



ADJUDICATION: APPLICABLE STANDARD OF PROOF IN AN APPLICATION TO SET ASIDE AN ADJUDICATION DETERMINATION

Vinod Kumar Ramgopal Didwania v Hauslab Design & Build Pte Ltd [2017] SGCA 19

IN SUMMARY

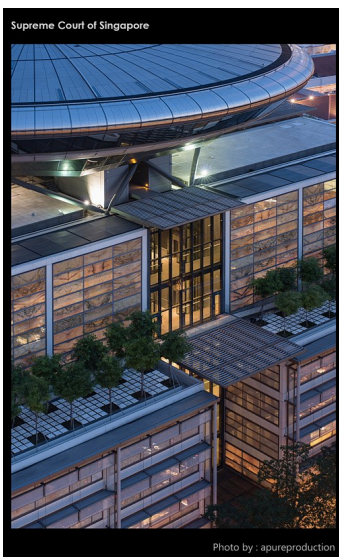
This Court of Appeal decision of 17th March 2017 considered the question of the applicable standard of proof in an Application to set aside an Adjudication Determination and held that the Applicant needs to prove its case on a balance of probabilities.

FACTS

The Appellant entered into a construction contract on 15 April 2013 (the “Construction Contract”) with Hauslab D&B Pte Ltd (“D&B”) for D&B to design and build a two-storey detached house on the Appellant’s property. Sometime in December 2013, one Mr Tan, the director of D&B, produced a draft novation agreement (“the Novation Agreement”) with the intention to novate the Construction Contract from D&B to another company, Hauslab Design & Build Pte Ltd, the Respondent in this appeal.

On 2 February 2015, the Respondent served Progress Claim No 18. On 3 February 2015, the Appellant informed the Respondent that the Appellant’s contract was with Mr Tan of D&B and not with the Respondent. The Appellant therefore questioned the basis on which the Respondent issued Progress Claim No 18 and did not provide any Payment Response or make any payment in respect of Progress Claim No 18.

The Respondent then proceeded to commence Adjudication and the Adjudicator determined that the Respondent succeeded in its entire claim and ordered that the Appellant pay the Respondent the sum of \$396,875 together with interest. The Adjudicator also held that since no Payment Response had been provided by the Appellant, he was not entitled to raise any justification to withhold payment of the claimed amount in the Adjudication Response. Based on the evidence before him, the Adjudicator found that the Appellant had agreed to novate the Construction Contract from D&B to the Respondent because the Appellant had drawn cheques in favour of the Respondent rather than of D&B when making payment of previous progress claims between 23 May 2014 and 15 December 2014.





The Appellant then applied to the High Court ("HC") to set aside the Adjudication Determination on the following grounds:

- (a) that the Adjudicator lacked the jurisdiction to adjudicate the dispute between the parties because the Appellant had never entered into a contract with the Respondent within the meaning of *Section 4* of the *SOP Act* – the contract was with D&B and this had in fact never been novated; and
- (b) that the Adjudicator had breached his duty under *Section 16(3)* of the *SOP Act* to comply with the principles of natural justice.

The Appellant also raised a preliminary issue that the applicable standard of proof in an application to set aside an Adjudication Determination should be that which applied to a summary judgment application, relying on precedents from England and from New South Wales ("NSW") and that therefore all he had to show was an arguable case that there had been no effective novation of the Construction Contract from D&B to the Respondent.

HOLDING OF THE HIGH COURT

On the preliminary issue, the HC held that any defence had to be established on the balance of probabilities.

It held that none of the cited NSW authorities supported the Appellant's submission that an Adjudication Determination may or would be set aside as long as the Appellant was able to make out an arguable case of a lack of jurisdiction. Further, the English authorities did not help the Appellant's case because the English regime was founded on contract, unlike Singapore's, which was founded on statute (i.e. the *SOP Act*).

Following from the above, on the issue of the Adjudicator's jurisdiction, the HC found that the Appellant did not prove on a balance of probabilities that it never agreed to novate the Construction Contract to the Respondent. Accordingly, the Adjudicator had not exceeded his jurisdiction.

