IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 27

Civil Appeal No 89 of 2015

Between

SGB STARKSTROM PTE LTD

… Appellant

And

THE COMMISSIONER FOR LABOUR

… Respondent

GROUNDS OF DECISION

[Administrative Law] — [Judicial review]
[Employment Law] — [Work Injury Compensation Act]

Version No 1: 27 Oct 2020 (22:39 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

SGB Starkstrom Pte Ltd
v
Commissioner for Labour

[2016] SGCA 27

Court of Appeal — Civil Appeal No 89 of 2015
Sundaresh Menon CJ, Chao Hick Tin JA and Andrew Phang JA
29 March 2016

21 April 2016

Sundaresh Menon CJ (delivering the grounds of decision of the court):

1 Mr Tan Yun Yeow ("the Injured Employee") was employed by the appellant, SGB Starkstrom Pte Ltd. Following a tragic workplace accident, the Injured Employee suffered serious injuries and became mentally incapacitated as a result. The Injured Employee's brother, Mr Rodney Tan, was eventually appointed as his deputy under the Mental Capacity Act (Cap 177A, 2010 Rev Ed) ("Mental Capacity Act"). However, prior to his appointment as a deputy, Mr Rodney Tan purported to make a claim on behalf of the Injured Employee under the Work Injury Compensation Act (Cap 354, 2009 Rev Ed) ("WICA") ("the Disputed Claim"). The WICA establishes a statutory compensation scheme that is available to employees who suffer injuries in the course of employment. This statutory compensation scheme generally offers a lower cost alternative to pursuing a common law claim for damages arising from workplace negligence. However, the heads of damages that may be recovered

are constrained by the terms of the WICA. An employee who elects to pursue his claim under the WICA will also forgo his rights at common law. The filing of the Disputed Claim therefore had important potential consequences for the Injured Employee.

2 The Commissioner of Labour ("the Commissioner") initially accepted the Disputed Claim, and issued a Notice of Assessment to both the appellant and Mr Rodney Tan pursuant to s 24(2)(*a*) of the WICA ("the Notice of Assessment"). Having received the Notice of Assessment, Mr Rodney Tan then resiled from the position he had taken earlier and maintained that he wished and was entitled to pursue the claims of the Injured Employee at common law. The Commissioner did not agree with this initially, but changed her position upon receiving advice from the Attorney-General's Chambers. She informed the appellant that the Disputed Claim was not a valid claim on the basis that Mr Rodney Tan did not have the authority at the material time to make a valid election on behalf of the Injured Employee to pursue his remedies under the WICA instead of under the common law.

3 On appeal, the primary question before us was whether Mr Rodney Tan had the capacity, prior to being appointed as a deputy under the Mental Capacity Act, to make an election on behalf of the Injured Employee to seek relief under the WICA. A second issue relating to the administrative law doctrine of substantive legitimate expectations was also raised, for the first time on appeal, by the appellant. In essence, the appellant asserted that it had a substantive legitimate expectation that the Disputed Claim was valid and bound the Injured Employee on the basis of the Commissioner's representation that this was so. The appellant submitted that if it was correct on this, then even if the Disputed Claim was invalid in law, the court should nevertheless treat it as having been validly made and so foreclose the

Version No 1: 27 Oct 2020 (22:39 hrs)

possibility of Mr Rodney Tan pursuing the Injured Employee's claims for damages against the appellant at common law. It was said that this was appropriate so that the appellant's legitimate expectations would not be frustrated. To put this in another way, the appellant's case was that even if the incapacitated person had not, as a matter of law, compromised his common law rights, those rights had been compromised and extinguished, in effect, by the actions of the Commissioner.

4 After hearing the parties, we dismissed the appeal. We found that the Disputed Claim was not valid because Mr Rodney Tan did not have authority to make the Disputed Claim on behalf of his brother at the material time. Further, leaving aside the question of whether the doctrine of substantive legitimate expectations was part of Singapore law, we found that the doctrine had no possible application on the facts, and hence, could be of no possible assistance to the appellant. We gave brief reasons at the time we dismissed the appeal and now explain the reasons for our decision in more detail. We preface this with a summary of the key facts.

Background facts

5 The background facts are undisputed and are as described in the judgment below (*Tan Lip Tiong, Rodney as Deputy for Tan Yun Yeow v The Commissioner for Labour and another matter* [2015] 3 SLR 604) ("the Judgment"). The Injured Employee was employed by the appellant when he was involved in a serious workplace accident on 19 March 2009. He suffered serious injuries, which rendered him mentally incapacitated and incapable of managing his financial and personal affairs. On 22 January 2010, Mr Rodney Tan by his solicitors, M/s Marican & Associates ("Marican"), wrote to the Commissioner to inform her of the fact that Mr Rodney Tan was acting on

Version No 1: 27 Oct 2020 (22:39 hrs)

behalf of the Injured Employee pursuant to a power of attorney that had been granted by the Injured Employee's next-of-kin. On 10 May 2010, having received a medical report from the hospital confirming that the Injured Employee was incapacitated and incapable of managing himself or his affairs, the Commissioner asked Marican whether the Injured Employee's next-of-kin wished to claim compensation on his behalf under the WICA. Acting on Mr Rodney Tan's instructions, Marican replied on 20 May 2010 stating that its client did wish to claim compensation on behalf of the Injured Employee under the WICA. This letter formed the essence of the Disputed Claim. We emphasise that on 20 May 2010, Mr Rodney Tan had not yet been appointed under the legislation applicable at that time (see [8] below) to act on his brother's behalf.

