Justice in Adjudication: Rough, Ready and "Natural"
Apparent Bias in Construction Adjudication

Introduction

Many adjudicators are also practitioners at the construction bar, who would have dealt with several members of the construction industry during their practice. It is therefore not improbable for adjudicators to have had dealings with the parties who come before them. This reality is however fertile ground for allegations of bias against adjudicators. The first complaint of apparent bias against an adjudicator made its way to the Singapore High Court in the recent case of *UES Holdings Pte Ltd v KH Foges Pte Ltd*[1]. Quentin Loh J's detailed and well-reasoned judgment provides practical guidance on this subject to adjudicators and parties alike. This case also sheds light on two other issues of practical significance in the adjudication context. First, it clarifies that where a contract does not define "*day*", the SOPA[2] definition of "*day*" (which excludes public holidays) can apply to contractual payment response timelines. Lastly, while the SOPA Regulations[3] require the notice of intention to apply for adjudication ("NOI") to state a "*brief description of the payment claim dispute*", *UES Holdings* clarifies that such failure, by itself, will not justify the setting aside of an adjudication determination.

Apparent Bias on Part of Adjudicators

The law is circumspect even about the mere *perception* of a decision-maker's bias, and for good reason – it can unravel confidence in the system of justice. Against this consideration however, stands the need to ensure that the justice system is not stymied by unmeritorious allegations of bias. This need is especially pronounced in the context of a dispute-resolution process which – by design – is meant to be fast, like SOPA adjudication. Allegations of apparent bias in this context therefore call for careful examination, and *UES Holdings* provides guidance on what such examination would entail.

The relevant facts of *UES Holdings* are as follows. UES applied to set aside an adjudication determination on the basis, *inter alia*, of apparent bias on the Adjudicator's part. In this regard, UES first pointed to the Adjudicator's prior dealings with a corporate representative of KH Foges, one Mr Foo. UES highlighted that the Adjudicator had previously acted as counsel for a company (RPPL) of which Mr Foo was the MD, and for RPPL's related company (EPPL). The Adjudicator had also been a non-executive director of another company (RH) while Mr Foo was its CEO and EC. Next, UES complained about the Adjudicator's failure to disclose his relationship with Mr Foo, RPPL and RPPL's related companies. Lastly, UES alleged that the Adjudicator was not forthcoming in addressing its queries about details of these associations. After a detailed examination of the law and facts, the Court rejected UES' allegation of apparent bias.

As a preliminary point, the Court traced the juridical basis for applying the doctrine of apparent bias to adjudicators to SOPA. Section 16(3) of SOPA requires adjudicators to act "*impartially*" and to "*comply with the principles of natural justice*". The Court noted that the statutory impartiality requirement embodies the natural justice principle of "*the rule against bias*", of which the doctrine of apparent bias is an offshoot.

Bias Due to Association

The test for apparent bias in well-established in Singapore law, but its application in the context of a tribunal's association with a party had not previously been considered. It is settled law that apparent bias is established "*if there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the tribunal was biased*".

[1] [2017] SGHC 114 (29 May 2017)
[2] Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed)
[3] Regulation 7(1)(f) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed)

In applying this test to an allegation of bias by association, Loh J held that a rational connection between the tribunal's association and the prospect of bias must be shown. This requires the party alleging bias to show that there is reason to hold that the tribunal's association might influence its decision. Relevant factors in approaching this inquiry are: the duration, intensity and nature of the tribunal's association, and the time elapsed since the last renewal of such association.

The application of these factors to the facts is particularly illuminating. As regards the Adjudicator's association with Mr Foo *qua* counsel for RRPL, Loh J held that a fair-minded reasonable observer would not place much weight on it because would be aware of the "*reality*" of SOPA adjudicators likely having had dealings with disputing parties (or their representatives). Further, the Adjudicator's association with RRPL was relatively remote in time, the last association having ended more than three years before his appointment as adjudicator. Neither could the association be considered "*strong or close*" in terms of intensity, as the Adjudicator had only acted for RRPL twice in over 12 years. During this period, four other lawyers were had acted for companies in the RRPL group across 13 different matters. The Adjudicator's association as counsel for EPPL was weaker still, a decade having elapsed since he last acted for EPPL, with Mr Foo never having been involved in these matters (or EPPL generally). Loh J similarly went on to examine the nature, duration and intensity of the Adjudicator's association with Mr Foo via his non-executive directorship of RH before concluding that little weight should be accorded to it.

Adjudicator's Disclosure of Associations

As foreshadowed, in alleging apparent bias, UES also complained about the Adjudicator's failure to disclose his associations with Mr Foo (and the related companies).