On the issue of the Adjudicator's duty under *Section 16(3)* of the *SOP Act*, the HC held that the Adjudicator complied with the principles of natural justice because he had considered the degree of complexity of the Adjudication and the objective of the *SOP Act* before deciding not to grant a longer extension of time to the Appellant to file his submissions.

On the above basis, the Setting Aside Application was dismissed.

ISSUES BEFORE THE COURT OF APPEAL

- (a) What the applicable standard of proof in an application to set aside an Adjudication Determination should be; and



(b) Whether the Appellant has discharged his burden of proof on the question of whether there was a contract between himself and the Respondent.

However, the CA found that there are significant differences in the way the Adjudication Determination is enforced in England and Singapore, as set out below:

HOLDING OF THE COURT OF APPEAL

Applicable Standard of Proof in an Application to Set Aside an Adjudication Determination

The Court of Appeal ("CA") agreed with the HC and held that an Applicant seeking to set aside an Adjudication Determination would have to establish his case on the balance of probabilities.

However, it came to the above conclusion for different reasons from the HC. While the HC had based its decision on the distinction between the Adjudication regimes in England and in Singapore, and specifically on the fact that the former is contractual in nature whereas the latter is founded on the *SOP Act*, the CA held that the more important point of distinction is the difference in the way an Adjudication Determination may be enforced in Singapore as compared to the English regime.

The CA re-iterated that Adjudication under the *SOP Act* although provisional in nature, is final and binding on the parties to the Adjudication until their differences are ultimately and conclusively determined or resolved whether by arbitration or litigation, and that this concept of temporary finality also underlies the English regime.

(a) In England, an Adjudication Determination is enforced by issuance of a writ seeking payment of the sum in question and will often be followed by an action for summary judgment where the court may grant summary judgment in favour of the claimant in respect of the whole claim or on a particular issue if it considers that the defendant has "no real prospect of successfully defending the claim or issue" (under *Part 24* of the *English Civil Procedure Rules*, similar *Order 14* of the *Rules of Court* (Cap 322, R 5, 2014 Rev Ed)). Therefore, the English court would give leave to defend if a respondent can raise an arguable case that the adjudicator lacked jurisdiction, and the claimant would have to prove its case at trial. Further, the only self-help remedy (i.e. a remedy whereby a claimant need not invoke the assistance of the courts) available in England in respect of enforcing an Adjudication Determination is the claimant's right to suspend works under *Section 112* of the *Housing Grants, Construction and Regeneration Act 1996*.



(b) On the other hand, in Singapore, a successful claimant may, with leave of court, directly enforce an Adjudication Determination “*in the same manner as a judgment or an order of the court to the same effect*” under Section 27 of the SOP Act. Further, the SOP Act provides a framework of self-help remedies for the Claimant once Adjudication Determination has been rendered – namely the right to request payment directly from the Employer under Section 24 of the SOP Act; exercise a lien over the respondent's goods under Section 25 of the SOP Act; and suspend works under Section 26 of the SOP Act.

The CA held that the above differences demonstrate that the Court's review of the Adjudication Determination in Singapore is a limited one, and re-iterated that while matters of jurisdiction may be raised to resist enforcement of an Adjudication Determination, the burden would be on the applicant to demonstrate this on a balance of probabilities.

The CA also agreed with the HC that if Adjudication Determinations are liable to be set aside more easily because the threshold is lower than proof on a balance of probabilities, the purpose of the SOP Act may be severely undermined, since contractors will often be left to await till the very end, after the dispute is finally determined at trial, adjudication, or some other dispute resolution proceeding (Section 21(1)(b) of the SOP Act), before receiving payment.

Whether a contract was formed between the parties

The CA agreed with the HC that there was ample ground to find on the balance of probabilities that the Construction Contract between the Appellant and D&B had been novated such that the Appellant and the Respondent were parties to a contract within the meaning of Section 4 of the SOP Act. This formed the basis of the Adjudicator's jurisdiction to determine the dispute with respect to Progress Claim No 18.

