JFC Builders Pte Ltd *v* LionCity Construction Co Pte Ltd
[2012] SGHC 243

Case Number : Originating Summons No 547 of 2012/K (Registrar's Appeal No 316 of 2012/K)

Decision Date : 30 November 2012

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Melvin Chan and Kishan Pillay (TSMP Law Corporation) for the plaintiff; Lam Wei Yaw and Cynthea Zhou (Rajah & Tann LLP) for the defendant.

Parties : JFC Builders Pte Ltd — LionCity Construction Co Pte Ltd

Building and Construction Law

30 November 2012

Woo Bih Li J:

Introduction

1 This is an appeal by LionCity Construction Company Pte Ltd ("the Defendant") against a decision by an Assistant Registrar to set aside an adjudication determination in favour of the Defendant under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA"). JFC Builders Pte Ltd is the plaintiff ("the Plaintiff"). After hearing arguments, I dismissed the appeal.

Background

2 I gratefully adopt the background as set out by counsel for the Plaintiff.

3 The Plaintiff is the main contractor for a project titled "Proposed Change of Use from Shop to Erection of a Hotel Development Comprising of 1 Block of 10-Storey Building with Swimming Pool, a Restaurant and a Basement Carpark on Lot 01698N and 01699X (PT) MK 01 at 50 Telok Blangah Road (Bukit Merah Planning Area)" ("the Project").

4 Pursuant to a Letter of Offer – Structural Works dated 12 May 2010, the Plaintiff engaged the Defendant to supply material, tools and labour to undertake the structural works for the Project.

5 Separately, pursuant to another Letter of Offer – Architectural Works dated 26 June 2010, the Plaintiff engaged the Defendant to supply material, tools and labour to undertake the architectural works for the Project.

6 The owner of the Project is Fiesta Development Pte Ltd ("the Owner").

7 The chronology of material events leading to the present proceedings is as follows:

S/No	Date	Event

(a)	15.12.10	Defendant submits Progress Claim No 7 to Plaintiff for work done up to 30 November 2010 for the sum of $360,254.34.
(b)	Prior to 24.01.11	Plaintiff makes payment of the sum of $125,000 in respect of Progress Claim No 7.
(c)	24.01.11	Defendant submits Progress Claim No 8 to Plaintiff for work done up to 30 November 2010 for the sum of $235,254.34. In the same letter, Defendant gives notice of intention to apply for adjudication.
(d)	31.01.11	Plaintiff does not submit payment response.
(e)	01.02.11	Start of dispute settlement period. Defendant writes to notify Plaintiff that it shall proceed with adjudication.
(f)	09.02.11	End of dispute settlement period.
(g)	14.02.11	Defendant submits Adjudication Application in respect of Progress Claim No 8 for the sum of $251,722.14 (including GST) – AA24/2011.
(h)	22.02.11	Plaintiff does not lodge Adjudication Response.
(i)	01.03.11	Adjudicator issues Adjudication Determination, determining that the following amounts shall be payable by the Plaintiff to the Defendant: (i) Adjudicated Sum of $204,734.09; (ii) Interest at the rate of 5.33% from the date of the Adjudication Determination; (iii) 90% of the Adjudication Application Fee of $535.00; and (iv) 90% of the Adjudicator's Fees of $11,235.
(j)	19.04.12	Defendant applies for leave to enforce the Adjudication Determination in the same manner as a judgment or order of court in OS 141/2012.
(k)	18.05.12	Defendant obtains Order of Court in OS 141/2012 granting leave to enforce the Adjudication Determination in the same manner as a judgment or order of court.
(l)	22.05.12	Order of Court in OS 141/2012 served on Plaintiff.
(m)	08.06.12	Plaintiff applies by OS 547/2012 (*ie*, the present proceedings) to set aside the Adjudication Determination and Order of Court in OS 141/2012.

8 The Plaintiff stressed that the Defendant's Progress Claim No 8 was for exactly the same work claimed under Progress Claim No 7. The amount claimed under Progress Claim No 8 would have been for the same sum as was claimed under Progress Claim No 7 but for the fact that the Plaintiff had made payment of $125,000 after receiving Progress Claim No 7. Therefore, the Defendant had given credit for this $125,000 in its Progress Claim No 8.

9 As can be seen from the above chronology, the Plaintiff did not issue a payment response to Progress Claim No 8. Neither did it participate in the adjudication process which arose from the Adjudication Application of the Defendant. The Adjudicator issued his Adjudication Determination ("the AD") as set out in the chronology. After this, the Defendant applied and obtained leave of court from a District Court to enforce the AD in the same manner as a judgment or order of court. After the District Court made an order to grant the Defendant such leave and that order was served on the Plaintiff, the Plaintiff then filed the present Originating Summons in the High Court ("OS 547/2012")

seeking, firstly, to set aside the AD and, secondly, to set aside the District Court Order granting leave to the Defendant to enforce the AD as mentioned above.

10 OS 547/2012 was heard by an Assistant Registrar ("AR") on 11 and 18 July 2012 who allowed the Plaintiff's application and ordered, *inter alia*, that the AD be set aside.

11 On 8 August 2012, the AR issued her Grounds of Decision stating, *inter alia*, that:

(a) the court can review the validity of a payment claim;

(b) there was insufficient basis to support setting aside the AD on the ground alone that Progress Claim No 8 was a repeat claim; and

(c) the AD was set aside on the basis that Progress Claim No 8 had been served out of time.