6 On 14 June 2010, the Commissioner issued the Notice of Assessment. The Notice of Assessment was served on Marican, the appellant, and the appellant's insurers on 21 June 2010. The following notation was set out at Part II of the Notice of Assessment:

> Claim is found valid and the compensation payable is as stated:
>
> 125.00% X $180,000.00 (MAXIMUM) = $225,000.00

7 The cover letter, however, also noted the following:

> 2 … We understand that the injured employee is unable to come forward to claim his compensation award as he is of unsound mind and incapable of managing himself or his affairs. In such circumstances, the claim is payable to his estate and under the law, a person can only act for the injured employee's estate if he or she has obtained a court order for the Committee of the Person and Estate of the injured employee.
>
> 3. Hence, you are advised to apply for the Committee of the Person and Estate of the injured employee. Thereafter, the appointed committee is advised to forward the following to the

Version No 1: 27 Oct 2020 (22:39 hrs)

> ministry for our verification before we process payment of compensation: a) A copy of the Committee of the Person and Estate of the injured employee; b) The completed Authority to Claim as attached; and c) The completed Interbank Giro form as attached.

8 The prevailing legislation at that time for the appointment of those empowered to act on behalf of persons lacking mental capacity was the Mental Disorders and Treatment Act (Cap 178, 1985 Rev Ed). Under that Act, the court was empowered to appoint a committee of the person and estate of an incapacitated person to manage his personal welfare and financial matters. This legislation and the associated practice of appointing a committee was later replaced by the Mental Capacity Act which provides instead for the appointment of a deputy to act on behalf of the mentally incapacitated person.

9 By the time Mr Rodney Tan received the Notice of Assessment, he had changed his mind about proceeding under the WICA. He therefore did not accept the Notice of Assessment. On 23 June 2010, Marican replied to the Commissioner's Notice of Assessment stating, among other things, that "the injured employee lacks the capacity to make the decision whether to accept or reject the work injury compensation assessed by you", and that they are "taking instructions from the injured employee's next of kin … on the application and appropriate Orders to seek" under the Mental Capacity Act. In the meantime, on 12 July 2010, having received the Notice of Assessment albeit with the cover letter which contained an important qualification as to the Injured Employee's capacity (as noted at [7] above), the appellant's insurers paid the sum of $225,000 assessed as the compensation due under the WICA to the Commissioner.

10 On 23 August 2012, Mr Rodney Tan was finally appointed as the Injured Employee's deputy under the Mental Capacity Act. Thereafter, the

Version No 1: 27 Oct 2020 (22:39 hrs)

Commissioner wrote to Marican on 29 October 2012 to ask if Mr Rodney Tan "wished to claim compensation for the deceased". A series of correspondence was then exchanged between them. By a letter dated 28 February 2013 to the Commissioner, Marican took the position that the Injured Employee had not made a valid application for compensation under the WICA and that the Notice of Assessment was therefore invalid. Subsequently, in its letters to the Commissioner dated 31 July 2013 and 29 August 2013, Marican indicated Mr Rodney Tan's intention to pursue his brother's claim under the common law and repeated its position that the Notice of Assessment was a nullity.

11 On 2 January 2014, the Commissioner replied to Marican taking the position that the 20 May 2010 letter (see [5] above) constituted a valid claim under s 11(1) of the WICA and that because an objection had not been timeously raised to the Notice of Assessment, it was deemed to be an order under the WICA. The Commissioner also observed that even if the Injured Employee's claim under WICA was withdrawn, he might not be able to pursue a claim under the common law. The same position had been taken by the Commissioner in an earlier letter dated 5 August 2013 addressed to Mr Rodney Tan. These letters were not copied to the appellant.

12 On 21 March 2014, Mr Rodney Tan, as deputy of the Injured Employee, commenced judicial review proceedings in Originating Summons No 265 of 2014 ("OS 265/2014") "to quash the decision of the Learned Commissioner for Labour made on the 2nd day of January 2014 with respect to the aforesaid Labour Case No. 0904903E wherein the Learned Commissioner for Labour decided that the Plaintiff had made a claim for compensation under the Work Injury Compensation Act (Cap 354) and issued the Notice of Assessment dated 21st June 2010".

Version No 1: 27 Oct 2020 (22:39 hrs)

13 On 1 July 2014, having received advice from the Attorney-General's Chambers, the Commissioner changed her position, and wrote as follows to Marican:

> 2. We have been advised by the Attorney-General that the Notice of Assessment of Compensation dated 21 June 2010 … is a nullity because as at the date of your letter dated 20 May 2010, Mr Tan Yun Yeow ("Mr Tan") was in a comatose state due to injuries sustained in the accident.
>
> 3. In view of Mr Tan's lack of capacity to make a decision for himself in relation to his property and affairs, no valid claim for compensation with respect to the accident could have been made on Mr Tan's behalf under Section 11(1) of the WICA. In the circumstances, the Notice of Assessment of Compensation dated 21 June 2010 was issued in error.
>
> 4. You may wish to produce this letter to the employers of Mr Tan, M/s SGB Starkstrom Pte Ltd and/or their insurer.

14 Having been notified of the Commissioner's change of position, the appellant wrote to the Commissioner on 21 July 2014 disagreeing with the Commissioner and requesting the Commissioner to reconsider her position. The Commissioner, however, maintained her position that the Notice of Assessment was a nullity. The appellant then commenced judicial review proceedings in Originating Summons 918 of 2014 ("OS 918/2014") on 30 September 2014 "to quash the decision of the Learned Commissioner For Labour made on the 1st day of July 2014 with respect to the aforesaid Labour Case No. 0904903E wherein the Learned Commissioner For Labour decided that the Notice of Assessment of Compensation dated 21 June 2010 issued under Section 24 of the Work Injury Compensation Act (Cap. 354) is a nullity and that it was issued in error".

15 In the meantime, common law proceedings were commenced by Mr Rodney Tan as deputy of the Injured Employee in Suit No 851 of 2013 ("S 851/2013") against the appellant and some other parties. The appellant

Version No 1: 27 Oct 2020 (22:39 hrs)

applied to strike out the writ and statement of claim filed in S 851/2013 on the basis of s 33(2)(*a*) of the WICA, which states that an action for damages is not maintainable if the workman "has a claim for compensation for that injury under the provisions of this Act and does not withdraw his claim within a period of 28 days after the service of the notice of assessment of compensation in respect of that claim". The striking out application was stayed pending the determination of OS 265/2014 and OS 918/2014.

