

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 261

Originating Summons No 258 of 2018
(Summons No 1455 of 2018)

In the matter of Section 27 of the
Building and Construction Industry
Security of Payment Act (Cap. 30B)

And

In the matter of Order 95, Rule 2 of
the Rules of Court (Cap. 322, Rule 5)

And

In the matter of SOP AA406 of 2017

Between

Yau Lee Construction
(Singapore) Pte Ltd

... Applicant

And

Far East Square Pte Ltd

... Respondent

GROUND S OF DECISION

[Building and construction law] — [Dispute resolution]

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	2
THE DEVELOPER’S CASE	5
PC 75 OBJECTION	5
ADJUDICATION APPLICATION OBJECTION	6
WAIVER AND ESTOPPEL	7
ADDITIONAL PRELIMINARIES OBJECTION	8
THE CONTRACTOR’S CASE	9
PC 75 OBJECTION	9
ADJUDICATION APPLICATION OBJECTION	10
WAIVER AND ESTOPPEL	10
ADDITIONAL PRELIMINARIES OBJECTION	11
ISSUES	12
MY DECISION	12
ANALYSIS	13
WHETHER THE DEVELOPER WAS ESTOPPED FROM RAISING THE PC 75 OBJECTION	13
WHETHER THE ARCHITECT’S LETTER WAS A PAYMENT RESPONSE OR OTHER OBJECTION TO PC 75	15
WHETHER PC 75 WAS A PAYMENT CLAIM	18
WHETHER THE DEVELOPER WAS ESTOPPED FROM RAISING THE ADJUDICATION APPLICATION OBJECTION	20

WHETHER THE ADJUDICATOR WAS ENTITLED TO CONSIDER THE CONTRACTOR'S CLAIM FOR ADDITIONAL PRELIMINARIES	21
CONCLUSION.....	24

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.

**Yau Lee Construction (Singapore) Pte Ltd
v
Far East Square Pte Ltd**

[2018] SGHC 261

High Court — Originating Summons No 258 of 2018
(Summons No 1455 of 2018)
Lee Seiu Kin J
27 April, 9 July, 9 October 2018

27 November 2018

Lee Seiu Kin J:

Introduction

1 The respondent, Far East Square Pte Ltd, was the developer for a building and construction project (“the developer”) while the applicant, Yau Lee Construction (Singapore) Pte Ltd was the main contractor for the project (“the contractor”). Summons no 1455 of 2018 was an application by the developer to set aside: a) an adjudication determination dated 14 February 2018 (“the adjudication determination”); and b) an order of court dated 12 March 2018 for the enforcement of the said adjudication determination (“the order of court enforcing the adjudication determination”). The developer sought, in the alternative, a stay of enforcement of the adjudication determination pending the

disposal of the proceedings in a suit that it had commenced against the contractor.

Background

2 By a Letter of Award dated 29 November 2010 (“the LOA”), the developer engaged the contractor for the construction and completion of an integrated commercial and residential development at Yio Chu Kang/Seletar Road (“the Project”) for the sum of \$82.8m.¹ The LOA incorporated, with amendments, the Articles and Conditions of Building Contract (Measurement Contract) (Seventh Edition, April 2005) published by the Singapore Institute of Architects (“Articles of Contract” and “Conditions of Contract”; collectively, “the Contract”).² While the LOA was accepted and signed by the contractor on 29 November 2010,³ the parties only signed the formal contractual documents on 23 April 2013 and it was stated in the Articles of Contract that the Contract was made on 23 April 2013.⁴

3 Phases one and two of the works were completed by the contractor on 5 December 2011 and 6 May 2014 respectively.⁵

4 The maintenance period of the works commenced on 6 May 2014 and ended on 5 August 2015. Pursuant to cl 31(11) of the Conditions of Contract,

¹ First affidavit of Belinda Abeyegoonasekera dated 27 March 2018 (“Affidavit of BA”), Tab 2.

² Affidavit of BA, at para 7.

³ Affidavit of BA, Tab 2 at p 95.

⁴ Affidavit of BA, Tab 3 at p 114.

