UES Holdings Pte Ltd *v* Grouteam Pte Ltd
[2015] SGHC 275

Case Number	: Originating Summons No 649 of 2015
Decision Date	: 26 October 2015
Tribunal/Court	: High Court
Coram	: Quentin Loh J
Counsel Name(s)	: Ian de Vaz and Melanie Chew (WongPartnership LLP) for the plaintiff; Radika Mariapan (IRB Law LLP) for the defendant.
Parties	: UES Holdings Pte Ltd — Grouteam Pte Ltd

Building and Construction Law – Statutes and Regulations

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 210 of 2015 was allowed by the Court of Appeal on 26 October 2016. See [2016] SGCA 59.]

26 October 2015 Judgment reserved.

Quentin Loh J:

Introduction

1 By this originating summons, UES Holdings Pte Ltd ("the Plaintiff") seeks to set aside an adjudication determination under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act").

2 The Plaintiff was engaged as a main contractor by Changi Airport Group (Singapore) Pte Ltd ("CAG") for a project entitled "Relocation of Pumphouse and Substation at Singapore Changi Airport" [note: 1] ("the Main Contract"). The Plaintiff then entered into a domestic sub-contract ("the Sub-contract") with Grouteam Pte Ltd ("the Defendant") to carry out, *inter alia*, the civil, structural and architectural works of the new Pumphouse and Substation. [note: 2]

3 On 20 April 2015, the Defendant served Payment Claim No. 18 ("the Payment Claim") on the Plaintiff. [note: 3] Not having received a payment response from the Plaintiff, on 20 May 2015, the Defendant proceeded to serve a notice of intention to apply for adjudication ("the Notice of Intention") and lodged an adjudication application ("the Adjudication Application") with the Singapore Mediation Centre ("SMC"). [note: 4] Upon receipt of the Notice of Intention, the Plaintiff then issued Payment Response No. 18 ("the Payment Response") on 20 May 2015. [note: 5] The SMC served a copy of the Adjudication Application on the Plaintiff on 21 May 2015. [note: 6] An adjudicator was appointed and on 19 June 2015, the adjudicator rendered his determination ("the Adjudication Determination") ordering, *inter alia*, that the Plaintiff pay the Defendant the sum of $2,905,683.89. [note: 7]

4 The Plaintiff is applying to set aside the Adjudication Determination on three alternative grounds: [note: 8]

(a) the Payment Claim was defective as it was served out of time ("the First Ground of Challenge");

(b) the Notice of Intention and/or the Adjudication Application were defective as they were served out of time ("the Second Ground of Challenge"); and

(c) the Adjudication Application was defective and/or invalid as it did not contain an extract of the terms and conditions of the Sub-contract that are relevant to the dispute ("the Third Ground of Challenge").

5 It is necessary to make some comments on the Sub-contract. It is exhibited in the 1st Affidavit of Chua Kok Liang, filed on 9 July 2015 ("1st CKL Affidavit"), and it runs for some 507 pages, from pp 85–592. The phrase "cobbled together" is an apt description, so are the words "enigmatic" and "confusing". There were quite a number of documents that were bundled together; some parts of which sat ill with another and the language used was at times wanting and difficult to comprehend. This is unfortunately not all that unusual in some of the construction contracts that end up in arbitration or the courts.

6 The affidavits give little or no information on the negotiations leading up to the Sub-contract or how some important documents came to be included in the Sub-contract. The context is thus largely missing. The more relevant parts of the Sub-contract, dated 30 August 2013, are as follows:

(a) It starts with a 'Sub-contract Agreement', dated 30 August 2013, comprising some 31 pages with 28 clauses and four Schedules. [note: 9]

(b) It is followed by Annex 1, entitled "Summary of Contract Negotiations" ("the SOCN"), which is signed by the parties, dated 28 August 2013 and envisaged the subsequent placing of a purchase order.

(c) A two page document from the Defendant, also dated 28 August 2013, [note: 10] follows; this appears to be a third revision of a quotation for the Sub-contract works following upon a joint site inspection with a revised price in manuscript of $8,300,000 (the previous price was $8,800,000 with the $500,000 difference being characterised as the "goodwill discount"). A typed notation: "Confirmed and Accepted by:" at the bottom right hand corner was not signed or stamped.

