

# MISDIRECTION OF LAW AS A GROUND TO SET ASIDE ADJUDICATION DETERMINATION

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## I. Introduction

1 In the case of *Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd*<sup>1</sup> (“*Ang Cheng Guan*”), the High Court interestingly set aside a review adjudication determination on the basis that the review adjudicator had “misdirected himself on a point of law”.<sup>2</sup> This seems to be a new ground to set aside adjudication and review adjudication determinations.

2 However, about a year later, the High Court in *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd*<sup>3</sup> (“*CMC*”) rejected the proposition that a misdirection on a point of law can be a ground for setting aside review adjudication determinations or adjudication determinations.

3 In *CMC*, the court’s reason for rejecting the misdirection of law as a ground for setting aside was that in “evaluating whether the Review Adjudicator had failed to take into account relevant matters or had taken into account irrelevant matters in respect of the Liquidated Damages Claim, which thereby affected his determination of the quantum of the adjudicated sum, *this*

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1 [2017] 3 SLR 988.

2 *Ang Cheng Guan Construction Pte Ltd v Corporate Residence Pte Ltd* [2017] 3 SLR 988 at [44].

3 [2018] 3 SLR 503.

court would effectively be reviewing the merits of the Review Adjudicator's decision".<sup>4</sup> [emphasis added]

4 The two seemingly conflicting decisions highlight the difficulty in applying the deceptively simple and settled principle that "the role of a court in reviewing an adjudicator's determination is not to review the merits of the determination ...".<sup>5</sup> The two cases illustrate the difficulty in determining the proper boundary between reviewable and non-reviewable matters.

5 However, it is submitted that the conflict between the two decisions is more apparent than real. The two judges were in fact referring to two different kinds of "misdirection of law". In *Ang Cheng Guan*, the mistake of law was a mistake as to the powers and duties of the adjudicator or review adjudicator under the Building and Construction Industry Security of Payment Act ("Act"). In *CMC*, the mistake was a mistake of law in relation to an issue that affected the substantive merits of the claim.

6 Therefore, it is argued that both judgments reached the correct outcome even though they seem to have adopted diametrically opposed positions on "misdirection of law" as a ground for setting aside adjudication determinations.

7 This article explores the nature of the "misdirection as to the law" ground referred to in the two judgments and reconciles the reasoning behind them.

## **II. Applicable review principles in setting aside review adjudication**

8 Incidentally, both *Ang Cheng Guan* and *CMC* are the only two reported local judgments to date on the setting aside of review adjudication determinations.

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4 *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [64].

5 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [73].

9 As to whether the principles applicable to setting aside of adjudication determinations would equally apply to the setting aside of review adjudication determinations, the court in *CMC* took the view that they would apply with suitable modifications. This was because:

(a) The applications to set aside adjudication review determinations are also governed by the same provision as that for adjudication determinations, namely s 27(5) of the Act.

(i) Section 27(5) of the Act relates to proceedings to set aside “adjudication determination” which is defined in s 2 of the Act to mean “the determination of the adjudicator”.

(ii) Section 2 of the Act further defines “adjudication” to include “an adjudication review” and that “adjudicator” also includes “a review adjudicator or a panel of review adjudicators”.

(iii) Therefore, applications to set aside “adjudication determinations” under s 27(5) would include applications to set aside review adjudication determinations.

(b) Review adjudicators are empowered under s 19(5) of the Act to consider and determine almost the same matters as adjudicators are empowered to determine under s 17(2) of the Act.

(c) Both adjudication determinations and review adjudication determinations have the same temporary binding quality.

10 The court in *CMC* therefore concluded that the court’s role in setting aside review adjudication determinations would be similar to that in setting aside adjudication determinations. This conclusion should not be controversial.

11 In this article, therefore, principles and cases involving the setting aside of adjudication determinations will be

presumed as applicable to *CMC* and *Ang Cheng Guan*. Conversely, the discussion on “misdirection of law” as a ground to set aside “review adjudication determinations” would equally be applicable to both types of adjudication determinations.

### III. Different concepts of misdirection of laws

12 It is important to first highlight that the errors or misdirection of laws in *CMC* and *Ang Cheng Guan* are different in nature.

13 In *CMC*, the applicant argued that the review adjudicator misdirected himself on a point of law in respect of the liquidated damages claim.

14 The applicant argued that the review adjudicator had made a mistake on contractual interpretation, which was held in another case<sup>6</sup> as a mistake in law. The misdirection on a point of law or mistake of law was an erroneous interpretation of contractual terms and requirements.

15 In the case of *Ang Cheng Guan*, the applicant was also not satisfied with the decision of the adjudicator with respect to various delays and liquidated damages issues. However, the complaint was not that the review adjudicator had made a mistake on the law regarding delay or liquidated damages.