⁵ Affidavit of BA, at para 10.

the contractor was required to submit a final claim to the architect of the Project (“the architect”) before the end of the maintenance period.⁶ However, after the expiry of the maintenance period on 5 August 2015, the contractor submitted 18 payment claims (payment claims number 55 to 72) between 16 November 2015 to 23 July 2017,⁷ and the architect issued interim certificates in respect of these claims which were deemed to be the developer’s payment responses under cl 31(3)(c) of the Conditions of Contract.⁸ Thereafter, the contractor submitted payment claim number 73 (“PC 73”) on 23 August 2017.⁹

5 On 5 September 2017, the architect issued a letter, described as a final certificate, certifying the final balance payable in the sum of \$1,545,776.20.¹⁰

6 Thereafter, on 12 September 2017, the developer issued a payment response which was entitled “Payment Response Reference Number 73 (Final)”.¹¹

7 On 24 October 2017, the contractor submitted payment claim number 74 (“PC 74”). The developer did not issue a payment response to PC 74. The architect informed the contractor on 7 November 2017 that as cl 31(11) of the Conditions of Contract stipulated that the final claim shall be submitted before

⁶ Affidavit of BA at paras 10–11; Tab 3 at p 148.

⁷ Second affidavit of Wong Ming Tak dated 11 April 2018 (“Affidavit of WMT”) at Tab 2.

⁸ Affidavit of WMT at paras 19.1–19.2; Affidavit of BA, Tab 3 at p 192.

⁹ Affidavit of BA at para 16.

¹⁰ Affidavit of BA at para 18.

¹¹ Affidavit of BA at para 19.

the end of the maintenance period and the contractor had failed to do so, he had proceeded to issue the final certificate in accordance with cl 31(12)(a) of the Conditions of Contract.¹²

8 On 24 November 2017, the contractor submitted payment claim number 75 (“PC 75”), which was in essence a repeat of PC 73 in terms of the heads of claim therein. The only difference was that in PC 75, the contractor had reduced its claim for additional preliminaries, prime cost sum and direct contracts, and factored in further payments made by the developer.¹³ The architect issued another letter on 24 November 2017 repeating that no further progress payments shall be issued following the issuance of the final certificate on 5 September 2017.¹⁴

9 The contractor lodged an adjudication application in relation to PC 75 on 27 December 2017,¹⁵ and on 14 February 2018 the adjudicator issued the adjudication determination, finding the developer liable to pay the contractor the sum of \$2,276,284.68.¹⁶

10 In these proceedings, the developer sought to set aside the adjudication determination on the following three main grounds:

¹² Affidavit of BA at paras 21–22.

¹³ Contractor’s written submissions at para 34.

¹⁴ Affidavit of BA at paras 23–24.

¹⁵ Affidavit of BA at Tab 15, p 462.

¹⁶ Affidavit of BA at Tab 1, p 34 at para 3.1

(a) The adjudicator lacked jurisdiction as PC 75 did not fall within the purview of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“the SOPA”). This is because PC 75 was invalid as the contractor was not entitled to submit further payment claims after the final payment claim and/or final certificate had been issued. I shall refer to this objection as the “PC 75 objection”.

(b) The adjudication application was lodged by the contractor outside of the applicable timelines, either prematurely if the contractual timelines were applicable, or out of time if the statutory timelines were applicable. I shall refer to this objection as the “adjudication application objection”.

(c) The adjudicator exceeded his jurisdiction by assessing the contractor’s claim for additional preliminaries. I shall refer to this objection as the “additional preliminaries objection”.

The developer’s case

PC 75 objection

11 The developer submitted that, at the time of submission of PC 75, the contractor was not entitled to submit any payment claim under the Contract. Therefore the adjudication did not concern a payment claim under s 10(1) of the SOPA and the adjudication determination was not enforceable under that Act.¹⁷

¹⁷ Developer’s written submissions dated 25 April 2018 (“Developer’s written submissions”) at paras 26–42.

12 The developer’s case was that PC 75 was invalid because the Contract did not allow the submission of further payment claims after the final payment claim and/or final certificate had been issued. By the time PC 75 was submitted by the contractor, the final certificate had already been issued in accordance with the terms of the Conditions of Contract.¹⁸ In addition, PC 73 was to be regarded as the final payment claim.¹⁹ In this regard, the developer relied on the *obiter dicta* remarks of the court in *Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd* [2015] 4 SLR 615 (“*Lau Fook Hoong*”) which it said supported its arguments.