(d) It is common ground that the next 50 pages (pp 128–181 of the 1st CKL Affidavit) were the Preliminaries (General Conditions and Preliminaries) from the tender documents of the Main Contract. The Defendant accepts that they are a "reproduction in whole of the Plaintiff's Main Contract tender documents". [note: 11] Its significance is that each item or part thereof, as the case may be, was specifically bracketed and was annotated with handwritten words next to it such as "Included", "Not Included", "NA", "Noted" or "Under Main Contract". It was alleged by Mr Ian De Vaz, counsel for the Plaintiff, and it was not denied by Ms Radika Mariapan, counsel for the Defendant, that the Defendant went through this document and made written annotations on the right hand side against each item; the handwriting was thus by "the Defendant" [note: 12] . The Defendant's stamp, which was initialled, appeared on each of these pages of the Preliminaries. I am told, and this is not denied, that a discussion and marking of these pages allegedly took place before the signing of the SOCN. [note: 13] I accept Mr De Vaz's submission that the parties had obviously applied their minds by going through each and every item or sub-item in the Preliminaries of the Main Contract and specifically deciding whether it was part of the

Sub-contract or otherwise. This same document appears at pp 215–268 of the 1st CKL Affidavit but with the words "INCLUDED" typed in for the applicable items and sub-items with the same stamp and initials of the Defendant at the bottom of each page. It should be noted that some items, which originally had the handwritten notation "NOTED" written against it, had been amended in the typed version of the Preliminaries to "INCLUDED"; each of these pages in the typed version of the Preliminaries also carried the stamp and initials of the Defendant. The items of note include the following:

(i) Item A of Sect1.1/1, under the heading "GENERALLY" which provided that "The Conditions of Contract used are the Public Sector Standard Conditions of Contract for Construction Works 2008 (Sixth Edition December 2008)…" ("PSSCOC") was "INCLUDED".

(ii) Item G of Sect1.1/11, which was titled "Clause 32. Progress Payments and Final Account" was "INCLUDED".

(iii) Item A of Sect.11/10, under the heading "CONDITIONS OF CONTRACT" which provided, *inter alia*, that the Conditions of Contract would comprise the PSSCOC was "INCLUDED".

(e) A purchase order was also executed on 30 August 2013 ("the Purchase Order") and this appears at p 1149 of the 1st CKL Affidavit.

7 I should mention at this juncture that Section 6 of the First Schedule to the Sub-contract Agreement contains a 'priority' or 'precedence' clause which provides for inconsistencies between the attachments which form the Sub-contract: [note: 14]

> Notwithstanding anything stated in this Sub-Contract, in the event and to the extent of any inconsistency between two or more attachments which form part of this Sub-Contract, those attachments will be interpreted in the following order of priority:
>
> (a) clauses 1 to 28 of this Sub-Contract;
>
> (b) the Schedules
>
> (c) the documents set out in **Section 6 of the First Schedule** (of which references to the Main Contract shall prevail in the event of inconsistency between the said documents
>
> [emphasis in original]

8 Section 6 of the First Schedule will play a crucial role as some parts of the Sub-contract appear, *inter alia*, to contradict other parts or to use different phrases or clauses to provide for possibly the same situation. I now turn to the parties' respective cases.

The First Ground of Challenge

The Plaintiff's Case

9 The Plaintiff's First Ground of Challenge (*ie*, the Payment Claim was served out of time), is that item E of Sect1.1/16 of the Preliminaries ("Preliminaries E") provides for the timeline in which a payment claim must be submitted. Preliminaries E provides that Defendant is only entitled to submit payment claims within seven days from the end of each calendar month. [note: 15] The Payment Claim,

which was served on 20 April 2015, was therefore served out of time.