Loh J held that a tribunal's failure to disclose can, in principle, lead to a reasonable suspicion of bias if it is sufficiently material or significant. Relevant factors in assessing the materiality of non-disclosure include the nature and extent of the tribunal's associations. In the event a tribunal makes partial disclosure of its association, the learned Judge clarified that the court will also examine whether such disclosure gives an impression of the tribunal intentionally concealing, or presenting a picture different from, the actual association. This can arise if, for instance, the tribunal reveals that it has links with a party, and discloses a trivial connection, but omits to mention a substantial tie (e.g. a prolonged personal friendship).

Two guiding principles on the issue of disclosing associations emerge from Loh J's judgment. First, an adjudicator should disclose all facts which might found a *bona fide* case of apparent bias, erring on the side of disclosure in borderline cases. Second, as a matter of good practice, if disclosure should be made, it should be full (not partial).

On the facts, Loh J found that the Adjudicator fell short of best practices in failing to disclose his associations with Mr Foo (and the related companies). However, given the limited and sporadic nature of the associations in the first place, a fair-minded observer would not have attributed the non-disclosure to bias. As such, UES' allegation of apparent bias failed on this ground.

Response to Queries About Associations

The Court also rejected UES' allegation of bias founded on the Adjudicator's responses to queries regarding his associations being allegedly less than forthcoming.

Loh J accepted that a tribunal's response to a party's inquiries for information about its associations can lend weight to a reasonable suspicion of bias. In this regard, the detail, speed and tone of the tribunal's responses are relevant considerations. Examining the Adjudicator's responses to UES' through the prism of these factors, Loh J was satisfied that they did not suggest a reasonable suspicion of bias. In reaching this conclusion, the learned Judge held that the Adjudicator's responses were meticulous and thorough, speedy and objective.

Early (or No) Challenge of Apparent Bias

The Court proceeded to note, *obiter*, that an allegation of apparent bias against an adjudicator must be raised at the earliest opportunity. A party cannot hold the allegation up its sleeve, only to spring it for

the first time when seeking to set aside (what turns out to be) an unfavourable adjudication determination. This would undercut the statutory objective of SOPA, *i.e.* ensuring timely settlement of payment disputes in the construction industry.

In practice therefore, if an adjudicator suggests that he has had "*previous dealings*" with a party, it is incumbent on the other party to inquire into those relevant facts immediately or without undue delay. Failure to do so can amount to a waiver of an apparent bias challenge, especially if a party is legally represented.

Contractual interpretation of "*day*"

One of the issues before the Court in *UES Holdings* was whether the adjudication application was lodged out of time ("Timing Issue"). The parties' agreement provided for payment responses to be made within 21 days from the 25th of every month.

In deciding the Timing Issue, the Court had to determine whether, in light of the definition of "*day*" in section 2 of SOPA, public holidays were excluded from the 21-day submission period of the payment response (even though parties did not expressly incorporate the SOPA definition in their agreement).

Loh J held that the SOPA definition of "*day*" applied, and public holidays were excluded. In reaching this conclusion, the learned Judge applied the ordinary "*principle of contextual interpretation*" of contracts, reasoning that the legal and regulatory backdrop of the contract is relevant to its interpretation. His Honour held that it was "*beyond doubt*" that parties contracted with the SOPA timelines for payment response in mind, fortified in this conclusion with the express reference to s 11(1) of SOPA[4] in their agreement.

In light of the Court's reasoning, if a contract is silent on the definition of "*day*", public holidays will likely be excluded for the purposes of computing SOPA timelines under a contract. If parties intend otherwise, they must expressly say so in their contracts.

Requirement of brief description of payment claim dispute in NOI

Regulation 7(1)(f) of SOPA Regulations requires the NOI to state "*a brief description of the payment claim dispute*". The court held that a breach of this provision alone does not justify setting aside an adjudication determination. The court confirmed that the touchstone of the enquiry for setting aside an adjudication application on grounds of a defective NOI, is whether such failure impeded the adjudication process. A key consideration in this regard is whether notwithstanding the failure, the respondent was notified of the applicant's intention to apply for adjudication and was able to prepare its substantive response accordingly. The court held that a failure to comply with regulation 7(1)(f) did not impede the adjudication process, as notwithstanding the failure, such an NOI will effectively communicate the claimant's intention to the respondent.

Conclusion

In addition to clarifying the application of the SOPA definition of "*day*" to a contract, and addressing implications of a non-compliant NOI, *UES Holdings* provides welcomed practical guidance on allegations of apparent bias against adjudicators. It demonstrates that such allegations cannot be lightly made out, and will be subject to close scrutiny by the courts. Even if apparent bias is established, *UES Holdings* clarifies that the court *may* set aside the adjudication determination. The role of the court's discretion in this regard is borne out by Loh J's *obiter* observation that only material breaches of natural justice justify setting aside an adjudication determination. The manner in which courts would exercise their discretion on this front is however a matter for a future case.

Contributed by: Ramandeep Kaur - MPillay

[4] The provision governing timelines of payment responses