The decision below

16 OS 265/2014 and OS 918/2014 were heard together. Before the High Court judge ("the Judge"), the only issue canvassed was whether a mentally incapacitated employee's next-of-kin who had not been appointed a deputy under the Mental Capacity Act could nonetheless elect on behalf of that employee to pursue his remedies under the WICA. This would determine whether the Disputed Claim was valid and that in turn could affect the Injured Employee's common law claim for damages given the effect of s 33(2)(*a*) of the WICA.

17 The Judge held (at [40] of the Judgment):

> Accordingly, in my judgment, the next-of-kin of a mentally incapacitated employee do not have, without more, the requisite capacity to make a claim under the Act on behalf of the employee. Only a person duly appointed by the court under the Mental Capacity Act will have the legal capacity to do so. …

18 In reaching this conclusion, the Judge held that the WICA was silent on who had the requisite capacity to make a claim under the WICA on behalf of a mentally incapacitated employee (at [29], [31] and [33]). He reasoned that the law was generally careful to ensure that a person has the requisite legal capacity to act on behalf of someone else (at [36]), and that the courts would

Version No 1: 27 Oct 2020 (22:39 hrs)

"jealously guard the rights of injured workers who lack the mental capacity and competence to make choices that are in their best interests by making sure fit and proper persons are appointed as their deputy under the Mental Capacity Act" (at [38]).

19 The Judge therefore held that the Notice of Assessment was a nullity because the Disputed Claim was made at a time when neither Mr Rodney Tan nor the Injured Employee's wife had been appointed a deputy under the Mental Capacity Act (or the equivalent applicable legislation) (at [43] and [44]). The fact that Mr Rodney Tan was subsequently appointed deputy on 23 August 2012 did not make a difference because at the material time of the election, he had no legal capacity. OS 918/2014 was dismissed and the quashing order prayed for in OS 265/2014 was granted.

The appeal

20 In the appeal before us, the appellant advanced two main contentions: first, that the Disputed Claim and the Notice of Assessment were valid because Mr Rodney Tan had the requisite capacity to make a WICA claim on behalf of his brother on 20 May 2010; and second, that it had a substantive legitimate expectation that the Disputed Claim would be treated as valid and that in making payment in accordance with the Notice of Assessment, it had discharged its liability to the Injured Employee arising from the accident. These contentions framed the two main issues that arose for decision on appeal. As the appeal potentially raised the question of whether the doctrine of substantive legitimate expectations is part of our law, we appointed Mr Patrick Ang Peng Koon as *amicus curiae* to assist us. We are grateful to Mr Ang for the submissions he made both in writing and orally, on this issue.

Version No 1: 27 Oct 2020 (22:39 hrs)

21 In the event, we did not find it necessary to reach the issue of whether the doctrine of substantive legitimate expectations is part of our law because it was abundantly clear to us that even assuming that the doctrine was part of our law, there was no conceivable basis on which it could apply on the facts before us. We turn to deal with each of the two issues in turn.

Legal capacity

22 It is well-established that one has no power to make decisions or to act on behalf of a mentally capacitated person unless properly authorised to do so. Just recently, in *Teo Gim Tiong v Krishnasamy Pushpavathi (legal representative of the estate of Maran s/o Kannakasabai, deceased)* [2014] 4 SLR 15, we held that the deceased plaintiff's mother could not act on behalf of the estate to accept an offer to settle that had been tabled, when she had not been properly authorised to act for the estate. The short point is that, in general, being the next-of-kin or a close relation of an incapacitated person does not, without more, confer legal capacity to act on behalf of the latter; such authorisation must be conferred *by law*.

23 The decision to claim compensation under the WICA entails an election because by so doing, the claimant forgoes his entitlement to seek relief under the common law. In our judgment, this is a pre-eminent example of an act that can only be regarded as valid and binding on a mentally incapacitated person *if* the person who made the election on his behalf was properly conferred with the authority to do so.

24 The making of a claim under the WICA on behalf of an injured employee has the effect of irrevocably compromising the rights of that employee to seek relief under the common law by reason of s 33(*2*) of the

Version No 1: 27 Oct 2020 (22:39 hrs)

WICA. As we have already noted, there are material differences between the two avenues for seeking relief in terms of what must be proved by the claimant as well as what may be claimed. The WICA may in general offer a more certain, faster and cheaper route to recovery; but it will also usually result in compensation that is less than would follow upon a successful claim at common law. These significant implications underscore the need to ensure that the person making an election purportedly on behalf of a mentally incapacitated employee has been properly conferred with the authority to do so.

25 In Singapore, the Mental Capacity Act is the prevailing legislation governing the conferment of authority on a third party to manage the affairs of a mentally incapacitated person. As stated in the long title, it is an Act "relating to persons who lack capacity" and which seeks "to provide for matters connected therewith". It is a statute of general application. This means that as a general rule, it will be applicable across all situations in which a third person purports to act on behalf of a mentally incapacitated individual. It seems conceivable that apart from the Mental Capacity Act, a particular statute might establish a specific regime that enables a third person to act on behalf of an incapacitated person for the particular purposes of the statute in question. But where this is so, one would expect the derogation or deviation from the provisions of the Mental Capacity Act to be expressly and clearly spelt out.