Concluding Views

This case is yet another example of the Singapore Courts re-affirming the position that Adjudication Determinations have temporary finality and will only be set aside if an Applicant can prove his or her case on a balance of probabilities that the Adjudicator had lacked jurisdiction to determine the dispute. Upholding this standard of proof strikes a balance between furthering the statutory purpose of the SOP Act of creating a speedy and low cost Adjudication process while preserving the Court's supervisory role over an Adjudicator's jurisdiction.

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BUILDING & CONSTRUCTION LAW: RECOVERY FOR LOSS OF PROFITS ON UNCOMPLETED WORK DUE TO TERMINATION OF EMPLOYMENT

TT International Limited v Ho Lee Construction Private Limited [2017] SGHC 62

IN SUMMARY

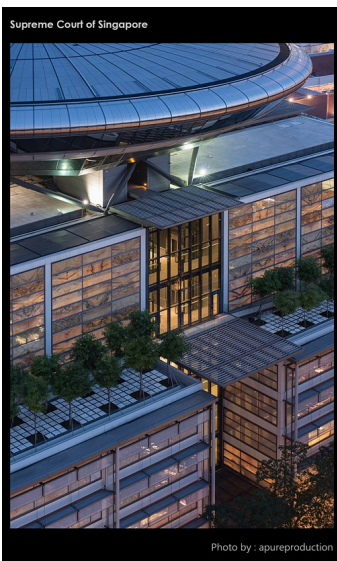
This Singapore High Court decision of 29 March 2017 deals with the issue of whether, on a true construction of a contract, entered into on the *Public Sector Standard Conditions of Contract for Construction Works* ("PSSCOC"), a party is entitled to recover for loss of profits on uncompleted work flowing from the said party's termination of the other party's employment.

FACTS

TT International Limited (the "Plaintiff"), obtained a Warehouse Retail Scheme licence from the Economic Development Board to develop and construct an eight-storey warehouse retail complex, known as the "Big Box", at Jurong East Street 11 ("the Project"). The Plaintiff subsequently entered into two contracts with Ho Lee Construction Private Limited (the "Defendant") in relation to the Project. First, a contract for piling and sewer diversion works, and secondly, a contract for the main building works ("the Main Contract") for the sum of \$226,000,000.00. Both contracts incorporated the PSSCOC 2006. The Plaintiff appointed Jurong Consultants Pte Ltd ("Jurong Consultants") as the Superintending Officer ("the SO") in respect of works under the Main Contract.

Sometime in March or April 2008, the Defendant began works under the Main Contract. In the second half of 2008, the Plaintiff began to experience financial difficulties, resulting in the Plaintiff instructing the SO to issue 3 directions to the Defendant to suspend the works. In early November 2008, the Plaintiff froze repayments of all debts due to its creditors except for debts due to its essential trade creditors. On 9 December 2008, the Plaintiff sent a Notice of Termination under Clause 31.4 of the PSSCOC ("Clause 31.4") to the Defendant, thus terminating the Defendant's employment under the Main Contract.

The Plaintiff eventually made an application to the court for a Scheme of Arrangement, and on 29 January 2009 obtained approval from the High Court to convene a meeting of its creditors to vote on the Scheme. On 6 October 2009, the Defendant submitted its Proof of Debt for the sum of \$84,563,154.14. This comprised a claim in the sum of \$33,556,433.09 for loss of profits.





On 15 December 2009, the Scheme Manager notified the Defendant that it had rejected the Defendant's claim in part (admitting \$22,769,729.15), and that the disputed debt amount was \$61,793,424.99 ("the Disputed Amount").

After a series of court approvals for Schemes of Arrangement obtained by the Plaintiff, the Plaintiff at the Defendant's request on 12 November 2010 commenced proceedings in the High Court for adjudication of the Disputed Amount (which was revised by the Defendant in this Suit to \$53,855,381.00).

