to the court’s satisfaction, that the Adjudicator’s decision was so unreasonable that no reasonable Adjudicator (based on the same facts and applying the same legal principles) would have arrived at such a decision. Provided such unreasonableness can be established, the court may be willing to intervene and set aside the Adjudication determination.

The scope and extent of applying concepts and principles that are peculiar to the realm of public and administrative law in applications to challenge an adjudication determination under Section 21 of the SOPA is a question that requires further judicial guidance. Nevertheless, the rationale for the approach is to be clearly appreciated – that is, to ensure that the overall objective of a “speedy and low cost adjudication process” is maintained with the preservation of the court’s right to intervene, in appropriate cases, where justice so requires. Having said that, it is also imperative to ensure, going forward, that the principle of Wednesbury unreasonableness is limited to issues governing the Adjudicator’s jurisdiction and not extended (as would be the case in judicial review applications against the decisions of public authorities) to the substantive merits of an Adjudication Determination. Such a development would have the unwelcome effect of militating against the statutory objectives of the adjudication process.