

## PROCEDURAL COMPLIANCE IN THE ADJUDICATION REGIME

### A Close Look at the New Test of Material Prejudice

[2019] SAL Prac 12

*Should a claimant’s adjudication application be invalidated on the basis that a relevant extract of the contract was not duly appended? In the recent amendments<sup>1</sup> to the Building and Construction Industry Security of Payment Act, the insertion of s 16(2A) makes it clear that adjudicators now have the discretion to accept non-compliant adjudication applications in so far as it does not materially prejudice the respondent. This paper examines the rationale and effect of this new test and proposes a framework for assessment going forward.*

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#### **I. Introduction**

1 At present, reg 7(2)(d) of the Building and Construction Industry Security of Payment Regulations<sup>2</sup> (“SOP Regulations”) requires every adjudication application to contain an extract of terms or conditions of the contract that are relevant to the payment claim dispute. The failure to do so runs afoul of s 13(3)(c) of the Building and Construction Industry Security of Payment Act<sup>3</sup> (“SOP Act”), and this means that the adjudicator *must* reject the adjudication application pursuant to s 16(2)(a) of the SOP Act. The mandatory wording in s 16(2)(a) makes it plain

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1 See Building and Construction Industry Security of Payment (Amendment) Act 2018 (Act 47 of 2018).

2 Cap 30B, Rg 1, 2006 Rev Ed, as amended by Building and Construction Industry Security of Payment (Amendment) Regulations 2012 (S 488/2012).

3 Cap 30B, 2006 Rev Ed.

that there is no room for discretion and a non-compliant adjudication application must necessarily be rejected.

2 Nonetheless, it is apparent that this strict position has created some degree of discomfort in so far as adjudicators have, in many cases, departed from what they deem an “unduly technical”<sup>4</sup> position. While this approach assuages concerns that claimants would otherwise be unnecessarily tripped up over mere technicalities, the non-adherence with the clear wording of s 16(2)(a) is obvious.

3 This has not gone unnoticed and Parliament has, through the Building and Construction Industry Security of Payment (Amendment) Act 2018,<sup>5</sup> introduced a new subsection 2A into s 16 of the SOP Act, giving adjudicators the power to accept a defective adjudication application if satisfied that non-compliance with s 13(3)(c) *does not materially prejudice the respondent*. The new s 16(2A) of the SOP Act reads:

Despite subsection (2), an adjudicator may accept any adjudication application that is not made in accordance with section 13(3)(c) if the adjudicator is satisfied that the non-compliance does not materially prejudice the respondent.

4 The new test of material prejudice should be lauded to the extent that it injects a substance over form approach to alleviate the harshness of the strict wording in the aforesaid provisions. Nonetheless, this must not detract from the equally important need to safeguard discipline and adherence with procedure, both of which are key to the smooth running of an efficient adjudication regime. The test of material prejudice must not be conferred an overly broad reading such as to sanction even the most careless and wanton disregard for procedure.

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4 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 9.68, cited in *UES Holdings Pte Ltd v Grouteam Pte Ltd* [2016] 1 SLR 312 at [56] and *Fujitec Singapore Corp Ltd v GS Engineering & Construction Corp* [2016] 1 SLR 1307 at [19].

5 Act 47 of 2018.

5 In this regard, this paper seeks to distil key guiding principles for the interpretation and application of the new test of material prejudice. The purpose of this paper is not to draw bright lines, but rather, to give a sense of the appropriate balance between the competing considerations governing the adjudication regime.