Following mediation on 16 May 2012, the parties reached agreement on several items of claim in relation to the Disputed Amount. Consequently, the dispute was narrowed to three items of claim, viz, the Defendant's claims for:

- (a) Loss of profits ("Loss of Profit Issue");
- (b) Damages payable to its subcontractors and suppliers ("Damages Issue"); and
- (c) Interest for 4 progress claims which were adjudicated upon under the *Building and Construction Industry Security of Payment Act* ("SOP Act") ("Interest Issue").

On 11 July 2012, the Plaintiff filed a summons, with the Defendant's consent, for the trial of two preliminary points of law which pertained to the Damages Issue and the Interest Issue respectively. The parties later reached an agreement on the Damages Issue.

A trial for the Loss of Profits Issue began on 25 March 2013. There were two main sub-issues:

- (a) whether the Plaintiff was entitled to rely on *Clause 31.4* to limit or dispose of the Defendant's claim for loss of profits ("the *Clause 31.4 Issue*"); and
- (b) if *Clause 31.4* was inapplicable, the quantum of damages that the Defendant was entitled to for loss of profits ("the *Quantum Issue*").

The Plaintiff requested for the High Court's decision on the *Clause 31.4 Issue*.

ISSUES BEFORE THE HIGH COURT

- (a) Whether *Clause 31.4(2)* exhaustively sets out the sums which the Contractor is entitled to recover after (proper) termination under *Clause 31.4(1)* ("the *Threshold Issue*"); and
- (b) Whether "Loss and Expense" under *Clause 31.4(2)(b)* includes loss of profits ("the *Scope Issue*").

HOLDING OF THE HIGH COURT

On The Threshold Issue

Clause 31 of the *PSSCOC* empowers an employer ("the Employer") to terminate the Contractor's employment. It contains four sub-clauses. *Clauses 31.1* to *31.3* address the situation of termination upon the Contractor's default. By contrast, *Clause 31.4* allows the Employer to terminate the Contractor's employment without the latter's default.

Clause 31.4 is a "termination for convenience" clause (also known as a convenience clause). Such clauses grant the Employer the power to terminate the contract even if the Contractor is not in breach or default of the contract.



Clause 31.4(2) imposes a duty on the Employer to pay the certified sums to the Contractor. This duty correlates to the Contractor's right to receive the said sums, and thus confers on the Contractor a right to payment in respect of the heads of claim in *Clause 31.4(2)(a)* and *(b)* (subject to deductions for sums owed by the Contractor to the Employer).

The High Court also rejected the Defendant's submission that upon termination under *Clause 31.4(1)*, the Contractor obtains without more a right at common law to recover for loss of profits which *Clause 31.4(2)* fails to oust, on the basis that in terminating the Contractor's employment under *Clause 31.4(1)*, the Employer is exercising a contractual right. The mere exercise of a contractual right cannot constitute a breach of contract, let alone a repudiation of the contract. Thus, the Contractor does not acquire a right at common law to recover for loss of profits upon termination under *Clause 31.4(1)*.

As such, *Clause 31.4(2)* provides for the sums which the Contractor is entitled to recover after (proper) termination under *Clause 31.4(1)*. Upon such termination, the Contractor does not acquire additional remedial rights at common law.

The High Court also rejected the Defendant's submission that the Plaintiff had concurrently repudiated the Main Contract based on its instructions to the Defendant through the SO to suspend works and the Plaintiff's freezing of debt repayments to its creditors, on the basis that there was no concurrent repudiation of the contract by the Plaintiff, as the Plaintiff held the contractual right of termination.