10 Preliminaries E appears at Sect1.1/16 of the Preliminaries under the heading "INTERIM PAYMENTS". Item D appears under that heading as well and precedes Preliminaries E; item D is headed "The Reference Schedule" and caters for valuation of progress claims by reference to items within a "Reference Schedule" based on the percentage completion of each item therein. It reads:

> *For the purposes of clause 32 of the [PSSCOC]*, the Contractor shall allow in his price for progress payments to be valued by reference to the items set out in the Reference Schedule for the Valuation of Progress Payments ("the Reference Schedule"). The valuation for each progress payment shall be based on the percentage completed of each of the items set out in the Reference Schedule in a reference month and multiplying the said percentage by the value of the item.
>
> [emphasis added]

Preliminaries E, which follows item D, provides as follows:

> *Within 7 days from the end of each calendar month* (hereinafter "the reference month"), *the Contractor shall deliver* to the Employer (with copies to the Superintending Officer), *a payment claim* in a form which shows a breakdown of the amount claimed by reference to the items as set out in the Reference Schedule. In addition to the requirements set out in clause 32.1(1) of the [PSSCOC], the payment claim shall also state:
>
> (1) Amounts paid previously under the Contract; and
>
> (2) The balance arising out of the Contract in respect of the reference month which is due to the Contractor or the Employer, as the case may be.
>
> [emphasis added]

11 In contrast, the Defendant disagrees and contends instead that clause E of the SOCN ("Negotiations E") is the applicable provision that governs the submission of payment claims. [note: 16] As noted above, the SOCN is set out in Annex 1 of the Sub-contract. Clause D of the SOCN sets out a Payment Schedule which breaks down the payment of the contract price into stages by percentage. Under this Schedule, 5% is payable upon receiving the Performance Bond, 5% upon submission of shop drawings, 75% "[u]pon monthly progress payment", 10% upon the Temporary Occupation Permit, 2.5% upon submission of as-built drawings and 2.5% upon issuance of the Certificate of Substantial Completion. Negotiations E follows and provides as follows:

> E **TERMS OF PAYMENT**
>
> All above payments shall be effected within **30 days** after receipt of required progress claim documentation for [Plaintiff] approval and issuance of payment certificate. The method of payment is by monthly application and submission of invoices reflecting the value of the work carried out or of the goods/works provided, submitted not later than the 20th of each month to a program agreed with [Plaintiff].
>
> Any discrepancies noted in the Sub Contractor's application may be adjusted by [Plaintiff] to agree to the value of the work carried out or goods delivered and a certificate shall be issued accordingly.

> Within **seven (7) days** after receipt of the interim payment claim, [Plaintiff] (*sic*) Project Manager shall issue an interim certificate to the Sub Contractor.
>
> Within a further **seven (7) days** from the issue of the invoice from the sub-contractor but subject to a maximum of **twenty-one (21) days** from the receipt of the invoice, [Plaintiff] shall be entitled to issue a payment response.
>
> [emphasis in original]

Pursuant to Negotiations E, the Defendant would have been entitled to submit payment claims no later than the 20th of each month and the Payment Claim would therefore have been served within time.

12 The Plaintiff advances several reasons to support its contention that it is Preliminaries E, and not Negotiations E, which applies. First, it argues that Negotiations E is completely inapplicable to begin with and there is therefore no conflict between the two. This is because Negotiations E pertains to the submission of an "invoice" and not a "payment claim". [note: 17] The Plaintiff also highlights the fact that the SOCN is only meant to be transitory in nature. This is evidenced by clause K of the SOCN ("Negotiations K") [note: 18] which provides that all stipulations agreed upon in the SOCN shall remain valid until the actual placement of a purchase order. According to the Plaintiff, this means that after the Purchase Order was placed, the terms of the SOCN no longer applied. [note: 19] Furthermore, the Plaintiff argues that pursuant to the wording of Negotiations E, the payment claim had to be submitted to "to a program agreed with [the Plaintiff]". Since no such program had been agreed upon, Negotiations E is not applicable. [note: 20]

13 Alternatively, the Plaintiff argues that even if there is a conflict between Negotiations E and Preliminaries E, the latter should take precedence over the former. This is because Preliminaries E constitutes a "reference to the Main Contract" and pursuant of s 6 of the First Schedule, such a term shall be accorded priority over any other terms in the annexure documents (see above at [7]).