Adjudication application objection

13 The developer also submitted, in the event that PC 75 is valid under the SOPA, that the adjudication application was lodged outside of the applicable timelines.

14 Pursuant to s 10(2)(b) of the SOPA, the applicable timelines were those stipulated under the SOPA and not under the Contract as there was no provision in the Contract that dealt with the situation where a payment claim was submitted by the contractor after the final claim and/or final certificate had been issued. Based on the timeline prescribed under s 13(3)(a) of the SOPA, the contractor had lodged its adjudication application late.²⁰

¹⁸ Developers’ written submissions at paras 52–58.

¹⁹ Developers’ written submissions at paras 59–63.

²⁰ Developer’s written submissions at para 118.

15 In the alternative, the developer argued that if the contractual timelines were applicable as opposed to the statutory timelines, the adjudication application was lodged prematurely. It disagreed with the adjudicator’s finding that the date of contract was the date stipulated in the Articles of Contract (*ie*, 23 April 2013) and submitted that the date of Contract was instead the date on which the LOA was signed (*ie*, 29 November 2010).²¹ Taking the date of the Contract to be 29 November 2010, the contractor had lodged its adjudication application prematurely.²²

Waiver and estoppel

16 The developer submitted that although it had not issued a payment response to PC 75, it was not precluded from raising arguments concerning the adjudicator’s jurisdiction in these proceedings. It argued that the requirement in *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 (“*Audi Construction*”) for a respondent to raise jurisdictional objections in a payment response or otherwise be regarded as having waived its right to object was inapplicable in the present case.²³

17 In the alternative, the developer submitted that it had raised its objections pertaining to the validity of PC 75 timeously, through the letter sent by the architect to the contractor on the very same date on which PC 75 was submitted by the contractor, *ie*, 24 November 2017.²⁴

²¹ Developer’s written submissions at paras 120–121.

²² Developer’s written submissions at para 140.

²³ Developer’s written submissions at para 73.

²⁴ Developer’s written submissions at paras 98–109.

18 At the hearing before me, the developer also submitted that even if it was precluded from raising the PC 75 objection due to its failure to file a payment response, it was not precluded from raising the adjudication application objection. The developer could only raise objections concerning the timing of the lodgement of the adjudication application in its adjudication response and not any earlier because the adjudication application would post-date the time for the submission of the payment response. Therefore, it could not anticipate and object to any errors made in the adjudication application by the contractor at the payment response stage. In this case, the developer had raised the adjudication application objection at the earliest opportunity, in its adjudication response.

Additional preliminaries objection

19 The developer submitted that the adjudicator erred in allowing the contractor's claim for additional preliminaries since he had no jurisdiction to consider such a claim.

20 It was argued that the Contract allowed additional preliminaries to be claimed for prolongation arising from variations but not prolongation arising from other delaying events such as delays by the architect/developer.²⁵ The contractor's claim was the latter. Prolongation claims arising from other delaying events cannot be determined by way of adjudication since such a claim is based on breach of contract and is not a claim for construction work done which is required for the adjudication regime to be engaged.²⁶ Such a claim,

²⁵ Developer's written submissions at paras 145–148.

²⁶ Developer's written submissions at paras 151–156.

being complex in nature, should be determined by a court where evidence and disputed facts can be better ventilated, rather than in adjudication proceedings.²⁷

21 Given that the adjudicator had acted in excess of his jurisdiction in determining the prolongation claims, the adjudication award should be severed and the portion relating to the prolongation claims amounting to \$926,355.50 should be set aside.²⁸

The contractor's case

PC 75 objection

22 The contractor submitted that it was entitled to submit further payment claims after the issuance of the final certificate and hence PC 75 was valid. Correspondingly, the adjudicator had the jurisdiction to hear the claim.²⁹

23 First, PC 73 was not the final payment claim, contrary to the submissions of the developer. Even after the expiry of the maintenance period on 5 August 2015, the contractor had continued to submit payment claims and the architect had continued to issue interim certificates in response to these claims, which were deemed to be the developer's payment responses under the Conditions of Contract.³⁰ This amounted to a waiver by the developer of the requirement under cl 31(11) of the Conditions of Contract for a final payment claim to be submitted before the end of the maintenance period.³¹ In the

²⁷ Developer's written submissions at para 157–168.