26 The appellant accepted the broad proposition that Mr Rodney Tan could only make the Disputed Claim on behalf of his brother if he had been conferred with the authority to do so under the law. However, the appellant submitted that the WICA establishes its own framework which enables a third party to bring a claim on behalf of an injured worker even where he has not been appointed as a deputy under the Mental Capacity Act. In short, the

Version No 1: 27 Oct 2020 (22:39 hrs)

appellant contended that the Mental Capacity Act was not the controlling legislation in determining who could elect to seek remedies under the WICA on behalf of an incapacitated person. The appellant argued that the WICA had permissive rules in this regard, and specifically, that the only requirements were that the representative (a) was acting to claim compensation "for the benefit of" the injured employee, and (b) had no "interest adverse" to the injured employee. The appellant's grounds for making this submission were as follows:

> (a) The WICA provisions unequivocally contemplated that third persons could make a claim under the WICA on behalf of a mentally incapacitated person.
>
> (b) The WICA was silent on who these third persons were, and did not expressly restrict these third persons to deputies under the Mental Capacity Act.
>
> (c) An instructive parallel could be drawn between O 76 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules of Court") and the WICA framework. Under O 76 of the Rules of Court, a litigation representative may be appointed as long as such a person had no interest adverse to the mentally incapacitated litigant. A similar criterion should be applied in the WICA framework.
>
> (d) This would be in line with the legislative purpose of the WICA which is to simplify the process of claiming compensation for claimants.

27 We agree that the WICA does contemplate that a third party may make a claim under its provisions on behalf of a mentally incapacitated employee

Version No 1: 27 Oct 2020 (22:39 hrs)

(see ss 12A and 24 for example). This, however, does not advance the appellant's case. After all, it must be so since otherwise, an employee who becomes mentally incapacitated would never be able to pursue his remedies given that such a person by definition has no capacity to act on his own behalf. Hence, it remains necessary to examine *who* may make a claim on behalf of an incapacitated employee. Here, the concession, which in our view was correctly made by the appellant's counsel, Mr K Anparasan ("Mr Anparasan"), that the WICA is *silent* as to which third parties may act on behalf of a mentally incapacitated employee was fatal to the appellant's case. As we have already noted at [25] above, if the WICA was intended to establish a regime aside from the Mental Capacity Act enabling a third party other than a deputy to make an election under the WICA on behalf of a mentally incapacitated person, we would expect to find *explicit language* to that effect. Without such express provisions, the default position that remains and applies would be that set out in the Mental Capacity Act.

28 This is the short, and in our judgment, dispositive response to the appellant's arguments. However, we turn to consider s 6 of the WICA because this was the key provision that the appellant relied on for its submission that any person may make a claim on behalf of a mentally incapacitated employee subject *only* to the qualifier that the claim must be made "for the benefit of" the employee. Section 6(1) states:

> Compensation under this Act *shall be payable to or for the benefit of the employee* or, where death results from the injury, to the deceased employee's estate or to or for the benefit of his dependants as provided by this Act.
>
> [emphasis added]

29 It is plain that s 6 concerns the *receipt of compensation*, rather than the *making of a claim* under the WICA. In the course of the hearing, we pointed

Version No 1: 27 Oct 2020 (22:39 hrs)

out to Mr Anparasan that the right to make an election by filing a claim under the WICA and to receive compensation on behalf of another are conceptually distinct matters. Even assuming s 6 of the WICA creates an entitlement for someone other than a lawfully appointed deputy under the Mental Capacity Act to receive a payment due under the WICA, which we add was not argued and which we doubt in any case, this does not imply that such a person could also make the election to bring a claim on behalf of an injured and incapacitated employee under the WICA thus compromising the rights of that employee under the common law. We therefore found that the appellant's reliance on s 6 of the WICA was not well conceived.

30 We also did not agree with the parallel that Mr Anparasan sought to draw between the WICA and O 76 of the Rules of Court. Mr Anparasan argued that because a litigation representative appointed under O 76 could be someone other than a deputy appointed under the Mental Capacity Act, the same should apply to the WICA which, after all, was a form of legal process. In our judgment, there was no basis either in law or in logic to import the regime for appointing a litigation representative under the Rules of Court into the WICA. In any event, the regime for appointing a litigation representative, to the extent it operates independently of the Mental Capacity Act, is *expressly* spelt out in the Rules of Court (see O 76 r 3). The WICA on the other hand is silent on the subject. Furthermore, an important safeguard in O 76 is that the *court* authorises the appointment of the litigation representative where a lawfully appointed deputy has not been authorised to conduct legal proceedings on the injured employee's behalf under the Mental Capacity Act.

31 Finally, we rejected the appellant's submission that the statutory purpose behind the WICA compels the adoption of a more permissive interpretation as to who may make a statutory claim on behalf of a mentally

Version No 1: 27 Oct 2020 (22:39 hrs)

incapacitated employee. In essence, the appellant's argument was that it would be contrary to the WICA's objective of ensuring the expeditious and low cost resolution of work injury claims if *only* a deputy was permitted to claim a claim on behalf of a mentally incapacitated employee. This submission rests on the premise that appointing a deputy under the Mental Capacity Act could be costly and time consuming. In our judgment, the objective of enabling an expeditious and low cost resolution of work injury claims has nothing to do with the wholly separate question of who may act on behalf of a mentally incapacitated employee. In those rare cases where the employee has been mentally incapacitated as a result of a work injury, we do not accept that Parliament intended to prioritise speed and the minimisation of cost over and above the need to ensure that there exist proper safeguards in empowering a representative to act on behalf of that employee. Such safeguards are essential to properly protect the rights of mentally incapacitated employees as noted by the Judge (see [18] above) and this is a consideration of the first importance.

32 Further, we put to Mr Anparasan, during the hearing, our concern that his suggested interpretation of the WICA, insofar as it concerned who could bring a WICA claim on behalf of an incapacitated employee, was likely to be uncertain and untenable in practice. To begin with, there would be no mechanism to deal with the situation where two or more eligible persons purported to act on behalf of the injured employee and disagreed on whether a mentally incapacitated employee should pursue his rights under the WICA. Nor for that matter, was it evident what should be done if the next-of-kin or other relation of the incapacitated person subsequently rejected or disputed a statutory claim which had already been made and assessed. Or whether a person with no adverse interest could act for the benefit of the injured employee even if a deputy had already been appointed. In the final analysis,

Version No 1: 27 Oct 2020 (22:39 hrs)

Mr Anparasan's suggested approach, which we have set out at [26] above, was directed at ensuring that the person who purported to act for the incapacitated employee did so without being in a position of conflicting interests. This was much too blunt an approach for dealing with the more fundamental question of how such a person could, without more, act to *bind* the employee.