The Defendant's Case

14 The Defendant argues that Preliminaries E is inoperative and should be disregarded altogether because Preliminaries E makes references to a "Contractor" and "Superintending Officer", both of which are terms which have not been defined in the Sub-contract. Additionally, the term "Employer" is defined in the Sub-contract as CAG and not the Plaintiff. [note: 21] The Defendant therefore argues that Preliminaries E, which pertains to the service of payment claims from the "Contractor" to the "Employer", governs the service of payment claims from the Plaintiff to CAG and not payment claims from the Defendant to the Plaintiff. [note: 22]

15 The Defendant, rather quizzically, also takes the position that Preliminaries E is not a reference to the Main Contract, but the standard form main contract as it does not expressly refer to the actual "Main Contract" in its wording. [note: 23] Therefore, contrary to what has been submitted by the Plaintiff, s 6 of the First Schedule does not resolve the conflict between the two clauses in favour of Preliminaries E applying.

16 The Defendant further contends that the ambiguities present in Negotiations E and Preliminaries E, which result in a conflict between these two provisions, should be read against the Plaintiff pursuant to the *contra proferentem* rule. The Plaintiff had drafted both these terms and therefore

should not be allowed to benefit from any ambiguities contained therein.

17 The Defendant also relies upon the fact that the Plaintiff never objected upon receipt of the purportedly premature Payment Claim and instead proceeded to issue the Payment Response, albeit belatedly so. [note: 24] Furthermore, the Plaintiff had previously responded to a payment claim by stating in an email, dated 29 December 2014, that it had 21 days to issue its payment response. [note: 25] According to the Defendant, this 21-day timeline is only explicable if it is Negotiations E, and not the terms of the Preliminaries, which applies. Accordingly, the Plaintiff's conduct itself shows that it had always regarded Negotiations E as the applicable clause. [note: 26]

My Decision – First Ground of Challenge

18 The key issue is which provision governs the making of Payment Claims – Negotiations E or Preliminaries E – and the time period within which the Defendant was entitled to submit the Payment Claim. This depends upon a proper construction of the Sub-contract.

19 I do not agree with the Defendant's contention that Preliminaries E is inoperative, inapplicable and should be disregarded altogether. [note: 27] The Defendant is wrong in contending that just because the term "Employer" is defined in the Sub-contract as CAG and not the Plaintiff, Preliminaries E does not pertain to the service of payment claims from the Defendant to the Plaintiff. In my view, this is not only an overly technical and arid literal reading of the Preliminaries, it is the wrong approach in construing sub-contracts of this nature which are invariably a part of the works of a main contract. The Preliminaries, which was a tender document for the Main Contract, was clearly incorporated into the Sub-contract and may apply between the parties *mutatis mutandis*. Contrary to what has been submitted by the Defendant, [note: 28] there is no need for the contract to expressly use the words "*mutatis mutandis*" before a document may be incorporated as such (see *eg*, *Jurong Engineering Ltd v Paccan Building Technology Pte Ltd* [1999] 2 SLR(R) 849, especially at [37]). What I find compelling, as noted above (at [6(d)]), is that both parties had gone through the Preliminaries, as one would have expected them to do in the context of the Sub-contract, and someone from the Defendant had written against each item or part thereof, whether or not it was to be included in the Sub-contract. Moreover the Defendant's stamp and initials of one of its employees appears on each page of the two sets of the Preliminaries (one with handwritten notations and the other with the typed notations). This was *not* disputed by the Defendant. Moreover, as highlighted above, when it came to typing the notations in the Preliminaries, the handwritten "Noted" against references to the PSSCOC were changed to "INCLUDED". As against Preliminaries E, the word "INCLUDED" had been specifically written in both versions. I am satisfied that on a true construction, the clear intention of the parties was that Preliminaries E was included in and part of the Sub-contract, [note: 29] and that the PSSCOC conditions were also incorporated into the Sub-contract. The Defendant's argument that Preliminaries E is inoperative or does not apply for the reasons it proffers is, with respect, wrong.

20 By s 6 to the First Schedule of the Sub-contract Agreement, the parties have specifically provided for the priority or precedence in the event of and to the extent there is any inconsistency between two or more attachments. Clauses 1 to 28 of the Sub-contract Agreement are accorded the highest precedence. Clause 19, headed "Payment", states:

> 19.1 The Supplier agrees and accepts that the relevant provisions of the SOPA shall apply to this Sub-Contract in respect of payment claim(s), payment response(s) and the date(s) on which progress payment(s) become(s) due and payable.