On the Scope Issue

The High Court held that *Clause 1.1(q)* of the PSSCOC expressly defines Loss and Expense, and rejected the Defendant's submission that *Clause 22* expands *Clause 1.1(q)*'s definition of Loss and Expense to to include loss of profits such that the Contractor may recover for loss of profits under *Clause 31.4(2)(b)* on the following bases:

- (a) *Clause 22.1* stipulates that the loss and expense must arise as a result of the regular progress and/or completion of the Works or any phase or part of the Works having been disrupted, prolonged or otherwise materially affected by the events set out in *Clause 22.1*, and thus does not refer to a termination of the whole of the Works as expressly provided for under *Clause 31.4*;
- (b) none of the events in *Clause 22.1(a)* to (i) were applicable to the facts of the case
- (c) the Loss and Expense covered by *Clause 22.1* is the loss and expense suffered by the Contractor for which he cannot recover under any other provision of the PSSCOC, and *Clause 31.4* clearly gives the Contractor the entitlement to recover the sums provided for therein;
- (d) the operative words "sustained" and "incurred" are in the past tense. Thus, cl 22.1 clearly refers to Loss and Expense that has already been sustained or incurred by the Contractor, and could not apply to future Loss and Expense that has not been already "sustained" or "incurred".



As such, based on the definition of “Loss and Expense” used in Clause 31.4(2) in Clause 1.1(q), the Contractor may not recover for loss of profits under *Clause 31.4(2)(b)*, but may only recover 15% of the costs under *Clause 1.1(q)(i)* and *(ii)* in lieu of, inter alia, lost profits.

Thus on a true interpretation of *Clause 31.4(2)*, the Contractor may not recover for loss of profits for uncompleted work upon termination under *Clause 31.4(1)*.

As to whether the Plaintiff was entitled to rely on *Clause 31.4(2)*, the Defendant relied on 3 grounds to argue that the Plaintiff was not entitled to do so:

- (a) the Plaintiff was barred by the principles of issue estoppel and abuse of process from relying on *Clause 31.4*;
- (b) the Plaintiff had lost its right to rely on *Clause 31.4* due to waiver by estoppel - the Defendant had detrimentally relied on the Plaintiff's representation that it would not enforce its rights under *Clause 31.4*;
- (c) the Plaintiff could not rely on *Clause 31.4(2)* as it had “disabled” *Clause 31.4(2)* by impeding the SO from certifying the sums payable to the Contractor under *Clause 31.4(2)*.

The High Court held that the elements of the above 3 grounds were not fulfilled in the Defendant's submissions, and thus the Plaintiff was entitled to rely on *Clause 31.4(2)* to dispose of the Defendant's claim for loss of profits in this case.

In conclusion, the High Court held that the Defendant was not entitled to recover for loss of profits on the uncompleted parts of the works. However, it was entitled to recover a 15% margin on the costs under the heads in *Clause 1.1(q)(i)* and *(ii)* in lieu of, inter alia, loss of profits.

Concluding Views

This High Court decision deals with “termination for convenience” clauses, and demonstrates the importance of Employers exercising their contractual right to terminate for convenience in strict compliance with the procedure for such exercise under the PSSCOC -and therefore this decision also gives light to the interpretation of Clauses 31.4 of the PSSCOC 2006.

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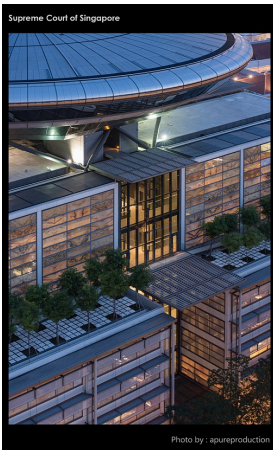


MEDICAL NEGLIGENCE IN SINGAPORE: NEW LEGAL TEST TO DETERMINE STANDARD OF CARE IN RELATION TO PROVISION OF MEDICAL ADVICE

Hii Chii Kok v Ooi Peng Jin London Lucien and another [2017] SGCA 38

IN SUMMARY

This Court of Appeal decision of 12th May 2017 decided that the *Bolam-Bolitho* test is no longer the applicable legal test to determine that appropriate standard of care of a medical practitioner in the provision of medical advice to his patient. A new 3-stage, more patient-centric legal test ought to be applied.



FACTS

The Appellant had pancreatic lesions which were diagnosed by a team of specialists at the National Cancer Centre of Singapore ("NCCS") to be either neuroendocrine tumours of the pancreas ("PNETs") or a less serious condition known as pancreatic polypeptide hyperplasia. The Appellant was then referred to a surgeon, Professor Ooi Peng Jin London Lucien ("Prof Ooi") to ascertain if the pancreatic lesions could be surgically removed.

