

‘Unknown unknowns’ and the limits of natural justice challenges in adjudication

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The Singapore High Court has set aside a construction adjudicator's determination for breaching the rules of natural justice. The adjudicator applied the wrong standard of proof without hearing submissions on the issue. This unusual case demonstrates the limits of natural justice challenges in the adjudication context.

Decision: *WCS Engineering Construction Pte Ltd v Glaziers Engineering Pte Ltd* [2018] SGHC 28

Background: SOP Act Adjudication

Adjudication aims to provide contractors with a fast and low-cost route to payment. A summary of the adjudication process under Singapore's Building and Construction Industry Security of Payment Act ('SOP Act') can be found in one of our earlier alerts, available [here](#).

Facts

Glaziers was a sub-contractor engaged by WCS on a substantial residential construction project.

A payment dispute arose. Glaziers started an adjudication to obtain payment. WCS argued that losses caused by Glaziers' allegedly defective work should be deducted from any payment.

The adjudicator found for Glaziers. He was not satisfied 'beyond reasonable doubt' that WCS's deductions were valid. He did not, however, seek or receive submissions from the parties on whether 'beyond reasonable doubt' was the correct standard of proof.¹

WCS applied to set aside the adjudicator's determination. It argued, among other things, that the adjudicator breached the rules of natural justice by failing to hear the parties on the correct standard of proof.

Decision

The court set aside the adjudicator's determination.

¹ As explained at paragraphs 32-34 of the judgment, strictly speaking, neither party in an adjudication has a burden of proof, because neither party needs to prove that its case is true. Rather, each party seeks to persuade the adjudicator to give, or refuse to give, 'temporary finality' to the claimant's claim (an adjudication determination is usually binding unless or until the dispute is determined by a court/tribunal or settled). In this alert, we use the term 'standard of proof' as a shorthand for this approach.

The parties agreed that the adjudicator applied the wrong standard of proof. Had the adjudicator asked, both parties would have said that WCS only needed to show a *prima facie* entitlement to make the deductions. WCS did not need to prove its case ‘beyond reasonable doubt’. The court agreed.

The adjudicator’s failure to hear submissions on this issue breached the rules of natural justice. But this in itself was not sufficient to set aside the determination. The court set aside the determination because, in addition, the breach:

- was **causally connected** with the decision made – the application of the incorrect standard of proof was ‘one step on the critical path’ to the adjudicator’s overall determination; and
- caused WCS **actual prejudice** – if the correct standard had been applied, the adjudicator’s determination *could* have been different (it did not have to be shown that it *would* have been different).

Comment

The SOP Act regime aims to provide a robust, speedy and efficient route to payment. To ensure this, set aside is limited to situations where the adjudicator lacks jurisdiction; fails to comply with the SOP Act; or breaches the rules of natural justice. Errors of law or wrong substantive findings do not warrant set aside.

The requirements for set aside on natural justice grounds will rarely be met. An applicant must show:

- a breach of natural justice;
- a causal connection with the determination; and
- actual prejudice.²

Although these requirements were satisfied here, the court gave examples of several similar situations where set aside would not have been granted.³ The court’s approach demonstrates the limits of viable natural justice challenges.

The court also emphasised other unusual features of the case. For the adjudicator, the standard of proof was seemingly an ‘unknown unknown’: he did not know that he did not know the correct standard. Adjudicators do not usually make findings of law without hearing from the parties. Still less do they fail to recognise when they need assistance from the parties.

Although adjudication determinations are rarely set aside, an unsuccessful set aside application can delay payment and lead to additional legal and other costs. Adjudication claimants in particular will therefore wish to minimise the risk of such applications. One practical way to do so is by raising points of potential uncertainty during the adjudication, and ensuring that both parties comment on them. As this case shows, however, the risk of an adjudicator taking into account ‘unknown unknowns’ can never be ruled out completely.

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² The ‘causal connection’ and ‘prejudice’ requirements are sometimes referred to together as the ‘materiality’ requirement: see paragraph 68 of the judgment.

³ For example, if: (i) the adjudicator had failed to hear the parties on the standard of proof, but applied the correct standard; (ii) the parties had made conflicting submissions on the standard of proof, and the adjudicator then applied the wrong standard; or (iii) the parties had made no submissions on the standard of proof, the adjudicator identified the wrong standard of proof in his determination, but then in substance applied the correct standard anyway.