## II. Section 16(2A): A timely panacea

6 The new s16(2A) departs from the uncompromising position that an adjudication application must be rejected if it fails to append the extract of terms or conditions of the contract that are relevant to the payment claim dispute.<sup>6</sup> This gives effect to the notion that not every instance of non-compliance with the requirements of the SOP Act or SOP Regulations is necessarily fatal to an adjudication application. Instead, the more important inquiry is whether the provisions which are the subject of non-compliance were so important that it was the legislative purpose that an act done in breach of the provision should be invalid.<sup>7</sup>

7 From a policy standpoint, this is a welcome move bearing in mind that the *raison d'être* of the SOP Act is to ease cash-flow problems of contractors by providing “a fast and low cost adjudication system to resolve payment disputes”,<sup>8</sup> and not to trip up contractors over mere technicalities. Notably, the High Court in the recent case of *Fujitec Singapore Corp Ltd v GS Engineering & Construction Corp*<sup>9</sup> warned that allowing a breach of reg 7(2)(d) to invalidate the adjudication application would

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6 This is the position under the current reg 7(2)(d) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed), read with ss 13(3)(c) and 16(2)(a) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

7 *Lee Wee Lick Terence v Chua Say Eng* [2012] SCAJr 771 at [67], cited with approval in subsequent decisions including *UES Holdings Pte Ltd v Grouteam Pte Ltd* [2016] 1 SLR 312 at [40] and *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] SCAJr 831 at [30].

8 *Parliamentary Debates, Official Report* (16 November 2004), vol 78 at col 1113 (Cedric Foo Chee Keng, Minister of State for National Development).

9 [2016] 1 SLR 1307.

inevitably “engender endless applications for invalidation and cripple the operation of the Act”.<sup>10</sup>

8 Furthermore, the new amendment resolves the inconsistent standards that have been applied thus far in determining the validity of non-compliant adjudication applications. In some cases, the strict and plain wording of the SOP Act and SOP Regulations has been favoured.<sup>11</sup> Yet in others, adjudicators and judges have chosen to depart from the mandatory wording of the provisions in a bid to prevent non-compliant adjudication applications from being knocked out on technical grounds. This has conceivably created confusion and uncertainty in the adjudication process.

9 A common justification for accepting non-compliant adjudication applications is that the failure to attach the relevant extract is a procedural irregularity which can be cured by reg 7(2A) of the SOP Regulations. Regulation 7(2A) of the SOPR reads:

The adjudicator appointed under section 14 of the Act may, at any time before the making of the determination and on such terms as to costs or otherwise as he thinks just, allow such amendments to be made to an adjudication application as he thinks fit.

10 The issue of the interpretation of reg 7(2A) came to the forefront in *ATA Pte Ltd v ATB Pte Ltd*<sup>12</sup> (“*ATA v ATB*”). The respondent alleged that the claimant fell afoul of s 13(3)(c) of the SOP Act as the adjudication application did not contain relevant extracts of the terms or conditions mandated under reg 7(2)(d) of the SOPR. The missing documents related to “fines” and “administrative charges” which were components of the respondent’s cross-claim for backcharges. Since the backcharges

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10 *Fujitec Singapore Corp Ltd v GS Engineering & Construction Corp* [2016] 1 SLR 1307 at [20].

11 See for example *ARU Pte Ltd v ARV* [2014] SCAJr 561 at [74]–[81] and *VH Pte Ltd v VI Pte Ltd* [2010] SCAJr 241 at [32]–[33].

12 [2015] SCAJr 406.

were part of the respondent's case rather than the claimant's, the claimant was not found to have infringed s 13(3)(c) of the SOP Act, read with reg 7(2)(d) of the SOP Regulations.

11 While this was sufficient to dismiss the respondent's argument, the adjudicator went further, stating that he would in any event be entitled to allow the claimant's application to include a previously omitted document pursuant to reg 7(2A). In his opinion, reg 7(2A) extends to *errors that might previously be fatal to an adjudication application*.<sup>13</sup>

12 On a plain reading of reg 7(2A), there are no bars to this wide interpretation. However, it is submitted that this unnecessarily stretches the ambit of reg 7(2A) beyond that which was originally contemplated. Regulation 7(2A) was only intended to be invoked under limited circumstances, as was alluded to in the Building and Construction Authority's circular.<sup>14</sup>

