

YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd
[2014] SGHC 142

Case Number : Originating Summons No 1223 of 2013
Decision Date : 15 July 2014
Tribunal/Court : High Court
Coram : Tan Siong Thye J
Counsel Name(s) : Abraham Vergis (Providence Law Asia LLC) for the plaintiff; Ng Kim Beng, Hazel Tang, Gerald Wiyatno (Rajah & Tann LLP) for the defendant.
Parties : YTL Construction (S) Pte Ltd — Balanced Engineering & Construction Pte Ltd

Building and Construction Law – Statutes and Regulations

15 July 2014

Judgment reserved.

Tan Siong Thye J:

Introduction

1 This is an application by the Plaintiff, YTL Construction (S) Pte Ltd, to set aside an adjudication determination dated 11 December 2013 made pursuant to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOP Act"). Under the adjudication determination, the Plaintiff was directed to pay the Defendant \$754,111.22 (inclusive of Goods and Services Tax ("GST")). This was the amount certified and payable by the Plaintiff to the Defendant for the work done and materials supplied.

Facts

Background

2 The Adjudication between the parties arose out of a project for the construction of three 30,000 tonne cement silos and a four-storey office building with associated services at the existing Jurong Port Cement Terminal, Pulau Damar Laut, Singapore ("[note: 1](#)"). The Plaintiff was appointed as the main contractor for the Project on 15 December 2011. Subsequently, the Plaintiff entered into a sub-contract agreement with the Defendant for the Defendant to supply labour, machinery and equipment to install and complete structural works ("the Subcontract"). The original agreed value of the works to be executed by the Defendant was about \$9m. [\[note: 2\]](#)

The payment claim and payment response

3 On 6 September 2013, the Defendant served on the Plaintiff a payment claim for progress payment for work done under the Subcontract in August 2013 pursuant to s 10(1) of the SOP Act. The payment claim stated that the cumulative value of the work done by the Defendant from the start of the Project till August 2013 was \$6,152,032.37. The payment claim did not specify the amount claimed for the month of August 2013. [\[note: 3\]](#)

4 Nevertheless, the Plaintiff subsequently served its payment response on the Defendant on 30

September 2013 pursuant to s 11(1) of the SOP Act. The payment response certified that the cumulative value of the work done to be \$5,608,268.53. It also provided that the payment amount certified for August 2013 was \$695,370.76 (exclusive of GST). [\[note: 4\]](#)

5 Under cl 17 of the Subcontract, the Defendant was required to prepare a tax invoice amount based on the response amount as stated in the payment response in order to obtain payment. On 9 October 2013, the Defendant issued its tax invoice to claim \$744,046.71. However, the calculations in this tax invoice did not include the GST. Upon the Plaintiff's request, the Defendant subsequently issued a revised tax invoice for \$897,889.83 on 10 October 2013. This amount was set off against the Plaintiff's cross invoice for \$143,778.61. Hence a net sum of \$754,111.22 (inclusive of GST) was payable to the Defendant. [\[note: 5\]](#)

The adjudication application

6 The due date for payment of the \$754,111.22 was 14 November 2013. When the Plaintiff failed to make payment by that date, the Defendant wrote to the Plaintiff on 15 November 2013 to give notice to the Plaintiff of its intention to apply for adjudication in relation to the payment claim ("the Notice") in accordance with s 13(2) of the SOP Act. In the Notice, the Defendant indicated that it is claiming the invoice amount of \$897,889.83 and for the dispute details it ticked the item "[p]aid amount disputed (including nil payment by the payment due date)". The Defendant further described the dispute in the Notice as "[n]o payment received on the payment due date of 14 November 2013". [\[note: 6\]](#)

7 On 20 November 2013, the Defendant lodged its adjudication application with the Singapore Mediation Centre ("SMC"). In its adjudication application, the Defendant indicated the nature of dispute as "[p]aid amount disputed (include nil payment)". [\[note: 7\]](#) However, the Defendant indicated the "Claimed Amount" to be \$1,328,536.83, a sum higher than the payment response of \$695,370.76 (exclusive of GST). [\[note: 8\]](#) This higher amount was the original amount that the Defendant was claiming from the Plaintiff in the payment claim and the adjudication application. As the original payment claim did not specify the claimed amount for August 2013, the Defendant had added handwritten notations to the original payment claim to derive a claimed amount of \$1,328,536.83 from the cumulative value of work done indicated in the original payment claim. [\[note: 9\]](#) Instead of the original payment claim, the Defendant then lodged this amended payment claim together with its adjudication application.

8 On 26 November 2013, the SMC informed both the parties that Mr Tan Keok Heng George had been appointed to act as the adjudicator for the adjudication. [\[note: 10\]](#) The Plaintiff subsequently lodged its adjudication response, a summary sheet and a bundle of supporting documents with the SMC on 28 November 2013 after receiving the adjudication application on 21 November 2013. [\[note: 11\]](#)

The adjudication determination

9 At the adjudication proceedings, the Plaintiff argued that the payment claim was invalid because the original payment claim failed to specify the claimed amount for the reference period, ie, August 2013. The claimed amount of \$1,328,536.83 was only provided for in the amended payment claim which was lodged together with the adjudication application on 20 November 2013.