33 For these reasons, we were satisfied that the WICA does not create a separate regime aside from the Mental Capacity Act for claims to be made on behalf of mentally incapacitated employees. Only a deputy properly appointed under the Mental Capacity Act could make such a claim. We therefore affirmed the Judge's decision that Mr Rodney Tan had no capacity to make the Disputed Claim as of 20 May 2010, and hence, that the Notice of Assessment was void.

Substantive legitimate expectations

34 The appellant's second contention was based on the doctrine of substantive legitimate expectations. A preliminary objection was raised by the respondent, which was that the submissions on substantive legitimate expectations were being raised for the first time at the appeal. As we have already observed, this was not in issue before the Judge. It is clear that we have the power to hear new points on appeal under O 57 r 13 of the Rules of Court: see *Riduan bin Yusof v Khng Thian Huat* [2005] 4 SLR(R) 234 at [35] and *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 at [46]. However, O 57 r 9A(4) of the Rules of Court requires that leave to introduce a new point be sought and obtained, and that the relevant party must clearly state in its case that it is applying for such leave. The appellant did not comply with this requirement in this case. Nevertheless, it was clear that the parties

Version No 1: 27 Oct 2020 (22:39 hrs)

had notice of the issues and we therefore did not disallow the attempt to raise the argument.

35 Much of the submissions focused on whether the doctrine of substantive legitimate expectations should be a part of Singapore law. However, upon considering the facts, we found that a more fundamental difficulty plagued the appellant's case on substantive legitimate expectations: in short, the doctrine could *never* apply to facts such as the present.

Inapplicability of the doctrine to the facts

36 It is helpful to begin by outlining the broad contours of the substantive legitimate expectations doctrine. For this purpose, we refer to two cases, one of which is English, in which the doctrine was first fully articulated, and the other, a decision of our High Court which held that the doctrine applied in Singapore.

37 In *R v North and East Devon Health Authority; ex parte Coughlan* [2001] 1 QB 213 ("*Coughlan*"), the applicant, Miss Coughlan, was grievously injured in a road traffic accident following which, she resided in Newcourt Hospital. In 1993, she agreed to move to another location, Mardon House on the health authority's clear promise that Mardon House would be her home for life (*Coughlan* at [6]). After rounds of policy deliberation and consultation, in 1998, the health authority decided to close Mardon House. Miss Coughlan challenged the decision to close Mardon House by way of judicial review on the ground that she had a legitimate expectation that Mardon House would be her home for life. She sought substantive protection of that legitimate expectation. Among the legal issues to be decided was the question of "the court's role when a member of the public, as a result of a promise or other

Version No 1: 27 Oct 2020 (22:39 hrs)

conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way" (*Coughlan* at [56]). The Court of Appeal granted Miss Coughlan the substantive relief she sought, ordering the health authority not to close down Mardon House. In so doing, the Court of Appeal identified three possible reliefs which may be granted when a claimant has a legitimate expectation. The court may (*Coughlan* at [57]):

> (a) require the public authority "to bear in mind its previous policy or other representation, giving it the weight it thinks right";
>
> (b) require the public authority to consult and/or hear the affected parties before making its decision; or
>
> (c) give effect to the substance of the legitimate expectation where "to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power"; here, "the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."

38 In justifying the expansion of the court's judicial review powers to encompass the third limb above, Lord Woolf MR (delivering the judgment of the court) held that the court was not merely concerned with the fairness of the decision-making *process*, but also with the fairness of the *outcome* (*Coughlan* at [71]). In this regard, Lord Woolf criticised the limitations of review that was confined to the process by which public bodies came to their decisions for "exclud[ing] from consideration another aspect of the decision which is equally the concern of the law" (*Coughlan* at [65]), this aspect being the question of fairness to the person affected by the decision. In short, the English Court of Appeal established that in the context of legitimate

Version No 1: 27 Oct 2020 (22:39 hrs)

expectations, where a public authority's decision was *substantively unfair* such that it amounted to an *abuse of power*, it may be *unlawful* (*Coughlan* at [67] and [70]).

39 Since *Coughlan*, the doctrine of substantive legitimate expectations has been firmly established as a part of English law. We turn to consider the position in Singapore. Until the High Court decision in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 ("*Chiu Teng*"), the Singapore courts had not definitively pronounced on the issue of whether the doctrine of substantive legitimate expectations was part of Singapore law (*Chiu Teng* at [101] and [105]). In *Chiu Teng*, the applicant invoked the doctrine of substantive legitimate expectations in an attempt to compel the Singapore Land Authority ("SLA") to act in accordance with its purported representations about how it would calculate the differential premium payable for state leases. The applicant argued that the SLA should not be permitted to act in a manner contrary to the legitimate expectations that had allegedly been induced by its actions or representations. In *Chiu Teng* at [119], the High Court held that "the doctrine of legitimate expectation should be recognised in our law as a stand-alone head of judicial review and substantive relief should be granted under the doctrine subject to certain safeguards". The safeguards were stated to be as follows (at [119]):

> (a) The applicant must prove that the statement or representation made by the public authority was unequivocal and unqualified;
>
> > (i) if the statement or representation is open to more than one natural interpretation, the interpretation applied by the public authority will be adopted; and
> >
> > (ii) the presence of a disclaimer or non-reliance clause would cause the statement or representation to be qualified.

Version No 1: 27 Oct 2020 (22:39 hrs)

> (b) The applicant must prove the statement or representation was made by someone with actual or ostensible authority to do so on behalf of the public authority.
>
> (c) The applicant must prove that the statement or representation was made to him or to a class of persons to which he clearly belongs.
>
> (d) The applicant must prove that it was reasonable for him to rely on the statement or representation in the circumstances of his case:
>
> > (i) if the applicant knew that the statement or representation was made in error and chose to capitalise on the error, he will not be entitled to any relief;
> >
> > (ii) similarly, if he suspected that the statement or representation was made in error and chose not to seek clarification when he could have done so, he will not be entitled to any relief;
> >
> > (iii) if there is reason and opportunity to make enquiries and the applicant did not, he will not be entitled to any relief.
>
> (e) The applicant must prove that he did rely on the statement or representation and that he suffered a detriment as a result.
>
> (f) Even if all the above requirements are met, the court should nevertheless not grant relief if:
>
> > (i) giving effect to the statement or representation will result in a breach of the law or the State's international obligations;
> >
> > (ii) giving effect to the statement or representation will infringe the accrued rights of some member of the public;
> >
> > (iii) the public authority can show an overriding national or public interest which justifies the frustration of the applicant's expectation.