12 The AR declined to hear any argument in respect of the prayer to set aside the District Court Order which granted the Defendant leave to enforce the AD. She made no order on that prayer save that leave was granted to the Plaintiff to bring an application to set aside the District Court Order.

13 On 31 July 2012, the Defendant filed the present appeal (Registrar's Appeal No 316 of 2012) against the AR's decision.

The process of applying for leave to enforce or to set aside an AD

14 As can be seen from the facts enunciated above, the Plaintiff filed OS 547/2012 in the High Court even though the order granting leave to the Defendant to enforce the AD was made by the District Court.

15 Counsel for the Plaintiff explained that in a previous similar case, a District Judge had decided that the District Court has no jurisdiction to set aside an AD because the review or consideration of such a determination is an exercise of supervisory power which the District Court does not have. After an appeal was filed to the High Court against that decision, the High Court agreed with the decision of the District Judge. Accordingly, in the present case, counsel for the Plaintiff filed its application in the High Court to set aside both the AD and the District Court Order granting leave to enforce the AD.

16 However, the AR apparently was of the view that since the order granting leave to enforce the AD was made by the District Court, then the District Court was the appropriate court to set aside such an order.

17 The Plaintiff's counsel said it was not clear in the first place whether the District Court has jurisdiction to grant leave to enforce the AD although he was of the view that it does have such a jurisdiction. Section 27(1) of SOPA which stipulates that an AD "may, with leave of the court, be enforced in the same manner as a judgment or an order of the court to the same effect" does not specify from which court the leave should be sought. Accordingly, it does not stipulate that leave to enforce must be sought from the High Court. Secondly, the granting of leave to enforce an AD was not an exercise of supervisory power.

18 He also said that O 95 r 2(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") states that an application for such leave is to be made to the Registrar without qualification and the definition of the "Registrar" refers to the Registrar of the Supreme Court and of the Subordinate

Courts (of which the District Court is part).

19 As for the prayer to set aside the order granting leave to enforce, it seemed to me that there is no need to apply to set aside the order granting leave to enforce the AD if the AD itself is set aside. The order granting leave to enforce would then cease to be effective.

20 Nevertheless, it does seem strange that an application for leave to enforce an AD may be made to the District Court but an application to set aside such an AD must be made in the High Court. I am of the view that such a dichotomy will trip many a solicitor as happened in the previous case mentioned by the Plaintiff's counsel. Indeed, it seemed to me that he was aware of it only because he or his firm acted in the previous case when the client's application to set aside an AD failed because it was filed in the wrong court.

21 I hope that the process can be streamlined, whether by amendment of the Rules or otherwise, so that in future any application for leave to enforce will be made in the High Court.

Issues arising in this appeal

22 The issues to be determined in the appeal were:

(i) whether the court may review the validity of a payment claim;

(ii) whether it was inequitable for the Plaintiff to challenge the AD or the Plaintiff had waived its right to do so. This was a new issue raised by the Defendant's counsel, Mr Lam, at the appeal.

(iii) whether Progress Claim No 8 was an invalid payment claim under SOPA and, if so, its effect;

(iv) whether Progress Claim No 8 was served out of time; and, if so, its effect;

(v) whether the adjudication application was invalid as a result of the Defendant failing to serve a Notice of Intention to Apply for Adjudication in accordance with the provisions of SOPA. This was a new issue raised by the Plaintiff's counsel, Mr Chan, at the appeal.

Issue 1- Whether the court may review the validity of a payment claim

23 SOPA does not expressly state that a court may set aside an AD but, as Mr Chan submitted, s 27(5) of the SOPA clearly contemplates that a court can do so. Section 27(5) states, "Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, ...". The court's power to set aside an AD is acknowledged by O 95 of the Rules which sets out specific provisions on the manner in which a party may apply to set aside an AD. The Defendant did not dispute the court's power to set aside an AD.

24 SOPA does not elaborate on the matters which a court may consider in deciding whether to set aside an AD.

25 After considering differing High Court decisions on the scope of review available under s 27(5) of the SOPA, I concluded that the court may review the validity of a payment claim.

26 There is no need for me to discuss here the various High Court decisions as the Court of Appeal recently delivered its written judgment in *Lee Wee Lick Terence* (*Li Weili Terence*) v *Chua Say Eng* (*formerly trading as Weng Fatt Construction Engineering*) [2012] SGCA 63 ("*Lee Wee Lick*") after I

had given my oral decision. I will refer to that judgment as "the CA Judgment". In the CA Judgment, the Court of Appeal reviewed various High Court authorities and drew a distinction between two situations. The first is whether there is in existence a payment claim. The second is whether a payment claim complies with the requirements of SOPA. The first goes to the validity of the appointment of an adjudicator. The second goes to the validity of an AD. They can lead to the same outcome, *ie*, the setting aside of an adjudication award, but it would be for entirely different reasons (see [28], [31] and [37] of the CA Judgment).

27 The Court of Appeal also reviewed various Australian cases and were of the view that the characterisation in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 ("*Brodyn*") of a condition, the breach of which would invalidate an adjudication, as "essential" is substantially the same as the characterisation in *Chase Oyster Bar Pty Limited v Hamo Industries Pty Ltd* [2010] NSWCA 190 ("*Chase Oyster*") of such a condition as "mandatory" (see [61] of the CA Judgment).

28 The question is whether the non-compliance or the breach is of a provision which is so important that it is the legislative purpose that the non-compliance or breach results in invalidity (see [67] of the CA Judgment).