10 The Plaintiff also argued that the claimed amount in the adjudication was for \$1,328,536.83.

This sum is higher than the amount stipulated in the payment response. Therefore, the Defendant was essentially disputing the payment response instead of disputing non-payment of the amount stated in the payment response as indicated in its adjudication application. This meant that, in accordance with s 12(2)(a), s 12(5) and s 13(3)(a) of the SOP Act, the 7-day time limit for the Defendant to lodge an adjudication application began after 8 October 2013. This is the date when the Defendant was first entitled to make an adjudication application after the expiry of the 7-day "dispute resolution period" which began after the receipt of the payment response on 30 September 2013. Therefore, the last day for the Defendant to lodge its adjudication application was 15 October 2013 and the adjudication application lodged by the Defendant on 20 November 2013 was lodged out of time.

11 The Plaintiff then submitted that the Defendant failed to include a complete copy of the payment response in its adjudication application as required by reg 7(2)(e) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("SOPR"). In its adjudication application, the Defendant only included one out of four printed pages of the payment response served on it by the Plaintiff.

12 For these three reasons, the Plaintiff urged the adjudicator to reject the adjudication application. The adjudicator agreed with the Plaintiff's submissions that the payment claim was not in order, that the adjudication application was filed out of time and that the adjudication application failed to include a complete payment response. However, the adjudicator also took cognisance of the fact that the Plaintiff conceded in its adjudication response that the lower certified amount of \$695,370.36 (exclusive of GST) stated in the payment response was payable to the Defendant. Therefore, the adjudicator only rejected the part of the claim of \$1,328,536.83 that was in excess of \$695,370.36 (exclusive of GST). He found that part of the claim should be allowed because the Plaintiff had, in relation to the sum of \$695,370.36 (exclusive of GST), waived the formal requirements relating to the payment claim and adjudication application under the SOP Act.

13 The Defendant also expressed concern during the adjudication that the adjudication determination may have had to be rendered by 5 December 2013 within 7 days after the commencement of the adjudication in accordance with s 17(1)(a)(ii) of the SOP Act. This was because s 17(1)(a)(ii) would have applied if the adjudicator found the dispute to be one which concerned the failure to make payment in accordance with the payment response. However, the adjudicator found that as the original claim in the adjudication application was for an amount higher than the payment response, s 17(1)(b) of the SOP Act applied which allowed him a 14-day time limit to issue the adjudication determination. Therefore, he found that he only had to issue the adjudication determination by 12 December 2013.

14 Consequently, the adjudicator, in his adjudication determination dated 11 December 2013, held that the Plaintiff should pay the Defendant \$695,370.36 (exclusive of GST) which translated to \$754,111.22 after GST was included. He also ordered that interest on the sum of \$754,111.22 be paid to the Defendant. The adjudication costs were ordered to be borne equally by the parties.

15 The Plaintiff was dissatisfied with the adjudication determination and therefore made this application seeking to set aside the adjudication determination.

The plaintiff's submissions

16 The Plaintiff submitted that the adjudication determination should be set aside for the following reasons:

- (a) That the payment claim failed to comply with s 10(3)(a) of the SOP Act by stating the claimed amount calculated by reference to the period to which the payment claim relates instead of the outstanding unpaid amount;
- (b) That the adjudication application was lodged out of time and should have been rejected by the adjudicator in accordance with s 16(2)(a) of the SOP Act;
- (c) That there was a failure by the adjudicator to comply with the principles of natural justice as required under s 16(3)(c) of the SOP Act;
- (d) That the adjudication determination was rendered out of time.

Court's decision

The court's role in a setting aside application

17 In deciding whether or not to set aside an adjudication determination it is not the court's role to scrutinise the decisions of the adjudicator. However, an invalid appointment of the adjudicator will nullify an adjudication determination. There are also certain legislative provisions in the SOP Act that are so important that their breach may affect the validity of the adjudication determination. These are the observations made by the Court of Appeal in *Lee Wee Lick Terence (alias Li Welli Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Chua Say Eng*") at [66]–[67]:

66 Turning now to the court's role in a setting-aside action, we agree with the holding in *SEF Construction* ([14] *supra*) that the court should not review the merits of an adjudicator's decision. The court does, however, have the power to decide whether the adjudicator was validly appointed. If there is no payment claim or service of a payment claim, the appointment of an adjudicator will be invalid, and the resulting adjudication determination would be null and void.

67 Even if there is a payment claim and service of that payment claim, the court may still set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, has not complied with one (or more) of the provisions under the Act which is so important that *it is the legislative purpose that an act done in breach of the provision should be invalid*, whether it is labelled as an essential condition or a mandatory condition. A breach of such a provision would result in the adjudication determination being invalid. [emphasis in original]

18 Therefore, the crux of the matter lies in the legislative intent behind the provisions. Regardless of whether the word "shall" is used, the court must always ask itself whether it was Parliament's intent to have adjudication determinations that are made in violation of certain requirements set aside. Certain factors would have to be considered in answering such a question. As stated by Woo Bih Li J in *Australia Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776 ("*Australia Timber*") at [75]:

It seems to me that a number of considerations ought to influence the determination of whether a particular provision of the Act or the SOPR is a legislatively important provision. These considerations would include the overarching purpose of the Act, the degree of difficulty in ascertaining compliance with that provision, the fact that curial intervention is permitted in the Act's adjudication mechanism, and the practical realities of the construction industry and its operation. I hasten to add that this is not an exhaustive list.