13 More importantly, this interpretation of reg 7(2A) is unsupported by the mandatory wording of s 16(2)(a) pursuant to which an adjudication application which contravenes s 13(3)(c) read with reg 7(2)(d) *must* be rejected.<sup>15</sup> To construe reg 7(2A) as a curative provision in the manner envisaged in *ATA v ATB* would be to render the mandatory provisions in the SOP Act otiose, and this runs counter to the principle that subsidiary legislation

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13 *ATA Pte Ltd v ATB Pte Ltd* [2015] SCAdjR 406 at [52]

14 Letter from the Building Construction Authority ("BCA") to the Singapore Mediation Centre ref: BCA ID 86.10.13 vol 1 (15 October 2012) in which the Deputy Director of the BCA Business Development Group stated: "The intent behind the phrase is to allow the amendment of clerical errors ... Therefore, an adjudicator should exercise his powers under Regulations 7(2A) and 8(1A) to only allow the correction of clerical errors." This was cited in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at fn 88 of para 9.73.

15 See also Commentary [2015] SCAdjR 3 at para 4.10 and Commentary [2014] SCAdjR 3 at para 6.6.

introduced should not be inconsistent with the provisions of the main Act.<sup>16</sup>

14 It is apparent that the strict adherence to statute has sometimes been unwittingly sacrificed in an attempt to promote quick resolution under the adjudication regime. It is hard to decide which approach should prevail although it suffices to say that there exists a clear intractable tension between the letter and spirit of the law. In this premise, the new s16(2A) is a panacea in so far as adjudicators now have the power to accept adjudication applications without being at risk of overreaching.

15 Nonetheless, the expression “material prejudice” is a protean one and it carries the risk of being exploited by claimants who adopt a dismissive attitude towards procedural compliance. This cannot be tolerated and it bears emphasising that inasmuch as it is important to protect claimants from being tripped up by technical objections, it is equally important to uphold adherence to procedural requirements so as to ensure the smooth running of the adjudication process.

16 In this regard, it is necessary to set out key principles and parameters to guide the application of the new s16(2A). This forms the subject of the next section.

### **III. Shedding light on the new test**

17 With the insertion of the new s16(2A) into the SOPA, an adjudication application which is not made in accordance with s13(3)(c) may nonetheless be accepted as long as non-compliance does not materially prejudice the respondent. This entails a two-step test:

- (a) pursuant to reg 7(2)(d), the adjudicator must first consider if the omitted extract of the terms or conditions

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16 Section 19(c) of the Interpretation Act (Cap 1, 2002 Rev Ed) provides that unless otherwise stated, “no subsidiary legislation made under an Act shall be inconsistent with the provisions of any Act”.

of the contract are *relevant to the payment claim dispute*;  
and

(b) if so, the adjudicator must then ascertain if the omission of the relevant extract will *materially prejudice the respondent* pursuant to s 16(2A).

18 If step two is also answered in the positive, the adjudicator must reject the adjudication application pursuant to s 16(2)(a). If it is answered in the negative, the adjudicator may accept the adjudication application and proceed with the adjudication.

#### **A. Step 1: Relevance of extract to payment claim dispute**

19 The first stage involves determining whether the extract in question is relevant to the payment claim dispute. In practice, most adjudication applications would be filed with a complete set of contractual documents as parties usually err on the side of caution. However, it is not necessary to do so as the plain wording of reg 7(2)(d) only requires an extract of the relevant terms.

20 The relevance of the omitted extract is to be assessed by an objective standard, taking into account the complexity of issues in the payment dispute. In this regard, “relevance” should be determined with reference to the payment claim and the payment response, where one has been served.<sup>17</sup>

21 However, there is no need for the claimant to extract terms in anticipation of the points which the respondent has yet to raise. This was borne out in *ATA v ATB* where the adjudicator found that since the alleged missing document was a component of the respondent’s cross-claim for backcharges, it was unrelated to the claimant’s case and the claimant was not obliged to include it.<sup>18</sup> Similarly, in *AON Pte Ltd v AOO Pte Ltd*<sup>19</sup>

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17 *HW v MR HX* [2008] SCAJr 501 at [19].