16 Rather, the setting aside of the review adjudication determination was on the ground that the review adjudicator had made a mistake on the law regarding his own power and the scope of a review adjudication under the Act.

17 In *Ang Cheng Guan*, the review adjudicator had formed the view that his jurisdiction in the review adjudication was limited. He adopted the interpretation that he was only allowed under the Act to review and determine issues raised by the party who had

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6 See *Lim Chin San Contractors Pte Ltd v LW Infrastructure Pte Ltd* [2011] 4 SLR 455.

applied for the review adjudication. In essence, the review adjudicator took the view that because the Act only allows a respondent (in an adjudication) to apply for review, only issues raised by the respondent could and need to be considered.

18 The review adjudicator therefore refused to and did not consider all other issues raised by the claimant (the party responding to the review adjudication), which were not related to the issues raised by the respondent (the applicant applying for the review adjudication).

19 The High Court in *Ang Cheng Guan* disagreed with the review adjudicator's construction of the Act regarding the scope of review under the Act. The court held that the correct construction of the Act was that a review adjudicator is entitled to and should review the entire adjudication determination (the "Broad Interpretation"). This would include a review of not only matters raised by the applicant (the respondent in the adjudication) in the review adjudication but also any matters and issues raised by the claimant in the adjudication (the party responding to the review adjudication).

20 Having decided that the Broad Interpretation was the correct interpretation of the Act with respect to the scope of a review adjudication, the misdirection of law made by the review adjudicator in *Ang Cheng Guan* was an error of law regarding his duties under the Act. Specifically, the review adjudicator had made a mistake which may have breached the mandatory provision of the Act regarding his duties.

#### **IV. Imprecise usage of term "misdirection of law"**

21 The different nature of the misdirection of law in the two cases underscores the confusion that can arise from the imprecise or loose usage of the term "misdirection of law".

22 On its natural construction, a misdirection of law would be wide enough to include a misdirection of all laws. However, to say that all misdirection of laws in adjudications or review

adjudications would not be reviewable would clearly be wrong. Such a proposition would also run contrary to many established grounds for setting aside.

23 In this regard, all constructions of provisions in the Act undertaken by adjudicators are interpretations of law. A wrong determination or misdirection of law regarding mandatory provisions would certainly lead to a setting aside of that adjudication determination.

24 For instance, the law is settled that an adjudication determination which arose from “rubber stamping” a claim where there is no payment response would be susceptible to be set aside. In this regard, the Court of Appeal affirmed this in *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd*<sup>7</sup> (“*Comfort*”). The Court of Appeal explained that this is because “Section 16(3)(a) of the Act requires [an adjudicator] to act ‘independently’. Inherent in the concept of independence ... is the idea that the content of the adjudicator’s duty to adjudicate cannot depend on whether a payment response has been filed or not”.<sup>8</sup>

25 Hence, it would be a misdirection of the law if an adjudicator determined that he or she could “rubber stamp” a claimant’s claims where there was no payment response. The adjudicator would then have committed a misdirection of the law, specifically a misdirection on the proper construction of ss 15(3) and 16(3)(a) of the Act regarding his duties. A determination on that basis should and would be set aside.

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7 [2018] 1 SLR 979.

8 See *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [56].

## V. Proper understanding of misdirection of law

26 To help us understand the two conflicting decisions of *Ang Cheng Guan* and *CMC*, the reasoning behind the two decisions has to be revisited and ascertained.

27 The key to this may lie in the manner the Court of Appeal in *Comfort* has dealt with the concept of “patent error” as a ground for setting aside adjudication determinations.

28 It should be first recognised that an adjudicator’s decision on the existence of a patent error in the documents before him or her would be a decision on the merits. Rightly or wrongly, it would be “mere errors of law or fact that relate to the determination of the quantum of the adjudicated sum ...”.<sup>9</sup> A failure to recognise a patent error must be an error of fact that he or she is allowed to make.

29 In this regard, the Court of Appeal in *Comfort* was clear and reaffirmed that “the role of a court in reviewing an adjudicator’s determination is not to review the merits of the determination”.

30 The Court of Appeal further held that:<sup>10</sup>

... any setting aside must be premised on the adjudicator’s acting in excess of his jurisdiction or in breach of the rules of natural justice. As we explained in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 at [48]:

Put simply, in hearing an application to set aside an AD and/or a s 27 judgment, **the court does not review the merits of the adjudicator’s decision, and any setting aside must be premised on issues relating to the jurisdiction of the adjudicator**, a breach of natural justice or non-compliance with the SOPA. Applications to set aside ADs and/or s 27 judgments are thus *akin* to

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9 See *CMC Ravenna Singapore Branch v CGW Construction & Engineering (S) Pte Ltd* [2018] 3 SLR 503 at [71].