19 Bearing these considerations in mind, I proceed to examine the Plaintiff's submissions.

The payment claim

Is the payment claim valid?

20 Section 10(3)(a) of the SOP Act states that:

10(3) A payment claim -

(a) shall state the claimed amount, calculated by reference to the period to which the payment claim relates ...

21 Regulation 5(2) of the SOPR also provides that:

5(2) A payment claim shall -

(a) be in writing;

(b) identify the contract to which the progress payment that is the subject of the payment claim relates; and

(c) contain details of the claimed amount, including -

(i) a breakdown of the items constituting the claimed amount;

(ii) a description of these items;

(iii) the quantity or quantum of each item; and

(iv) the calculations which show how the claimed amount is derived.

22 The purpose for having these requirements was enunciated by the Court of Appeal in *Chua Say Eng* at [74]:

... It seems to us that the legislated formal requirements for payment claims are designed to ensure that specified items of information are made available to the respondent before the claimant's rights under the Act are engaged. The emphasis is therefore not on the claimant's intention but on the respondent being given notice of certain information about the claim (such as the amount claimed, the contract under which the claim is made and a breakdown of the items constituting the claim). ...

Bearing in mind the purpose of such requirements, the Court of Appeal concluded at [78]:

... the correct test for determining the validity of a payment claim is whether a purported payment claim satisfies all the formal requirements in s 10(3)(a) of the Act and reg 5(2) of the SOPR. If it does, it is a valid payment claim. ...

23 Nonetheless, although a payment claim that satisfies all the formal requirements in s 10(3)(a) of the Act and reg 5(2) of the SOPR is a valid payment claim, the converse cannot be said to be true. As stated by Woo Bih Li J in *Australia Timber* at [30]:

In my view, therefore, the two-step analysis proceeds as follows. If a purported payment claim complies with s 10(3)(a) of the Act and reg 5(2) of the SOPR, it is a valid payment claim and no further question arises as to its validity, although an argument based on estoppel against the claimant can still be made (*Chua Say Eng* at [33], [73] and [78]). If, however, the purported payment claim does not comply with these statutory provisions, it is not necessarily rendered invalid and the adjudication determination is not automatically invalidated. The court should instead proceed to examine whether any of the provisions which were not complied with was so important that it was the legislative purpose that an act done in breach of the provision should be invalid, so that non-compliance with such a provision would invalidate the adjudication determination (*Chua Say Eng* at [67]).

24 For the purposes of determining the validity of the payment claim, I shall only consider the original payment claim served on the Plaintiff on 6 September 2013. I shall comment on the amended payment claim annexed with the Defendant's adjudication application later on. The Defendant does not dispute that the payment claim served on the Plaintiff on 6 September 2013 for progress payment for work done under the Subcontract in the month of August 2013 did not state the specific amount claimed for the reference period which is the month of August 2013. It only stated the cumulative value of the work done from the start of the Project till the end of August 2013. The Plaintiff would not know the actual amount claimed from the original payment claim until the payment claim was amended with handwritten entries subsequently. This amended payment claim was lodged by the Defendant together with its adjudication application stating the amount claimed. Therefore, when the Plaintiff was served with the payment claim on 6 September 2013, it would not know how much the Defendant was actually claiming. The Defendant argued that the payment claim was in order as the SOP Act does not specify what constitutes a claim amount and what does not. Furthermore, the Defendant submitted that the Plaintiff is estopped from disputing the validity of the payment claim. The Defendant also argued that the Plaintiff did its own calculation and in its payment response issued interim Payment Certificate 12 approving payment to the Defendant for \$695,370.76. This was on 30 September 2013.

25 How important is the payment claim under the SOP Act? This requires a close perusal of s 10 of the SOP Act, particularly s 10(3) that deals with payment claim:

10(3) A payment claim —

(a) shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and

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

26 From the above wordings it is clear that Parliament had mandated that the payment claim must state the claimed amount. This is a basic requirement because the respondent, and later on the adjudicator, will want to know what is being claimed. After all, the main purpose of the SOP Act is to facilitate easy and quick processing of claims in the construction industry. It is the payment claim that initiates the claim protocol under the SOP Act. Therefore the payment claim must clearly state what the claim amount is. It is very unfortunate that the Defendant had failed to indicate the exact amount it was claiming for the month of August 2013. This is a series of serious errors made by the Defendant. Later, when no payment was forthcoming despite the Plaintiff certifying the amount of \$695,370.76 (exclusive of GST), the Defendant served the Notice of Intention to apply for adjudication on the Plaintiff on 15 November 2013. It did not indicate \$695,370.76 (exclusive of GST) as the claimed amount but \$897,889.83 instead. When the Defendant lodged its adjudication

application, it once again claimed a different amount. This time the Defendant claimed \$1,328,536.83. What then is the actual amount that the Defendant was claiming? At the hearing before me the Defendant submitted that it was claiming \$695,370.76 (exclusive of GST) but this was not apparent when the Defendant initiated the claim proceedings under the SOP Act.

