CHANGAROTH CHAMBERS LLC

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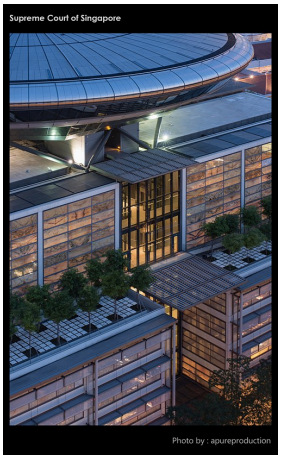
ADJUDICATION: IS A PAYMENT CLAIM THAT IS DUE "ON" A SUNDAY VALIDLY SERVED IF SERVED ON THE FRIDAY BEFORE?

***Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] SGCA 4**

IN SUMMARY

This Singapore Court of Appeal decision of 22 January 2018 provided greater clarity and certainty to the adjudication process under the *SOP Act*, in particular, on how parties can perform their obligations when they fall due on a Sunday or a public holiday. The Court of Appeal also explained waiver and estoppel in the context of a the respondent's jurisdictional objections.



FACTS

Audi Construction Pte Ltd ("the Appellant") was engaged by Kian Hiap Construction Pte Ltd ("the Respondent") as subcontractor to carry out structural works in the construction of a nursing home. Pursuant to *Clause 59* read with *Appendix 1* of the subcontract, the Appellant was entitled to serve a payment claim on the "*20th day of each calendar month*". The 20th day of November 2016, however, fell on a Sunday. The Appellant therefore decided to serve a payment claim two days earlier on the Friday of that week (i.e. 18th November 2016), but dated the payment claim 20th November 2016. The Respondent did not issue and serve any payment response and the Appellant subsequently applied for adjudication under the *SOP Act*.

Before the Adjudicator, the Respondent challenged the validity of the payment claim on the basis that it had not been filed on the 20th of the month as the contract required, which is therefore a breach of *Section 10(2)* of the *SOP Act* (which required a payment claim to be served "*at such time as specified in or determined in accordance with the terms of the contract*". This is the first time that this challenge had been raised. The Adjudicator rejected this argument and issued the Adjudication Determination in favour of the Appellant in January 2017.

The Appellant subsequently applied for and was granted leave to enforce the Adjudication Determination. The Respondent then applied to the High Court to set aside both the Adjudication Determination and the order granting leave to enforce. The Judge in the High Court set aside the Adjudication Determination and held that the *SOP Act* required the payment claim to be served *on* (and not *by*) 20th November 2016, "*neither sooner nor later*" The Appellant then appealed to the Court of Appeal against that decision.

ISSUES BEFORE THE COURT OF APPEAL

The issues before the Court of Appeal were:

(a) Issue 1: Whether the payment claim was validly served; and

(b) Issue 2: If the payment claim was not validly served, whether the respondent had waived its right to object to the payment claim's invalid service or was estopped from raising such an objection ("Waiver and Estoppel").

HOLDING OF THE COURT OF APPEAL

The Court of Appeal allowed the appealed as it had found that the payment claim was validly served (Issue 1).

With regard to Issue 2, while it did not arise for consideration in light of the Court's decision on Issue 1, the Court nevertheless took the opportunity to set out its views on the issue. In essence, the Court found that the Respondent's failure to file a payment response constituted an unequivocal representation that it would not raise any objection to the validity of the payment claim, and therefore, the Respondent is estopped from subseqeuntly raising the object in adjudication, in the High Court and in the Court of Appeal.

ISSUE 1: WHETHER THE PAYMENT CLAIM WAS SERVED VALIDLY

As a starting point, the Court reiterated its decision in *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011 ("*Grouteam*") that *Section 10(2)* of the *SOP Act* is a mandatory provision, the breach of which would render an adjudication determination invalid.

Interpretation of Contractual Provision

In this case, as the subcontract provided that the Appellant is entitled to serve a payment claim "on" the date for submission (i.e. 20th day of each calendar month), *Section 10(2)(a)* of the *SOP Act* was the applicable subsection (i.e. "*a payment claim shall be served at such time as specified in or determined in accordance with the terms of the contract*").

The Court held that where the parties' contract provides for the service of payment claims *on* a stipulated date, this means service *on* that date and not service *by* that date. Therefore, the starting point was that the payment claim in this case ought to have been served on 20th November 2016 .