29 Accordingly, the court may review the validity of a payment claim subject to the second issue which I now come to.

Issue 2 – Whether it was inequitable for the Plaintiff to challenge the AD or the Plaintiff had waived its right to do so

30 Mr Lam relied on *Brookhollow Pty Ltd v R&R Consultants Pty Ltd* [2006] NSWSC 1 ("*Brookhollow*") for the proposition that a challenge to a payment claim, like a challenge to the service thereof, must be raised in a timeously served payment response. As the Plaintiff did not send a payment response or participate in the adjudication proceedings, he submitted that it was inequitable for the Plaintiff to challenge the validity of Progress Claim No 8. I add that s 15(3)(a) SOPA states:

> **15**.—(3) 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;

Therefore, in the context of a construction contract which the parties proceeded under, there is a consequence if a respondent does not serve a payment response.

3 1 *Brookhollow* was a case dealing with the New South Wales Building and Construction Industry Security of Payment Act 1999 (which was amended in 2002 as I shall elaborate below). Section 20(2A) of their legislation is the equivalent of s 15(3)(a) SOPA.

32 *Brookhollow* is authority for the proposition that a respondent must timeously serve a payment schedule (which is the equivalent of a payment response under SOPA) to state its reasons for contesting a payment claim. If it does not, then it is precluded from raising those reasons to set aside or restrain enforcement of an AD.

33 Recently, in *RN & Associates Pte Ltd v TPX Builders Pte Ltd* [2012] SGHC 225, Justice Andrew

Ang ("Ang J") delivered a written judgment whereby he concluded that a respondent who served a payment response but did not raise a certain objection in its payment response was estopped from raising it before the court.

34 Ang J was also of the view that the validity of a payment claim is a mixed question of law and fact within an adjudicator's jurisdiction.

35 I should mention that Ang J's written judgment was also delivered after I had given my oral decision in the present case. My view was that if a payment claim was given in breach of SOPA, that would undermine the jurisdiction of the adjudicator to give the AD. Accordingly, neither s 15(3) SOPA nor estoppel would preclude the Plaintiff from challenging the validity of the payment claim.

36 As mentioned above at [26], the CA Judgment has drawn a distinction between two different situations which I need not repeat. As regards the second situation, where, for example, the validity of an AD is in issue because of the validity of a payment claim, the CA Judgment suggests that the Plaintiff would still not have been precluded from challenging the validity of a payment claim notwithstanding the absence of a payment response from the Plaintiff.

37 In *Lee Wee Lick*, the respondent also did not serve a payment response and also did not file an adjudication response although, apparently, it did participate in the adjudication conference. Yet the Court of Appeal did not conclude that the respondent there was precluded from raising reasons to challenge the validity of an AD.

38 For completeness, I would mention that in another case which I recently heard, a claimant relied on the last sentence of [65] of the CA Judgment to contend that failure to serve a payment response precluded a respondent from raising any ground to challenge an AD. That sentence states: "... If the respondent's objection is that there is no valid payment claim, this should be raised as soon as possible in the payment response so as not to delay the adjudication process."

39 As can be seen, that sentence does not go so far as that claimant's contention. All that sentence said was that a respondent's objection "should" be raised as soon as possible. I agree that a respondent's objection should be raised as soon as possible. However, that is a far cry from saying that absence of a payment response precludes a respondent from challenging an AD on any ground.

40 Furthermore, the CA Judgment confines the role of an adjudicator to certain functions which do not include the review of the validity of a payment claim and suggests that the validity of a payment claim is to be determined by the court (see [64]-[65] of the CA Judgment).

41 This arguably also suggests that failure to serve a payment response does not preclude a respondent from relying on an alleged invalidity of a payment claim in a setting aside application made to the court.

42 I come now to Mr Lam's other argument that the validity of the payment claim could be waived and was waived by the Plaintiff because (a) the Plaintiff had paid $110,000.00 being a partial payment of the amount awarded under the AD and, in so doing, had waived its right to challenge the validity of the payment claim and (b) any error by the adjudicator about the validity of the payment claim was a mere irregularity which could be waived, relying on the judgment of Prakash J in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658 ("CHHK") at [43] and [44].

43 I was of the view that if the payment claim was in breach of s 10(1) SOPA, as alleged by the

Plaintiff, that was not an irregularity which could be waived.

44 In any event, the Plaintiff said that it had made the alleged payment pursuant to a settlement agreement it had reached with the Defendant after the AD was made and not pursuant to the AD whereas the Defendant denied any settlement and alleged that the payment was made pursuant to the AD. The evidence at present was insufficient to establish whether the payment was made pursuant to the AD or not. Accordingly, on the available facts so far, I did not think that the Defendant had established this contention.

Issue 3 - Whether Progress Claim No 8 was an invalid payment claim under SOPA and, if so, its effect

45 As I mentioned above, the AR was of the view that there was insufficient basis to support the setting aside of the AD on the ground that Progress Claim No 8 was a repeat identical claim. Her reason was that in order to do so, "I would first have to consider as a matter of law whether a sum could be included in a fresh payment claim where no further works had been carried out after service of the original claim but the said sum had not been paid. I would also have to consider as a matter of fact what the nature of the works originally claimed and what the nature of the works claimed in the allegedly repeat claim were. This could entail a laborious process of looking at the breakdown of the claim and going into an understanding of how each item was incurred."