27 It is common sense that for any claim or adjudication procedure to advance expeditiously and efficiently, the claimed amount must be made known in the payment claim pursuant to s 10(3)(a) of the SOP Act. If that is not the case, it would be difficult for the respondent to serve a proper payment response. How would one be able to decide on how much to pay another if he does not even know how much is demanded? Further, if there is a dispute as to the payment response, the respondent will be unable to negotiate with the claimant since he is unaware of the claimant's position. The adjudication process will then not be able to proceed in accordance with the envisioned framework of the SOP Act.

28 Here, it was not a situation whereby the figures provided in the payment claim would allow a person to logically ascertain what the actual claimed amount was at that point in time. There was no indication of the amount claimed. It was later at the adjudication application that figures were hand written and labelled as "Amount approved previously" and "Retention 10%". These were added on in the amended payment claim. The amounts also did not correspond with any of the numbers in the Plaintiff's payment response. Thus the Plaintiff would not have known the Defendant's claimed amount for the month of August 2013. In short, it was impossible for the Plaintiff to have figured out what the Defendant's actual claim in its payment claim. This explains why subsequently when the Plaintiff lodged its adjudication response at section B under "Contract type" it ticked the box "Disputed payment response" and for "Nature of Dispute" it ticked the boxes "Disputed payment response" and "Paid amount disputed (including nil payment)" [\[note: 12\]](#). In this case when the Plaintiff certified \$695,370.76 (exclusive of GST) on 30 September in response to the payment claim, it did so from its own calculation and understanding of the amount outstanding for the month of August 2013. It did not and could not do so based on the Defendant's understanding since the Defendant's payment claim failed to stipulate the claimed amount in breach of s 10(3) of the SOP Act. Hence, I find that the non-compliance with s 10(3)(a) rendered the Defendant's payment claim invalid.

May the invalidity of the payment claim be waived?

29 Despite the Defendant's failure to state the amount claimed in its payment claim, the Defendant turned the table and argued that the Plaintiff is estopped or had waived the claim requirement under the SOP Act. Is this a valid argument when it is the Defendant who had failed to comply with the SOP Act in its pursuit of its claim under the same Act?

30 As held by Judith Prakash J in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 at [43]–[44]:

43 Considering the authorities cited by each party, it appeared at first that they could not be reconciled. On the one hand, it was declared by high authority that parties could not be estopped from contesting jurisdiction and, on the other hand, there were numerous cases in which exactly that seemed to have happened. There was, however, an answer to the quandary and it was provided by the claimant. The claimant pointed out that the confusion arose from the way in which the word "jurisdiction" was used by the respondent. Agreeing that parties could not confer or waive "jurisdiction" as explained in the authorities cited by the respondent, the claimant averred that that was the case when "jurisdiction" was used in its narrow meaning of "competence to hear". When "jurisdiction" was used in a wider sense, *ie*, in reference to the manner in which the court's power was exercised then waiver or estoppel could be relied on. The

distinction between the two meanings of the word appears clearly from the following passage of the judgment of Deane J in *Then Kang Chu v Tan Kim Hoe* [1925] SSLR 4:

By the jurisdiction of a Court is meant the authority which the Court has to decide matters litigated before it or to take cognizance of matters presented in a formal way for its decision. Its limits are defined in the Statute, Charter or commission constituting the Court and must be sought for there.

...

The last point to be dealt with is the argument that defendant having appeared in the lower Court and taken no objection to the jurisdiction is thereby estopped from pleading to it. The principles governing the application of estoppel in such cases are well stated in Spencer Bower on 'Estoppel by Representation' at page 187, 'Even the most plain and express contract or consent, a fortiori, therefore, any mere conduct or inaction or acquiescence, of a party litigant from which a representation may be implied, such as to give rise to an estoppel, cannot confer judicial authority on any of His Majesty's subjects not (18) already invested with such authority by the law of the land, or add to the jurisdiction lawfully exercised by any judicial tribunal'. ... On the other hand, 'where it is merely a question of irregularity of procedure, or of a defect in "contingent" jurisdiction or non-compliance with statutory conditions precedent to the validity of a step in the litigation, of such a character that, if one of the parties be allowed to waive, or by conduct or inaction to estop himself from setting up such irregularity or want of "contingent" jurisdiction or noncompliance, no new jurisdiction is thereby impliedly created, and no existing jurisdiction is thereby impliedly extended beyond its existing boundaries, the estoppel will be maintained, and the affirmative answer of illegality will fail'.

44 Thus, it seemed that when what was being alleged was an absolute lack of jurisdiction on the part of a particular tribunal or court to hear a particular dispute, "jurisdiction" being used in the strict sense of capacity to hear, then if the tribunal concerned does not have such jurisdiction, any party to the dispute may assert the lack of jurisdiction at any stage and can never be held to be estopped from doing so or to have waived its right of protest. On the contrary, when it is a question of irregularity of procedure or contingent jurisdiction or non-compliance with a statutory condition precedent to the validity of a step in the litigation, such irregularity or non-compliance can be waived because the effect of the waiver would not be to create or confer any jurisdiction that did not previously exist.