In this regard, the Appellant argued that a "purposive interpretation" of the contractual date for service of a payment claim should be taken. However, the Court disagreed that a purposive interpretation would have the effect that the Appellant contended for, suggested a departure from the ordinary principles of contractual interpretation, and would introduce an unacceptable degree of uncertainty into a regime which places great importance on timeliness (especially when certainty is vital in the context of the *SOP Act*).

The Court's Decision and Reasoning

Nevertheless, the Court was of the view that the payment claim, having been served two days before the specified day in the subcontract, was validly served due to the combination of two facts, namely:

(a) the Appellant had a good reason for effecting service of the payment claim before 20th November 2016 – that day was a Sunday, and there was no dispute that the Respondent's office was closed on Sundays; and

(b) there could not have been any confusion as to the payment claim's operative date – the payment claim was correctly dated 20th November 2016, the day on which the contract entitled the Appellant to serve a payment claim.

It is therefore clear and obvious to the Respondent from this manner of dating that the Appellant intended for the payment claim to be treated as being served and, importantly, operative only on 20th November 2016. The fact is that the Appellant simply adopted a practical and sensible way of complying with the parties' subcontract. By doing so, the Court found that the Appellant did comply with the relevant provisions in the parties' subcontract and there did also comply with *Section 10(2)(a)* of the *SOP Act*.

However, the Court emphasised and cautioned that its decision in this regard was made on the basis of the combination of the two facts set out above. Therefore, if there is no good reason for serving a payment claim early, the Court would not consider service to be valid service. This means that this decision does not entail that a payment claim may be served as early as the Claimant wishes so long as he dates it correctly. Also, while the Respondent contended that the payment claim could have been served on 20th November 2016 by fax, email or leaving it at the Respondent's Registered Office or usual place of business, the Court did not think that either of these contentions undermined the good reason which the Appellant had for physically serving the payment claim early on 18th November 2016.

Similarly, the Court also cautioned that if serving the payment claim early might cause confusion as ot its operative date (i.e. in this case if the payment claim was not only physically served but also dated 18th November 2016), the Court would also not consider such service to be valid.

The Court's Futher Observations

The Court also made the following 2 observations with regard to how this decision would affect the timeline for the service of the payment response:

(a) the Court accepted that *Section 11(1)* of the *SOP Act* provides that the time for providing a payment response runs from the date a payment claim is served (as opposed to when a payment claim is dated), and therefore, it may be argued that *Section 11(1)* precludes us from construing the payment claim as having taken effect on 20th November 2016 – however, the Court found this argument superficially attractive as it would not be possible for the Appellant in this case to insist that the payment claim took effect on 18th November 2016 (as it was dated 20th November 2016) and as such, *Section 11(1)* did not preclude the Court from construing the payment claim as taking effect on 18th November 2016; and

(b) The Appellant's argument that the earlier physical service of the payment claim gave the Respondent more time to deal with the payment claim is not helpful as it did not

shed light on whether there was compliance with the payment provisions in the subcontract, which was the relevant issue at hand.

Applicability of the *Interpretation Act*

More importantly, the Court also made observations with regard to *Section 50(c)* of the *Interpretation Act* and provided guidance for future cases in discerning how parties can perform their obligations when they fall due on a Sunday or public holiday for the purposes of the *SOP Act*.

Pursuant to *Section 50(c)* of the *Interpretation Act*, if an obligation under the *SOP Act* is to be performed on an "*excluded day*" (which is defined in *Section 50(b)* of the *Interpretation Act* as a Sunday or a public holiday), that obligation may be performed the next day. Thus, if the Appellant in this present case had served the payment claim on 21st November 2016, that is on the following Monday, the Court would have had no hesitation in holding that the payment claim has been validly served. This would be so irrespective of whether the payment claim was dated 20th ot 21st November 2016.

Therefore, based on this guidance from the Court, the Court indicated that it does not expect a dispute similar to the present case to arise in the future.

ISSUE 2: WAIVER AND ESTOPPEL

At the outset, it should be highlighted that in light of the Court's decision on the first issue, the second issue did not arise strictly for the Court's consideration. Nevertheless, the Court proceeded to set out its views on the matter.

