Qingjian International (South Pacific) Group Development Co Pte Ltd *v* Capstone Engineering Pte Ltd
[2014] SGHCR 5

Case Number : Originating Summons No 1022 of 2013

Decision Date : 18 February 2014

Tribunal/Court : High Court

Coram : Eunice Chua AR

Counsel Name(s) : Tan Yeow Hiang and Lim Yao Jun (Kelvin Chia Partnership) for the plaintiff; A Rajandran (A Rajandran) for the defendant.

Parties : Qingjian International (South Pacific) Group Development Co Pte Ltd — Capstone Engineering Pte Ltd

Building and Construction Law

Civil Procedure

18 February 2014 Judgment reserved.

Eunice Chua AR:

1 This is an application for the setting aside of an adjudication determination pursuant to s 27(5) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). As parties raised issues that have yet to be addressed in judicial precedent relating to the appropriate mode of service of the order of court granting leave to enforce the adjudication determination, whether or not there existed a contract in writing within the meaning of s 4 of the Act, and whether or not there was valid service of a payment claim that was addressed to two parties in the alternative and communicated by way of email, I reserved judgment to give careful consideration to the matter.

Factual background

2 The plaintiff, Qingjian International (South Pacific) Group Development Co Pte Ltd, was the main contractor of a Housing and Development Board project at Upper Serangoon View ("the Project"). The defendant, Capstone Engineering Pte Ltd, was engaged as a sub-contractor to supply labour, equipment and tools for masonry and plastering works for certain blocks of the Project. The precise contours and manner of the defendant's engagement is disputed by the parties.

3 It will be appropriate at this juncture to introduce Qingdao Construction (Singapore) Pte Ltd ("Qingdao"). Qingdao and the plaintiff have the same registered office and the same officers, and both are wholly owned by CNQC (South Pacific) Holding Pte Ltd. The persons dealing with the defendant in relation to the Project have positions in both the plaintiff and Qingdao.

4 It was apparent that the defendant initially regarded Qingdao as the party who had engaged its services for the Project. On 8 January 2013, the defendant issued a quotation in relation to works for Blocks 476A, 476B, 477B and 477C of the Project ("the 8 January 2013 Quotation") to Qingdao. It is not disputed that there was no signed written contract as between the plaintiff and the defendant or Qingdao and the defendant. Nevertheless, the defendant commenced works in relation to the Project.

5 Disputes soon arose relating to the 1st, 2nd and 3rd payment claims submitted by the defendant and the defendant lodged an adjudication application against Qingdao in SOP AA 105 of 2013 ("AA 105/2013") in respect of those payment claims on 7 June 2013. The present application is in relation to SOP AA 126 of 2013 ("AA 126/2013") arising from the 4th payment claim submitted by the defendant. However, AA 105/2013 provides important background to the present application. It is noted that the same solicitors that represented Qingdao in AA 105/2013 represented the plaintiff in the present proceedings.

6 In AA 105/2013, Qingdao took the position that the defendant was claiming against the wrong party and that it ought to look to the plaintiff for payment instead. AA 105/2013 was eventually settled at mediation on 18 July 2013 and, in exchange for a cheque payment from the plaintiff, the defendant re-issued, *inter alia*, the 8 January 2013 Quotation by addressing it to the plaintiff instead of Qingdao ("the Revised Quotation").

7 Before AA 105/2013 was settled but after it was commenced, the defendant made its 4th payment claim, dated 28 June 2013, against the plaintiff. The 4th payment claim was for the sum of $223,004.00 and was addressed to:

> Qingdao Construction (Singapore) Pte Ltd
>
> OR Qinjian [*sic*] International (South Pacific) Group
>
> Development Co., Pte Ltd
>
> QS – Ms Zhu Xiao Xia
>
> CM – Ms Chu Xiao Yan

8 The email enclosing the 4th payment claim, also dated 28 June 2013, stated as follows:

> To: Qingdao Construction (Singapore) Pte Ltd or Qingjian International (South Pacific) Group Development Co., Pte Ltd
>
> Attn: CM – Ms Chu Xiao Yan; QS – Ms Zhu Xiaoxia
>
> Dear Ms Chu/Ms Zhu,
>
> We are pleased to enclose our 4th Progress Claim (Payment Claim) dated 28th June 2013.
>
> In accordance with the provisions of Section 11(1)(b) of [the Act], i.e. within 7 days of the date hereof [*sic*].
>
> This Payment Claim is submitted without prejudice to our position in AA/ SOP 105 of 2013."