²⁸ Developer's written submissions at para 169–173.

²⁹ Contractor's written submissions at para 29.

³⁰ Contractor's written submissions at para 30.2.

circumstances, the developer was not entitled to unilaterally treat PC 73 as the final payment claim.³²

24 Second, it was argued that there were no express exclusions in the Contract which prevented the contractor from submitting further payment claims after the final certificate had been issued.³³

25 Third, pursuant to s 10(4) of the SOPA, the contractor was entitled to submit a fresh payment claim for a sum included in a prior payment claim that had not yet been adjudicated upon. This was precisely the nature of PC 75, in that it was a repeat of PC 73 in terms of the heads of claim.³⁴

Adjudication application objection

26 The contractor argued that by virtue of s 10(2)(a) of the SOPA, the contractually stipulated timelines were applicable rather than the default statutory timelines. There was no reason why the contractual timelines should cease to apply in relation to a claim submitted after the issuance of the final certificate.³⁵ Hence, the adjudication application was lodged at the appropriate time pursuant to the contractual terms.

³¹ Contractor's written submissions at para 30.3.

³² Contractor's written submissions at para 30.4.

³³ Contractor's written submissions at para 31.

³⁴ Contractor's written submissions at paras 34–37.

³⁵ Contractor's written submissions at paras 40–51.

27 As for the developer's contention that the adjudication application was lodged prematurely if the contractual timelines were applicable, the contractor countered that the contract date was that which was expressly stated in the Articles of Contract (*ie*, 23 April 2013) rather than the date the LOA was signed (*ie*, 29 November 2010). On this basis, the adjudication application was not lodged prematurely.³⁶

Waiver and estoppel

28 The contractor submitted that the developer was estopped from raising the PC 75 objection in these proceedings. It relied primarily on the case of *Audi Construction* to argue that the developer's failure to file a payment response to PC 75 constituted an unequivocal representation that it would not raise any objections to PC 75, and that the developer was therefore estopped from bringing such an objection before the adjudicator and the court.³⁷ In addition, the architect's letter of 24 November 2017 was not a valid objection to PC 75 on the part of the developer.³⁸

29 The developer was also estopped from raising the adjudication application objection. The developer's submission on the applicability of statutory timelines as opposed to contractual timelines was premised on PC 75 being an invalid payment claim under the Contract. Therefore, the developer's objection on the timing of the lodgement of the adjudication application was inextricably linked to its PC 75 objection. Since it had not raised the PC 75

³⁶ Contractor's written submissions at paras 59–61.

³⁷ Contractor's written submissions at paras 18–23.

³⁸ Contractor's written submissions at paras 26–27.

objection through a payment response, the developer could not raise objections on the timing of the adjudication application in these proceedings either.

Additional preliminaries objection

30 The contractor argued that the adjudicator was entitled to consider its claim for additional preliminaries.³⁹ Given that the adjudicator’s decision on the claim for additional preliminaries went towards the substance of the claim, the court should not delve into the merits of the adjudicator’s decision in the present application.⁴⁰

31 In any event, the adjudicator was correct in finding that cl 5(2) of the Conditions of Contract allowed the assessment of additional preliminaries for prolongation of the Contract in general, not just prolongation from variations. The contractor submitted in this regard that its claim for additional preliminaries was made pursuant to the mechanism provided for such claims under the Contract, and was not a general damages claim premised on breach of contract.⁴¹

Issues

32 The issues in this case were:

- (a) Was the developer estopped from raising the PC 75 objection? If no, was PC 75 an invalid payment claim?

³⁹ Contractor’s written submissions at para 72.

⁴⁰ Contractor’s written submissions at para 73.

⁴¹ Contractor’s written submissions at paras 75–79.

- (b) Was the developer estopped from raising the adjudication application objection? If no:
 - (i) What was the applicable timeline for the filing of the adjudication application by the contractor?
 - (ii) Was the applicable timeline adhered to by the contractor?
- (c) Was the adjudicator entitled to consider the contractor's claim for additional preliminaries?