The law is clear in that *Section 10(2)* of the *SOP Act* is a mandatory provision, the breach of which would invalidate the substantive basis of an Adjudicator's jurisdiction and therefore render an adjudication determination invalid. This means that if the payment claim was served in breach of *Section 10(2)(a)* of the *SOP Act,* then that breach would have gone to the substantive jurisdiction of the Adjudicator. The Appellant in this present case submitted that the Respondent had waived its right to object to that breach by failing to file a payment response.

Party May Waive His Right to Object to Breach That Goes Towards The Substantive Jurisdiction of the Adjudicator

The Court affirmed its decision in *Grouteam* in that a party may in fact waive his right to object to a breach which goes towards the substantive jurisdiction of the Adjudicator. The Court took the opportunity in this case to further elaborate its views as set out in *Grouteam*, and did so in two parts, namely:

(a) Whether an Adjudicator has the power to decide matters which go towards his jurisdiction; and

(b) When a party may be said to have forgone his right to raise a jurisdictional objection, whether by having waived that right or by being estopped from exercising it.

For the first part, the Court affirmed the view that the Adjudicator has the power to decide matters which go towards his substantive jurisdiction.

For the second part, the Court stated that it is well established that mere silence or inaction will not normally amount to an unequivocal representation. However, in certain circumstances where there is a duty to speak, mere silence may amount to a representation.

Duty to Speak in the Context of the *SOP Act*

In the context of the *SOP Act*, the *SOP Act* and the contract define the rights that parties have in relation to each other, which can in principle be the subject matter of waiver by election or estoppel. For example, when a Claimant serves a payment claim, a Respondent is entitled to raise an objection to that claim through a payment response. If the Respondent elects not to raise an objection to the payment claim's validity, he may in principle be said to have waived his right to make that objection in an adjudication.

The question then turned to whether there is a duty to speak. The Court referred to *Section 15(3)(a)* of the *SOP Act*, which restricts the issues which can be raised before an adjudicator to the issues stated in the payment response provided by the Respondent to the Claimant. It therefore follows that a Respondent has a duty to speak by raising jurisdictional objections in a payment response and such duty has to be discahrged by such time a Claimant would reasonable expect a Respondent to air its objections (which in Adjudication cases, should be the deadline for the issue of the payment response).

Therefore, as the Respondent had failed to issue and serve a payment response, it constituted an unequivocal representation that it would not raise any objection to the validity of the payment claim and as such, the Respondent is estopped from subsequently raising that objection in the Adjudication and all subsequent proceedings.

Concluding Views

This case clearly provided greater clarity and certainty to the adjudication process under the SOP Act. The guidance by the Court of Appeal with respect to the relevance of Section 50(c) of the Interpretation is most welcome as it seems to be have addressed practical issues / difficulties faced by parties during the adjudication procees, such as when the deadline for lodging of an Adjudication Application and/or Adjudication Response with the Singapore Mediation Centre falls on a Sunday.

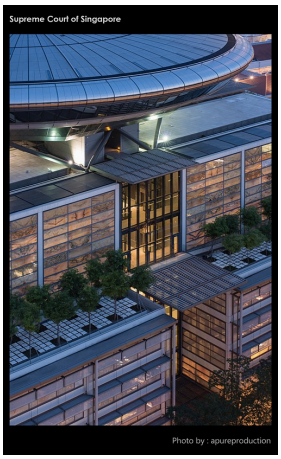
On the waiver and estoppel issue, this case clearly underscores the importance of issuing and serving the payment response and to ensure that all reasons that the Respondent wishes for the adjudicator to take into account should be set out in the payment response.

ARBITRATION: AD HOC ADMISSIONS

***Re Harish Salve* [2018] SGCA 6**

IN SUMMARY

This Singapore Court of Appeal decision of 25 January 2018 was an appeal against the High Court's dismissal of two applications regarding the *ad hoc* admission of Senior Advocate of the Indian Bar, Mr. Harish Salve under *Section 15* of the *Legal Profession Act (Cap 161)*. The purpose of the *ad hoc* admissions were to set aside an Arbitral Award. The Court of Appeal reversed the decision of the High Court and allowed Mr. Salve to be admitted under the *ad hoc* admission regime



FACTS

This appeal followed the High Court's dismissal of two applications for the *ad* hoc admission of Mr. Harish Salve ("*the Appellant*") to represent parties in the setting aside of a Final Arbitral Award (the "Award"). The purpose of admission was for the Appellant to argue issues of Indian law (and only such issues, while local counsel would argue the other issues) in applications to set aside a final award in an ICC Arbitration and to resist the enforcement of the Award in Singapore.