The Sub-contract Agreement uses the terms "Main Contractor" and the "Sub-Contractor" and the

unexpected appearance of the word "Supplier" in Clause 19 is obviously a typographical error and should have read "Sub-Contractor". By this clause it is also clear that the parties accepted that the relevant provisions of the Act were to apply to payment claims, payment responses and the dates on which progress claims become due and payable. However that does not take us very far because the relevant provisions of the Act, *viz*, s 8(1) relating to the due date for payment, s 10(2) relating to payment claims, and s 11(1) relating to payment responses, refer us back to the contract provisions. Accordingly, we have to turn back to the Sub-contract to ascertain if Preliminaries E or Negotiations E or any other provision governs the due date for submission of payment claims and responses for the purposes of the Act.

21 The SOCN pre-dates the Sub-contract by two days. Under the rather enigmatic heading: "K. RESPONSIBLE PARTNERS IN CASE OF ORDER", there appear the following sub-paragraphs: [note: 30]

> …
>
> This "Summary of Contract Negotiations" sets out the principal terms with respect to a proposed Sub-Contract between the parties and includes all documents referred to herein. It *constitutes an offer* by the Quoting Company, which is firm and binding.
>
> In case of ordering the terms and conditions of this "Summary of Contract Negotiations" shall govern to the extent that the order is in conformity with such terms and conditions. In case no agreement can be reached about deviations in the order, if any, the Quoting Company's obligation to abide by the terms and conditions of this "Summary of Contract Negotiations" shall remain valid.
>
> …
>
> All stipulations agreed upon in this Summary of Contract Negotiations *shall remain valid until the actual placement* of a Purchase Order.
>
> [emphasis added]

These sub-paragraphs indicate the true nature of the SOCN. It is in the nature of a quote whose terms are to remain firm. They remain valid until the placement of the Purchase Order. From the nature of some of its terms as well as the next document, the Purchase Order, some of the provisions of the SOCN survived and hence the SOCN's inclusion as part of the Sub-contract documents.

22 I should also point out one more feature of the SOCN which exacerbates the challenges faced in interpreting this poorly drafted Sub-contract. Clause B of the SOCN, titled "INTEGRAL PARTS OF CONTRACT PRECEDENCE" [note: 31] , seemingly acts as a precedence clause which places the SOCN at the top of that list, followed by the Sub-contract Agreement. The third level of documents in that precedence clause is described as "[a]ll documents and drawings as mentioned in Clause A – "Scope of Technical Documentation"". The Preliminaries falls within this third level of documents. I do not purport to go through and clarify the various inconsistent terminologies that were present within this precedence clause alone; it suffices to say there were many. What is clear to me, however, is that on a true construction of this Sub-contract, this priority clause in the SOCN, an earlier document which was not the concluded contract, cannot override s 6 of the First Schedule that is annexed to and part of the Sub-contract Agreement, the later document which became the concluded contract. With the signing of the Sub-contract Agreement two days later, it cannot make any commercial sense for the parties to have intended for the SOCN to prevail and take priority over the Sub-contract Agreement which must have been in draft when the SOCN was signed. Clause K makes this clear.

Clause B of the SOCN must, therefore, have been superseded when the Purchase Order was issued and the parties signed the Sub-contract Agreement.

23 The Purchase Order issued by the Plaintiff is dated 30 August 2013. For some unexplained reason, it was not bundled as part of the Sub-contract. The Purchase Order contains some terms that shed some light on the Sub-contract: [note: 32]

(a) In a box with the printed word "Terms" the words "30 days upon receipt of invoice" appear. This, as I shall discuss below is consistent with the understanding of the parties under the Sub-contract.

(b) In another box with the printed words "Date Required" the words "Refer to the SOCN, Clause F" are typed. Clause F of the SOCN is headed "Work Program" with key milestone dates with a notation that the master construction schedule might change and be updated. These milestones obviously became part of the Sub-contract.

(c) Under "Payment Term", the same breakdown of the contract works against the same percentage of the overall price as that set out in Clause D of the SOCN (see above at [11]) appears.