Prof Ooi and other doctors at the NCCS had informed the Appellant about various treatment options, including surgically removing the pancreatic lesions or not proceeding with surgery and repeating another scan in six months. The Appellant decided to remove the lesions, undergoing two procedures, including a major pancreatic surgery.

The surgery had turned out to be unnecessary as the post-operative study indicated that the Appellant's pancreas had hyperplasia and not PNETs. Further, as a result of the surgery, the Appellant developed complications and had to undergo further operations. He brought proceedings against Prof Ooi and the NCCS for, among other things, negligent Diagnosis and negligent Advice.

DECISION IN THE HIGH COURT

The High Court ("HC") dismissed the claim in its entirety. Following the Singapore Court of Appeal's decision in *Khoo James & Anor v Gunapathy d/o Muniandy and another appeal* [2002] 1 SLR(R) 1024, it held that the proper standard to apply in medical negligence is that set out in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582, supplemented by *Bolitho v City and Hackney Health Authority* [1998] AC 232 (the "*Bolam-Bolitho*" test), namely that doctors cannot be found negligent if they



acted in accordance with what a responsible body of medical practitioners skilled in the relevant medical specialisations would have accepted as proper and reasonable and the opinions of these experts were defensible when the test of logic was applied.

The HC further held that the *Bolam-Bolitho* test is applicable to determine the standard of care in all three aspects of medical care being (1) Diagnosis, (2) Treatment, and (3) Advice.

On this basis, the HC found that neither Prof Ooi nor the NCC were negligent with respect to all three areas.

ISSUES BEFORE THE COURT OF APPEAL

The Court of Appeal ("CA") was concerned with what the applicable test is (or tests are) in relation to the assessment of the standard of care in medical negligence, and whether the Respondents had fell below in reaching their Diagnosis of the Appellant's condition and in relation to the Information and Advice that was furnished to the Appellant.

HOLDING OF THE COURT OF APPEAL

In this landmark decision, the Court of Appeal held that while the *Bolam-Bolitho* test should continue to apply with respect to Diagnosis and Treatment, a more patient-centric approach is appropriate when prescribing the standard of care in relation to the doctor's duty to advise the patient and to provide the patient with the requisite information to enable him to participate meaningfully in decisions affecting the medical treatment he will receive.

To this end, the Court of Appeal formulated a new 3-stage test ("New Test") being a modified version of test propounded in the UK Supreme Court decision of *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, to apply when determining whether a doctor is in breach of the applicable standard of care in respect of his or her duty to Advise.

Applying the New Test to the negligent Advice claim, and the *Bolam-Bolitho* test to the other claims, the CA concluded that the applicable standards were not breached in relation to the entirety of the Respondents' interactions with the Appellant.

Reasons for the New 3-Stage Test

In developing the New Test, the CA found that unlike in the case of Diagnosis and Treatment where the patient is a passive participant, when Advice is being furnished to the patient, the patient assumes an active role because the patient is in charge and must make choices and decisions on the course of action to pursue. The doctor's role here is to empower and enable the patient to make that decision by giving him relevant and material information.

The CA found that there has now been a "seismic shift" toward recognising patient autonomy as a principle of prime importance as exemplified by the Singapore Medical Council's Ethical Code and Ethical Guidelines (2016 Edition) (2016 ECEG), which came into force on 1st January 2017. The 2016 ECEG makes explicit the need to respect patient autonomy and the doctors' obligation to uphold their patient's desire to be adequately informed and (where relevant) their desire for



self-determination. This reflected the fact that the nature of the doctor-patient relationship has evolved together with the level of education and access to knowledge of the ordinary Singaporean. In the circumstances, applying the *Bolam-Bolitho* test to determine what and how much information to impart to the patient would allow the doctor to withhold whatever he wishes to so long as some of his peers would have done the same and such an outcome to be incompatible with the notion of patient autonomy.