46 I gather that the second reason, *ie*, the factual reason was the main reason why the AR was of the view that there was insufficient basis to decide whether Progress Claim No 8 was in fact a repeat claim in the first place.

47 However, the facts before me were clear and undisputed. Mr Lam did not suggest that Progress Claim No 8 was not a repeat claim of Progress Claim No 7. I stress that my reference to a "repeat" claim is one which merely repeats an earlier claim without any additional item of claim, whether for additional or repair work or otherwise although of course it may and should give credit for any payment received since the earlier claim was made.

48 There was no doubt that Progress Claim No 8 was a repeat claim. The question was whether it was a valid claim under SOPA. Sections 10(1) and (4) SOPA state:

> **10**.—(1) A claimant may serve one payment claim in respect of a progress payment on —
>
> (*a*) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or
>
> (*b*) such other person as specified in or identified in accordance with the terms of the contract for this purpose.
>
> ...
>
> (4) 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.

49 Mr Chan submitted that s 10(1) implicitly precluded a claimant from making a repeat claim. As for s 10(4), he submitted that s 10(4) allows an earlier payment claim to be "included" in a subsequent payment claim only if the earlier payment claim is part of a larger subsequent payment claim. In other words, s 10(4) does not allow a claimant to simply repeat an earlier claim.

50 Mr Lam did not seem to dispute that s 10(1) implicitly precluded a claimant from making a repeat claim. However, he focussed on s 10(4) and submitted that it allows a claimant to make a repeat claim.

51 The Adjudicator was of the view that s 10(4) did not prevent the Defendant from including in Progress Claim No 8 what had been claimed in Progress Claim No 7 (see [19] and [20] of the AD). He seemed to assume that the word "include" in s 10(4) allows the Defendant to make a repeat claim. In fairness to him, he might not have been aware of the argument about s 10(1) as the Plaintiff did not participate in the proceedings before the Adjudicator.

52 SOPA is derived primarily from New South Wales legislation, *ie*, their Building and Construction Industry Security of Payment Act 1999 as amended in 2002 ("BCISOPA Amended 2002").

53 In 2002, New South Wales introduced various provisions including a new section 13(5) and (6):

> (5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.
>
> (6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

54 As can be seen, s 13(5) BCISOPA Amended 2002 is explicit about prohibiting a claimant from serving more than one payment claim whereas our s 10(1) does not have this express prohibition. The argument before me was that the prohibition was implied. Another "difference" is that the said s 13(5) talks about a payment claim in respect of "each reference date under the construction contract" whereas our s 10(1) talks about one payment claim in respect of "a progress payment". However, the definition of a "reference date" in s 8(2)(a) BCISOPA Amended 2002 in turn refers to a progress payment as it means "a date determined by ... the terms of the contract as the date on which a claim for a progress payment may be made ...".

55 In *Sandra Doolan and Stephen Doolan v Rubikcon (QLD) Pty Ltd* [2007] QSC 168 ("*Doolan*"), the Supreme Court of Queensland was considering, *inter alia*, ss 17(5) and (6) of the Building and Construction Industry Payments Act 2004 which is similar to (but not identical with) ss 13(5) and (6) of BCISOPA Amended 2002. Fryberg J decided that a previous claim cannot be the sole item included in a later claim.

56 In *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 ("*Dualcorp*"), Allsop P of the New South Wales Court of Appeal said, at [13] and [14]:

> 13 I see no warrant under either the contract or the Act, s 8 for permitting a party in Dualcorp's position to create fresh reference dates by lodging the same claim for the same completed works in successive payment claims. That is not the intended operation of the last phrase of s 8(2)(b) ("and the last day of each subsequent named month").
>
> 14 Here, the work had been done; Dualcorp, the subcontractor, had left the site; it claimed payment by six invoices; six weeks later it repeated that claim by reference to the same invoices

and, in my view, in respect of the same reference date. Dualcorp was prevented from serving the second payment claim. The terms of s 13(5) are a prohibition. The words "cannot serve more than one payment claim" are a sufficiently clear statutory indication that a document purporting to be a payment claim that is in respect of the same reference date as a previous claim is not a payment claim under the Act and does not attract the statutory regime of the Act.

57 Section 8(2)(b) of BCISOPA Amended 2002 states:

> (2) In this section, ***reference date*** , in relation to a construction contract, means:
>
> ...
>
> (b) if the contract makes no express provision with respect to the matter—the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.
>
> [emphasis in original]

58 In *Doo Ree Engineering & Trading Pte Ltd v Taisei Corp* [2009] SGHC 218 ("*Doo Ree*"), another Assistant Registrar, Nathaniel Khng, referred to various cases including *Dualcorp* and *Doolan* as well as *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152. He decided that repeat claims are not allowed under SOPA. AR Khng said at [20]:

> 20 The interpretation given in *Shellbridge* and *Dualcorp* would appear to be in line with the legislative intention behind the enactment of ss 13(5) and 13(6), which apparently was to limit the number of times a claim could be made in respect of each particular reference date in order to prevent abuse. At the Second Reading of the Building and Construction Industry Security of Payment Amendment Bill 2002 (NSW), which sought to enact, *inter alia*, ss 13(5) and 13(6), Mr Morris Iemma (the Minister for Public Works and Services, Minister for Sport and Recreation, and Minister Assisting the Premier on Citizenship) stated (New South Wales, Legislative Assembly, *Parliamentary Debates* (12 November 2002) at p 6543):
>
> > W e *recognise the potential for claimants to abuse also the intent of the legislation*. Consequently, the bill [*ie*, the Building and Construction Industry Security of Payment Amendment Bill] *restricts claimants to one payment claim under the Act in respect of each reference date*. [emphasis in AR Khng's decision]