The underlying dispute arose out of a Share Purchase and Subscription Agreement ("the Agreement") between BPW ("the Respondent") and certain shareholders ("the Sellers") of [P] Limited ("the Company") for the purchase of the Sellers' stake in the Company. The Agreement is governed by Indian law and contains an ICC arbitration clause designating Singapore as the place of arbitration. The Respondents commenced arbitration proceedings alleging fraudulent misrepresentation and concealment by the Sellers in investigations conducted by the United States Department of Justice and United States Food and Drug Administration that were commenced against the Company. The Tribunal decided in favour of the Respondent in an Award delivered on 29th April 2016.

The Appellant was appointed lead counsel by some of the Sellers to assist them in resisting enforcement proceedings commenced in India by the Respondent. The Respondent was granted leave to enforce the Award in Singapore against the Sellers on 18th May 2016. The Sellers responded by taking out an application to set aside the Award and the relevant Originating Summons seeking for the *ad hoc* admission of the Appellant. It should be noted that the Sellers filed two separate applications in the setting aside of the Award and correspondingly, two separate applications for the *ad hoc* admission of the Appellant. This is because the Sellers comprise two groups – the first group comprises 15 adult and corporate sellers ("the Adult Sellers") and the second group comprises 5 minor sellers ("the Minor Sellers").

GOVERNING FRAMEWORK

Section 15 Legal Profession Act

The governing provision for the *ad hoc* admission of foreign counsels is *Section 15* of the *Legal Profession Act* (Cap. 161, 2009 Rev Ed) ("*LPA*") which states at *s15(1)*:

> *"(1) Notwithstanding anything to the contrary in this Act, the court may, for the purpose of any one case, admit to practice as an advocate and solicitor any person who –*
>
> *(a) holds –*
>
> *(i) Her Majesty's Patent as Queen's Counsel; or*
>
> *(ii) any appointment of equivalent distinction of any jurisdiction;*
>
> *(b) does not ordinarily reside in Singapore or Malaysia, but has come or intends to come to Singapore for the purpose of appearing in the case; and*
>
> *(c) has special qualifications or experience for the purpose of the case."*

The law was summarised in the High Court decision and upheld in the Court of Appeal. In essence, the court evaluates every application for *ad hoc* admissions in two stages:

a. first, the court must be satisfied of the three mandatory requirements in *s15(1)* of the *LPA*. If the requirements are not met, the application must fail and the question of discretion does not arise; and

b. second, if the mandatory requirements are satisfied, the court goes on to decide whether to exercise its discretion to admit the Applicant, having regard to the matters specified in paragraph 3 of the *Legal Profession (Ad Hoc Admissions) Notification 2012* (S 132/2012) ("*Notification Matters*"), which states:

> *"For the purposes of section 15(6A) of the Act, the court may consider the following matters, in addition to the matters specified in s15(1) and (2) of the Act, when deciding whether to admit a person under s15 of the LPA for the purpose of any one case:*
>
> *i. the nature of the factual and legal issues involved in the case;*
>
> *ii. the necessity of the services of a foreign senior counsel;*
>
> *iii. the availability of any Senior Counsel or other advocate and solicitor with appropriate experience; and*
>
> *iv. whether, having regard to the circumstances of the case, it is reasonable to admit a foreign senior counsel for the purpose of the case."*

The overarching principle guiding the exercise of the court's discretion is that the foreign senior counsel should only be admitted on the basis of "need". "Need" should be assessed not only from the perspective of the litigant but also with regard to the court's need for assistance with the issues in connection to the matter. The foreign senior counsel should not be admitted merely because it was "*desirable or convenient or sought as matter of choice*".

ISSUE

The key issue was whether the Appellant could be admitted under *s15* of the *LPA* pursuant to the law set out above.