Accordingly, the CA declared that the *Bolam-Bolitho* test should no longer be applicable to the aspect of a doctor's advice to his patient.

First-Stage: Assessing the sufficiency of information given to the patient from the patient's perspective

At this stage, the patient must identify the exact nature of the information that he or she claims was not provided by the doctor and justify why it would be regarded as relevant and material.

Relevant and material information may include:

- (a) the doctor's diagnosis of the patient's condition;
- (b) prognosis of the condition with and without medical treatment;
- (c) the nature of the medical treatment proposed by the doctor;
- (d) any risks associated with the proposed medical treatment;
- (e) reasonable alternatives to the proposed medical treatment, as well as the advantages and risks of those alternatives.

The inquiry at this stage is purely from the perspective of the patient, having regard to matters that the patient was reasonably likely to have attached significance to in arriving at his decision, or matters which the doctor in fact knew or had reason to believe that the patient in question would have placed particular emphasis on.

If the Court is satisfied that the information is indeed relevant and material, it will then proceed to the second stage of the test.

Second-Stage: Determining whether the doctor was in possession of the information

At this stage, the Court will determine whether the doctor was in possession of the information.

If the Court finds that doctor did not have the information at the material time, this will be matter of negligence in Diagnosis or Treatment (but not Advice) because the doctor did not conduct the relevant procedure or lacked the factual or technical knowledge to realise that a particular risk or alternative treatment existed.

If the Court finds that the doctor did possess the information, it will then proceed to the third stage of the test.

Third Stage: Justification as to why the Information was withheld

At this stage, the doctor has the burden to justify why he chose to withhold such relevant and material information.

This inquiry is taken from the doctor's perspective and the Court will decide if the doctor was justified to withhold the information having regard to "*the doctor's reasons for withholding the information and then*



considering whether this was a sound judgment having regard to the standards of a reasonable and competent doctor".

The CA highlighted three non-exhaustive situations whereby the withholding of information may be justified:

- (a) Waiver – The patient is entitled to exercise their autonomy by deciding that they do not want to hear further information about the proposed treatment or its alternatives. Given the seriousness of such a decision, the patient must have had clearly expressed his waiver;
- (b) Emergency Situations – If the patient is on the verge of death or serious harm and the patient lacks decision-making capacity, and there is no appropriate substitute decision-maker (e.g. where life-saving surgery must be performed on an unconscious or delirious person); and
- (c) Therapeutic Privilege – The doctor has reason to believe that the very act of giving a particular information to a patient would cause them serious physical or mental harm (e.g. patients with anxiety disorders or certain geriatric patients).

In the above situations, the doctor cannot have been considered negligent in their duty of care to the patient as they can be justified to have been protecting their patient from harm.

Unless all three stages have been fulfilled, a doctor cannot be deemed to have been medically negligent.

APPLICATION TO THE FACTS

With respect to the Appellant's negligent Diagnosis claim, the CA held that the Diagnosis that the Appellant probably had PNETs with the possibility of hyperplasia was not negligent because it was made after exercising their professional judgment with due care, taking into account all the surrounding circumstances, and was supported by a responsible and logical body of medical opinion.

With respect to the Appellant's negligent Advice claim, the CA held that the doctors were not negligent because the Appellant was well aware of the risk that he was taking in undergoing the surgery and of the option of waiting and its limitations. A third alternative had also been proposed.

Concluding Views

This is a carefully considered decision where the Court set out the reasons for the continued relevance of the Bolam-Bolitho test with respect to Diagnosis and Treatment before deciding that the New Test should apply to determine the standard of care in relation to the provision of medical Advice.

The New Test encourages further collaboration between doctors and patients where the doctors will now have to be more mindful of the needs of certain patients and consider whether there are additional risks, or any other information which may be material to a particular patient which consequently pushes



the patient to be forthcoming with information that he thinks his or her doctor should be aware of.

In this respect, patients would be more well-informed of the risks and options that are available to them before deciding on their course of action.

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