59 So far, the authorities mentioned above were in support of Mr Chan's contention. However, when the Defendant's appeal first came on for hearing before me on 6 September 2012, Mr Lam had discovered and referred to a contrary decision by the Queensland Court of Appeal in *Spankie v James Trowse Construction Pty Ltd* [2010] QCA 355 ("*Spankie*"). I have mentioned above that ss 17(5) and (6) of the Queensland legislation is similar to the New South Wales legislation. I set out below ss 17(1), (2), (4), (5) and (6) of the Queensland legislation:

> 17 Payment claims
>
> (1) A person mentioned in section 12 who is or who claims to be entitled to a progress payment (the claimant) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (the respondent).

(2) A payment claim –

(a) must identify the construction work or related goods and services to which the progress payment relates; and

(b) must state the amount of the progress payment that the claimant claims to be payable (the claimed amount); and

(c) must state that it is made under this Act.

...

(4) A payment claim may be served only within the later of –

(a) the period worked out under the construction contract; or

(b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.

(5) A claimant cannot serve more than 1 payment claim in relation to each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

60 In *Spankie*, the court of first instance rejected the contention that the law precluded the making of successive payment claims for identical amounts for the same work where the second payment claim related to a new reference date after the reference date for the first claim. The Court of Appeal dismissed an appeal against that decision.

61 The judgment of the Court of Appeal was delivered by Fraser JA. He said at [23]:

> I return to the provision which is critical for the appellant's argument, s 17(6). In my respectful opinion, the text of s 17(6) is wholly inapt to impose any restriction upon the generally expressed entitlement in s 17(1). When s 17(6) is read in the context of the preceding provisions, as it should be, its effect is merely to ensure that no implication may be drawn that s 17(5) precludes a claimant from making a payment claim for an unpaid amount claimed in a previous claim. Section 17(6) does not provide that a payment claim may not claim only an unpaid amount of a previous payment claim and it should not be given that construction. The prospect that claimants might cause respondents undue expense and inconvenience by using payment claims as rehearsals for a final claim is an insufficient basis for such a construction. That concern should not be exaggerated. Claimants will ordinarily have a powerful interest in putting their best foot forward in the earliest payment claim so as to obtain prompt payment. In any event, even on the appellant's construction s 17(6) permits repetitive claims if the subsequent payment claim also claims another amount. That requires rejection of the appellant's argument that there is a general implication in BCIPA against any "re-agitation" of a payment claim in a subsequent payment claim, even where there has been no adjudication determination.

62 As for the observations made by Allsop P in *Dualcorp*, Fraser JA distinguished *Dualcorp* from *Spankie* on the basis that in *Dualcorp* the earlier claim was the subject of a valid AD.

63 In view of the above authorities, I asked counsel to do further research, *inter alia*, to see if there was any Parliamentary statement (other than the one cited in *Doo Ree*) in any of the various jurisdictions including Singapore which would shed more light on the issue. Notwithstanding their diligence, counsel were unable to uncover any such statement although Mr Lam came up with more cases which I will come to later.

64 If one were to apply Fraser JA's observations about the said s 17(6) to s 10(4) of SOPA, one might think that this would mean that our s 10(4) is also inapt to impose any restriction on repeat claims. While this may be so, I did not agree, for the reasons stated below, that a claimant in Singapore may rely on a repeat claim as the basis of an adjudication application.

65 I did not think that our s 10(1) is a generally expressed entitlement. On the contrary, it stipulates that a claimant may serve "one" payment claim. That restriction applies "in respect of a progress payment".

66 In Queensland, s 17(1) is subject to s 17(5) which restricts one payment claim in relation "to each reference date" so that, in the view of Fraser JA, another payment claim can be made so long as it is in relation to a different reference date even though it is in respect of an identical sum for identical work previously claimed and no more.

67 In my view, s 10(1) does impliedly preclude a claimant from making a repeat claim. Otherwise there would be no purpose in having s 10(1). Furthermore, it is because s 10(1) contains this implied prohibition that s 10(4) starts off by stating "Nothing in subsection (1) shall prevent ...". If there is no prohibition in s 10(1) in the first place, then the starting words in s 10(4) are unnecessary. Furthermore, Mr Lam did not suggest that s 10(1) imposed a prohibition other than the one contended by Mr Chan. Indeed, as mentioned above, he appeared to accept Mr Chan's position on s 10(1) but not on s 10(4).

68 It also seemed to me that it is an abuse to allow a claimant to make repeat claims which he will do if, for example, he has missed the deadline under SOPA to serve his earlier payment claim. Indeed, the deadline to do so would also be rendered largely nugatory if he can resurrect a new deadline by merely issuing and serving a repeat claim.

69 I come now to the additional cases which Mr Lam cited to support the Defendant's position. I need only mention four specifically.

70 In *Watpac Constructions v Austin Corp* (2010) NSWSC 168, the facts were quite different. The payment claim which was the subject of an AD included a claim for variation work which had been the subject of an earlier AD by another adjudicator. The court decided that such an inclusion did not make the entire payment claim an invalid one.