31 Therefore, in such an instance, the question would then depend on whether the irregularity pertaining to the requirements of making a valid payment claim relates to "jurisdiction" in the narrow sense or the wider sense. In relation to non-compliance with s 10(3) of the SOP Act, Quentin Loh J held in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 at [59]–[60]:

59 ... In discussing *TPX Builders* [Woo Bih Li J] said that a payment claim made in breach of the Act would undermine the jurisdiction of the adjudicator and therefore the validity of his rendered determination: at [35]. Accordingly neither s 15(3) of the [SOP] Act nor estoppel should preclude a respondent from challenging the validity of the payment claim in an action for setting aside. Woo J pointed to *Terence Lee* at [64]–[65] for the proposition that a dispute over the validity of the payment claim was an issue to be determined by the court and not the adjudicator and repeated this reasoning in the recent case of *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776 at [36]:

The formal validity of a payment claim under s 10(3) of the Act is therefore not a matter on which an adjudicator is entitled to decide; and in this regard, it would be superfluous to raise for the adjudicator's consideration any objection to validity stemming from the lack of detail in a purported payment claim. No question of any estoppel can arise, given that the adjudicator cannot decide on the point even if it is brought up for his consideration.

60 I agree that in *Terence Lee*, the Court of Appeal definitively clarified that a challenge to the validity of a payment claim amounts to a challenge to the validity of the appointment of the adjudicator, ie, a challenge to the adjudicator's jurisdiction rather than the exercise of such jurisdiction (see [21] above) ...

32 Therefore, given that the irregularity here related to "jurisdiction" in the strict sense, such that it affected the validity of the appointment of the adjudicator and his competence to hear the adjudication, no defence of waiver or estoppel may be relied upon by the Defendant. *Woo Bih Li J* also found that non-compliance with s 10(1) of the SOP Act could not be waived in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 at [43]. Accordingly, I find that non-compliance with s 10(3) of the SOP Act cannot be waived as well. I would also like to point out that the adjudicator could not have decided on the issue of waiver in his adjudication determination since he did not have the power to decide on issues related to the validity of his own appointment.

33 In any event I do not think that the Plaintiff had waived compliance with s 10(3)(a) or had been estopped from complaining about it at any point in time of the adjudication. The Plaintiff was never aware of the actual claim of \$1,328,536.83 until the time the amended payment claim was lodged together with the adjudication application and forwarded to it by the SMC. Upon discovery of this unexpected amount, the Plaintiff then began to mount its complaints. The serving of the payment response on the Defendant cannot be taken to mean that the Plaintiff had forgone its legal rights since it was all the Plaintiff could have done at that point in time other than refusing to respond to the Defendant. The Plaintiff could not have challenged its validity because there was no forum for the Plaintiff to do so at that point in time. This also applies to all the previous instances where the Defendant served a payment claim for an unspecified amount and subsequently accepted the Plaintiff's payment response.

34 Therefore, when SMC appointed George Tan as the adjudicator for this case it was unaware of the invalidity of the payment claim. Hence this had affected the validity of the adjudicator's appointment. He would then have no jurisdiction or competence to make an adjudication determination. This itself is sufficient for the setting aside of the adjudication determination. However, I shall proceed to consider the other grounds of setting aside raised by the Plaintiff.

The adjudication application

Was the adjudication application filed out of time?

35 The Plaintiff submitted that as the Defendant claimed for \$1,328,536.83 in its adjudication application, an amount higher than that stated in its payment response, the Defendant was in fact disputing the payment response provided by the Plaintiff. Furthermore, the Defendant had indicated in the Notice that it was claiming \$897,889.83. Thus, both these amounts claimed were higher than the payment response of \$695,370.36 (exclusive of GST). In such a scenario, the time for the Defendant to lodge an adjudication application is determined in accordance with s 12(2) and s 12(5) of the SOP Act which state that:

12(2) Where, in relation to a construction contract -

- (a) the claimant disputes a payment response provided by the respondent; or
- (b) the respondent fails to provide a payment response to the claimant by the date or within the period referred to in section 11(1),

the claimant is entitled to make an adjudication application under section 13 in relation to the relevant payment claim if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response, as the case may be.

...

12(5) In this section, "dispute settlement period", in relation to a payment claim dispute, means the period of 7 days after the date on which or the period within which the payment response is required to be provided under section 11(1).

36 In this case, the Plaintiff served the payment response on the Defendant on 30 September 2013. The "dispute settlement period" therefore started on 1 October 2013 and ended on 7 October 2013. Therefore, the Defendant was entitled to lodge an adjudication application from 8 October 2013 onwards. The time limit for lodging an adjudication application would then be within 7 days after 8 October 2013 in accordance with s 13(3)(a) of the SOP Act which states that:

13(3) An adjudication application -

- (a) shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12 ...

37 The last day for the Defendant to lodge its adjudication application was on 15 October 2013. However, in this case, the adjudication application was only lodged with the SMC on 20 November 2013. Thus it was lodged out of time.