My decision

33 I found that the developer was estopped from raising the PC 75 objection and the adjudication application objection due to its failure to file a payment response. I also found that the adjudicator had the jurisdiction to grant the additional preliminaries and that his decision on this was not reviewable. In the circumstances, I dismissed the developer's application for the setting aside of the adjudication determination.

Analysis

Whether the developer was estopped from raising the PC 75 objection

34 In *Audi Construction*, the Court of Appeal held that a respondent has a duty to speak and to raise its objections to the claimant's payment claim in its payment response. Should the objection not be raised in the payment response, the respondent would be taken to have waived its right to raise the objection and

would be estopped from raising such objection thereafter before the adjudicator and the court (see *Audi Construction* at [66]–[67]).

35 The developer argued that it was not precluded by the doctrines of estoppel or waiver from raising the PC 75 objection notwithstanding *Audi Construction*. In this regard, the developer submitted that a distinction should be drawn between payment claims that are invalid by virtue of non-compliance with the mandatory provisions of the SOPA (*eg*, where the payment claim is not served on the correct date) (“first category”) and payment claims that are invalid as they fall outside of the SOPA from the outset (*eg*, where the payment claim falls within a category excluded by the SOPA such as where it pertains to construction work outside of Singapore) (“second category”).⁴² A respondent who fails to file a payment response should be taken to have waived its right to raise a jurisdictional objection only if the objection fell within the first category. This is because the first category of invalidity can be rectified by a claimant through issuing a new payment claim, while the second category of invalidity cannot be so rectified.⁴³ According to the developer, as its PC 75 objection fell within the second category, it was not required to raise its objection in a payment response.

36 I was unable to accept the developer’s submissions in this regard. In *Audi Construction*, the Court of Appeal clearly stated that the duty to speak arises in relation to *any* jurisdictional objection to a payment claim. The

⁴² Developer’s written submissions at paras 73–74.

⁴³ Developer’s written submissions at paras 79–80.

developer's objection to PC 75, however classified, would fall within this broad scope where there is a duty to speak.

37 As the Court of Appeal explained in *Audi Construction*, the reason that there is a broad duty to raise jurisdictional objections early, in the payment response, is because s 15(3)(a) of the SOPA restricts the issues which can be raised before an adjudicator to issues stated in the payment response. The duty also arises on account of the general regime of expeditious dispute resolution underlying the SOPA. Section 15(3)(a) of the SOPA reads:

The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —

(a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; ...

38 In particular, the Court of Appeal stated in *Audi Construction*:

52. ... Of overriding importance to the scheme of the Act is the expeditious resolution of payment disputes, and there is no reason to allow respondents to withhold jurisdictional objections *of any nature* only to spring them on the claimant in court.

66. ... By that provision [*ie*, s 15(3)(a)], the Act restricts the issues which can be raised before an adjudicator to the issues stated in the payment response provided by the respondent to the claimant. It follows that if a respondent wants to raise a jurisdictional objection before the adjudicator, he must include that objection in the payment response. Reading s 15(3)(a) as requiring a respondent to raise *any* jurisdictional objection it has in its payment response is, again, entirely in line with the purpose of the Act, which need not be repeated (see [1], [49] and [52] above). Section 15(3)(a) and the general regime of expeditious dispute resolution being the relevant legal context

of this case, we have no hesitation in holding that a respondent has a duty to raise jurisdictional objections in his payment response.

[emphasis added]

39 Therefore, as the developer failed to file a payment response, it was estopped from raising any arguments on the invalidity of PC 75 and the corresponding lack of jurisdiction of the adjudicator in the adjudication and in the present proceedings.

Whether the architect's letter was a payment response or other objection to PC 75

40 The developer submitted in the alternative that it was not estopped from raising its jurisdictional objection because it had raised objections to PC 75 through the architect's letter dated 24 November 2017. The architect was acting as an agent of the developer in notifying the contractor that no further payment claims were to be submitted after the final certificate had been issued.⁴⁴ The developer argued that the architect's letter constituted a payment response.⁴⁵ In the alternative, if the architect's letter did not constitute a payment response, the developer argued that there was no reason why it could not raise jurisdictional objections through other means aside from a payment response, such as through correspondence between the parties.⁴⁶

41 The architect's letter read:⁴⁷

⁴⁴ Developer's written submissions at paras 106–108.