71 The second case is *Olympia Group Pty Ltd v Tyrenian Group Pty Ltd* [2010] NSWSC 319. Mr Lam relied on what Hammerschlag J said at [32]:

> So far as abuse of process point is concerned, I propose to follow what was said by the Court of Appeal in *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259. In the judgment of Hodgson JA at par 36 his Honour held that the Act permits successive payment claims to be made for the same work. This disposes of the first plaintiff's submission.

72 The third case is *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* [2006] NSWCA 259 which was cited with approval by Hammerschlag J. In that case, Hodgson JA adhered to

what he had said in *Brodyn* "to the effect that after cessation of work there continue to be reference dates in respect of which successive payment claims can be made ..." and that s 13(6) permits successive payment claims to be for the same work.

73 However, what Hodgson JA said in *Brodyn* was not in respect of a repeat claim as such. What he said there was that successive payment claims could still be made even though no further work was done because an earlier claim may, for one reason or another, have excluded a claim for work done. Hodgson JA said at [62] to [64]:

> 62 Brodyn's submission was that the payment claim served on 28 September 2003 was not a valid payment claim under the Act, because the termination of the contract and cessation of the work under it meant that there was thereafter only one reference date, in respect of which only one final payment claim could be made. This submission was supported by the decision of McDougall J in *Holdmark Developers Pty Ltd v G J Formwork Pty Ltd* [2004] NSWSC 905.
>
> 63 However, s 8(2) of the Act does not provide that reference dates cease on termination of a contract or cessation of work. This may be the case under s 8(2)(a) if the contract so provides but not otherwise; while s 8(2)(b) provides a starting reference date but not a concluding one. In my opinion, the only non-contractual limit to the occurrence of reference dates is that which in effect flows from the limits in s 13(4): reference dates cannot support the serving of any payment claims outside these limits.
>
> 64 In my opinion, as submitted by Mr Fisher for Dasein, this view is supported by s 13(6), which indicates that successive payment claims do not necessarily have to be in respect of additional work; and especially by s 13(3)(a), which provides for inclusion in payment claims of amounts for which the respondent is liable under s 27(2A). Losses and expenses arising from suspension of work could arise progressively for a substantial time after work has ceased on a project, and s 13(3)(a) expressly contemplates that further payment claims for these losses and expenses may be made progressively.

74 The fourth case is *CC No 1 v Reed* [2010] NSWSC 294. Mr Lam relied on what MacReady AsJ said at [25] to [27]:

> 25 The critical section to which regard has to be given in any proper construction of the Act is of course s 13 and in particular subsections (5) and (6). As the President said at paragraph 8 of his judgment in *Dualcorp* the subsections permit the inclusion in another payment claim (necessarily by reference to another reference date) an amount that has been the subject of a previous claim. He then gave a common example. That example of course fits in well with the scheme of the Act as frequently there are variation claims which proceed over a substantial period of time and will have an increasing value as each progress claim by reference to a new reference date is made.
>
> 26 What was emphasised in the defendant's submissions was a common situation that may occur where although the physical work is complete the total cost might not be apparent at the time of submitting a claim. For instance a subcontractors invoice might not be received or some item of cost may be overlooked. Take a common example of a cost plus contract which does not give a right to progress payments. It may well be that after the completion of a separate part of the work and a submission of the claim another item of the cost may come to light. As long as it is included in the next reference date claim so as not to administratively overburden the owner why should the builder not be able to claim? It would not be fair to make him wait for the

conclusion of the contract for a chance to exercise his rights under s 32 of the Act.

27 The defendant's construction of the Act seeks to accommodate these additional claims being made in order to allow the contractor to receive the benefit of the cash flow to which he is entitled under the Act notwithstanding that a claim will be for an amount in respect of work, which was physically complete at an earlier time.

75 In my view, those observations did not assist the Defendant. Mr Chan had accepted that the Defendant could present claims of increasing value but not a repeat claim.

76 In the circumstances, I was of the view that a claimant is precluded from making a repeat claim. Section 10(1) is an important part of the scheme under SOPA and it is the legislative purpose that a breach of s 10(1) renders the payment claim invalid. Hence, Progress Claim No 8 was not a valid claim for the purpose of SOPA and the AD, which was based on Progress Claim No 8, was to be set aside.

77 I must, however, refer to the CA Judgment again. That case did not involve a repeat claim. Nevertheless, the judgment said, *obiter*, at [92]:

... In this connection, we should add that we do not approve the finding of the Assistant Registrar in *Doo Ree Engineering & Trading Pte Ltd v Taisei Corporation* [2009] SGHC 218 that s 10(1) of the Act prohibits all repeat claims (in that case, the repeat claim was a non-adjudicated premature claim).

78 It is not clear to me whether the Court of Appeal was referring to a repeat claim as I have described it at [48] above or not. Moreover, no reasons were given for its view. Accordingly, I will say no more about it for the time being.

Issue 4 - Whether Progress Claim No 8 was served out of time and, if so, its effect

79 In respect of Issue 4, Mr Chan submitted that because Progress Claim No 8 related to work carried out up to 30 November 2010, then it ought to have been submitted by 31 December 2010. However, it was only submitted on 24 January 2011 and was therefore served outside the period prescribed by Reg 5(1) of the Building and Construction Industry Security of Payment Regulations ("the SOP Regulations").

80 Regulation 5(1) of the SOP Regulations prescribes the time when a payment claim shall be served in the absence of a contractual stipulation. Regulation 5(1) states:

Where a contract does not contain any provision specifying the time at which a payment claim shall be served or by which such time may be determined, then a payment claim made under the contract shall be served by the last day of each month following the month in which the contract is made.