38 However, the Defendant submitted that the nature of the dispute was not in relation to the payment response but was instead based on the failure of the Plaintiff to pay the amount of \$695,370.36 (exclusive of GST) stated in its payment response. This was despite the fact that the Defendant had indicated its claimed amount as \$1,328,536.83 which was higher than the Plaintiff's payment response amount. In the Notice, the claimed amount of \$897,889.83 is also higher than the response amount. Notwithstanding these facts, the Defendant relies on the fact that in both the Notice and its adjudication application, it had ticked the boxes beside the phrases "Paid amount disputed (including nil payment by the payment due date)" and "Paid amount disputed (include nil payment)" respectively. The boxes ticked indicated the nature of the dispute in both forms. The Defendant submitted that it did not tick the boxes with the phrases "Payment response disputed (applicable to construction contracts only)" and "Disputed payment response" in the Notice and its adjudication application respectively.

39 According to the Defendant's submissions, it was entitled to lodge its adjudication application on the day after the payment date for \$695,370.36 (exclusive of GST) on 14 November 2013 had passed. Section 12(1) of the SOP Act states that:

12(1) Subject to subsection (2), a claimant who, in relation to a construction contract, fails to receive payment by the due date of the response amount which he has accepted is entitled to make an adjudication application under section 13 in relation to the relevant payment claim.

40 Given that the Defendant was only entitled to lodge its adjudication application on 15 November 2013, the last day for lodging its adjudication application would be 22 November 2013. Therefore, since the adjudication application was lodged by the Defendant on 20 November 2013, it was lodged within time.

41 I cannot accept the Defendant's submission. Its adjudication application was clearly based on a dispute as to the Plaintiff's payment response. Although it kept insisting that the dispute was in relation to "[p]aid amount disputed", it never unequivocally abandoned or withdrew the claim of \$1,328,536.83. Although the Defendant agreed that Plaintiff should pay it \$695,370.36 (exclusive of GST), this did not mean that the Defendant was not claiming in excess of \$695,370.36 (exclusive of GST) as well. The Defendant did not adduce any evidence that it had "accepted" the payment response, as required by s 12(1) of the SOP Act, such that it has agreed to accept the payment response in satisfaction of its payment claim in its entirety. On the contrary, the Defendant had indicated that it was claiming for higher amounts in both the Notice and the adjudication application. Furthermore, if the Defendant was truly only claiming for \$695,370.36 (exclusive of GST) and nothing in excess of the payment response—which would render it a dispute as to the payment response—it could have applied to the adjudicator to amend its adjudication application by correcting the claimed amount such that it reflected \$695,370.36 (exclusive of GST) only. This is permitted under reg 7(2A) of the SOPR which states that:

7(2A) The adjudicator appointed under section 14 of the Act may, at any time before the making of the determination and on such terms as to costs or otherwise as he thinks just, allow such amendments to be made to an adjudication application as he thinks fit.

42 However, the Defendant did not attempt to make any amendment to its adjudication application. This was despite it knowing of the problem with the claimed amount before the adjudication determination was issued on 11 December 2013. It is peculiar that the Defendant could make submissions to the effect that the dispute was one as to "[p]aid amount disputed" but could not make an application to amend its adjudication application. The Defendant clearly wanted to have its cake and eat it. It claimed for a higher amount while insisting on timelines that only applied if it claimed for the payment response amount only. Even if the higher claimed amount was a clerical mistake, the Defendant made no attempt to correct the mistake. By not abandoning or withdrawing the higher claimed amount, the Defendant took a risk. It kept alive the possibility that it could receive a determination for a sum greater than \$695,370.36 (exclusive of GST). However, at the same time, it gave rise to the possibility that its adjudication application could be found to be lodged out of the time. This was what happened in this case. By claiming for a higher amount, the Defendant in effect disputed the payment response. It should have lodged its adjudication application by 15 October 2013 but failed to do so. Therefore, I find that the Defendant had lodged its adjudication application out of time and failed to comply with s 13(3)(a) of the SOP Act.

Must an adjudication determination premised on an out of time adjudication application be set aside?

43 Section 16(2)(a) of the SOP Act states that:

16(2) An adjudicator shall reject -

- (a) any adjudication application that is not made in accordance with section 13(3)(a), (b) or
- (c) ...

44 This is a directive to the adjudicator to reject the adjudication application if it was filed out of time pursuant to s 13(3)(a) of the SOP Act. This is elaborated on in Chow Kok Fong, *Security of*

Payments and Construction Adjudication (LexisNexis, 2nd Ed, 2013) at para 9.52:

Of the requirements stipulated under section 13(3), those under paragraphs (a), (b) and (c) are particularly important because section 16(2)(a) provides that 'an adjudicator shall reject ... any adjudication application that is not made in accordance with section 13(3)(a), (b) or (c)': Given the mandatory wording of the subsection, as long as a case for non-compliance with any of these three requirements has been made, the adjudicator is obliged to dismiss the adjudication application.

