The Adjudicator

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**Hon Industries Pte Ltd v Wan Sheng Hao Construction Pte Ltd**
[2011] SGHC 247 [Eunice Chua AR]

*Whether subject progress claim a valid payment claim under the Building and Construction Industry Security of Payment Act – whether rectification works were works in respect of which a progress claim could be made – whether adjudicator breached rules of natural justice in referring to other unpublished adjudication determinations which were not cited by parties*

The Plaintiff (Hon Industries Pte Ltd), a respondent in an Adjudication where the Defendant (Wan Sheng Hao Construction Pte Ltd) was the claimant, applied to the Court to set aside the Adjudication Determination on the following grounds ("Application"):

(1) Progress Claim No. 8 ("Claim No. 8"), which formed the subject matter of the Adjudication, was not a valid payment claim under the Act ("the validity issue") because: (a) It was not intended by the Defendant as a payment claim under the Act, and even if it did, such intention was not communicated to the Plaintiff; (b) The Defendant had previously and in the same month when Claim No. 8 was served, served a document ("the 10 March 2011 document") titled "Tax Invoice" dated 10 March 2011 and described as "being 7th Progress Claim" containing a breakdown of the "Total Work Done as at 25/12/2010", and this was in breach of reg 5(1) which only permitted the service of one payment claim in each month; And (c) Although Claim No. 8 was expressed as being for work done "up to 25 March 2011", it was actually for work done up to 31 December 2010 as works at the site had ceased by December 2010 with only rectification works carrying on thereafter, and, given that the Defendant had previously submitted other progress claims for work in that period (i.e. the 10 March 2011 document), Claim No. 8 was made in breach of s 10(1) which only allowed "one payment claim in respect of a progress payment".

(2) Even if Claim No. 8 was a valid payment claim under the Act, it, being actually for work done up to 31 December 2010 (see above), should have been served by 31 January 2011. However, it was served only in March 2011 and was therefore time-barred for purpose of adjudication ("the service issue"); and

(3) The Adjudicator breached the rules of natural justice as he had referred to other unpublished adjudication determinations which were not cited by the parties, and this deprived the parties of the opportunity to address the Adjudicator on these other adjudication determinations.

As a preliminary point, the Defendant objected to the Application on the ground that the Plaintiff was estopped from raising the validity issue and the service issue as they had not been brought up during the Adjudication conference before the Adjudicator.

**HELD:** Both the Defendant's preliminary objections and the Plaintiff's Application were rejected and dismissed.

1. **No issue of estoppel.** While the validity issue had not been raised throughout the entire Adjudication process, it went to the jurisdiction of the Adjudicator and thus, a matter for the Court's scrutiny in the present Application.

2. The service issue had been raised by the Plaintiff in its final submissions and the Adjudicator had considered the issue in the Adjudication and had not limited himself to only the issues agreed upon by the parties at the

conference. There was therefore no reason for the Court to limit the scope of what the Plaintiff may argue in the present Application to only the issues agreed on at the Adjudication conference.

3. **Validity issue.** Claim No. 8 was prepared in "a business-like document" and it was apparent from its contents that the Defendant was claiming that a sum of money was due.

4. Although a sentence in the cover letter had referred to work done for the Plaintiff's "certification", it must have been evident to the Plaintiff that payment was sought from the rest of the document, for example, in the penultimate sentence "[w]e trust that the aforesaid claim is in order and look forward to your prompt payment".

5. The reference to "certification" in the cover letter was indeed consistent with the parties' dealings in that the whole purpose of the Plaintiff's certification was so that the Defendant could obtain payment for work done.

6. Further and as established in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459, it was not necessary for a payment claim to state expressly that it was made under the Act. The only formal requirements for validity under the Act are found in s 10(3) and reg 5(2), and it was not disputed in the present case that any of those formal requirements have not been met.

7. There was no merit in the Plaintiff's argument that it had been "ambushed" by Claim No. 8 as it had in its arguments before the Adjudicator that it had made a valid payment response, understood Claim No. 8 to be a payment claim under the Act, and had treated it as such in the Adjudication.