9 On 2 July 2013, Ms Chu Xiao Yan emailed the defendant taking objection to the 4th payment claim as follows:

> Dear Mr Lim,
>
> I refer to your email to me on 28 June 2013 and the attachments, including in particular your

payment claim no. 4 for $223,004 dated 28 June 2013 ("**your claim**") which was addressed to Qingdao Construction (Singapore) Pte Ltd ("**Qingdao**") OR Qingjian International (South Pacific) Group ("**Qingjian**").

I regret to inform you that neither Qingdao nor Qingjian is able to consider or accept your claim, as it is invalid and not in compliance with the provisions of [the Act].

Under the Act, you may only serve your payment claim on a person or persons, who under the contract concerned, is or may be liable to make the payment to you.

Clearly, you cannot have more than one contract for your works and Qingjian and Qingdao cannot be liable to you at the same time under your contract. Further, you should also know who you had contracted with. The onus and responsibility is therefore on you to specify who your claim was intended for.

We ask therefore that you clarify and specify the company to which you claim was addressed.

Qingdao or Qingjian, as the case may be, will respond to your claim, upon receiving your clarification.

Please let us have your clarification **on or before 3 p.m. of Tuesday, 2 July 2013**.

We reserve all of our rights, including in particular the right to bring this exchange of emails to the attention of the appropriate forum at the appropriate time.

[emphasis in original]

10 Although the defendant did not provide the clarification sought by Ms Chu, the plaintiff served its payment response to the 4th payment claim on 12 July 2013. The defendant filed AA 126/2013 on 19 July 2013. The plaintiff attempted to file an adjudication response at 4.35pm on 29 July 2013 and the defendant took objection on the basis that pursuant to the Singapore Mediation Centre Rules, the adjudication response would be considered as lodged the next day as it was lodged after 4.30pm. The adjudicator agreed with the defendant and did not consider the adjudication response for the reasons set out in a determination on this preliminary issue dated 29 August 2013.

11 The adjudicator issued her adjudication determination on the merits of AA 126/2013 on 30 August 2013. The amount due pursuant to the adjudication determination in AA 126/2013 was $80,566.51.

12 When payment was not made by the due date of 17 September 2013, the defendant filed Originating Summons No 887 of 2013 on 20 September 2013 seeking leave to enter judgment and to enforce the judgment. The defendant's application was granted on 24 September 2013.

13 According to the defendant, the order of court granting leave was served on the plaintiff's solicitors on 4 October 2013 by way of fax, email and post. The plaintiff does not dispute receipt of the fax and email on 4 October 2013, but tendered a copy of the defendant's letter stamped with the date 10 October 2013 as evidence that the documents were received by post only on 10 October 2013.

14 The plaintiff filed the present application to set aside the adjudication determination in AA 126/2013 on 24 October 2013. It was eventually heard on 28 and 30 January 2014 as there was an

interim application for an extension of time by the defendant to file its affidavit heard by me on 4 December 2013. The plaintiff did not object to the defendant's extension of time application but sought and was granted four weeks after the filing and service of the defendant's affidavit to file its reply affidavit.

Issues

15 Returning to the present application, as a preliminary issue, the defendant argued that the application should be dismissed on the basis that it was filed out of time.

16 In addition, the application presented two main issues for decision:

(a) Whether there was a contract in writing between the plaintiff and the defendant within the meaning of s 4 of the Act; and

(b) Whether there was valid service of the 4th payment claim within the meaning of s 10(1) of the Act, and, if not, whether that would render the adjudication determination invalid and liable to be set aside.