45 Although the Court of Appeal did not express an opinion as to whether an adjudication determination premised on an out of time adjudication must be set aside in *Chua Say Eng* at [61], subsequent cases have answered the question in the affirmative. In *RN & Associates Pte Ltd v TPX Builders Pte Ltd* [2013] 1 SLR 848, Andrew Ang J held at [54] –[55]:

54 Besides, s 16(2) of the SOP Act circumscribes the jurisdiction of an adjudicator by laying out the circumstances wherein an adjudicator *must* reject an adjudication application, viz, where the application does not comply with s 13(3)(a), (b) or (c) of the SOP Act. ...

55 The SOP Act has chosen the grounds under s 13(3)(a), (b) and (c) of the SOP Act to circumscribe the adjudicator's jurisdiction in relation to an adjudication application. ... [emphasis in original]

The above was followed by AR Jordan Tan in *Shin Khai Construction Pte Ltd v FL Wong Construction Pte Ltd* [2013] SGHCR 4 at [26]–[28].

46 I agree with the above two decisions in relation to s 16(2)(a) of the SOP Act which makes it mandatory for an adjudicator to reject an adjudication application that does not comply with ss 13(3) (a), (b) or (c). This is especially the case for s 13(3)(a) of the SOP Act which deals with timelines, an essential factor in ensuring a fast and fluid cash flow within the building and construction industry. As stated by Mr Cedric Foo Chee Keng, then Minister of State for National Development, during the second reading of the Building and Construction Industry Security of Payment Bill 2004 (Bill 54 of 2004) ("the SOP Bill"), which was later enacted as Act 57/2004, *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1112:

The SOP Bill will preserve the rights to payment for work done and goods supplied of all the parties in the construction industry. It also facilitates cash flow by establishing a fast and low cost adjudication system to resolve payment disputes. Affected parties will have the right to suspend work or withhold the supply of goods and services, if the adjudicated amount is not paid in full or not paid at all.

47 The timelines under the SOP Act are therefore very tight so as to facilitate "cash flow by establishing a fast and low cost adjudication system": *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") at [25]. The importance of observing such tight timelines was elaborate by McDougall J in the Australian decision of *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190 ("*Chase Oyster*") at [208]–[209]:

208 Further, the *Security of Payment Act* operates in a way that has been described as "rough and ready" or, less kindly, as "Draconian". It imposes a mandatory regime regardless of the parties' contract: s 34. It provides extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses. It provides a very limited time for adjudicators to make their decisions on what, experience shows,

are often extremely complex claims involving very substantial volumes of documents (see, for example, my decision in *Laing O'Rourke Australia Construction v H&M Engineering and Construction* [2010] NSWSC 818 at [8]).

209 The *Security of Payment Act* gives very valuable, and commercially important, advantages to builders and subcontractors. At each stage of the regime for enforcement of the statutory right to progress payments, the *Security of Payment Act* lays down clear specifications of time and other requirements to be observed. It is not difficult to understand that the availability of those rights should depend on strict observance of the statutory requirements that are involved in their creation.

48 Hence, the legislative intent was for the 7-day timeline in s 13(3)(a) to be observed strictly such that the adjudicator must, without any room for discretion, reject an adjudication application lodged out of time. This would also mean that there is no room for waiver of the formal requirements by the parties to the adjudication. Even though this may seem draconian, the observations by the Court of Appeal in *W Y Steel* at [22] must be borne in mind:

Statutory adjudication of building and construction disputes takes the concept one step further. Interim payment claims *per se* are not granted temporary finality under the adjudication scheme. Instead, the parties enter into an expedited and, indeed, an abbreviated process of dispute resolution in which payment claims and payment responses must be made within the stipulated deadlines to an adjudicator, who is himself constrained to render a quick decision. As a species of justice, it is admittedly somewhat roughshod, but it is fast; and any shortcomings in the process are offset by the fact that the resultant decision only has temporary finality. The party found to be in default has to pay the amount which the adjudicator holds to be due (referred to in the Act as the "adjudicated amount"), but the dispute can be reopened at a later time and ventilated in another more thorough and deliberate forum.

49 Therefore the adjudicator should have rejected the adjudication application as required by s 16(2) which circumscribes the adjudicator's jurisdiction. There is no exception to this obligation. The Plaintiff also succeeds on this ground of setting aside.

Was there a failure by the adjudicator to comply with the principles of natural justice as required under s 16(3)(c) of the SOP Act

50 The Plaintiff submitted that after the adjudicator found that the Defendant had failed to comply with the requirements of the SOP Act, the adjudicator concluded that the Plaintiff, through its conduct, had waived the strict compliance with the requirements of the SOP Act in favour of the Defendant. The Plaintiff argued that it had not waived the strict compliance of the SOP Act as it opposed the Defendant's claim. The Plaintiff took issue with the fact that the adjudicator had not solicited the Plaintiff's view on this issue of waiver and thus the Plaintiff was denied the opportunity to address the adjudicator. In my view this ground for setting aside the adjudication determination is unmeritorious.

