

Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd
[2015] SGHC 141

Case Number : Originating Summons No 915 of 2014
Decision Date : 25 May 2015
Tribunal/Court : High Court
Coram : Aedit Abdullah JC
Counsel Name(s) : Chia Chee Hyong Leonard and Tan Hin Wa Jason (Asia Ascent Law Corporation) for the plaintiff; Lam Kuet Keng Steven John (Templars Law LLC) for the defendant.
Parties : Lau Fook Hoong Adam — GTH Engineering & Construction Pte Ltd

Building and Construction Law – Statutes and Regulations

25 May 2015

Judgment reserved.

Aedit Abdullah JC:

Introduction

1 The plaintiff in this case seeks to resist the enforcement of an adjudication determination dated 1 October 2014 made pursuant to the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (“the SOPA”). What is unusual, however, is that the plaintiff’s application is not made pursuant to O 95 r 3 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) which requires the plaintiff to provide security for the unpaid portion of the adjudicated amount that he is required to pay in consequence of the adjudication determination at the time of the filing of the application.

2 Instead, the plaintiff, without providing security, seeks a declaration that the adjudication determination is null and void and, in the alternative, a declaration that the adjudicator lacked jurisdiction to adjudicate the matter under the SOPA. He alleges, *inter alia*, that the payment claim issued by the defendant on 31 July 2014 which triggered the adjudication is not a valid payment claim under the SOPA and that there was a breach of natural justice during the course of the adjudication.

3 Lastly, in the event that the court refuses to grant the declarations sought, the plaintiff requests for an order to stay the enforcement of the adjudication determination.

Facts

Background

4 The plaintiff and the defendant were engaged in an employer-contractor relationship under a building and construction contract entered into on 10 December 2008 which incorporated Singapore Institute of Architects’ Articles and Conditions of Building Contract (Lump Sum Contract) (7th Ed, April 2005) (“the SIA Conditions 2005”) . [\[note: 1\]](#) The agreed fee was \$1,906,891.31 and 5 December 2009 was the stipulated date for completion. [\[note: 2\]](#)

5 The defendant was unable to complete its works by the completion date and the architect for

the building project issued a delay certificate on 10 December 2009. The architect thereafter only issued the completion certificate on 3 March 2011, certifying that the defendant had completed its works. [\[note: 3\]](#) Prior to this, the defendant had issued 15 progress payment claims and corresponding interim architect's certificates were issued pursuant to the mechanism provided for under cl 31 of the SIA Conditions 2005. The fifteenth progress payment claim and corresponding interim certificate were issued on 23 June 2010 and 6 July 2010 respectively. [\[note: 4\]](#) The plaintiff paid the amounts certified in all of the 15 interim certificates issued.

Payment claims leading up to the adjudication

6 On 22 February 2012, the architect reminded the defendant to submit its "final claim" [\[note: 5\]](#) pursuant to cl 31(11) of the SIA Conditions 2005 which provides as follows:

Final Claim Documents

31.(11) The Contractor shall before the end of the Maintenance Period submit a final claim to the Architect with a copy to the Quantity Surveyor. Such claim shall contain details of all quantities, rates and prices and any adjustment of the Contract Sum or additional payments or compensation claimed by the Contractor under the terms of the Contract, together with any explanations and supporting vouchers, documents or calculations, including documents relating to the accounts of Designated or Nominated Sub-Contractors or Suppliers, which may be necessary to enable the Final Account to be prepared by the Quantity Surveyor.

7 The defendant thereafter served on the architect a payment claim which it referred to as "Progress Claim No.16A (FINAL ACCOUNT)" on 27 February 2012. [\[note: 6\]](#) I shall henceforth refer to this payment claim as "Payment Claim 16A". Payment Claim 16A did not specify which period of time for works done by the defendant it related to. Instead, it purported to represent the "FINAL SUMMARY (FINAL ACCOUNT)" [\[note: 7\]](#) for works done by the defendant. The architect and quantity surveyor, assuming that Payment Claim 16A was intended to be the defendant's final claim under cl 31(11) of the SIA Conditions 2005, did not take any action because the defendant failed to produce the supporting documents needed for the preparation of the Final Account as required under that very clause.

8 After some intermittent communications between the parties, and upon the request of the plaintiff for the defendant to issue its final claim pursuant to cl 31(11) of the SIA Conditions 2005, the defendant served another payment claim on 6 January 2014. The respective letter attaching the payment claim states as follows: [\[note: 8\]](#)

RE: 4 TAI YUAN HEIGHTS – PROGRESS CLAIM NO. 16B (FINAL ACCOUNT)

We refer to the above and are pleased to submit herewith our Progress Claim No.16B (FINAL ACCOUNT) for your perusal and consideration.

I shall henceforth refer to this payment claim as "Payment Claim 16B". Payment Claim 16B similarly did not specify which period of time for works done it related to. Instead, like Payment Claim 16A, it purported to represent the "FINAL SUMMARY (FINAL ACCOUNT)" for works done by the defendant. [\[note: 9\]](#) Vouchers, invoices and other supporting documents were also appended to Payment Claim 16B.

9 The quantity surveyor then sought to clarify with the defendant the nature of Payment Claim 16B. In an email from the quantity surveyor, Mr Oliver Ho ("Mr Ho") to an employee of the defendant, Ms Angie Ang ("Ms Ang"), dated 27 January 2014, Mr Ho asked: [\[note: 10\]](#)

Hi Angie,

Please confirm whether your Claim No 16B is actually your *Final Account Document* submission pursuant to *[cl]* 31(11)(a) of the SIA Conditions *[sic]* of Contract.