81 It was not disputed that the contracts between the parties do not specify the date on which a payment claim is required to be served. As such, the Defendant was required to serve its payment claim in accordance with Reg 5(1).

82 As can be seen, Reg 5 does not expressly state that a payment claim must include all work done in the period which is the subject of the claim. In *Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) v Lee Wee Lick Terence (alias Li Weili Terence)* [2011] SGHC 109, the

parties appeared to proceed on that basis and so did the court. The question there was different, *ie*, whether a payment claim for work done in April 2010 had to be served by 30 April 2010 or by 31 May 2010 in the absence of any contractual provision stating otherwise. Tay J decided that it was the latter after referring to comments from a book by Chow Kok Fong and a book and a paper by Dr Philip Chan. Thus, Tay J said, at [49], that "for example, for work done in April, payment must be claimed by 31 May ... if payment for work done in a certain month is not claimed under the SOPA by the last day of the subsequent month, then a claim in respect thereof cannot be made under the SOPA anymore ...".

83 The CA Judgment has decided that Tay J was wrong to conclude that a payment claim for work done in one month must be served by the end of the next month (see [87]-[90] of the CA Judgment) because work done in one month need not be the subject of a payment claim made in the next month.

84 Therefore, it may be that Progress Claim No 8 was not served out of time, if the Defendant is not precluded from making a repeat claim.

85 I will not say more on this issue as I have concluded that the Defendant was precluded from making a repeat claim.

Issue 5 - Whether the Defendant's Notice of Intention to Apply for Adjudication was invalid and, if so, its effect

86 As mentioned above, Mr Chan raised Issue 5 only at the appeal stage. The relevant provisions are ss 11(1), 12(2)(b), 12(5), 13(1) to (3)(a) SOPA.

87 Section 11(1)(b) SOPA stipulates that a respondent named in a payment claim is to respond to the payment claim within seven days after the payment claim is served under s 10 where the construction contract does not specify a date to do so. It was not disputed that the contracts in question did not specify a date to do so.

88 Sections 12(2)(b) and 12(5) state:

> **12**.—(1) ...
>
> (2) Where, in relation to a construction contract —
>
> (*a*) ...
>
> (*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.
>
> ...
>
> (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).

89 I should mention for completeness that s 12(2) pertains to a construction contract whereas

there is another provision, *ie*, s 12(3) which pertains to a supply contract. However, the parties proceeded on the basis that s 12(2) is the applicable provision.

90 Sections 13(1) to (3)(a) state:

> **13**.—(1) A claimant who is entitled to make an adjudication application under section 12 may, subject to this section, apply for the adjudication of a payment claim dispute by lodging the adjudication application with an authorised nominating body.
>
> (2) An adjudication application shall not be made unless the claimant has, by notice in writing containing the prescribed particulars, notified the respondent of his intention to apply for adjudication of the payment claim dispute.
>
> (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;
>
> ...

91 As Progress Claim No 8 was submitted on 24 January 2011, the Plaintiff had seven days to respond, *ie*, by 31 January 2011. The dispute settlement period was seven days thereafter. According to Mr Chan, this would expire on 9 February 2011 in view of two Chinese New Year holidays and not on 8 February 2011 as the Defendant had thought. The difference of one day is immaterial for present purposes. After 9 February 2011, the Defendant had seven days to make its adjudication application, *ie*, between 10 February to 16 February 2011. Mr Chan submitted that the Defendant had to give its notice of intention to apply for adjudication ("NIAA") during this period and not before because the Defendant was not entitled to seek adjudication until the period between 10 February to 16 February 2011.

92 Mr Chan accepted that the Defendant did give an NIAA to the Plaintiff twice before 10 February 2011.

93 The first NIAA was in the text of Progress Claim No 8. It stated:

> ...
>
> Kindly take note that you shall make payment response to us by 31 January 2011 in accordance with SOP Act and both parties shall manage to settle the disputes within the next 7 days, that is, by 8 February 2011. We respectfully believe that adjudication is a fair and reasonable process to deal with payment disputes, kindly please also take this letter as our notice of intention to apply for adjudication.
>
> ...

94 The second NIAA was on 1 February 2011 when the Defendant wrote to the Plaintiff. The letter recorded that the Plaintiff had failed to make a payment response and reminded the Plaintiff that the dispute settlement period ended on 8 February 2011 (which should be 9 February 2011 as mentioned above at [91]). In the letter, the Defendant notified the Plaintiff of its intention to "proceed with adjudication on 9 February 2011 should the dispute be not settled and payment be not made". (see the AD at [24]).