(d) Under the "Detailed Scope of Supply/Work and Other Terms & Conditions", there is reference to the SOCN, the Sub-contract Agreement, all documents and drawings in Clause A of the SOCN and the Defendant's quotation, mentioned above, that were bundled as part of the Sub-contract.

(e) Under "Liquidated Damages for delay", there is a reference to SOCN Clause G "for the detailed" (no doubt a typographical error; it should instead read "for details").

From the above, it should be clear that items such as Clause F obviously survives the Purchase Order and becomes part of the Sub-contract subject to changes or modification by the other parts of the Sub-contract, *eg*, by the Preliminaries at item F of Sect1.1/46 to item D of Sect1.1/47 under the heading "Programme Charts and Returns". This is totally in keeping with sub-contracts of this nature. I should also point out that under clause 4 of the Sub-contract Agreement, the Defendant as Sub-contractor was deemed to have full knowledge of the provisions of the Main Contract (other than the Plaintiff's pricing) and the Plaintiff was obliged to provide the Defendant with a true copy if so requested by the Defendant but at the Defendant's expense.

24 I therefore cannot accept Mr De Vaz's submission that the *whole* of the SOCN was only "transitory" in nature and became inapplicable once the Sub-contract Agreement was signed. Obviously some clauses continued to survive although I accept that some clauses would have been superseded or modified as the case may be. In my judgment, Negotiations E was one such clause which had been superseded and had been replaced with Preliminaries E.

25 Notwithstanding my conclusion that Negotiations E was superseded by Preliminaries E once the Sub-contract was signed and entered into, because the parties submitted on the construction of Negotiations E in contending for its applicability or otherwise, it is necessary for me to set out my views on the interpretation of Negotiations E. Negotiations E, although not the most clearly worded, envisaged the following steps with regard to claims and payment terms:

(a) First, from the first sentence of the first sub-paragraph (see above at [11], all the payments set out at clause D of the SOCN were to be made within 30 days after receipt of two

things:

(i) the required progress claim documentation for the Plaintiff's approval; *and*

(ii) the Plaintiff's issuance of a payment certificate.

This was in keeping with a credit term of 30 days that was also noted in the Purchase order. I should also point out at this juncture that under the Main Contract, pursuant to cl 32.6 of the PSSCOC titled "Period for Honouring Certificate" read with the Appendix, the default 21 days for payment after the date of the interim payment certificate was amended in the Appendix to 30 days from the date of the receipt of the tax invoice. [note: 33]

(b) Secondly, from the first part of the second sentence of the first sub-paragraph, the "method of payment" would be by the monthly application and submission of invoices reflecting the work carried out or of the goods or works provided. The reference to "invoices" clearly refers to supporting invoices for the claims of the Defendant. This would include invoices for the delivery of, *eg*, steel reinforcement bars to site, ready-mixed reinforced concrete deliveries, and equipment like pumps, tanks and valves.

(c) Thirdly, the second part of the second sentence of the first sub-paragraph then states that the monthly application with supporting invoices shall be "… submitted not later than the 20th of each month to a program agreed with [the Plaintiff]". The submission by the 20th of each month is clear and does not give rise to difficulties, but the following words "… to a program agreed with [the Plaintiff]" gives rise to differences between the parties.

(d) It is common ground that Negotiations E calls for submission by the 20th of each month. The Defendant thus contends it had up to the 20th of the month to submit its monthly payment claim. The Plaintiff says, *inter alia*, the words "…to a program agreed with [the Plaintiff]" meant that it was subject to changes and the Defendant is mistaken in its reliance on being able to submit its monthly payment claims by the 20th of each month. It is undisputed that no such program had been agreed between the parties. [note: 34] In my judgment, although there was no discussion and agreement in the evidence before me, as a matter of construction, this phrase qualified the stipulated 20th day of each month as it allowed for the Plaintiff to stipulate another time period for the submission of payment claims. As I will set out below, this was changed by Preliminaries E such that payment claims had to be made within seven days from the end of each calendar month. This is to coincide with the date when the Plaintiff has to make its interim payment claims upstream.

(e) The second sub-paragraph does not give rise to any dispute. It allows for discrepancies in the monthly payment claim to be adjusted by the Plaintiff to accord with the value of work done on site or for the goods delivered to site and the Plaintiff would issue a certificate, *ie*, an interim payment certificate.