[emphasis added]

Ms Ang then replied on the same day: [\[note: 11\]](#)

Dear Oliver

We would like to confirm that our Claim No.16B dated 6 January 2014 is our *Final Account*.

[emphasis added]

10 It bears noting that the SIA Conditions 2005 does not contain a cl 31(11)(a). Clause 31(11) of the SIA Conditions 2005 does not contain any sub-clauses (see above at [6]). Rather, cl 31(11)(a) is only found in later editions of the standard form contract, such as the most recent Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract) (9th Ed, Reprint August 2011) ("the SIA Conditions 2011"). Clause 31(11) of the SIA Conditions 2011 in fact provides for a final claim procedure different from that found in cl 31(11) of the SIA Conditions 2005:

Final Account Documents

31.(11)(a) The Contractor shall before the end of the Maintenance Period submit his Final Account Documents to the Architect with a copy to the Quantity Surveyor showing the final value of all Works carried out including variations and such other amounts which he considers he is entitled to under the Contract together with supporting documents, vouchers and other documents including documents relating to the accounts of the Designated or Nominated Sub-Contractors or Suppliers to enable the Quantity Surveyor and the Architect to prepare the Statement of Final Account under paragraph (b) hereof.

31.(11)(b) The Architect shall within 3 months from:

(i) the date of receipt of the Final Account Documents from the Contractor under paragraph (a) hereof; or

(ii) the date of the issue of the Maintenance Certificate;

(whichever is the later) provide to the Contractor the Statement of Final Account which shall show the Architect's final measurement and valuation of all Works carried out together with any permitted deductions (including liquidated damages) under the terms of the Contract whether or not such deductions have been made by the Employer unless in respect of permitted deductions not yet made by the Employer, the Employer has informed the Architect of his decision to forgo or postpone the same.

31.(11)(c) The Contractor shall serve his final payment claim to the Employer (with a copy to

the Architect and the Quantity Surveyor) within 14 days after the occurrence of either of the following events whichever is the later:

- (i) the issue of the Maintenance Certificate; or
- (ii) the receipt by the Contractor of the Statement of the Final Account under paragraph (b) hereof.

...

11 It thus appears to be the case that both the quantity surveyor and the defendant had, at least as of 27 January 2014, proceeded on the incorrect basis that it was the SIA Conditions 2011 (or any other editions of the standard form contract subsequent to the SIA Conditions 2005) that governed the final claim procedure instead of the SIA Conditions 2005 that was incorporated into the building contract between the parties. This is a significant point which I will return to later on in this judgment.

12 Upon confirmation by the defendant that Payment Claim 16B was intended to be a "Final Account", the parties, including the quantity surveyor, began to prepare the Final Account. However, the documentation provided together with Payment Claim 16B was deemed deficient by quantity surveyor and more documents were requested. The documentation required for the preparation of the Final Account pursuant to cl 31(11) of the SIA Conditions 2005 was only fully consolidated on 26 June 2014. The architect then issued the maintenance certificate on 30 June 2014 and began to prepare the final certificate pursuant to cl 31(12)(a) of the SIA Conditions 2005 which provides as follows:

Final Certificate

31.(12)(a) Within 3 months of receipt from the Contractor of the documentation referred to in the preceding sub-clause of this Condition or of the issue of the Maintenance Certificate (whichever is the later) the Architect shall issue a Final Certificate. Such Certificate shall be supported by documents showing the Architect's final measurement and valuation of the Works in accordance with all the terms of the Contract, and after setting out and allowing for all payments or other expenditure of the Employer or any permitted deductions by him shall state any final balance due from the Employer to the Contractor or from the Contractor to the Employer, as the case may be, which shall thereupon become a debt due. Such certificate shall also take account expressly of any outstanding permitted deductions not yet made by the Employer under the terms of the Contract whether by way of liquidated damages or otherwise (unless the Employer shall inform the Architect of his decision to forego or postpone his right to the same).

As the issuance of the maintenance certificate was the later event, the final certificate was due by 30 September 2014.

13 On 31 July 2014, the defendant issued what it referred to as "Progress Claim No.17". [\[note: 12\]](#) I shall henceforth refer to this payment claim as "Payment Claim 17". Unlike Payment Claim 16A and Payment Claim 16B, Payment Claim 17 did not purport to be a "FINAL ACCOUNT" or to provide a "Final Summary" of the Final Account. Instead, Payment Claim 17 referred specifically to the period of time for works done between 23 July 2010 (the date of the fifteenth progress payment claim mentioned above at [5]) and 31 July 2014. [\[note: 13\]](#)

14 The plaintiff did not issue a payment response to Payment Claim 17. He was of the opinion that Payment Claim 16B was the defendant's final claim under cl 31(11) of the SIA Conditions 2005 and

that the defendant could not, and should not, issue any payment claim subsequent to its final claim. The architect did not issue any corresponding certificate as well. The defendant then, on 3 September 2014, gave notice to the defendant and the architect of its intention to apply for adjudication. The architect, uncertain as to why the plaintiff issued Payment Claim 17, sent the following letter to the defendant on 4 September 2014: [\[note: 14\]](#)

We refer to your letter dated 3rd September 2014.