⁴⁵ Minute sheet dated 27 April 2018.

⁴⁶ Developer's written submissions at paras 98–105.

⁴⁷ Affidavit of BA, Tab 14 at p 454

We refer to your letter ref. YLCS/SGW/CM/PC/0075 dated 24 November 2017 on the above subject.

Please note that the Final Certificate has been issued via our letter ref. 2-ADDP/914/09K-171278 dated 5 September 2017.

Hence, there will be no further progress payment after the above-mentioned Final Certificate.

42 I found that the developer's duty to speak in relation to its objection to PC 75 was not discharged by the architect's letter of 24 November 2017. The architect's letter was not a payment response as it did not state the response amount and the reasons for the difference between that amount and the claim as required by s 11(3) of the SOPA. That provision states as follows:

(3) A payment response provided in relation to a construction contract –

...

(b) shall state the response amount (if any);

(c) shall state, where the response amount is less than the claimed amount, the reason for the difference and the reason for any amount withheld; and

(d) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

In relation to s 11(3)(d) of the SOPA, reg 6 of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) provides as follows:

6.—(1) Every payment response provided in relation to a construction contract shall —

...

(c) state “nil” where the respondent does not propose to pay any part of the claimed amount and the reasons therefor; and

(d) where the response amount is less than the claimed amount —

...

(ii) contain any amount that is being withheld, the reason for doing so and the calculations which show how the amount being withheld is derived.

43 The architect’s letter did not state that the response amount was “nil” and did not provide the reason for this. Although the letter alluded to a “Final Certificate” and “no further progress payment” after that, it is necessary for a respondent in a payment response to state its contractual position clearly in this kind of situation. In the circumstances, the architect’s letter of 24 November 2017 could not constitute a payment response under the SOPA.

44 I also rejected the developer’s alternative submission that it need not object to PC 75 through a payment response, but may object through correspondence. Section 15(3)(a) of the SOPA (see [37] above) restricts the issues which can be raised before an adjudicator to those stated in the payment response and thereby renders it necessary for the respondent to include its jurisdictional objection in its payment response in order to raise it before the adjudicator. It was thus insufficient for the developer to raise objections through correspondence between the parties.

Whether PC 75 was a payment claim

45 As the developer was estopped from objecting to the jurisdiction of the adjudicator on the basis of the purported invalidity of PC 75, I did not strictly speaking have to consider if PC 75 was an invalid claim.

46 In any event, I was of the view that PC 75 was a valid claim. Having continued to accept 18 interim payment claims subsequent to the end of the maintenance period,⁴⁸ the architect and the developer had in effect waived the requirement under cl 31(11) of the Conditions of Contract for the final payment claim to be submitted prior to the end of the maintenance period. The contractor, developer and architect were operating outside the scope of the Contract. In this regard, the developer and architect were not entitled to unilaterally treat PC 73 as the final payment claim, proceed to issue the final certificate, and prevent any further payment claims from being submitted thereafter by the contractor. To allow otherwise would result in injustice to the contractor who may have intended to include other heads of claim if the payment claim in question was to be treated as the final claim.

47 The facts in the present case were also distinguishable from that in *Lau Fook Hoong*, a case relied on by the developer. While the contractor in this case had expressly written to the architect and the developer to inform them that PC 73 should not be treated as its final payment claim,⁴⁹ the claimant in *Lau Fook Hoong* had in fact provided confirmation that the payment claim in question was its “final account” document upon a request for clarification from

⁴⁸ Affidavit of WMT at Tab 4, pp 268–304.

⁴⁹ Affidavit of WMT at Tab 6, pp 388 and 392.

the quantity surveyor (see *Lau Fook Hoong* at [8]–[9]). Thus the principle expressed, *obiter*, in *Lau Fook Hoong* that no further payment claims should be submitted after the final payment claim as this would defeat the final nature of the final payment claim and accounting process (see *Lau Fook Hoong* at [48]–[49]) was not applicable in this case as PC 73 was not the final payment claim. I therefore rejected the developer’s submission that PC 75 was invalid as it was issued after the final payment claim and final certificate were issued.