HIGH COURT'S DECISION

In summary, by framing the Damages Issues and Minors Issues narrowly (which were the 2 issues raised in the application to set aside the Award), the High Court dismissed the applications on the ground that the Appellant did not fulfil the requirement under *s15(1)(c)* of having "*special requirements or experience for the purpose of the case*" even though he had extensive experience in the relevant area of law.

The Damages Issues were framed as:

a. what is the measure of damages permissible under s19 of the Indian Contract Act, in particular whether a party who has elected to affirm the contract may be awarded damages that put it back in position as if the misrepresentation had not been made;

b. the status of the case authorities in Indian contract law; and

c. what constitutes consequential damages under the *Indian Contract Act*

The Minors Issues were framed as:

a. what is the law of India regarding the protection and welfare of minors and whether this forms part of the public policy of India;

b. whether the minors have legal capacity to appoint an agent under Indian law and may be held liable for the fraudulent actions of their guardian or their guardian's agent under Indian law and public policy; and

c. whether the Minor's liability under the Award is disproportionate to their interests under the SPSSA and therefore offends Indian public policy.

COURT OF APPEAL'S DECISION

The Appellant appealed and the Court of Appeal allowed the *ad hoc* admission of the Appellant, holding that the Court would be more assisted by an Indian counsel than a local counsel. This was achieved by reframing the Damages Issues and Minors Issues.

The Damages Issues were reframed to be:

a. what damages should be awarded for fraudulent misrepresentation under Indian law?

b. what constitutes consequential damages under Indian law?

The Minors Issues were reframed to what constitutes the law and public policy of India in relation to the contractual capacity of minors and their liability for contracts made on their behalf.

Accordingly, the Court of Appeal reversed the decision of the High Court and found that *s15(1)(c)* of the *LPA* was satisfied for the following reasons:

a. the Appellant's curriculum vitae demonstrated deep expertise and experience in the relevant area of law;

b. contrary to the High Court's reasoning, it was unnecessary to demonstrate specific experience with actual issues of the case; and

c. being the solicitor-general of India for three years, the Appellant would have had considerable experience in Indian public policy.

On Notification Matters, the Court of Appeal found the factors in favour of the Appellant's *ad hoc* admission:

a. regarding the first Notification Matter, the Singapore proceedings involved complex and unsettled issues which did not seem to be easily resolved by reference to a particular statutory provision or case authority;

b. regarding the second and third Notification Matter, given the complexity of the Indian law issues, the court hearing the Singapore proceedings would definitely be more assisted by Indian counsel than by a local counsel. And given that the proceedings arose out of an international arbitration in which the governing law was foreign law but the seat was Singapore, where the foreign law is complex, it would aid the Singapore court in exercising its supervisory powers to have a most complete possible picture of the foreign law and policy and how they operate in the jurisdiction they spring from (i.e. India in this case); and

c. regarding the fourth Notification Matter, the Court of Appeal noted that *s15* was amended to allow the admission of any senior foreign counsel of any jurisdiction whereas previously only the Queen's Counsel in the United Kingdom could be admitted under the *ad hoc* admission regime. This broadening of the pool of qualified lawyers implied that the Parliament recognized the potential aid that can be provided by the expertise of foreign lawyers in the appropriate cases.

In addition, as the governing law of the arbitration was foreign law and the seat was in Singapore, the Court considered that the admission of would aid the court in having the "*most complete picture of foreign law and policy*".

Concluding Views

This is the first time the question of ad hoc admission has come before Courts involving a senior counsel who is not a Queen's Counsel. It is worth to note the Court of Appeal's comment on the parliamentary debates preceding the amendment to s15 of the LPA which broadened the scope and allowed the admission of any senior foreign counsel of any jurisdiction who holds an appointment of equivalent distinction to the appointment of the Queen's Counsel in the United Kingdom. The Court of Appeal identified that the purpose of the amendment was likely to recognise that in the right circumstances, our courts "could be aided by the expertise of lawyers who practised in any foreign jurisdiction whether or not that jurisdiction applied English law".

Further, at paragraph [45] of the Court of Appeal's Judgment, the Court referenced to proceedings in the Singapore International Commercial Court's ("SICC") where questions of foreign law may be determined on submissions (see Order 110 Rule 25 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)) and compared it to the domestic regime where foreign law is determined on the basis of proof. The Court seemed to suggest that the practice of the SICC, in contrast to the present Court's regime, might provide greater help to the Tribunal in the understanding of foreign law.