(f) The third sub-paragraph sets a time limit for the Plaintiff to issue the interim payment certificate; it stipulates a time limit of seven days from the *receipt* of the monthly payment claim, now referred to in this sub-paragraph as an "interim payment claim".

(g) The fourth sub-paragraph states that the Plaintiff is entitled to issue a "payment response" within seven days *from the issue* of the Defendant's invoice but subject to a maximum of 21 days *from the receipt* of that invoice. Two points should be clarified at this juncture. First,

the reference to an "invoice" here refers to a tax invoice, which is typically based on and issued after an interim payment certificate has been issued. Secondly, the wording of the sub-paragraph can also give rise to problems as to when the Defendant's tax invoice "is issued" in contradistinction to the Plaintiff's "receipt" of that tax invoice. What is, in my view, fairly clear was that the Plaintiff, as main contractor, had to issue the interim payment certificate within seven days from the receipt of the payment claim but it had up to 21 days thereafter to issue a payment response if it disagreed to make any payment or pay some of the items claimed or at the value ascribed to those items by the Defendant, as sub-contractor. By this sub-paragraph, the Plaintiff was apparently trying to stipulate the maximum time allowed under s 11(1)(*a*) of the Act.

26 The Plaintiff first contends that Negotiations E cannot apply because it deals with the submission of an invoice and not a payment claim. [note: 35] As can be seen from the analysis above, Negotiations E does deal with payment claims, invoices in two senses (*ie*, supporting invoices when making a payment claim and tax invoices), and payment. Secondly, according to the Plaintiff, an invoice is conceptually distinct from a payment claim as recognised under s 8(6) of the Act. [note: 36] This argument is, with respect, correct in one aspect but misconceived in another. It is true that an invoice is not an interim payment claim. However, where the invoice fits into the scheme of payment can be gleaned from s 8(6) of the Act which refers to "tax invoices" as defined under the Goods and Services Tax Act (Cap 117A, 2005 Rev Ed). The tax invoice has in fact little or no bearing on the process of the interim payment claims and the interim payment certificates. It is more of an administrative matter dealing with the payment and recovery or off-setting of the Goods and Services Tax ("GST") by the parties. When an interim payment certificate is issued, it certifies the value of the work done or material or equipment supplied to site; it does not include any GST (*eg*, see the Purchase Order where the words "(excl. GST)" appear under the "Total Amount"). It is true that the GST element may be included in the valuation if a piece of equipment delivered to site with an invoice from the supplier includes the GST but this is then taken into account when computing the GST flows when certifying payment. Generally speaking, the downstream party then has to add GST, if applicable, to the sum certified and present that tax invoice, backed by the interim payment certificate, for payment. Hence, in this case, both the SOCN (Negotiations E) and the Purchase Order stipulates that the 'payment term' is 30 days. It does not really affect the timelines under the Act.

27 This can also be seen from the Preliminaries, Items C to J of SECT1.1/17 under the heading "INTERIM PAYMENTS". Under that heading is a sub-heading "Particulars of Tax Invoice". It is there provided that: "[u]pon receipt of the payment response, the Contractor shall prepare and present to the Employer for payment, a tax invoice made pursuant to the Goods and Services Tax Act (Cap 117A), and this invoice shall contain the following particulars…", *eg*, the name, address and registration number of the taxable person, and the date of supply as defined in the Goods and Services Tax Act, *etc*.

28 The fourth sub-paragraph of Negotiation E however, appears to have provided a possibly longer period for the payment response than that provided by the Act, since it allows for a payment response to be issued 21 days from the issue of a tax invoice. Under s 11(1)(*a*), the maximum period allowed is 21 days after the *payment claim*, *ie*, the interim payment claim, is served. Why the parties put in sub-paragraph four is neither explained nor addressed by the parties in their submissions. The parties have done a number of strange things in this Sub-contract and short of an opportunity to question the parties on their reasons for this sub-paragraph, this will remain a mystery.

29 What we have to do is to construe the Sub-contract before us. Notwithstanding that Negotiations E does pertain to payment claims, it cannot be the operating clause in the present case.