48 In any event, as PC 75 was essentially a repeat of PC 73 which had not been adjudicated upon, the contractor was also entitled under s 10(4) of the SOPA to submit PC 75 even if PC 73 was deemed the final payment claim. In *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011, the Court of Appeal held that a “payment claim which merely repeated an earlier claim” is permissible under s 10(4) of the SOPA “where a previous payment claim for the same work or goods was not in fact adjudicated on the merits” (at [57]). The Court of Appeal explained that the mechanism under s 10(4) of the SOPA addresses the potential draconian effect from the mandatory requirement under s 10(2) for payment claims to be served in accordance with stipulated timelines (at [56]–[58]).

49 The developer argued that s 10(4) of the SOPA was applicable in the context of interim payment claims but was not applicable after the final payment claim and/or final certificate had been issued. However I found that the developer’s reading of s 10(4) was not justified by the wording of the section. Under s 10(4), the only restriction on the contractor’s right to submit a repeat claim is that the preceding claim must have been served within six years after

the construction work to which the claim relates was carried out. Section 10(4) of the SOPA reads:

Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.

Whether the developer was estopped from raising the adjudication application objection

50 While the developer framed its adjudication application objection as one based on the timing of the lodgement of the adjudication application which could not be raised at the payment response stage, I found that the adjudication application objection was inextricably linked to the PC 75 objection. As the developer was estopped from arguing that PC 75 was invalid under the Contract, the developer was also estopped from making submissions on the applicable timelines for the filing of the adjudication application, since this was dependent on its position on PC 75 which it did not make an election on at the payment response stage.

51 The adjudication application objection – being premised on the applicability of the default timelines under the SOPA – presupposes that PC 75 is an invalid payment claim under the Contract but is valid under the SOPA. For the reasons that I have stated at [34]–[39] above, the developer was under an obligation to raise its PC 75 objection early *via* a payment response. Had the

developer informed the contractor that it objected to the validity of PC 75 *under the Contract*, the contractor could have filed its adjudication application in accordance with the SOPA timelines or during the period of overlap, if any, where both timelines would have been met.

52 To hold otherwise would allow the developer to reserve its position on PC 75 until the adjudication proceedings and to put forward numerous alternative submissions at the proceedings, both on the validity of the payment claim and the timing of the adjudication application, as was attempted by the developer in the present case. This would put a respondent who does not file a payment response in a more favourable position than one who does so which would defeat the objectives of the SOPA. As the Court of Appeal stated in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 (at [33]–[34]):

33 ... In view of the scheme of the Act, it is clear that WY Steel's argument – *viz*, that s 15(3) applies to exclude consideration of matters not contained in a payment response only where a payment response, albeit an incomplete one, has been filed and not otherwise – cannot be right. This reading would ... perversely favour a respondent who did not file a payment response at all over one who did and, thus, would incentivise conduct that defeats the very purposes of the Act.

34 In our judgment, Parliament intended that a respondent should ventilate his reasons for withholding payment within the timelines prescribed by the Act or suffer the consequences, namely, losing the opportunity to ventilate those reasons at all at the adjudication stage. ...

53 Therefore, the developer was estopped from arguing that the adjudication application was either lodged late pursuant to statutory timelines or prematurely pursuant to contractual timelines.

Whether the adjudicator was entitled to consider the contractor's claim for additional preliminaries

54 The contractor made a claim for additional preliminaries totalling \$1,678,024.33 arising from the delay in the completion of Phase 2 of the Project.⁵⁰ The adjudicator allowed the contractor's claim for additional preliminaries partially, in the amount of \$926,355.50.⁵¹

55 I found that the adjudicator was entitled to find that the contractor could make its claim for prolongation under cl 5(2) of the Conditions of Contract and that his decision in this area was not reviewable by this court.

56 Clause 5(2) of the Conditions of Contract states:⁵²

In the case of any preliminary items of expenditure in the Bills the Contractor shall when tendering indicate by an appropriate key letter those items requiring adjustment based on the quantities of work carried out (Letter Q); those items requiring adjustment based on the time required to carry out the work (Letter T); and those items of expenditure which are of a once-for-all or fixed character and independent of quantities or time (Letter F). In the case of Preliminary or General or Contingency or Lump Sum items, the Contractor shall in addition when tendering indicate precisely all categories of expenditure contemplated by those items which are not included in his other rates and prices. Preliminary items for which the Contractor has given no key letter indication shall be deemed to be fixed.

