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# Court rules on whether arbitration award can be partially set aside and whether objection to arbitrator's appointment was afterthought

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TASHA LIM YI  
CHIEN



KEVIN LEE  
MING KAI

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## Introduction

In *Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan*, the Court of Appeal<sup>(1)</sup> decided on two important issues that impact the arbitration scene in Malaysia. The issues before the Court of Appeal were:

- whether the High Court judge had erred in coming to its decisions in setting aside the whole arbitration award pursuant to section 37(1) of the Arbitration Act 2005 (AA) upon deeming that section 37(3) of the AA was not applicable; and
- whether the arbitrator had indeed breached public policy by not making a full and timely disclosure of his relationship with the witness.

## Facts

Persatuan Kanak-Kanak Spastik Selangor dan Wilayah Persekutuan (the association) appointed Mr Low Koh Hwa of Low Kok Hwa (Low), a registered architect who practises as a sole proprietor, to provide architectural consultancy services for the redevelopment of a building of the association in Petaling Jaya, Selangor.

Low claimed that he had completed the services but that the association had failed to pay his fee of 485,269.33 Malaysian ringgit . Low's claim against the association was referred to arbitration before a sole arbitrator, Mr Akbal Singh Sandhu (the arbitrator).

On 12 February 2020, the arbitrator announced his final arbitration award, which favoured the association. The award, among other things, found that:

- Low was only entitled to claim a sum of 747,250 Malaysian ringgit for his services;
- Low was estopped from claiming any professional fees in excess of the 747,250 Malaysian ringgit; and
- the association had overpaid a sum of 72,750 Malaysian ringgit to Low, which he had to refund.

## High Court

Following this award, Low filed an action in the High Court to set aside the award pursuant to section 37(1) of the AA.

The Court allowed the application and set aside the whole award. Among other things, the Court found the following.

- The award for "overpayment" and "interest on overpayment" was not within the parties' submission to arbitration and, therefore, had breached section 37(1)(a)(iv) of the AA, as the award dealt with a dispute not contemplated by the parties.
- Section 37(3) of the AA, which stipulates that part of the award which contains decisions on matters not within parties' submission may be set aside, was found to be inapplicable as the award for overpayment was inseverable from the rest of the award.
- The arbitrator had failed to make full and timely disclosure of his relationship with the association's witness before the commencement of the arbitration proceeding.

Aggrieved by the decision of the High Court, the association appealed to the Court of Appeal.

## Court of Appeal

The following issues were presented for determination before the Court of Appeal:

- whether the High Court judge had erred in not applying or invoking section 37(3) of the AA and setting aside the whole award instead;
- whether the High Court judge had erred in finding that the arbitrator had breached "public policy" due to the non-disclosure of his circumstances pursuant to section 14 of the AA; and
- whether Low was estopped from raising an objection relating to the appointment of the arbitrator.

## Issue one

The Court of Appeal concluded that the High Court judge had erred in setting aside the whole award by wrongly invoking section 37(1)(a)

(iv) of the AA as the basis to set aside the award wholly, without applying section 37(3) of the AA instead.

The Court held that the award for overpayment was patently clear and distinct. Therefore, it could easily be severed from the rest of the award.

The Court of Appeal found that section 37(3) of the AA was clearly applicable and ought to have been invoked by the High Court judge. Section 37(3) gives the court the discretion to set aside only the part of the award that is not within the parties' submission while maintaining the rest of the award.

### ***Issues two and three***

The Court observed that the disclosure by the arbitrator of his relationship with the witness was more than sufficient to trigger concerns of impartiality on the part of the arbitrator. Low had 15 days from the date of the disclosure to raise a complaint and challenge the appointment of the arbitrator pursuant to section 15 of the AA.

The Court of Appeal concluded that the High Court judge had erred in invoking section 14 of the AA as there were no exceptional circumstances to warrant him setting aside the whole award.

As Low failed to object promptly to the continued appointment of the arbitrator, even after being made aware of the arbitrator's relationship with the witness, after which he should have exercised his rights pursuant to section 14(3)(a) of the AA, the Court found that this showed that Low had full faith in the arbitrator's independence and impartiality.

The Court observed that Low's challenge to the appointment of the arbitrator in a subsequent application and after the release of the award was clearly an afterthought and an attempt to circumvent the provision of section 15(1) of the AA, which appeared to be an abuse of process of court.

### **Comment**

Section 37(3) of the AA allowed the Court to set aside part of an arbitration award that was not within the parties' submission, while maintaining the other parts of the award or order made within the contemplation of the parties. The purpose of section 37(3) is to prevent injustice to the parties where the enforcement of the award or order would not be rendered academic as the award or order can be severable from the rest of the other awards.

Further, when circumstances give rise to justifiable doubts as to the arbitrator's independence or impartiality, the affected party should promptly challenge the appointment. An objection made in a subsequent application, especially when the decision was not made in favour of the affected party, suggests that it is afterthought and an abuse of court process.

*For further information on this topic please contact Tasha Lim Yi Chien or Kevin Lee Ming Kai at Gan Partnership by telephone (+603 7931 7060) or email (tasha@ganlaw.my or mingkai@ganlaw.my). The Gan Partnership website can be accessed at [www.ganlaw.my](http://www.ganlaw.my).*

### **Endnotes**

(1) *Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan v Low Koh Hwa @ Low Kok Hua* [2022] 1 LNS 2693.