18 *ATA Pte Ltd v ATB Pte Ltd* [2015] SCAJr 406 at [48].

19 [2013] SCAJr 161.

(“AON v AOO”), the adjudicator held that since it was the respondent, and not the claimant, who sought to argue that the Schedule of Rates applied, it was for the respondent to provide the Schedule of Rates.<sup>20</sup>

22 On a related point, the respondent’s failure to provide a payment response necessarily means that the scope of dispute in the payment claim will be narrowed, thus reducing the need for voluminous attachments. This issue surfaced in *APN Pte Ltd v APO (Pte) Ltd*<sup>21</sup> where the respondent argued for the rejection of the adjudication application on the ground that the claimant, who included variations in its payment claim, had failed to attach extracts of the “General Terms and Conditions” relating to these variations. The claimant had only included a copy of the letter of award.

23 The adjudicator took the view that in the absence of a payment response, the payment claim dispute became very limited and as a result, variation terms as well as payment terms were, objectively speaking, irrelevant. For example, the respondent could not now argue that the variation amounts were inconsistent with the prescribed methodology, or that the variations were not in fact variations, by reference to the applicable variation and payment clauses.<sup>22</sup>

24 However, this did not mean that no part of the contract documents needed to be extracted and attached. The applicant was still obliged to present sufficient contract material to demonstrate, for example, that the contract in question fell within the scope of the SOP Act.<sup>23</sup> For this purpose, the adjudicator was content with the attachment of the letter of award.<sup>24</sup>

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20 *AON Pte Ltd v AOO Pte Ltd* [2013] SCAdjR 161 at [58]. The same issue was also addressed in *AUU Pte Ltd v AUV Pte Ltd* [2016] SCAdjR 313 at [85]–[90].

21 [2013] SCAdjR 500.

22 *APN Pte Ltd v APO (Pte) Ltd* [2013] SCAdjR 500 at [78].

23 See s 4 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed).

24 *APN Pte Ltd v APO (Pte) Ltd* [2013] SCAdjR 500 at [79].

**B. Step 2: Material prejudice to respondent**

25 If the said extract is assessed to be relevant, the next question to consider is whether the claimant's failure to include it in its adjudication application will *materially prejudice the respondent*.

26 It is submitted that this entails the assessment of whether non-compliance prevents the respondent from understanding the case it has to meet or otherwise affects the outcome of the adjudication determination. The latter gives effect to the understanding that material prejudice arises not only from the respondent's inability to understand its case, but also where the *adjudicator* is not sufficiently apprised of all relevant terms and conditions of the contract to make a reliable determination.

27 This was discussed at length in *ARU Pte Ltd v ARV*,<sup>25</sup> where the adjudicator opined that reg 7(2)(d) was clearly also imposed for the benefit of the adjudicator as the adjudicator must be furnished with all relevant terms of the contract in order to render a safe and reliable determination. The fact that the respondent may be aware of all the relevant terms of the contract does not mean that the adjudicator is similarly apprised, and therein lies the danger that the determination may be prejudicial to the respondent.<sup>26</sup>

28 While the assessment of material prejudice should be applied on a case-by-case basis, it may be useful to discuss some potential situations and likely outcomes.

**(1) Said extract incorporated by reference into respondent's own document**

29 A respondent who is aware of the contractual premise upon which the payment claim dispute arises is not one who can

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25 [2014] SCAJr 561.