57 The adjudicator found that:⁵³

⁵⁰ Contractor's written submissions at para 68.

⁵¹ Affidavit of BA, Tab 1, at p 82 para 156.

⁵² Affidavit of BA, Tab 3 at p 124.

⁵³ Affidavit of BA, Tab 1, at p 76 paras 131.4 and 132.

131.4 ... Clause 5(2) stated quite clearly that apart from valuing variations, the breakdown in Bill No. 1 are also agreed to be for the purpose of measuring the Works. Therefore, if the work quantities were different as a result of remeasurement or if the work quantities were carried out over a longer duration than originally contracted for, I think the breakdown of the preliminary items in Bill No. 1 were intended to be used to facilitate remeasurement, including remeasuring the preliminary items.

...

132 It is therefore my view and finding that the breakdown provided in Bill No. 1 pursuant to Clause 5(2) can be used to assess additional preliminaries which arise from prolongation of the Contract in general and is not confined to prolongation from variations. ...

58 While the developer submitted that the adjudicator had no power to award damages for breach of contract, the additional preliminaries were not awarded on this basis, but pursuant to a term of the Contract. The adjudicator was entitled to find that the contractual provision allowed the contractor to make its claim for additional preliminaries from prolongation.

59 In *Metropole Pte Ltd v Designshop Pte Ltd* [2017] 4 SLR 277, the court made a similar finding in relation to the adjudicator's jurisdiction to interpret a term of the parties' contract. In that case, the respondent argued that the adjudicator exceeded his jurisdiction by allowing the claimant to rely on cl 2.3(3) of the parties' contract to make its claims. Clause 2.3(3) of the parties' contract provided that upon termination of the contract, the respondent was to pay the claimant a minimum of two-thirds of the fee for a particular stage of work if the claimant had carried out any work at all for that stage. In relation to the respondent's submission that cl 2.3(3) was a clause for damages for breach of contract which should be dealt with in separate dispute resolution

proceedings rather than in adjudication proceedings, the court stated (at [93]–[94]):

93 ... [T]he manner in which cl 2.3(3) should be interpreted is a matter that falls within the adjudicator's jurisdiction and is an aspect of the merits of his determination. The adjudicator has interpreted cl 2.3(3) to exclude claims for stages of work for which no work has commenced. He has also found that [the claimant] commenced works for stages E and H but not for stages L, M, and N. He therefore did not allow [the claimant's] claim for two-thirds of the fees for stages L, M, and N (see adjudication determination at [50]).

94 Although [the respondent] has made submissions with respect to the appropriate interpretation of cl 2.3(3), the court cannot and should not go into the merits of the adjudicator's interpretation of cl 2.3(3) or his findings on whether work had indeed commenced for each stage.

60 In the present case, the adjudicator interpreted cl 5(2) of the Conditions of Contract as allowing a claim to be made for additional preliminaries from prolongation in general (not just from variation) and the court should not and cannot go into the merits of the adjudicator's interpretation and assessment. Therefore, I rejected the developer's submission that the adjudicator exceeded his jurisdiction in awarding the additional preliminaries under cl 5(2) of the Conditions of Contract.

Conclusion

61 For the foregoing reasons, I dismissed the developer's stay application and application to set aside the adjudication determination and the order of court enforcing the adjudication determination.

62 In the circumstances, I ordered the sum of \$2,276,284.68 and the costs of the application fixed at \$17,000 (inclusive of disbursements) to be paid out to the contractor.⁵⁴

Lee Seiu Kin
Judge

Raymond Chan and Oung Hui Wen Karen (Chan Neo LLP) for the
applicant;
Chuah Chee Kian Christopher, Lee Hwai Bin, Muhammad Asfian
Bin Mohaimi, Valerie Koh and Deborah Hoe
(WongPartnership LLP) for the respondent.

⁵⁴ Minute sheet dated 9 October 2018.