95 Mr Chan further submitted at pp 22-23 of his written submissions dated 6 September 2012 as follows:

> 78. While this result [of his contention] is admittedly drastic, we submit that the Australian Courts have taken an equally strict position in applying their equivalent Act. Under the [BCISOPA Amended 2002]:
>
> (i) a respondent must provide a payment schedule (the equivalent of a payment response) to the claimant either (1) within the time required by the contract; or (2) within 10 business days after the payment claim is served, whichever is earlier. (section14)
>
> (ii) If it fails to do so, the claimant then has to notify the respondent of its intention to apply for adjudication. (section 17(2)(a))
>
> (iii) The respondent must then be given an opportunity to provide a payment schedule within 5 business days after receiving the claimant's notice. (section 17(2)(b))
>
> (iv) If the respondent still does not provide a payment schedule within the 5 day period, then an adjudication application must be made within the following 10 business days. (section 17(3)(e))
>
> 79. In the case of *Taylor Projects Group Pty Ltd v Brick Dept Pty Ltd* [2005] NSWSC 439 ("*Taylor*")]..., the respondent had served its payment schedule one day after the stipulated 10 day period, but before the claimant notified the respondent of its intention to apply for adjudication. However, after the claimant had notified the respondent accordingly, the respondent failed to re-serve its payment schedule within the subsequent 5-day period.
>
> [80]. The Court held that although the respondent had physically provided a payment schedule, it was not done within the stipulated 10 day period. Therefore, the "payment schedule" was not a proper payment schedule provided in compliance with the NSW AOP Act. The same "payment schedule" could also not be construed as being served during the subsequent 5 day period, as the requisite notice had not yet been issued by the claimant. As such, the Court held that the payment schedule was not valid.

96 Mr Chan relied on what Einstein J said at [49] and [51] in *Taylor:*

> 49 The point was made in Emag that the whole of the rationale underpinning the procedures laid down by the Act is directed at providing a quick and efficient set of procedures permitting recovery of progress payments and the quick resolution of disputes in that regard; that the time limits under the Act are strict and that the consequences of not complying with stipulated time limits may be significant. In my view it is simply critical for a rigid approach to be taken to compliance with the terms of the Act, particularly for the reason that the legislation provides for a fast dual-track interim determination, reserving the parties' final legal entitlements for subsequent determination. The adjudicator is not shown to have erred in failing to consider the payment schedule provided by Taylor on 20 January 2005.
>
> 50 **...**
>
> 51 Taylor's submissions as to "technical infringement" and "time-frames and requirements" set up by section 17(2)(b) are rejected. The Act requires to be construed in the orthodox fashion – in accordance with the ordinary meaning of the words used.

97 Mr Chan also relied on *Security of Payments and Construction Adjudication* by Chow Kok Fong, LexisNexis, 2005 Ed at pp 264-265 and a flowchart in the Building and Construction Authority's SOPA 2004 Information Kit to support his contention that an NIAA can only be issued after the claimant is entitled to apply for adjudication under s 12(2).

98 On the other hand, Mr Lam submitted that SOPA does not expressly state when an NIAA is to be given. Furthermore, there was no prejudice to the Plaintiff when the Defendant gave the NIAA before it was entitled to apply for adjudication.

99 It seemed to me that SOPA envisages that the NIAA will be given after the Defendant is entitled to apply for adjudication, *ie*, after the expiry of the dispute settlement period. The flowchart from the Information Kit which Mr Chan relied on illustrates this point. The textbook by Chow Kok Fong at pp 264-265 also supports this view. However, neither the flowchart nor the textbook goes so far as to say that an NIAA may only be issued after the Defendant is entitled to apply for adjudication. For example, pp 264-265 of Chow's textbook merely states:

> **Time of Service**
>
> It is interesting that, under the Singapore BCISP Act, no minimum interval is prescribed between the service of the notice on the respondent and the making of the adjudication application by the claimant. It would appear, therefore, that the claimant can make the application the moment the notice has been served. In the case of a payment dispute arising from a construction contract, the notice is likely to be served at the conclusion of the dispute settlement period if no settlement is reached.

100 Furthermore, while it is true that there is an express deadline by which the adjudication application must be made and consequently an NIAA must be given before that deadline, there is no express stipulation that the NIAA may only be issued after the right to apply for adjudication has arisen. The key question was whether such a stipulation should be implied.

101 I did not think that *Taylor* assisted the Plaintiff much because in that case, the respondent had served its payment schedule late and then omitted to serve it within an additional period. The facts were different from the present case.

102 It seemed to me that there are enough timelines under SOPA for a claimant to watch for. It is one thing to impose the severe consequence of invalidity if he takes a step too late. It is another to impose the same severe consequence if he takes a step too early. On the other hand, I was concerned that if I rejected Mr Chan's contention, a claimant may decide to give a blanket NIAA right from the very start when he makes his first payment claim so as to avoid having to give an NIAA each time for each progress claim. If a claimant gives a blanket NIAA, a respondent may forget that the claimant intends to proceed with an adjudication application in respect of subsequent claims, in the absence of a favourable response from the respondent. However, s 13(2) appears to address this concern because it requires the NIAA to contain the prescribed particulars which must mean the particulars of a particular claim.

103 It may of course be argued that a claimant who gives an NIAA even before the commencement of the dispute settlement period evinces an intention not to even try to settle any dispute which may arise from his payment claim. I would not agree with such an argument. I do not think that the one necessarily leads to the other.

104 I considered the following:

(a) the absence of any express prohibition against an early NIAA;

(b) the severe consequence which Mr Chan's contention will attract;

(c) the absence of any prejudice to the Plaintiff; and

(d) the absence of any policy argument favouring Mr Chan's contention. I was of the view that I ought to reject Mr Chan's contention. In the circumstances, the Defendant's NIAA was not invalid.

Summary

105 In the circumstances, I dismissed the Defendant's appeal with costs which I fixed. I would mention that because the Plaintiff did not raise his objection to Progress Claim No 8 earlier, the AR took this into account when she granted the Plaintiff costs of $200 only for the hearing below. Since the Plaintiff had been penalised for its conduct, I awarded it costs of $7,500 plus reasonable disbursements for the appeal.