My decision

17 I determined the preliminary issue in favour of the plaintiff but not the substantive issues for the reasons set out below.

Whether the application was filed out of time

18 Under O 95 r 2(4) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed):

> Within *14 days after being served with the order granting leave*, the debtor may apply to set aside the adjudication determination and the adjudication determination shall not be enforced until after the expiration of that period or, if the debtor applies within that period to set aside the adjudication determination, until after the application is finally disposed of.
>
> [emphasis added]

19 The defendant argued that the setting application was filed out of time because the 14 days within which the application should be filed started running from 4 October 2013, which was when the relevant documents, including the order granting leave, were sent by fax, email and post to the plaintiff's solicitors. Counsel for the defendant submitted that the order granting leave could be served by fax and email by virtue of s 37 of the Act. In any event, the defendant relied on s 2(5) of the Interpretation Act (Cap 1, 2002 Rev Ed) and the Singpost website stating that "[m]ost letters posted before 5.00pm outside Central Business District and 7.00pm within Central Business District should be delivered to the recipient by the next working day" to argue that it was inconceivable that the documents were only received by the plaintiff on 10 October 2013 when they were sent on 4 October 2013 and that the burden was on the plaintiff to prove otherwise.

20 The plaintiff argued that service by fax was invalid because O 62 r 6(3) of the Rules of Court was not satisfied and that service by email was invalid because it was not a mode of service prescribed by O 62 r 6(1). In relation to service by post, the plaintiff accepted that it was a valid mode of service but stated that it only received the order granting leave on 10 October 2013, which was the date stamped on the copy of the defendant's letter. Relying on s 2(5) of the Interpretation

Act and *Chia Kim Huay (litigation representative of the estate of Chua Chye Hee, deceased) v Saw Shu Mawa Min Min and another* [2012] 4 SLR 1096, the plaintiff argued that service on it was effected when it actually received the order granting leave.

21 In my view, the defendant's reliance on s 37 of the Act was misplaced. That section applies to the service of documents authorised or required by the Act. It does not apply to service of the order granting leave, which is provided for in the Rules of Court and not in the Act. Further, s 37(3) of the Act explicitly provides that the provisions of s 37 "are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of documents".

22 However, the plaintiff's reliance on O 62 r 6 was also misplaced as there was a more specific provision prescribing how the order granting leave should be served – O 95 r 2(3) of the Rules of Court, which states:

> An order granting leave must be drawn up by or on behalf of the applicant, and must be served on the debtor —
>
> (a) by delivering a copy to him personally;
>
> (b) by sending a copy to him at his usual or last known place of business; or
>
> (c) in such other manner as the Court may direct.

This was the applicable provision to service of the order granting leave.

23 If the defendant wished to serve the order granting leave by way of fax or email, it should have sought the Court's leave in accordance with O 95 r 2(3)(*c*) whether at the time of application for enforcement of the adjudication determination or otherwise. As the defendant did not do so, it could not rely on such modes of service.

24 In relation to service by post on the plaintiff's solicitors, it was not disputed that such a mode of service was valid and I assume that parties had agreed for personal service on the debtor to be effected through service on its solicitors. The only issue raised by the defendant was the time that the service was effected.

25 Section s 2(5) of the Interpretation Act provides that:

> Where an Act authorises or requires any document to be served by post, whether the word "serve", "give" or "send" or any other word is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, *unless the contrary is proved, shall be deemed to have been effected at the time at which the letter would be delivered in the ordinary course of post.* [emphasis added]

26 In my view, the plaintiff had discharged its burden of proving that it received the order granting leave on 10 October 2013 by adducing evidence of the cover letter enclosing the order granting leave time stamped with the date 10 October 2013. Absent any other evidence from the defendant on when the plaintiff *actually* received the order granting leave, I found in favour of the plaintiff on the preliminary issue.