40 The High Court held that the upholding of legitimate expectations is "eminently within the powers of the judiciary" (at [113]), and explained the normative reasons for accepting the doctrine of substantive legitimate expectations in Singapore in the following terms (at [112]):

Version No 1: 27 Oct 2020 (22:39 hrs)

> If private individuals are expected to fulfil what they have promised, why should a public authority be permitted to renege on its promises or ignore representations made by it? If an individual or a corporation makes plans in reliance on existing publicised representations made by a public authority, there appears no reason in principle why such reliance should not be protected.

Since the decision in *Chiu Teng*, this issue has not been considered by the Singapore courts. In particular it has not been the subject of any pronouncement of this court.

41 Against that backdrop, we turn to consider the possible applicability of the doctrine of substantive legitimate expectations to the present facts. It is important to emphasise that we do so assuming, *but without deciding,* that the doctrine is a part of Singapore law. As we have noted, the doctrine was accepted as such by the High Court in *Chiu Teng* and as we made clear at the time we dismissed the present appeal, we neither affirm nor overrule *Chiu Teng* because it is not necessary for us to decide this. But as articulated in *Chiu Teng*, the doctrine of substantive legitimate expectations seeks, in essence, to bind public authorities to representations, whether made by way of an express undertaking or by way of past practice or policy, about how these authorities will exercise their powers or otherwise act in the future, in circumstances where a representation has been made by the authority in question and relied on by the plaintiff to his detriment. As Lord Woolf put it in *Coughlan* (at [56]), the question concerns the response of the court when confronted with a member of the public who has a legitimate expectation as to how he will be treated by a public body and that body wishes to treat him otherwise than in accordance with that expectation. Similarly, in C F Forsyth, 'The Provenance and Protection of Legitimate Expectations' (1988) 47(2) CLJ 238 at 239, the learned author explained that "[t]he judicial motivation for seeking to protect [legitimate] expectations is plain: if the executive

Version No 1: 27 Oct 2020 (22:39 hrs)

undertakes, expressly or by past practice, *to behave in a particular way* the subject expects that undertaking to be complied with" [emphasis added].

42 The first thing that may be noted from this is that the doctrine is concerned with regulating the exercise of executive powers in the administration of executive actions or policies in circumstances where this adversely affects the plaintiff. The short point here is that the doctrine is invoked in circumstances where there is a contest between a public authority and an individual. The doctrine has no application whatsoever where the contest, in substance, is only between two individuals. Yet, this in fact is the case here.

43 The real contest in the present case is between the interests of the Injured Employee and the appellant. The Commissioner had found herself caught in the middle because she was faced with what she thought was a claim under the WICA made on behalf of the Injured Employee. But that is as far as it went. This was neither a case about regulating a public authority in the carriage of its functions, nor was it a case where the Commissioner had made a representation as to how she intended to conduct herself in relation to the exercise of her powers.

44 This becomes clear from the following facts in particular:

(a) The real question in this case was whether a claim had validly been made under WICA on behalf of the Injured Employee. If so, he would be precluded from pursuing his common law claim against the appellant. Consistent with this, the appellant had sought to strike off the action that had been commenced on behalf of the Injured Employee in pursuit of his rights at common law: see [15] above.

Version No 1: 27 Oct 2020 (22:39 hrs)

(b) That issue ultimately had nothing to do with the Commissioner. She certainly had no direct interest in the matter. She did have to make an assessment in respect of the Disputed Claim. If she was wrong in that initial assessment, certain consequences would flow from that. But the question, whether a valid and irrevocable election had been made on behalf of the Injured Employee, could have been resolved entirely without the involvement of the Commissioner.

(c) Although the present proceedings took the *form* of judicial review proceedings, this was probably an unnecessary expansion of the dispute between the parties who were in fact directly interested, namely, the appellant and the Injured Employee.

(d) The fact that both sides commenced judicial review proceedings seeking to overturn the decisions of the Commissioner demonstrates that in truth, this was nothing more than a dispute between the Injured Employee and the appellant, each seeking to uphold one position or the other of the Commissioner on the question of whether the Disputed Claim was valid.

45 This case stands in sharp contrast to the situation in *Chiu Teng*, where, as explained at [39] above, the applicant invoked the doctrine of substantive legitimate expectations to compel the Singapore Land Authority ("SLA") to act in accordance with its purported representations about how it would calculate the differential premium payable for state leases. The claim failed because, among other things, the court found that the applicant's reliance on the SLA's representations was not reasonable (*Chiu Teng* at [129]). Nevertheless, the facts of *Chiu Teng* illustrate how far removed the present case is from any possible application of the doctrine of substantive legitimate

Version No 1: 27 Oct 2020 (22:39 hrs)

expectations. The cases where the doctrine has been applied are those where the applicant seeks to hold the public authority to a representation it has made as to how *it intended to act*.

46 We add that it was not evident at all what *actionable* representation the Commissioner had made. Reference was made essentially to the Notice of Assessment issued on 14 June 2010 which stated that the "[Disputed Claim] is found valid" (see [6] above). The appellant also relied on the fact that the Commissioner had accepted the payment it made of the sum of $225,000 pursuant to the Notice of Assessment. The cumulative effect of these acts, the appellant argued, was that a representation had been made that (a) the Disputed Claim was valid, and (b) in satisfying the Notice of Assessment, the appellant had fully discharged its liability to the Injured Employee for the accident. With respect, this was a misconceived submission.