You will recall that you submitted your final claim pursuant to clause 31(11) of the contract on 6th January 2014.

On the basis that this is your final claim, we understand that you have been liaising with the quantity surveyor Mr. Oliver Ho in relation to the submission of all necessary documents to enable the Final Account to be prepared.

We further understand from Mr. Oliver Ho that submission for all necessary documents was finally completed on 26th June 2014. On this basis we are in the process of issuing the Final Certificate pursuant to clause 31(12)(a) of the contract.

There is therefore no basis for any further progress claims to be submitted and we will proceed on the basis their [*sic*] Progress Claim No. 16B dated 6th January 2014 is your final claim.

Alternatively, if you are in fact treating Progress Claim No. 17 as your final claim pursuant to clause 31(11) and wish for us to disregard Progress Claim No. 16B, please let us know within 7 days of this letter, failing which we will proceed to issue the Final Certificate on the basis of your final claim as set out in Progress Claim No. 16B dated 6th January 2014 and in that event, Progress Claim No. 17 will be disregarded.

As can be seen from this letter, the architect had treated Payment Claim 16B as a final claim under cl 31(11) of the SIA Conditions 2005 and was of the opinion that no further payment claims should be issued after the final claim. The defendant never replied to this letter from the architect. The architect consequently disregarded Payment Claim 17 and continued to prepare the final certificate.

The adjudication

15 The defendant lodged an adjudication application with the Singapore Mediation Centre on 4 September 2014 and the plaintiff was notified of this on 5 September 2014. [\[note: 15\]](#) The plaintiff then filed its adjudication response on 12 September 2014. In its adjudication response, the plaintiff submitted that the defendant had no basis to issue Payment Claim 17 after it had issued what the plaintiff regarded as the defendant's final claim in the form of Payment Claim 16B. [\[note: 16\]](#)

16 An adjudicator was nominated and an adjudication conference was held on 19 September 2014. At this conference, counsel for the plaintiff repeated the arguments in his adjudication response. He also asked for an adjournment of the matter in the light of the fact that the final certificate was soon to be issued on 26 September 2014. The defendants, however, refused to acquiesce to such an adjournment. The adjudicator thereafter, with the agreement of both parties, directed that the plaintiff was to file his written submissions by 24 September 2014 and that the defendant was to tender any reply by 26 September 2014. The adjudication determination was to be rendered by 1 October 2014. [\[note: 17\]](#)

17 The Final Account and final certificate were issued on 25 September 2014. [\[note: 18\]](#) The plaintiff informed the adjudicator of this the next day, on 26 September 2014. He subsequently sent the adjudicator an email dated 27 September 2014 requesting the adjudicator to consider the fact that the Final Account and final certificate had been issued for the purposes of rendering his decision. [\[note: 19\]](#)

18 As agreed, the adjudicator issued his adjudication determination on 1 October 2014. He decided that there was nothing in the SIA Conditions 2005 and the SOPA that prohibited the filing of a payment claim after a final claim has been issued. Further, as the plaintiff had failed to file any payment response, the adjudicator noted that, according to s 15(3)(a) of the SOPA, he was not permitted to consider any reasons raised by the plaintiff for withholding the payment of any amount claimed under Payment Claim 17. The adjudicator thus found in favour of the defendant and granted the defendant its full claim under Payment Claim 17 amounting to \$625,167.98. The adjudicator did not make any reference to the Final Account or final certificate issued on 25 September 2014 in his adjudication determination.

The present proceedings

19 The plaintiff, unhappy with the adjudication determination rendered, brought the present proceedings to challenge the adjudication determination rendered by the adjudicator. He once again argues that the defendant was not allowed to issue Payment Claim 17 after it had issued Payment Claim 16B, which the plaintiff regards as the defendant's final claim under cl 31(11) of the SIA Conditions 2005. He also argues that there was a breach of natural justice arising from the adjudicator's failure to consider the Final Account and final certificate issued on 25 September 2014.

20 However, as I have mentioned above (at [1]), the application made by the plaintiff is not one under O 95 r 3 of the Rules of Court for the adjudication determination to be set aside—an application which would require the plaintiff to provide security for the \$625,167.98 that he is required to pay in consequence of the adjudication determination. Rather, the plaintiff, without providing such security, only seeks a declaration that the adjudication determination is null and void or that the adjudicator lacked jurisdiction to deal with the matter. In the alternative, the plaintiff seeks a stay of execution of the enforcement of the adjudication determination.

21 The defendant thus objects to the application on a preliminary basis. The defendant takes the view that the plaintiff is not entitled to make the application before me. It argues that the plaintiff should not be allowed to evade the requirement to provide security under s 27(5) of the SOPA and O 95 r 3(3) of the Rules of Court when he is in essence attempting to set aside the adjudication determination. If the defendant succeeds on this issue, then the entire application of the plaintiff must be dismissed regardless of the merits underlying his application. I shall therefore proceed to deal with this preliminary objection first.