All in all, this case provides a useful guide for future applications on ad hoc admissions as it details the Court's considerations when considering such an application.

As an additional point for the purposes of arbitration proceedings, the Singapore Parliament passed the Supreme Court of Judicature (Amendment Bill 2017) on 9th January 2018, which among other amendments:

a. *clarifies the SICC's jurisdiction to hear international commercial arbitration-related court proceedings. This includes but is not limited to, the enforcement or setting aside of arbitral awards that are traditionally referred to the High Court for adjudication; and*

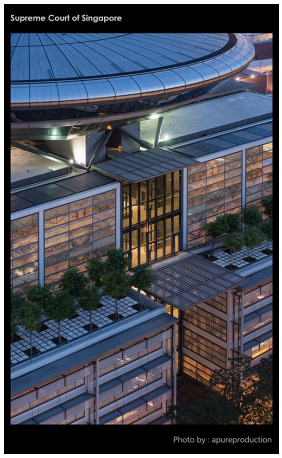
b. *removed the pre-action certification procedure for cases that wished to be heard by the SICC*

BUILDING AND CONSTRUCTION: CONTRACTORS' DUTIES & OBLIGATIONS IN A CONSTRUCTION CONTRACT

***Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264**

IN SUMMARY

This English Court of Appeal decision of 22nd February 2018 found that contractors have a duty to act reasonably in maintaing a long term contractual relationship and that such contracts sometimes warrant special treatment when questions of contract interpretation comes into play.



FACTS

Adjudication Application by Birmingham City Council

Amey Birmingham Highways Limited ("ABHL") was engaged by Birmingham City Council ("BCC") to undertake the rehabilitation, maintenance, management and operation of the road network in Birmingham for a 25 year period, pursuant to the Government's Private Finance initiative ("PFI") policy.

A database document detailing the Birmingham road network known as "DRD0626" was supplied by BCC to ABHL, which containing six tables of data: MSEC; MINV; MSURV; MECSURV; MCON, and MSCRIM. Both parties intended for DRD0626 to be the initial version of the Project Network Model ("PNM") but approximately 60% of the inventory details were based on national averages rather than detailed observation and measurement, a fact which both parties were well aware of.

Parties performed their obligations smoothly under the contract for three and a half years, until February 2014 where BCC's PFI Contract and Performance Manager noticed that there were parts of the roads and footpaths left unrepaired, and that ABHL were deliberately leaving defects in selected areas untreated.

The Arguments

ABHL took the view that their contractual obligations extended only to areas detailed in MSEC and MINV, which did not cover a lot of areas due to DRD0626 being based on default instead of updated data. It was found that ABHL have been updating MSURV, MECSURV, MCON and MSCRIM but not MSEC and MINV.

BCC maintained that this was a clear breach of contract as ABHL was under a duty to rehabilitate and maintain the road network which actually existed, not a hypothetical road network, which both parties knew to be based upon default data. BCC also maintained that ABHL was obliged to update the default inventory data in the PNM with actual inventory data, as survey results came in.

The independent certifier took the view that it was not his function to resolve the contractual issues between the parties, and in due course, he issued milestone certificates 6, 7, 8 and 9.

BCC referred the matter to adjudication pursuant to clause 70.13 of the contract.

Issues Before the Adjudicator

The following 2 issues were determined by the adjudicator ("the Adjudicator"):

(a) What was the scope of ABHL's obligation in relation to the core investment works;

(b) Whether ABHL were under an obligation to keep the PNM updated; and

(c) Whether milestone certificates 6 to 9 could be and should be set aside.

Decision of the Adjudicator

In essence, the adjudicator found in favour of BCC on all issues, and made the following declarations:

(a) That ABHL's obligations to perform the Core Investment Works and meet the requirements of Performance Standard 1 extend to the Project Network as a whole and are not limited to the RSLs as recorded in the PNM contained in DRD0626;

(b) That ABHL must update the PNM and maintain a Project Network Inventory which accurately reflects the actual extent of the Project Network and the Project Road; and

(c) That the Certificates of Completion for Milestones 6 to 9 inclusive be set aside, alternatively opened up, reviewed and revised and the relevant calculations performed again by reference to the actual Project Network Inventory.