47 We begin by considering the nature and content of the alleged representation. In our judgment, this was nothing more than the Commissioner's intimation as to how she had assessed the status of the Disputed Claim and how she then assessed the quantum of the claim. These assessments might well have been within the scope of the duties which the Commissioner had to carry out; but this was not an undertaking as to what the Commissioner would or would not do. There was nothing prospective about the Commissioner's assessment in the sense of it being a representation as to how she would in the future perform her duties or apply her policies, to which she could be bound. To term this a representation for the purposes of the substantive legitimate expectations doctrine is to wholly miss the point of the doctrine. This was nothing more than a conveyance of a decision made by the Commissioner. It bears recalling that the Commissioner has no power to compel an injured worker to resort to the WICA process. Nor was her

Version No 1: 27 Oct 2020 (22:39 hrs)

assessment of the legal status of the Disputed Claim constitutive or determinative of the validity of such a claim. There was nothing the Commissioner could do to bind the position of the Injured Employee. That depended entirely on the legal characterisation of the actions of his brother, Mr Rodney Tan, when he purported to act for him.

48 As we observed in putting our questions to Mr Anparasan, as well as in our brief oral judgment, the Commissioner could be wrong in her assessment of claims brought under the WICA. In the usual case where an aggrieved party considers that an assessment has been wrongly made, it seeks the appropriate relief from the court. But there is no basis whatsoever to suggest that it was possible to hold the Commissioner as well as *all affected third parties* bound by any assessment the Commissioner might make when the relevant legal determination of whether a valid claim had been made was ultimately one for the court to make. Any other view would lead to the startling conclusion that the appellant would be entitled to insist upon the Commissioner standing by her incorrect decision even though the mistaken decision would adversely affect the legal rights and position of the Injured Employee.

49 In these circumstances, it was plain to us that there was no representation to which the Commissioner could be held, or be compelled to act in accordance with, under the doctrine of substantive legitimate expectations.

50 As to the Commissioner having accepted the payment, we reiterate that the Commissioner was not an interested party and any payment her office received was merely as custodian for the Injured Employee.

Version No 1: 27 Oct 2020 (22:39 hrs)

51 In addition, aside from our finding that there was no representation here to speak of, we also examined this from the perspective of considering the consequences of the appellant's contentions. The effect of our finding on the capacity (or lack thereof) of Mr Rodney Tan to act on behalf of his brother was that any assessment made by the Commissioner was *void* in law. It was impossible to see how the doctrine of substantive legitimate expectations, if it applied at all, could then possibly have the effect of making valid that which was void. Nor could we see how it could be said that the Injured Employee's rights could somehow be compromised when, as we have held, nothing had been validly done on his behalf as a matter of fact and of law.

52 Finally, we also note that the relief sought in OS 918/2014, even if it were granted, would not have gone far enough for the appellant's purposes. As stated at [14] above, in OS 918/2014, the appellant sought to quash the *Commissioner's decision* that the Notice of Assessment was "a nullity and that it was issued in error". This would be insufficient for the appellant because it does not follow, even assuming we were to grant this relief sought by the appellant, that the *Notice of Assessment* would thereby automatically be revived and deemed valid in law. Indeed, we could not see how we could possibly order the Commissioner to stand by an assessment which we have found to be void at law.

53 In the course of arguments, Mr Anparasan made much of the alleged prejudice he said the appellant would face from having to defend the common law claim after having "closed its books". In our judgment, that was not prejudice that the law should take cognisance of. The effect of our decision was only that the Injured Employee would be free to pursue his rights at common law. Indeed, the Injured Employee might conceivably fail in his claim at common law and this illustrates why there might, in the end, be no

Version No 1: 27 Oct 2020 (22:39 hrs)

prejudice to the appellant at all. In keeping with this, the Commissioner has undertaken to refund the appellant the $225,000 it had paid pursuant to the Notice of Assessment with interest. In our view, therefore, the appellant has suffered no prejudice.

54 For these reasons, we found that the doctrine of substantive legitimate expectations, even if it was a part of Singapore law, could not assist the appellant in this case.

55 There remained the threshold question of whether the doctrine of substantive legitimate expectations is or should be accepted as part of our law. The *raison d'être* of judicial review is that all powers have *legal* limits, and that there must be "recourse to determine whether, how, and in what circumstances those limits [have] been exceeded": *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 ("*Tan Seet Eng*") at [1]. Indeed, the specific responsibility of pronouncing on the legality of government actions, and hence ensuring legal accountability, falls on the Judiciary: *Tan Seet Eng* at [90] and [97].

56 Traditionally, the scope of the court's intervention has been thought of as a limited one: *Re Dow Jones Publishing (Asia) Inc's Application* [1988] 1 SLR(R) 418 ("*Re Dow Jones Publishing*") at [20]. Two important distinctions have played a role in explaining the court's limited role in judicial review. First, the distinction between a ***review*** and an ***appeal*** is important. It has been emphasised that the role of the court in judicial review is not the same as the role of an appellate court: *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223, cited with approval in *Kang Ngah Wei v Commander of Traffic Police* [2002] 1 SLR(R) 14 at [16]; *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board and*

Version No 1: 27 Oct 2020 (22:39 hrs)

another [1997] 1 SLR(R) 52 at [78(b)]. Second, and inextricably linked to the first distinction, is the distinction between a review of the decision-making ***process***, as opposed to of the ***merits*** of the decision. In judicial review, the supervisory jurisdiction of the court has traditionally been thought to be confined to "the review of the decision-making process, but not to review the decision itself": *Re Dow Jones Publishing* at [20]. Put another way, the "court's role in judicial review... engages the *manner* in which the power is exercised" [emphasis added]: *Tan Seet Eng* at [99].

57 Flowing from this understanding of the court's role in judicial review, the established grounds for judicial review are "illegality, irrationality or procedural impropriety": *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 ("*Chng Suan* Tze") at [119]. This court, in *Tan Seet Eng* at [63] and [99], has recently re-affirmed that the court's role in judicial review should be *limited* to the "usual ambit of judicial review", namely, "illegality, irrationality and procedural impropriety", and that these three heads of review define the test for the *lawfulness* of an exercise of administrative discretion.