Whether there was a contract in writing

27 Before me, both parties accepted, and correctly so, that if there was no contract in writing within the meaning of the Act, the adjudication determination in AA 126/2013 should be set aside. This was because the Act applies "to any contract that is made in writing on or after 1st April 2005 …" (s 4(1) of the Act). If the Act does not apply, there is no basis for a payment claim to be made or for adjudication to be commenced.

28 In *Lee Wee Lick Terence v Chua Say Eng* [2013] 1 SLR 401 ("*Terence Lee*") at [67], the Court of Appeal stated that:

> the court may … 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]

29 The High Court in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [45] recognised that the existence of a contract between the claimant and the respondent to which the Act applies was such an essential or mandatory condition.

30 Under s 4(3) of the Act, a contract shall be treated as being made in writing:

> (*a*) if the contract is made in writing, whether or not it is signed by the parties thereto;
>
> (*b*) if the contract is made by an exchange of communications in writing;
>
> (*c*) if the contract made otherwise than in writing is recorded by one of the parties thereto, or by a third party, with the authority of the parties thereto; or
>
> (*d*) if the parties to the contract agree otherwise than in writing by reference to terms which are in writing.

31 Section 4(4) of the Act further provides that:

> Where a contract is not wholly made in writing, the contract shall be treated as being made in writing for the purpose of this section if, subject to the provisions of this Act, the matter in dispute between the parties thereto is in writing.

32 This is one aspect of the Act which differs from the New South Wales Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (NSW) Act ("the NSW Act") as the NSW Act applies to both written and oral contracts.

33 As observed by the authors of Annotated Guide to the Building and Construction Industry Security of Payment Act 2004 (Sweet & Maxwell, 2004):

> The requirement in the Act of some written record of the contractual terms is recognition that a summary dispute resolution procedure such as adjudication will not be suitable for cases where there are disputes on what the express or implied terms of oral agreements are.

34 However, the provisions of ss 4(3) and 4(4) of the Act are broadly drafted to give wide berth to the understanding of a "contract made in writing". See Chow Kok Fong, *Law and Practice of*

Construction Contracts vol 2 (Sweet & Maxwell Asia, 4th Ed, 2012) ("*Law and Practice of Construction Contracts*") at para 19.4. This is in all likelihood due to "the prevalent practice in the construction industry of commencing work without completing all the documentary formalities" alluded to in *Singapore Construction Adjudication Review [2005-2007]* (Chow Kok Fong, Christopher Chuah and Mohan Pillay gen eds) (Sweet & Maxwell Asia, Singapore Mediation Centre, 2009) at para 2.4. It would accordingly be consistent with the policy and purpose of the Act as outlined in *Terence Lee* at [2]–[5] as well as an ordinary reading of ss 4(3) and 4(4) to take a commercially sensible approach in finding the existence of a "contract made in writing".

35 In relation to s 4(4) of the Act, in particular, it is not necessary for all the terms agreed by the parties to be recorded in writing. Section 4(4) of the Act contemplates a contract with only some parts recorded in writing and treats that contract as having been made in writing for the purposes of the Act as long as "the matter in dispute between the parties thereto is in writing". Because s 4(3) applies to the entire s 4, a contract partly made in writing under s 4(4) also need not be a formal signed contract, but will satisfy the writing requirement as long as one of the situations in s 4(3) are satisfied.

36 Unfortunately, the state of evidence before me on the issue of whether there was a contract in writing left something to be desired. On the part of the plaintiff, the plaintiff's contract manager Ms Chu Xiao Yan deposed as follows at para 14 of the affidavit in support of the application:

> The relevant facts and evidence … are set out in the Submissions [appended to the adjudication response] and I will not repeat the same here. I adopt the facts as set out in the Submissions and confirm that they are true to the best of my information, knowledge and belief.

37 This was not ideal because the purpose and scope of the submissions appended to the adjudication response are not the same as an affidavit in support of a setting aside determination or a judgment. It is noted that under O 95 r 3(1)(*b*) and (*c*) of the Rules of Court, an affidavit in support of an application to set aside an adjudication determination is required to "state the grounds on which it is contended that the adjudication determination or judgment … should be set aside" and "set out any evidence relied on by the applicant". On another more practical note, as the submissions were exhibited as a single exhibit with the original page numbering removed, it was difficult to follow the cross-references to documents in the submissions.