51 Section 18 of the SOP Act permits an aggrieved respondent to seek a review of the adjudication determination. The Plaintiff chose not to seek an adjudication review in this case. In *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260, Judith Prakash J opined that the Court would not lightly interfere with an adjudication determination on the ground of natural justice as the aggrieved respondent could seek a review of the adjudication determination under s 18 of the SOP Act. The Court held at [26] that :

The principles of natural justice are concerned with the provision of a fair hearing to contending parties. They do not mandate any particular result. As long as the parties have been given a fair hearing, the decision cannot be set aside for failure to comply with natural justice. A party who is dissatisfied with the decision on its merits cannot use the principles of natural justice to have the decision set aside. In the scheme for adjudication set out by the SOP Act, a respondent who is dissatisfied with an adjudication determination can ask for a review adjudicator or review adjudication panel to be appointed to review the determination. If this is done, then the evidence can be revisited on the review and the review adjudicator may, if he sees fit, make a different decision from that made by the adjudicator. The SOP Act has provided a means for dissatisfied respondents to be reheard and that is the review adjudication; it is not the application to court for setting aside under s 27(5). The court cannot be asked under cover of an allegation of breach of natural justice to review the merits of the adjudicator's decision.

52 I am of the view that the Plaintiff was given a fair opportunity to be heard. There is no evidence to suggest that he was denied an opportunity to be heard. Thus there was no breach of natural justice.

The adjudication determination

Was the adjudication determination rendered out of time?

53 As stated by s 17(1) of the SOP Act:

17(1) An adjudicator shall determine an adjudication application -

(a) within 7 days after the commencement of the adjudication, if the adjudication relates to a construction contract and the respondent -

(i) has failed to make a payment response and to lodge an adjudication response by the commencement of the adjudication; or

(ii) has failed to pay the response amount, which has been accepted by the claimant, by the due date; or

(b) in any other case, within 14 days after the commencement of the adjudication or within such longer period as may have been requested by the adjudicator and agreed to by the claimant and the respondent.

54 In accordance with s 16(1) of the SOP Act, an adjudication is deemed to have commenced after the 7-day time limit for the respondent to file an adjudication response stipulated in s 15(1) has expired. Section 15(1) of the SOP Act provides that the respondent has to file an adjudication response within 7 days after it receives the adjudication application. Since the Plaintiff received the adjudication application on 21 November 2013, the last day for filing an adjudication response is 28 November 2013.

55 The Plaintiff submitted that if the Defendant's argument that the dispute fell under s 12(1) of the SOP Act (see [37] above), such that it was a dispute as to failure to make payment, then the deadline for the rendering of the adjudication determination would be 7 days after 28 November 2013 (the deadline for filing the adjudication response) in accordance with s 17(1)(a)(ii) of the SOP Act. Therefore, the deadline would be 5 December 2013. The adjudication determination rendered on 11 December 2013 would be rendered out of time.

56 However, as I have rejected the Defendant's argument that the dispute concerned the failure to make payment (see [40] above), the correct provision to apply would be s 17(1)(b) since this is a dispute as to the payment response itself. Therefore, the deadline would be 14 days after 28 November 2013, which would then be 12 December 2013. Therefore, I find that the adjudication rendered on 11 December 2013 was within time.

57 I would like to further add that s 17(1)(b) of the SOP Act allows the adjudicator to request for more time to submit his adjudication determination with the agreement of the parties. In this case the Defendant had emailed the adjudicator on 5 December 2013 asking whether the adjudicator required more time as it thought that s 17(1)(a) was the operative provision, *ie* the adjudicator had only 7 days to issue the adjudication determination. The adjudicator was of the view that this case involved a disputed payment response. Thus s 17(1)(b) applied, giving the adjudicator 14 days to issue his adjudication determination. This was communicated to the parties in the adjudicator's email dated 6 December. The Plaintiff did not express a contrary view. If it did, I am certain that the adjudicator would have requested for more time from the parties. It is therefore, not right for the Plaintiff to now complain that the adjudication determination was rendered out of time.

Conclusion

58 Although the adjudication determination was rendered within time, the Defendant's payment claim is invalid. The Defendant's adjudication application was also lodged out of time. These are valid grounds for setting aside the adjudication determination and I accordingly allowed the Plaintiff's application. I would like parties to address me on the issue of costs.

[\[note: 1\]](#) Affidavit of Tan Jiann Jiong, p 3, para 4.

[\[note: 2\]](#) Affidavit of Tan Jiann Jiong, p 3, para 5.

[\[note: 3\]](#) Affidavit of Tan Jiann Jiong, p 4, para 7.

[\[note: 4\]](#) Affidavit of Tan Jiann Jiong, p 4, para 8.

[\[note: 5\]](#) Affidavit of Tan Jiann Jiong, p 5, para 9 – 10.

[\[note: 6\]](#) Affidavit of Peter Green, p 312.

[\[note: 7\]](#) Affidavit of Tan Jiann Jiong, p 37.

[\[note: 8\]](#) Affidavit of Tan Jiann Jiong, p 37.

[\[note: 9\]](#) Affidavit of Tan Jiann Jiong, p 290.

[\[note: 10\]](#) Affidavit of Tan Jiann Jiong, p 687, para 18.

[\[note: 11\]](#) Affidavit of Tan Jiann Jiong, p 8, para 18.

[\[note: 12\]](#) Affidavit of Tan Jiann Jiong, Tab 5 page 266.

