

Dear IPAS Associates/Fellows,

We are glad to bring you the IPAS Update on the recent trends and developments in the insolvency profession.

Message from Chairman

Dear Associates/Fellows

This is one of a series of technical updates for Associates and Fellows as part of our initiatives to provide relevant technical knowledge in our on going Continuing Professional Education.

On behalf of the Board, we wish to thank Mr Ramesh Kannan, Senior Partner, Tan Kok Quan Partnership, for their contributions.

Members are encouraged to contribute articles of interest and share some of their expertise with colleagues in our profession, which can only be for the good of the profession as a whole.

Yours sincerely,
DON M HO, FIPAS
Chairman

Join IPAS

Invitation to join the Insolvency Practitioners Association of Singapore Limited (IPAS)

Pursuant to the recommendations of the Company Legislation and Regulatory Framework Committee, the Insolvency Practitioners Association of Singapore Limited (IPAS) was incorporated on 12

Technical Updates

Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title No 1256 [2006] SGHC 245

1. INTRODUCTION

The Singapore High Court recently examined the circumstances under which a determination by an expert pursuant to an appointment by parties to a contractual bargain may be challenged in subsequent proceedings in court in *Geowin Construction Pte Ltd (in liquidation) v Management Corporation Strata Title No 1256* [2006] SGHC 245. In doing so, the Justice V.K. Rajah reaffirmed the approach he had taken in his earlier decision on the same issue in *Evergreat Construction Co Pte Ltd v Presscrete Engineering Pte Ltd* [2006] 1 SLR 634 ("Evergreat"). Justice Rajah also made important comments on two other issues namely:

- (a) The distinction between an "expert" and an "arbitrator", and the procedural differences that would arise as a consequence as regards the way in which the determination is arrived at in both situations; and
- (b) the obligation of the expert to provide a reasoned or speaking determination, and the circumstances under which the same may be set aside.

2. FACTS

The plaintiff was the main contractor engaged by the defendant to perform addition and alteration works ("the works") on a condominium project. A dispute arose as to whether the works were complete and the plaintiff subsequently commenced proceedings to recover the amount allegedly due to it. However before the commencement of trial, the parties entered into a compromise which was later embodied in a Settlement Agreement ("the Agreement").

The parties had agreed to appoint an independent expert to assess the sums due for the works done and related claims. The agreement provided that the procedure and manner of the assessment would be in the sole discretion of the Expert and further, that the expert's decision would be final and that no appeal would lie against such decision:

April 2005 with the support of the Institute of Certified Public Accountants of Singapore (ICPAS), the Law Society of Singapore (Lawsoc) and the Official Receiver and Official Assignee. The members of IPAS are ICPAS and the Lawsoc.

IPAS cordially invites you to apply to be an Associate or a Fellow of IPAS and participate in our series of CPE courses, seminars and technical discussions on the specialist subjects of insolvency, restructuring and individual & corporate recoveries. Membership has advantages.

For the invitation letter and application form, please visit our website at www.ipas.org.sg

1) *An independent Expert shall be appointed to assess the sums due for work done under the contract and for variation works carried out by the Plaintiffs and for claims for defects and outstanding works (including any allowance for the costs of rectification, and expenses incurred or to be incurred) and for liquidated damages by the Defendants. The procedure of the Reference, the manner in which parties may make representations and any investigations and surveys required shall be in the sole discretion of the Expert. ...*

...

5) *The Expert shall be appointed as an expert and his decision as to the final account and the sums due is final and no appeal shall lie against such decision.*

Subsequently, the appointed expert ("Expert") issued a report assessing sums payable by the defendant to the plaintiff and denying the defendant's claim for liquidated damages (the "Award"). Dissatisfied with the Expert's decision, the defendant applied to set aside the Award, claiming that the Expert had breached the terms of her appointment.

3. JUDGMENT

Justice Rajah applied *Evergreat* and dismissed the application to set aside the expert's determination with costs.

3.1 Challenging an expert's award

Justice Rajah held that where the expert does not provide a reasoned or speaking determination, the same may only be set aside on the basis of fraud, partiality or collusion, or if the expert exceeds the terms of his appointment or the contractual parameters for his appointment. The fact that the expert was wrong in his conclusions per se does not create a basis for setting aside the determination. Justice Rajah emphasised to take any other approach "would be tantamount to rewriting the bargain".

Where the expert provides a reasoned award, the determination may also be set aside if it can be shown from the face of the determination that the expert fell into error. In examining this issue, one is restricted to the actual report or determination and the underlying evidence ought not to be re-examined or referred to. The right of review should therefore be confined to correcting apparent mistakes on the face of the report or determination (e.g. apparent mathematical miscalculations) and determining whether the expert has complied with the terms of his appointment.

Thus, unless the terms of the contract provide for additional bases, there are very tightly circumscribed parameters for setting aside both speaking and non-speaking determinations.

3.2 Expert versus Arbitrator

Justice Rajah also examined the key differences between an expert and an arbitrator. He recognised that both appointments emanate from a common foundation - pursuant to the terms of a contractual bargain. He noted that the precise contractual arrangement and the ensuing obligation of the office would in the final analysis be paramount. He made the following observations:

- (a) An expert is likely to have complete discretion in the to arrive at his determination without being hamstrung by procedural and evidential niceties;
- (b) An expert is able to inject his personal expertise and make his own inquiries without obligation to seek the parties' views or consult them;
- (c) An expert is not obliged to make his decision on the basis of the evidence presented to him and is able to act on his subjective opinion; and
- (d) The facet of natural justice that requires an adjudicator to allow parties to be heard on all issues before adjudicating does not apply to an expert.

3.3 Obligation to provide a reasoned determination

Justice Rajah held that in the absence of a stipulation in the contractual bargain or in the terms of appointment, an expert is not obliged to provide one. He wrote that it was not open to the court to insist on such an obligation as that would mean rewriting the bargain. He observed citing a passage from *Evergreat*:

"..The notion and objective of providing reasons is inextricably linked to the notion and possibility of review by another body. One must bear in mind however that when an expert's award is made as opposed to an arbitrator's award, there is no legal review process prescribed by law. Parties, who appoint an expert, must acknowledge and accept the risk that though an expert might and can err, they consciously and sanguinely accept that risk in lieu of the expense, uncertainty and perhaps delay that court and/or arbitration proceedings may occasion."

4. CONCLUSION

Therefore, parties who wish the right to challenge an expert's

determination should carefully consider the scope and language of the contractual term which provides for the appointment of the expert. Issues such as:

- (a) the procedure that the expert adopts about in arriving at his determination including whether parties should be availed of the right to be heard;
- (b) evidence and material that the expert can have reference to in arriving at his determination;
- (c) whether the award is final and binding; and
- (d) whether a reasoned award is required,

should be carefully weighed in the balance.

This is a note from Tan Kok Quan Partnership, summarising a recent development in arbitration law, which in our view might be of interest to you. This note does not constitute legal advice and is not intended to be relied on or made use of by any person. Please contact us at mail@tkqp.com.sg if you require specific legal advice or if you have any queries in relation to the contents of this note.

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