The propriety of the plaintiff's application

22 The SOPA provides a legislative framework for contractors to receive prompt payments for works done pursuant to a building and construction. This function of the SOPA has been comprehensively described by the Court of Appeal in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel*") (at [18]):

... It has often been said that cash flow is the life blood of those in the building and construction industry. If contractors and sub-contractors are not paid timeously for work done or materials

supplied, the progress of construction work will almost inevitably be disrupted. Moreover, there is a not insignificant risk of financial distress and insolvency arising as a result. In the years before the immediate predecessor of the Act (*viz*, the Building and Construction Industry Security of Payment Act 2004 (Act 57 of 2004) ("Act 57/2004")) was enacted in 2005, there had been several such cases. It was with the specific aim of minimising such disruptions that Act 57/2004 (now superseded by the Act) was passed. The Act achieves its stated purpose of facilitating cash flow in the building and construction industry in two principal ways. First, it establishes that parties who have done work or supplied goods are entitled to payment as of right: see s 5 of the Act. Second, it creates an intervening, provisional process of adjudication which, although provisional in nature, is final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined or resolved: see s 21 of the Act. This is what is referred to as temporary finality.

23 It is thus said that adjudication determinations are granted temporary finality in furtherance of the legislative purpose behind the enactment of the SOPA. They may be enforced in the same manner as a judgment or an order of court pursuant to s 27(1) of the SOPA; but they are only interim in nature and any underlying payment dispute resolved by the adjudication determination may be reopened at a later time and ventilated in what the Court of Appeal in *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] SGCA 14 ("*Chin Ivan*") described (at [22]) as "substantive' proceedings", that is, proceedings brought to obtain a final and binding determination of the full price payable for the work done.

24 Despite the temporary finality granted to an adjudication determination, a party that is dissatisfied with an adjudication determination may still challenge that particular adjudication determination under the SOPA in two ways. These two avenues available to a dissatisfied party have also been elaborated on by the Court of Appeal in *W Y Steel* (at [59]):

We have said above that the purpose of the Act is to ensure (*inter alia*) that even though adjudication determinations are interim in nature, *successful claimants are paid*. To this end, under s 22(1), the respondent must pay the adjudicated amount either within seven days after being served with the adjudication determination (see s 22(1)(a)), or by the deadline stipulated by the adjudicator (see s 22(1)(b)). The claimant can suspend work (see s 26(1)(d)) or take a lien on goods supplied (see s 25(2)(d)) if the respondent fails to pay. *If the respondent intends to apply for a review of the adjudication determination, he must first pay the adjudicated amount to the claimant: see s [1]8(3) [sic]. If the respondent wants to set aside the adjudication determination, he must pay into court as security the unpaid portion of the adjudicated amount: see s 27(5).* This requirement is repeated in O 95 r 3(3) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed). These provisions all point to one thing: *where a claimant succeeds in his adjudication application, he is entitled to receive the adjudicated amount quickly and cannot be denied payment without very good reason.*

[emphasis added]

25 As can be seen from the passage above, although a dissatisfied party may either apply for a review of an adjudication determination pursuant to s 18(2) of the SOPA or apply to court to set aside the adjudication determination, he must, in either instance, fork out the unpaid adjudicated amount; as payment to the claimant in the case of a review of the adjudication determination pursuant to s 18(3) of the SOPA or as payment into court as security for the unpaid portion of the adjudicated amount pursuant to s 27(5) of the SOPA and O 95 r 3(3) of the Rules of Court. Further, these provisions are in place to reinforce the entitlement of a successful claimant in an adjudication to quick payment of the adjudicated amount.

26 With regard to the requirement for the provision of security in a setting aside application, I would only add that this requirement also protects the successful claimant's right to be paid by guarding that claimant against the risk of the respondent becoming insolvent and the risk of the respondent dissipating assets to avoid payment. It also ensures that the claimant would be paid immediately upon the conclusion of the setting aside application (which may sometimes take a substantial amount of time to conclude) in the event that the application is dismissed. The claimant should not be put through the entire process of having to enforce the adjudication determination against the respondent when that process was delayed as a result of the setting aside application itself. All in all, s 27(5) of the SOPA and O 95 r 3(3) of the Rules of Court provides successful claimants with a very important safeguard against non-payment of adjudicated amounts which, in the grand scheme of things, is aligned with the SOPA's overarching aim of ensuring timeous payments to contractors.

27 I am thus of the view that the requirement for the provision of security under s 27(5) of the SOPA and O 95 r 3(3) of the Rules of Court is a strict requirement that must be observed if one seeks to challenge an adjudication determination in court. The SOPA seeks to provide contractors and sub-contractors with valuable rights in the light of the vulnerability of the liquidity-dependent industry which they operate in. It does so by laying down strict statutory requirements that apply to each juncture of the claim process, such as in the form of rigid timelines for the purposes of avoiding delay. It thus follows that the availability of these rights must be secured via strict observance of these statutory requirements. This is especially so when the requirements are clearly enacted to further the primary objective of the SOPA to preserve the rights of all parties in the construction industry to timeous payment for work done and goods supplied.

28 As was observed by the Court of Appeal in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401, the court in a setting aside action is concerned with jurisdictional challenges against the adjudicator, which if successful, would render the adjudication determination "null and void" (at [66]). The plaintiff here, who seeks a declaration that the adjudication determination is "null and void" [\[note: 20\]](#) and a declaration that the adjudicator "has no jurisdiction to adjudicate the matter", [\[note: 21\]](#) is thus attempting to achieve the exact effect of a usual setting aside application—save for the fact that he does not take the further step of requesting for an actual setting aside order. It follows that the plaintiff is, in fact, attempting to disguise (rather poorly, if I may add) his application as something other than a setting aside application so that he may evade the statutory requirement to provide security for the unpaid portion of the adjudicated amount. This is impermissible and to find otherwise would result in the complete erosion of the protection conferred on successful claimants in an adjudication determination under s 27(5) of the SOPA and O 95 r 3(3) of the Rules of Court.