38 Nevertheless, the plaintiff's account of the defendant's appointment as sub-contractor may be summarised as follows:

(a) The defendant's director, Mr Chai Noi Nam, contacted Ms Emily Tan, the plaintiff's deputy general manager, by phone to enquire about being sub-contractor for the Project. Ms Tan told Mr Chai to submit a quote.

(b) On 7 January 2013, the plaintiff sent a CD-ROM containing, *inter alia*, the relevant bills of quantities and drawings for plastering works to the defendant.

(c) On 8 January 2013, the defendant submitted the 8 January 2013 Quotation, which was not accepted or signed by Qingdao or the plaintiff. Instead, Ms Tan informed Mr Chai verbally of a set of applicable rates for 3-room, 4-room and 5-room units that was different from the rates contained in the 8 January 2013 Quotation.

(d) In February 2013, there was a meeting between various representatives of the plaintiff and the defendant where, *inter alia*, the defendant agreed to do the works for Block 476C instead

of Block 476B; the defendant was asked to submit its rate for Block 476C for the plaintiff's consideration; and the defendant was informed that while the defendant should start work on all the four blocks, whether the plaintiff would continue to engage the defendant for Blocks 477B and 477C would depend on whether the defendant's works for Blocks 476A and 476C were satisfactory to the plaintiff and met the targets set by the plaintiff.

(e) In late February 2013 or early March 2013 the defendant commenced work on the Project.

(f) In April 2013 the defendant requested for a copy of the sub-contract agreement for its works for the Project but the plaintiff told the defendant that its solicitors were in the midst of reviewing the plaintiff's contracts and that the sub-contract agreement would be furnished to the defendant when it was ready.

39 In short, the plaintiff took the position that its contract with the defendant was wholly oral because, *inter alia*, the 8 January 2013 Quotation was addressed to Qingdao and was, in any event, not accepted either by Qingdao or by the plaintiff. Further, no agreement on the scope of the defendant's works and the applicable rates were evidenced in writing. The plaintiff further submitted that the defendant could not rely on the Revised Quotation because it was not accepted and signed by the plaintiff and represented only an offer that the plaintiff did not accept.

40 The defendant, on its part, merely stated in an affidavit filed by its director, Mr Lim Jiunn Yih, that the contract was evidenced in writing by the Revised Quotation and responded that:

> The contents of Paragraph 14, respectfully, is a lame attempt to introduce, by the back door, the matters which have been rejected in accordance with the provisions of [the Act]. The Defendants reserve their rights.

41 Despite my indication to counsel for the defendant during the hearing that this evidence was not satisfactory, counsel for the defendant did not request for leave to adduce any further testimony but chose to base his submissions on the existing documents before the court.

42 Although the defendant's position on affidavit is that the contract is evidenced in writing by the Revised Quotation, in submissions, counsel for the defendant argued that the 1st, 2nd, 3rd and 4th payment claims, as well as their accompanying payment responses, payment certificates and invoices should also be considered as evidence of the contract in writing. In addition, counsel for the defendant pointed out that in AA 105/2013, no issue was taken as to whether the contract was evidenced in writing. In fact, the adjudication response submitted by Qingdao stated as follows:

> Capstone was appointed by Qingjian International as the sub-contractor to carry out, *inter alia*, plastering, skimming, bricklaying and partition wall works … at a total price of $1,387,900. Subsequent to its appointment, Capstone carried out works on the Project in March 2013. A copy of the Sub-Contract Agreement dated 6 March 2013 ("**Sub-Contract Agreement**"), evidencing the agreement between Capstone and Qingjian International and the terms of Capstone's appointment as the sub-contractor for the said works is exhibited … [emphasis in original]

43 However, it is not the defendant's case that the Sub-Contract Agreement alluded to in the adjudication response submitted by Qingdao is evidence of the contract between the plaintiff and the defendant so I do not understand the defendant as trying to argue that the plaintiff is bound by the position taken by Qingdao in AA 105/2013.