10 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [73].

judicial review proceedings, and are not appeals on the merits of the adjudicator's decision. In our judgment, it is consistent with the purpose of the SOPA, which is to facilitate cash flow in the building and construction industry, that the court, in hearing such applications, does not review the merits of the AD in question. ...

[emphasis in original in italics; emphasis added in bold italics]

31 However, in *Comfort*, the Court of Appeal was not concerned with the correctness of the adjudicator's ruling on the absence or existence of patent error *per se*. The Court of Appeal was concerned with whether the adjudicator had properly carried out his duty to adjudicate. The Court of Appeal was in fact drawing an inference that there had been a breach of the duty to adjudicate because obvious patent errors had not been identified. In other words, the Court of Appeal took the view that if an adjudicator had carried out his or her duties, the patent error would have been identified.

32 The Court of Appeal made it clear that:<sup>11</sup>

81 First, for the reviewing court, the question of whether there are patent errors is the decisive test for whether the adjudicator has breached his duty under s 17(3). *The theory behind this test is a simple process of inference. When a court looks at a payment claim that has been allowed, and sees that the payment claim or its supporting materials contain patent errors, the court will draw the inexorable inference that the adjudicator failed to recognise those errors. In failing to do so, he must therefore have failed to have regard to the matters under s 17(3), in contravention of his duty under that provision. In other words, if he had fulfilled that duty, he would have recognised the patent errors in question, and in the light of those errors, he would not have been satisfied that the claimant had established a prima facie case for the completion or value of the construction work which is the subject of the payment claim. He would therefore not have allowed the claim if he had applied his mind to it. For example, if he allows a payment claim that has absolutely no supporting material and*

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11 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [81].

no explanation to justify the claim notwithstanding the absence of any supporting material, *the court will not hesitate to draw the conclusion that he has breached s17(3)*; and this would be a classic case of an adjudicator rubber-stamping a claim ... [emphasis added]

33 The Court of Appeal in *Comfort* had explained that the unifying basis for all the recognised grounds of setting aside “was whether there has been a breach of a provision under the Act which is so important that it is the legislative purpose that an act done in breach of that provision should be invalid ... We labelled such a provision a *mandatory condition* ...”.<sup>12</sup> [emphasis added]

34 The Court of Appeal in *Comfort* also explained that:<sup>13</sup>

For this reason, *breach of a mandatory provision is sometimes referred to as a breach which invalidates the jurisdiction of the adjudicator*, that absence of jurisdiction being the basis for setting aside the adjudication determination ... *But the key inquiry in any setting aside is whether a mandatory provision has been breached, and if it has been, then the adjudication determination should be set aside.* This approach keeps the focus on the Act, as it should be. [emphasis added]

35 Therefore, regardless of the ground relied on to set aside a determination including the ground of “misdirection of law”, a determination would only be set aside if there had been a breach of one or more mandatory provisions of the Act.

36 In the case of *Ang Cheng Guan*, the correct interpretation of the Act requires a review adjudicator to review the entire adjudication determination and consider all issues raised by both parties. A misdirection of the law in this regard would lead to a breach of a mandatory provision under the Act, namely a breach of a duty to review the entire adjudication determination.

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12 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [75].

13 *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 at [75].

37 In the case of *CMC*, while the Act may require an adjudicator or review adjudicator to interpret a contractual clause, there is no mandatory requirement that the adjudicator has to make a legally correct interpretation of the contract. In other words, even if there is a wrong interpretation of the contract, there could be no breach of any mandatory provision under the Act.

## **VI. Conclusion**

38 The misdirection of law in *CMC* and *Ang Cheng Guan* was therefore only the symptom. The effect of the misdirection of law, namely whether it results in a breach of any mandatory provision, determines whether a decision ought to be set aside.

39 Understood in that way, it is clear that *CMC* should not stand for any wide proposition that any form of “misdirection of law” would not be reviewable. Rather, it would more properly be that a “misdirection of law” which does not result in a breach of mandatory provisions of the Act would not be reviewable.

40 Similarly, *Ang Cheng Guan* should only stand for the proposition that a “misdirection of law” leading to a breach of mandatory provisions of the Act would be a ground to set aside adjudication determinations or review adjudication determinations.

41 Nevertheless, given the Court of Appeal’s clarification in *Comfort* regarding the unifying and underlying inquiry in setting aside, labels such as misdirection of law or patent error may be superfluous. It may be less confusing if the decision to set side is focused on whether one or more mandatory provisions of the Act have been breached.