29 Challenges against an adjudication determination, either on jurisdictional grounds or for failure to comply with the requirements of the SOPA (such as the requirement for the adjudicator to "comply with the principles of natural justice" pursuant to s 16(3)(c) of the SOPA), if successful, result in that adjudication determination being rendered null, void or invalid. Such successful challenges consequently lead to the inevitable conclusion that the adjudication determination in question should be set aside such that the payment obligations flowing from that adjudication determination are extinguished. Thus, regardless of the form of the applications from which challenges against adjudication determinations are brought, challenges against adjudication determinations must be regarded as being effectively setting aside applications governed by s 27(5) of the SOPA.

30 In this regard, I am satisfied that the statutory regime contemplates only the prescribed avenues available to a dissatisfied party. To take a looser approach would, to my mind, undermine the

objective and intent of the statutory framework under the SOPA to safeguard the contractor's expectation of cash flow when certain conditions are met.

31 The plaintiff's application, which is premised upon certain challenges against the adjudication determination, is in essence a setting aside application and the plaintiff must accordingly provide the security required under s 27(5) of the SOPA and O 95 r 3(3) of the Rules of Court. As the plaintiff has failed to do so, its application is improper, or even an abuse of process if I may add, and I therefore order that it be dismissed in its entirety for the reasons I have given save for the plaintiff's prayer for a stay of enforcement of the adjudication determination which I shall now turn to.

Stay of enforcement of the adjudication determination

32 It is rather straightforward that the plaintiff's prayer for a stay of enforcement of the adjudication determination cannot be allowed and I make two points in this regard. First, a stay of enforcement of an adjudication determination must be premised upon enforcement proceedings being brought in the first place. This would mean that any stay application should properly be made by way of summons in the enforcement proceedings itself and not by way of originating summons, which the plaintiff has opted to do so here.

33 Secondly, in any event, the grounds for granting a stay of enforcement of an adjudication determination are very limited. These grounds were elaborated on by the Court of Appeal in *W Y Steel* (at [70]):

70 In our judgment, a stay of enforcement of an adjudication determination may ordinarily be justified where there is clear and objective evidence of the successful claimant's actual present insolvency, or where the court is satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body. Further, we agree with HHJ Coulson QC in *Derek Vago* that a court may properly consider whether the claimant's financial distress was, to a significant degree, caused by the respondent's failure to pay the adjudicated amount and, also, whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract.

71 In the course of the arguments before us, it was suggested that the above approach would tilt the balance unduly in favour of the successful claimant and place the unsuccessful respondent unfairly at risk. It was also suggested that this would leave a successful claimant in an adjudication under the Act in a better position than a party who had succeeded at a trial but where an appeal was pending. Whether that is true or not, the comparison is not one that is apt. An adjudication determination is provisional in the sense that it may ultimately be reversed if it is challenged in a court or tribunal or some other dispute resolution body. However, as far as the rights of the parties to the adjudication are concerned, to the extent that the adjudication determination remains intact pending any such challenge, it has the effect of absolutely and conclusively determining the parties' rights until and unless it is eventually reversed in accordance with the provisions of the Act - see [13] and [18] above. Hence, while we are prepared to recognise the possibility of granting a stay of enforcement of an adjudication determination because of the possibility of a different outcome emerging eventually, a stay will not *readily* be granted having regard to the overall purpose of the Act, which is precisely to avoid and guard against pushing building and construction companies over the financial precipice.

34 The plaintiff here has not produced any objective evidence of any risk of insolvency that the

defendant may face. He has also not shown in any way that there exists the possibility that any money paid to the defendant would subsequently be irrecoverable if the dispute between the parties are finally resolved in the plaintiff's favour. Lastly, there is also nothing to suggest that a different outcome would emerge at the conclusion of future "substantive" proceedings that will fully and finally resolve the parties' dispute. The plaintiff has thus not met the "high threshold ... required to justify granting a stay of enforcement" in the present application and its application in this regard must also be dismissed.

35 In the light of my findings above, the plaintiff's application must be dismissed in its entirety. The matter may thus be disposed of without any consideration of the actual challenges raised by the plaintiff against the adjudication determination. Nonetheless, I would like to make some observations concerning the plaintiff's contention that Payment Claim 17 is an invalid payment claim under the SOPA in the light of the fact that it was issued after the defendant had issued its "final claim" under cl 31(11) of the SIA Conditions 2005.

Further observations on Payment Claim 17

The SIA Conditions 2005 and the SIA Conditions 2011

36 The SIA Conditions 2005 are preceded by a set of standard forms of contract issued by the Singapore Institutes of Architects which existed long before the introduction of the SOPA and its predecessor, the Building and Construction Industry Security of Payment Act 2004 (Act 57 of 2004). Like the SOPA, the SIA Conditions 2005 include a mechanism for the payment of monies due to contractors. This mechanism was recently discussed in *Chin Ivan* at [13]–[14]:

13 The roots of the SIA Conditions can be traced to a set of standard forms of contract and subcontract drafted by the late Mr Ian Duncan Wallace QC. These standard forms were first introduced in 1980 and made significant changes to the regime reflected in the then existing standard B&C contracts. The standard forms were intended to address a number of issues that had bedevilled the local B&C industry; in particular, the fact that contractors sometimes found themselves at the mercy of employers who might withhold payment of certified sums on account of alleged counterclaims and set-offs. An important feature of the SIA Conditions is the regulation, by way of Architect's certificates, of the payment of monies due to contractors and of the deductions that can be made by employers. The Architect's certificate serves as the basis for both the contractor's claim for payment of monies due and also the employer's right to make deductions against such claims. Under a B&C contract which incorporates the SIA Conditions (also referred to hereafter as a "standard form SIA contract" where appropriate to the context), the Architect, in essence, is the quasi-adjudicator of both the contractor's right to receive payment for work done as well as the employer's right to withhold payment on account of any cross-claim(s). This fundamental role of the Architect and his certificates is clearly described in the Singapore Institute of Architects' *Guidance Notes on Articles and Conditions of Building Contract* (Singapore Institute of Architects, 3rd Ed, 2011) ("the *Guidance Notes*") as follows (at p 1):

2. Architect's powers

The scheme of the contract is *to ensure that virtually all areas of possible financial controversy, except most cases of breach of contract by the Employer and all terminations of the Contract by either party, are to be regulated by the certificates of the Architect. ... In all cases ... the contractual effect of these certificates is to bind both employer and contractor, but only until final judgment or final award in any dispute between them – both*

parties will therefore be able to use the summary procedures in the Courts (or interim awards by arbitrators) in order to enforce the certificates – see Clauses 31.(13) and 37.(3)(h) ...

[emphasis added]

14 This excerpt from the *Guidance Notes* introduces the concept of “temporary finality” that is to be accorded to valid Architect’s certificates so that they will bind the parties unless and until they are opened up and reviewed in the course of proceedings typically brought at the end of the project when a final judgment or award as to the parties’ substantive rights is rendered. The same broad scheme is mirrored in the role of Dispute Review Boards that assist in resolving disputes in large-scale engineering projects governed by the standard terms of the International Federation of Consulting Engineers, more commonly known as FIDIC. *The B&C adjudication framework encapsulated within the SOPA is also reflective of this scheme.*

[emphasis added]

Thus, under the SIA Conditions 2005, the architect, rather than an adjudicator, determines the amounts due from the employer to the contractor for works done. The architect’s certificate, rather than an adjudication determination, is then enforceable pursuant to cl 31(13) of the SIA Conditions 2005 by way of summary judgment or interim award. This general scheme remains in place under the SIA Conditions 2011 as well.

37 With the introduction of the SOPA, the standard forms of contract were updated to harmonise the architect certification scheme with the scheme under the SOPA. For example, an architect’s interim certificate must be issued 14 days after the contractor issues its progress payment claim (cl 31(3) of the SIA Conditions 2005). On the other hand, under the SOPA, the employer only has to issue its payment response 21 days after the contractor issues its payment claim (cl 31(15) of the SIA Conditions 2005 read with s 11(1)(a) of the SOPA). This scheme would mean that an architect’s interim certificate should always, or at least most of the time, be available for the purposes of the issuance of a payment response pursuant to the SOPA or for the purposes of any adjudication brought under the SOPA. This intention for the architect’s certificate and adjudication process to complement each other is stated in the Singapore Institute of Architects’ *Guidance Notes on Articles and Conditions of Building Contract* (Singapore Institute of Architects, 3rd Ed, 2011) (“the *Guidance Notes*”) at p 20:

The Contract Conditions do not preclude the Contractor from claiming for payment for works carried out as certified in the interim certificate or final certificate should he choose to do so. As a matter of practicality, with the availability of fast track adjudication under the SOP Act, it is expected that most Contractors will take advantage of the adjudication proceedings to pursue payment of their interim payment claims.

38 There was, however, some confusion regarding how the final claim process under cll 31(11) and 31(12)(a) of the SIA Conditions 2005 interacted with the SOPA. In particular, there was uncertainty as to whether a final claim under the SIA Conditions 2005 qualified as a payment claim under the SOPA. This confusion was put to rest by the decision of Lai Siu Chiu J in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Pte Ltd* [2007] 4 SLR(R) 364. In that decision, Lai J found (at [52]) that a “final claim” also constituted a payment claim under the SOPA which could be adjudicated upon.

39 Lai J’s decision resulted in a degree of incompatibility between the SIA Conditions 2005 and the SOPA in relation to the final claim process. Under cl 31(12)(a) of the SIA Conditions 2005, the architect is only required to issue the final certificate three months after the final claim is submitted

by the contractor with the required supporting documentation or three months after the architect has issued the maintenance certificate (whichever is later). This would mean that any payment response, which is due 21 days after the issuance of the final claim, would have to be issued without the benefit of any architect's certificate. Further, there is also the possibility that adjudication between the parties may take place without the benefit of an architect's final certificate which would only be issued by the architect at a much later date. There could, as a result, be two enforceable instruments that deal with the same subject matter and that may be inconsistent with each other.

40 Further changes were thus made to the standard forms of contract and this culminated in cl 31(11) of the SIA Conditions 2011 which I have laid out above (at [10]). Other than changing the wording "final claim" to "final payment claim" under cl 31(11)(c) of the SIA Conditions 2011, the terms were also amended such that the Final Account process is to take place before the issuance of the final payment claim. The architect's final certificate is then due within 14 days of receipt of the final payment claim pursuant to cl 31(12)(a) of the SIA Conditions 2011. This scheme thus harmonised the final payment claim and certification process with the SOPA in the same manner as that for progress payment claims described above (at [37]). The employer would thus have the benefit of the final certificate for the purposes of issuing a payment response to the final payment claim. The adjudicator would also have the benefit of the final certificate for the purposes of rendering an adjudication determination.