44 In addition, given that the existence of a contract in writing goes to the jurisdiction of the

adjudicator, no estoppel could have arisen as this was a matter for the court to decide and not the adjudicator: see *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 at [36]–[40]; *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 at [60] ("*Admin Construction*"). Although the High Court in *Admin Construction* raised various concerns with a late challenge to an adjudicator's jurisdiction (see [61] and [65]), these have yet to be addressed by legislative amendment or otherwise. As an aside, one troubling aspect of this case was that the parties had already been engaged in AA 105/2013 and had settled it by way of mediation without any issue being taken as to the existence of a contract in writing within the meaning of the Act. This fundamental issue was only raised in the adjudication response the plaintiff attempted to file in AA 126/2013.

45 After considering the submissions of parties and the evidence before me, I found that s 4(4) of the Act was satisfied on the basis that "the matter in dispute", which I interpret to mean the subject matter of AA 126/2013, *ie* the defendant's works in relation to the Project, can be found in an exchange of communications in writing. These communications included the Bills of Quantities and drawings for plastering works contained in the CD-ROM sent by the plaintiff to the defendant, the 8 January 2013 Quotation, the four payment claims made by the defendant, the payment responses issued by the plaintiff, the tax invoices issued by the defendant, and the Revised Quotation. These documents sufficiently showed agreement as to the matters in dispute, including the parties to the contract (the plaintiff and the defendant), the relevant scope of the works (masonry and plastering works for Blocks 476A, 476C, 477B and 477C of the Project) and the applicable rates to valuing the works (which may be inferred from the payment claims and payment responses). As indicated earlier, in my view, a broad interpretation should be accorded to what constituted an "exchange of communications in writing" and I was not confined to considering the communications pre-dating the commencement of works.

46 The plaintiff's interpretation of s 4(4) of the Act as requiring it to signify explicitly in writing its agreement to the applicable rates and scope of works was, in my judgment, too restrictive. This approach would not be commercially sensible in the context of the construction industry particularly where, as occurred on the facts of this case, agreements may be subject to change in the course of the progress of works without a formal signed record and where sub-contractors may be expected to commence works without a formal signed agreement. On the plaintiff's own account of the facts of this case, it was the plaintiff who was supposed to furnish the sub-contract agreement to the defendant but it did not do so. However, it proceeded to instruct the defendant to commence works, and duly certified the payment claims made by the defendant pursuant to which tax invoices were issued to the plaintiff from the defendant.

47 In addition, I did not accept the distinction drawn by the plaintiff in oral submissions between documents evidencing contract formation (which the court could consider) and documents post-formation (which the court ought not to consider). This distinction had no basis in the Act.

Whether there was valid service of the payment claim

48 On affidavit, the plaintiff challenged the validity of the service of the 4th payment claim based on s 10(1)(*a*) of the Act, which provides that a "claimant may serve one payment claim in respect of a progress payment on … one or more other persons who, under the contract concerned, is or may be liable to make the payment". According to the plaintiff, this section does not permit a payment claim to be served on two parties *in the alternative* because this would create uncertainty as to which person the payment claim was served on and which person is required to provide a payment response to the payment claim. The plaintiff then stated that it gave the defendant an opportunity to clarify its claim on 2 July 2013 (see [9] above) but the defendant refused to do so.

49 The defendant argued that there was no uncertainty or confusion created on the facts of the case because the plaintiff proceeded to issue a payment response. In any event, the defendant relied on *Terence Lee* at [66] to argue that the breach relied on by the plaintiff would not invalidate the appointment of the adjudicator and the resulting adjudication determination as it was not an essential or mandatory condition of the Act.