58 At least three justificatory principles for this traditional account of judicial review may be identified:

(a) First, under the constitutional doctrine of separation of powers, the court's limited role in judicial review is "premised on a proper understanding of the role of the respective branches of government – especially, in this context, the Executive and the Judiciary – in a democracy where the Constitution reigns supreme": *Tan Seet Eng* at [99]. In short, the judiciary's task is limited to reviewing the *legality* of administrative action.

Version No 1: 27 Oct 2020 (22:39 hrs)

(b) Second, and related to that, is the need to uphold *Parliament's intention* (as expressed in statute) to vest certain powers in the *Executive*: *Tan Seet Eng* at [64] and [99].

(c) Finally, there is also the pragmatic concern about *institutional competence*. In *Tan Seet Eng* at [93], we recognised that "courts and judges are not the best-equipped to scrutinise decisions which are laden with issues of policy or security or which call for polycentric political considerations. Courts and judges are concerned rather with justice and legality in the particular cases that come before them."

59 In our judgment, the acceptance of the doctrine of substantive legitimate expectations as a part of our law would represent a significant departure from our current understanding of the scope and limits of judicial review (as described above). Such a development would potentially change the understanding of the role of the courts in undertaking judicial review of administrative or executive actions, and could cause us to redefine our approach to the doctrine of separation of powers and the relative roles of the judicial and the executive branches of Government. As such, we prefer to defer such a question to an occasion when it is *essential* for us to decide it. Only then, would attention be focused on the possible difficulties that inhere in recognising the doctrine. In our judgment, it was not appropriate to determine such an important issue when it did not arise on the facts and indeed should never have been raised.

60 We also observe that the difficulties inherent in accepting the doctrine of legitimate expectations in Singapore should not be underestimated. While some common law jurisdictions, including the United Kingdom and Hong Kong, have accepted the doctrine, others, such as Australia and Canada, have

Version No 1: 27 Oct 2020 (22:39 hrs)

rejected it. Its applicability in Singapore will raise many nuanced questions that remain to be determined should the appropriate case come before us.

61 Some of these issues include the following:

(a) Would the doctrine of substantive legitimate expectations require the courts to review the substantive *merits* of executive action as opposed to questions of process and of legality and jurisdiction?

(b) If so, can this be reconciled with the doctrine of separation of powers where the judiciary would be engaging in reviewing the merits of a given executive action?

(c) Is it properly within the province of the courts to hold a public authority bound to a position, even when that authority has decided that it wished to change its policy stance on a matter that is *within* the realm of its constitutional domain?

62 It seemed to us that if the doctrine of substantive legitimate expectations were to result in *additional protection* being granted to the public in relation to public authorities, it must entail a more searching scrutiny of executive action, beyond what is currently contemplated under the framework of irrationality, illegality and procedural impropriety (see [57] above). In *Coughlan* at [83], the English Court of Appeal held that the court's role in cases where the doctrine of substantive legitimate expectations is invoked is to decide whether the *public interests* invoked by the public authority outweigh the applicant's *private interests* in having her substantive legitimate expectations protected. This suggests a binary process where the court assesses which is the weightier concern. But to extend the court's role in this manner could, as we have already noted, raise questions regarding the

Version No 1: 27 Oct 2020 (22:39 hrs)

separation of powers, and the institutional competence of the court to decide on issues that may often involve considerations of a polycentric nature, affecting third parties who may be direct or indirect beneficiaries of the public authority's intended change of stance. We would further observe that while much of the appellant's and the *amicus curiae's* submissions were focused on highlighting the many compelling reasons for protecting legitimate expectations, the countervailing public interest concerns that are bound to arise would generally be of equal importance. Thus, in our view, the crux of the issue is not likely to be whether there are sound reasons for protecting legitimate expectations, but rather, *which body should decide* whether the particular expectation in question is to prevail over the countervailing interests that may be at stake; specifically, should that balancing exercise be a matter for the court or the Executive? This is likely to be one of the central issues that would have to be considered should the question of substantive legitimate expectations come before us again.

63 Finally, we note that there is a range of possible measures between recognising a judicial power to enforce substantive legitimate expectations at one end, and holding that a public authority may *entirely* disregard a clear representation it has made even if there has been reasonable and detrimental reliance, at the other end. In between those points, the public authority could, for instance, be required to confirm that it has considered its representation in coming to its conclusion that the public interest justifies defeating any legitimate expectation; or it could be required to give reasons for its assessment that this is so, which could then be assessed within the traditional framework of illegality, irrationality and procedural impropriety. We mention these as possibilities to demonstrate that the resolution of the issues that may arise in this context need not call only for a binary approach between a merits

Version No 1: 27 Oct 2020 (22:39 hrs)

review and no review. These are all possibilities that will have to be examined and weighed if and when it is necessary for us to decide this issue.

Conclusion

64 We accordingly dismissed Civil Appeal No 89 of 2015. We held that the Disputed Claim was invalid, and hence that the Notice of Assessment was void. The Injured Employee's right to pursue his common law claim in S 851/2013 was therefore unaffected by the WICA. We also awarded costs of $25,000 inclusive of disbursements to the respondent, leaving the question of costs below for the High Court to decide.

Sundaresh Menon Chief Justice	Chao Hick Tin Judge of Appeal	Andrew Phang Judge of Appeal

Anparasan s/o Kamachi, Grace Tan Hui Ying and Audrey Wong (KhattarWong LLP) for the appellant;
Kwek Mean Luck, V Jesudevan, Nicholas Lim Kah Hwee, Koo Zhi Xuan and Seah Ee Wei (Attorney General's Chambers) for the respondent;
Patrick Ang (Rajah & Tann LLP) as *amicus curiae*.

Version No 1: 27 Oct 2020 (22:39 hrs)