The dispute over Payment Claim 17

41 The dispute between the parties thus arises as a result of the defendant and the quantity surveyor proceeding on the mistaken premise that the contract with the plaintiff incorporated the SIA Conditions 2011 (see above at [9]–[11]). This probably is a result of the fact that the defendant and quantity surveyor are both involved in many such building contracts and this caused them to lose track of the exact edition of the standard terms that was incorporated into the actual contract. Seen in this light, it can thus be understood that Payment Claim 16B was indeed intended by the defendant to be a progress payment claim that was submitted together with the Final Account documents required under cl 31(11)(a) of the SIA Conditions 2011 for the purposes of initiating the final payment process under the SIA Conditions 2011. To the defendant's mind, Payment Claim 16B cannot be a final payment claim since the latter may only be issued after the Final Account is prepared.

42 As this point came to light after the hearing, I requested further submissions from the parties on the impact, if any, of this confusion as to the applicable terms. The plaintiff's main contention is that the parties contracted only on the basis of the SIA Conditions 2005. The defendant argues however that in the present context there was no meeting of minds, as the parties were at cross-purposes. The defendant thus submits that Payment Claim 16B is not intended to be a final claim and that Payment Claim 17 was accordingly not incorrectly submitted.

43 I am unable to accept the defendant's further arguments. Whether a particular payment claim is a final claim or a progress payment claim must primarily be determined according to the terms of the contract between the parties which defines such claims and not by a party's mere subjective intention. To hold otherwise would blur and render uncertain the rules of engagement which the parties to a construction contract expressly agree to.

44 In my judgment, I am of the view that the objective evidence leads to the inevitable conclusion that Payment Claim 16B falls squarely within the definition of a final claim under cl 31(11) of the SIA Conditions 2005. This is reasonable in the circumstances since the supporting documents required to be provided with the final claim under cl 31(11) of the SIA Conditions 2005 were submitted together with Payment Claim 16B. Further, as contrasted with Payment Claim 17, no specified time period was

referred to in Payment Claim 16B. Instead, Payment Claim 16B purported to provide a “Final Summary” of the Final Account, and this would most definitely lead the plaintiff to believe that Payment Claim 16B was intended by the defendant to be a “final claim” which precedes the preparation of the Final Account under the SIA Conditions 2005. Even if the defendant did not intend for Payment Claim 16B to be a final claim, the fact that it had submitted Payment Claim 16B for the purposes of the preparation of the Final Account, a fact which the defendant itself accepts in its further arguments—is incontrovertible evidence of the true nature of Payment Claim 16B, that of a final claim filed prior to and for the purposes of preparing the Final Account as defined under cl 31(11) of the SIA Conditions.

45 Lastly, I also note that the defendant never objected to the architect’s indication that he would proceed to prepare the final certificate. If the defendant had believed the SIA Conditions 2011 to be applicable, it would have been expected that the defendant would object to the preparation of a final certificate, something that should only take place after the Final Account is prepared and after the defendant had issued what it believed to be its final payment claim. The defendant also did not reply to the architect’s letter dated 4 September 2014 seeking clarification on the matter (see above at [14]). Even if the defendant did not intend for Payment Claim 16B to be a final claim when it first issued Payment Claim 16B, its subsequent conduct suggests that this intention did not persist.

46 In the circumstances, although I do sympathise with the fact that the defendant had merely made an honest mistake when it issued Payment Claim 16B, the objective evidence suggests that Payment Claim 16B is indeed a final claim as defined under cl 31(11) of the incorporated SIA Conditions 2005. This brings me to the next issue, that is, whether payment claims may, under the SOPA, be issued after a final claim is issued pursuant to cl 31(11) of the SIA Conditions 2005.

Final claims and subsequent payment claims

47 It was probably the defendant’s view when it issued Payment Claim 16B that, as long as it had yet to issue a final payment claim, it may still issue progress payment claims even during the preparation of the Final Account. That a contractor may do so before issuing its final payment claim under cl 31(11)(c) of the SIA Conditions 2011 has been recognised in the *Guidance Notes* at pp 20–21:

It is important to note that the Contract Conditions do not in any way prevent the Contractor from serving a payment claim for works carried out (including variations ordered) as an interim payment claim at any time before he submits his final payment claim under Clause 31.11(c) and to refer such payment claim for adjudication under the SOP Act to secure payment.

As such, the final payment procedure under Clause 31.11, does not affect the Contractor’s right to seek immediate payment under the SOP Act for all works carried out including variations by the submission of an interim payment claim to the Employer. The Contractor need not wait until the time for the submission of his final payment claim in order to claim payment for variations ordered either in the course of the Works or after the completion of the Works.

48 Although this passage in the *Guidance Notes* states that payment claims may be made any time prior to the final payment claim, it is conspicuously silent as to whether further payment claims may be made after the final payment claim. In my opinion, this silence should be regarded as an implied acknowledgment that no further payment claims should be filed after the final payment claim. A final payment claim, or final claim, as the word “final” suggests, should be the last payment claim issued by the contractor. Further, while an architect may revise previously issued interim certificates by issuing a further certificate pursuant to cl 31(6) of both the SIA Conditions 2005 and the SIA Conditions 2011, cl 37(3)(i) states unequivocally that this power expires after the architect issues the final

certificate. This is further evidence of the “final” nature of a “final” claim, “final” payment claim and a “final” certificate.