50 I agree with the plaintiff that a payment claim ought not to be served on parties in the alternative but should only be served on the party or parties liable to make payment under the contract. However, the facts of this case are fairly unique. First, the payment claim was served on Ms Chu and Ms Zhu, in their capacities as contract manager and quantity surveyor of the Project, respectively. Coincidentally, they were employed by both the plaintiff and Qingdao. Second, the reason for the defendant doing so was plainly due to the dispute in AA 105/2013 which had yet to be resolved at the time the 4th payment claim was served. Third, in any event, it was apparently clear to the plaintiff that it was the proper party to the contract with the defendant. This was the position it must have taken as early as AA 105/2013 where, although it was not named as a party, it was the one who issued the cheque to the defendant in settlement of AA 105/2013. The plaintiff also filed the payment response in AA 126/2013.

51 Any breach of s 10(1)(*a*) of the Act was accordingly very technical in nature and certainly not so important, given the object and purpose of the Act, as to invalidate the appointment of the adjudicator and the resulting adjudication determination.

52 Finally, I should mention that during the adjourned hearing on 30 January 2014, which was scheduled for counsel for the defendant to make his reply submissions, counsel for the plaintiff raised a new argument that the 4th payment claim was served by way of email and that this was not one of the modes of service described in s 37(1) of the Act, which states as follows:

> Where this Act authorises or requires a document to be served on a person, whether the expression "serve", "lodge", "provide" or "submit" or any other expression is used, the document may be served on the person —
>
> (*a*) by delivering it to the person personally;
>
> (*b*) by leaving it during normal business hours at the usual place of business of the person; or
>
> (*c*) by sending it by post or facsimile transmission to the usual or last known place of business of the person.

53 Counsel for the defendant objected to this argument because it was raised late in the day – no such objection was taken in AA105/2013 or in the adjudication response the plaintiff attempted to file in AA 126/2013. The failure to state this argument as a ground for setting aside the adjudication determination on affidavit also breached O 95 r 3(1)(*b*) of the Rules of Court. Regardless, counsel for the defendant relied on *Terence Lee* at [67] and submitted that any breach in relation to how the payment claim was served was not such as to render the appointment of the adjudicator and the adjudication determination invalid.

54 It suffices to say that I agreed with counsel for the defendant.

55 In addition, I am also doubtful that s 37(1) is intended to be an exhaustive list of the permissible modes of service of documents under the Act. First, the permissive "may" is used rather than the mandatory "shall" or "must". This can be contrasted with O 95 r 2(3) of the Rules of Court

(see [22] above) which stipulates that an order granting leave to enforce an adjudication determination "must" be served in the stated ways. *Obiter dicta* to the effect that s 37(1) is not mandatory may also be found at [74] of *Terence Lee* where the Court of Appeal stated:

> As for the mode of giving notice, Parliament has stopped short of requiring the information to be personally communicated to the respondent. This can be seen from the service requirements in s 37(1) of the Act: that provision states that documents "may be served" by personal delivery (s 37(1)(*a*)), by leaving the document at the respondent's usual or last known place of business (s 37(1)(*b*)), or by posting or faxing it to that place (s 37(1)(*c*)). Other modes of service may also be possible.

56 Assuming I am correct that s 37(1) is permissive, it strikes me as odd that parties are not permitted to agree on a particular mode of service that may be most expedient for them – if the assumption holds, such agreements would not contravene s 36 of the Act which prevents contracting out of the Act. On the facts of this case, based on the conduct of the parties, I would have been prepared to accept that there was an agreement that payment claims may be served by way of email.

57 It also seems to me that s 37(3) of the Act, which states that the provisions of s 37 "are in addition to, and do not limit or exclude, the provisions of any other law with respect to the service of documents", supports my reading of s 37(1) being permissive rather than mandatory. However, the question is then raised as to what other laws Parliament may have had in mind in relation to s 37(3) and whether these should in any way serve to constrain a permissive reading of s 37(1).

58 Without the benefit of full arguments and submissions on this point (given the sudden manner in which it was raised), I decline to make any determination in relation to the interpretation of s 37(1) but have highlighted these potential considerations so that they may be properly addressed at the appropriate time.

Conclusion

59 For the foregoing reasons, I dismissed the setting aside application and will hear parties on costs.