8. The 10 March 2011 document could not be a payment claim under the Act as it failed to comply with the formal requirements for validity under the Regulations. In this regard and without going to the correctness of the Plaintiff's interpretation of reg 5(1) that it only permitted the service of one payment claim in each month, Claim No. 8 was not made in breach of reg 5(1).

9. There was no provision in the contract to the effect that rectification works were not works in respect of which a progress claim could be made. Neither was there any other evidence on the practices of the construction industry that could establish such a proposition. To exclude rectification works from the concept of "construction work or the supply of goods or services" which would entitle a claimant to a progress payment would, in any event, be contrary to s 3 of the Act which defined "construction work", "goods" and "services" in a manner that could not on a reasonable interpretation be read as excluding rectification works. The Plaintiff's argument of breach of s 10(1), which hinged on the proposition that rectification works were not works in respect of which a progress claim could be made, must therefore fail.

10. **Service issue.** Claim No. 8 was served on time (i.e. by 31 March 2011) as rectification works were on-going well into February 2011.

11. **Issue of breach of natural justice.** While the Adjudicator might have caused surprise in referring to other adjudication determinations that were not cited by the parties, that should not in itself lead to the setting aside of the Adjudication Determination, particularly when these unpublished adjudication determinations, when read in context, served merely as examples and illustrations and could not have affected the outcome of the case.

12. The parties had ample opportunity to address the issues in question whether at the Adjudication conference or through the various rounds of submissions submitted to the Adjudicator, and it could not be said that a reasonable litigant in the shoes of the Plaintiff could not have foreseen the possibility of reasoning of the type revealed in the award merely because the particular examples and references provided by the Adjudicator were not previously known to it.

13. The Adjudicator had complied with the *audi alteram partem* principle in that it had made

known his concerns on the (contentious) service issue, and had invited parties to address him on the authorities, and they had done so. Although the Adjudicator did not, in his decision in the service issue, accept either the Plaintiff's or the Defendant's submission in their entirety, he was not required or obliged to do so.

## EDITORIAL COMMENT

In support of its argument that Claim No. 8 was not intended to be a payment claim under the Act, the Plaintiff (i.e. respondent in the Adjudication) relied on the parties' usual course of dealings where the Defendant (i.e. the claimant in the Adjudication) would submit its payment claim only after the Plaintiff had issued an interim certification of the value of the works done by the Defendant, and argued that this process was not followed in respect of Claim No. 8, and it could not therefore be said that the intention to make a payment claim via Claim No. 8 had been communicated to the Plaintiff.

Indeed, such a process requiring the respondent's prior certification (or approval) before the claimant is permitted to submit its payment claim seems to be a norm nowadays and it is becoming common to find construction contracts providing for such a "pre-certification" process (especially those drafted in-house by the main contractors). In our view, such a provision is in contravention of the anti-avoidance provision under s 36(2) of the Act and should be void (and hence unenforceable) as it has the effect of excluding, modifying, restricting or prejudicing the operation of the Act or tantamount to an attempt to deter a claimant from taking action under the Act. Indeed, it is worth noting that although the enforceability of the "pre-certification" process was not in issue before the Court in *Hon Industries*, the Court did note that the effect of such a process would necessarily mean that the claimant would be barred from making any claims for payment unless the respondent had on its own initiative certified payments as being due and this was not commercially sensible.

This case is also interesting as it decided, for the first time, that rectification works were works in respect of which a progress claim could be made.

We do not agree with the Court's interpretation that "construction work" includes "rectification work". By definition, rectification works is to remedy defective works. If the defective works arose from the contractor's own default, it should follow that works carried out by the contractor to rectify such defective works should not be claimable. The contractor should not in principle be allowed to claim for such rectification works as it would have already been paid for the original works on the basis that these were properly carried out. More importantly, if contractors were allowed to claim for the costs to rectify its own defective works, this would be patently unjust and encourage the contractor to carry out shoddy work knowing that he can claim for the costs to rectify such defective works. Of course the situation will be different if the rectification works were caused by the defective design on the part of the Employer's design consultants.

In any case, we have doubts about the correctness of the Court's conclusion that Claim No. 8 was not time-barred as the rectification of any work would in the usual course of things have arisen only after the work had been carried out and hence the subject of a previous progress claim.

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