49 In my view, it would not be within the contemplation of the drafters of the SIA Conditions 2005 and the SIA Conditions 2011 for further payment claims made after the final claim or final payment claim to be resolved in ways other than the architect certification mechanism provided. To my mind, they probably did not expect any further payment claims to be made after the final payment claim as the final payment process is intended to resolve all matters concerning all the work done by the contractor.

50 In this regard, s 10(2) of the SOPA states as follows:

10.—(2) A payment claim shall be served —

(a) at such time as specified in or determined in accordance with the terms of the contract; or

(b) where the contract does not contain such provision, at such time as may be prescribed.

As seen from the wording of s 10(2), the timing for the serving of a payment claim is framed in a mandatory manner such that it “shall be served” at specified times. In this regard, s 10(2)(a) requires one to first look at the terms of the contract.

51 While it is clear that provisions in the building contract as to when a payment claim is to be served must be observed strictly pursuant to s 10(2)(a), it is not clear what the effect of any provision indicating when payment claims may not be served is. I am inclined towards the view that the latter provisions should be given the same mandatory effect pursuant to s 10(2)(a). A stipulation for payment claims to be filed at certain timings necessarily implies that payment claims are not to be filed outside those timings. In this regard, there is no real difference between provisions that stipulate when payment claims are to be served and those that stipulate when they may not be and there is no reason for s 10(2)(a) of the SOPA to discriminate between the two. In my judgment, it is, at the very least, arguable, that a payment claim issued at any time after the issuance of the final claim or final payment claim and thus not in accordance with the SIA Conditions 2005 or the SIA Conditions 2011 respectively, is invalid as it fails to comply with s 10(2)(a) of the SOPA. To this extent, the plaintiff’s argument that Payment Claim 17 is invalid in the light of the fact that it was issued after Payment Claim 16B (which should probably be regarded as the final claim under cl 31(11) of the SIA Conditions 2005) appears to have some semblance of merit.

52 Nonetheless, as I have already decided to dismiss the plaintiff’s application on preliminary grounds, there is no need for me to reach a conclusive determination as to this issue. I would like to emphasise that these observations made above concerning Payment Claim 17 and the issues associated with it (at [36]–[51]) are *obiter dicta*.

Conclusion

53 For the reasons given above (at [22]–[35]), I dismiss the application of the plaintiff. I also award costs to the defendant to be taxed if not agreed.

[note: 1] Affidavit of Tan Hin Wa, Jason dated 30 September 2014, JT-1, pp 1–75.

- [\[note: 2\]](#) Affidavit of Tan Hin Wa, Jason dated 30 September 2014, p 2 at [4]–[5].
- [\[note: 3\]](#) Affidavit of Tan Hin Wa, Jason dated 30 September 2014, JT-3, p 77.
- [\[note: 4\]](#) Affidavit of Tan Hin Wa, Jason dated 30 September 2014, JT-4, p 78.
- [\[note: 5\]](#) Affidavit of Adam Lau Fook Hoong @ Joe Lau dated 2 December 2014, JL-4, p 104.
- [\[note: 6\]](#) Affidavit of Tan Teck Leong dated 31 October 2014, TTL-2B-7, p 70.
- [\[note: 7\]](#) Affidavit of Tan Teck Leong dated 31 October 2014, TTL-2B-7, p 72.
- [\[note: 8\]](#) Affidavit of Tan Teck Leong dated 31 October 2014, TTL-2B-11, p 116.
- [\[note: 9\]](#) Affidavit of Tan Teck Leong dated 31 October 2014, TTL-2B-11, p 118.
- [\[note: 10\]](#) Affidavit of Tan Hin Wa, Jason dated 30 September 2014, JT-5, pp 124–125.
- [\[note: 11\]](#) Affidavit of Tan Hin Wa, Jason dated 30 September 2014, JT-5, p 124.
- [\[note: 12\]](#) Affidavit of Tan Hin Wa, Jason dated 30 September 2014, JT-7, p 130.
- [\[note: 13\]](#) Affidavit of Tan Hin Wa, Jason dated 30 September 2014, JT-7, p 131.
- [\[note: 14\]](#) Affidavit of Tan Teck Leong dated 31 October 2014, TTL-2B-22, p 394.
- [\[note: 15\]](#) Affidavit of Tan Hin Wa, Jason dated 30 September 2014, JT-10, p 137.
- [\[note: 16\]](#) Affidavit of Tan Teck Leong dated 31 October 2014, TTL-2B-21, pp 375–379.
- [\[note: 17\]](#) Affidavit of Tan Hin Wa, Jason dated 30 September 2014, p 8 at [21]–[23].
- [\[note: 18\]](#) Affidavit of Tan Hin Wa, Jason dated 30 September 2014, JT-12, pp 146–151.
- [\[note: 19\]](#) Affidavit of Tan Teck Leong dated 31 October 2014, TTL-2B-21, pp 353–354 at [40]–[41].
- [\[note: 20\]](#) Originating Summons No 915 of 2014 at [2].
- [\[note: 21\]](#) Originating Summons No 915 of 2014 at [3].