In light of the Adjudicator's views above, ABHL referred the dispute to the Technology and Construction Court (the "TCC"), which issued a declaration that the adjudicator's decision was wrong.

BCC was aggrieved by the judge's decision and accordingly they appealed to the Court of Appeal.

HOLDING OF THE ENGLISH COURT OF APPEAL

Duty of ABHL to update the MINV and MSEC tables in the PNM

The Court disagreed with ABHL's submission that the need to update the MIS was carefully prescribed in Part 8 of the Output Specification ("PS8") but the same was not

true for the PNM. The Court instead held that might be due to the MIS containing a number of elements, each of which requiring separate consideration and therefore it was appropriate for PS8 to provide some detail about the updating of all those elements.

It was also held that the updating of the PNM as new survey information came in was no a task requiring elaborate guidance or prescription, and that it is common ground that ABHL have been updating the MCON table in the PNM quite satisfactory. In fact, up until December 2013, ABHL were using updated inventory data for effecting repairs without difficulty.

The Court observed that there are seven strong indications in the contract that ABHL were required to update the whole of the PNM, not just MSURV, MECSURV, MCON and MSCRIM , which are as follows

(a) Clause 5 of the contract required ABHL to satisfy themselves about the extent of the project network. This requirement only makes sense if ABHL were required to maintain areas which actually existed. If ABHL were going to work for the next 25 years on the original unamended inventory in the PNM, there would be no point in satisfying themselves about the extent of the project network which actually existed.

(b) Clause 6 of the contract required ABHL to carry out all inspections and surveys in accordance with the Highways Maintenance Code.

(c) Clause 6.1.1.1 of the contract requires that ABHL will make available to BCC accurate inventory data about the highways, not default data.

(d) The test procedure set out in Schedule 15 to the contract requires the independent certifier to confirm that "the most up to date data" has been input into the PMM. The data referred to must be both inventory data and condition data.

(e) Clause 6.3.1 of the contract requires ABHL to carry out condition surveys on all project roads annually. It is implicit that ABHL will record the condition of all sections of road that are actually there. It would be a breach of clause 6.3.1 to disregard the condition of a section of road, simply because it was not shown in the default inventory.

(f) Clause 55.1.9 of the contract is an indemnity clause based upon the premise that ABHL is required "*to keep… the PNM up to date at all times*'.

The High Court held that it is clear from the main body of the contract and the other provisions referred to that ABHL were under a duty to keep the PNM updated, and that none of the contractual provisions relied on by ABHL provides any justification for treating MSEC and MINV differently from the other four database tables.

It was further held that It is clear from ABHL's conduct that they accept an obligation to keep most of the PNM updated.

Whether Milestone Certificates 6 to 9 should be Set Aside

The Court of Appeal rejected BCC's submission that the restrictions imposed by clause 13.5.1 fall away if an adjudicator or arbitrator come onto the scene. The court instead held that the dispute resolution procedures in clause 70 of the contract are subject to the restrictions imposed by clause 13.5.1. Therefore, neither the adjudicator nor the court could set aside milestone certificates 6 to 9 unless there has been fraud or manifest error.

On the question of whether there was manifest error, the Court relied on the cases of *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542' [2008] 2 All ER (Comm) 1173 and *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230; [2012] Ch 31. In particular, the Court noted that in this case, on the dates when the independent certifier issued milestone certificates 6 to 9, everyone knew those certificates would be based upon erroneous calculations, if BCC's case on the interpretation of the contract prevailed, which is similar to the *North Shore* case.

The Court thus concluded that the milestone certificates should be set aside for manifest error.

Concluding Views

This English Court of Appeal decision raises insteresting issues such as contractors have a duty to act reasonably in maintaining a long term contractual relationship, and that such contracts sometimes warrant special treatment when questions of contract interpretation comes into play.

While it is not clear whether the Singapore Courts will adopt the same approach, the writers are of the view that all parties should adopt a reasonable approach in accordance with what is obviously the long-term-purpose of the contract, and should not be latching onto the infelicities and oddities in order to disrupt the project and maximise their own gain.

If you would like more information on this or any other area of law, you may wish to contact us.

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