26 *ARU Pte Ltd v ARV* [2014] SCAJr 561 at [77]–[78].

be said to be materially prejudiced. In *AON v AOO*, the respondent argued that an extract of cl 12 (SIA Main Terms) should have been included and it was insufficient for the claimant to include only the respondent's letter of acceptance, despite it making reference to the said clause. The adjudicator was unimpressed by this argument in so far as the letter of acceptance which was drafted by the respondent had incorporated the said clause by reference and this was clear evidence that the respondent was fully cognisant of that clause.<sup>27</sup>

(2) *Well-known standard form contract*

30 The failure to attach extracts from a well-known standard form contract in public circulation will also unlikely prejudice the respondent. This was alluded to in *AHL Pte Ltd v AHM Ltd*<sup>28</sup> and more recently in the High Court decision of *UES Holding Pte Ltd v Grouteam Pte Ltd*.<sup>29</sup> However, this cannot be a foregone conclusion in so far as it has been rightly pointed out that standard form contracts can carry many editions and it may not be appropriate to assume the application of any particular edition.<sup>30</sup>

(c) *Missing pages of extract*

31 Where there are missing pages of a relevant extract, relevant considerations should include the *nature* of the missing pages as well as the *degree of compliance* as a whole. If the missing pages strike at the heart of the payment claim dispute, non-inclusion will arguably be materially prejudicial to the respondent.

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27 *AON Pte Ltd v AOO Pte Ltd* [2013] SCAJr 161 at [57]

28 [2011] SCAJr 355 at [44], where the adjudicator observed that the SIA Contract is a standard form contract publicly available and that the failure to attach it with the adjudication application would not prejudice the respondent.

29 [2016] 1 SLR 312 at [56].

30 *AHL Pte Ltd v AHM Ltd* [2011] SCAJr 355 at [44].

32 Where the degree of compliance is concerned, the failure to attach any extract whatsoever will also be materially prejudicial to the respondent in so far as the adjudicator would not have had sight of any relevant terms of the contract to render a proper determination. Furthermore, such blatant disregard for procedural requirements cannot be condoned as it would otherwise encourage a lackadaisical attitude and even abuse.

33 On the other hand, it is more likely that a claimant who has exhibited extensive documentation will not have its adjudication application rejected. This is especially if the missing pages are unlikely to affect the respondent's understanding of the case it has to meet, nor change the adjudicator's impression of the outlook and merits of the case.<sup>31</sup>

34 If the adjudicator decides that there is no material prejudice to the respondent, he may then accept the adjudication application and proceed with adjudication. Additionally, it may now be less objectionable for the adjudicator to cure the procedural irregularity by way of reg 7(2A) since s 16 will no longer strictly mandate the rejection of defective adjudication applications, thus nullifying the objection that reg 7(2A) is inconsistent with the mandatory wording of the existing s 16.

35 Hence, if the adjudicator determines that the respondent will not be prejudiced by the defective adjudication application, he can accept it and proceed to invoke reg 7(2A) to allow the claimant to include the previously omitted extract.<sup>32</sup> Although this is unlikely to have an impact on the adjudication determination, it bears reiterating that the adjudicator should

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31 See *ARL Pte Ltd v ARN Pte Ltd* [2014] SCAdJR 427 at [41]–[45], where the adjudicator held that eight missing pages in an adjudication application running into 12 lever arch files would not prejudice the respondent as they did not go towards defining the dispute or the merits of the case. Furthermore, neither party referred to nor relied on these eight pages.

32 See *ARU Pte Ltd v ARV* [2014] SCAdJR 561 at [83], where the adjudicator opined that the issue of prejudice to the respondent was relevant in determining whether to grant an amendment under reg 7(2A).

nonetheless be properly furnished with all relevant information and documents to aid in his determination.

#### **IV. Conclusion**

36 The new s 16(2A) is certainly a welcome addition to the SOP Act in so far as it ameliorates the harshness arising from the mandatory wording of existing provisions in the SOP Act and SOP Regulations. Nonetheless, this must not be construed as a nod to lower standards of procedural compliance, nor should it be seen as a subordination of procedural compliance for the sake of expediting the adjudication process. Adjudicators must continue to hold parties to the highest possible standards of conduct and exercise indulgence only where circumstances require. The effectiveness of the adjudication regime will only be optimised if adjudicators can strike the right balance between these competing considerations.