Quite apart from my reasons set out above and conclusion (at [24]) that Preliminaries E has superseded Negotiations E, the priority clause under s 6 of the First Schedule to the Sub-contract Agreement also points towards Preliminaries E applying over Negotiations E.

30 The Sub-contract Agreement is dated 30 August 2013. As noted above, s 6 of the First Schedule states that in the event and to the extent that there is any inconsistency between two or more attachments which form part of the Sub-contract, then the priority to be accorded to the provisions are:

(a) first, clauses 1 to 28 of the Sub-contract Agreement;

(b) secondly, the Schedules; and

(c) thirdly, the attachments set out in Section 6, which includes both Annex 1 (the SOCN, which contains Negotiations E) and Annex 4 (Price Schedule and Rate Schedule, which contains Preliminaries E), and in the event of any inconsistency *inter se*, then references to the Main Contract shall prevail.

31 Preliminaries E is not only a "reference" to the Main Contract, it came from and is part of the Main Contract. It should also be emphasised, as noted above, that the Defendant wrote and then typed the word "INCLUDED" against Preliminaries E and stamped and initialled the page. It is therefore clear, and should have been to the Defendant as well, that a reference to Preliminaries E is in fact a reference to the Main Contract. Accordingly, Preliminaries E prevails over Negotiations E. Moreover, the following clauses in the Sub-contract Agreement also reinforce the centrality of the Main Contract provisions and obligations which have been passed on to the Defendant as domestic sub-contractor to the Plaintiff:

(a) Clause 4.1: this provides that the Defendant shall be deemed to have full knowledge of the provisions of the Main Contract, other than the prices) and the Defendant is entitled, at his expense, to require the Plaintiff to provide it with a copy of the same;

(b) Clause 4.2: the Defendant is to execute, complete and maintain the Sub-contract Works, (which is defined in Clause 1.1 to mean the works, whether including the supply of goods or services or otherwise described in the documents specified in Part I of the Second Schedule), so that no act or omission of the Defendant in relation thereto shall constitute, cause or contribute to any breach by the Plaintiff (as Main Contractor) of any of the Plaintiff's obligations and liabilities under the Main Contract in relation to the sub-contracted work as if the Defendant were a party to the Main Contract in lieu of the Plaintiff, (but without creating any privity of contract between the Defendant and the Employer);

(c) Clause 4.3: the Defendant shall indemnify the Plaintiff against every liability which the Plaintiff may incur to any other person whatsoever and against all claims, demands, proceedings, damages, costs and expenses made against or incurred by the Plaintiff by reason of any breach by the Defendant of the Sub-contract.

(d) The indemnity in Clause 4.3 is of importance, given the context of the Defendant as domestic sub-contractor of the Plaintiff and of the works being within Changi Airport, as it is repeated in varying forms in clause G of the SOCN and the Purchase Order.

32 Also, there are clear references to the Main Contract works being awarded on the PSSCOC terms, *eg*, see s 6 of the First Schedule and item A of Sect1.1/1 of the Preliminaries. Preliminaries E

indicates that the interim payment claims are to be made before the seventh day of each calendar month, which is referred to as the "reference month" and s 5 of the First Schedule also states that the "Date(s) on which Main Contractor will be submitting statements to the Employer – "Specified Date": 7th day of each month".

33 Preliminaries E is therefore the applicable clause and the Defendant has to submit its payment claims within seven days from the end of each calendar month. The Payment Claim, which was submitted on 20 April 2015, was served out of time.

34 I now turn to address two final objections raised by the Defendant – that the clauses should be read against the Plaintiff on the basis of the *contra proferentem* rule and that the Plaintiff's conduct evinced that it had always regarded the timelines under Negotiations E as binding upon it.

35 As to the first contention, in my judgment, the Defendant's reliance on the *contra proferentem* rule is misconceived. Pursuant to clause 1.5 of the Special Conditions of Sub-contract, which is also annexed to the Sub-contract, it is provided that the *contra proferentem* rule shall not apply when interpreting the Sub-contract. [note: 37] In response to this, the Defendant has made the bare assertion that parties cannot contract out of the *contra proferentem* rule. [note: 38] With respect, this is quite wrong. Contracting parties are able to, and often do contract out of the *contra proferentem* rule. For example, in the building and construction industry context, under Art 7 of the Singapore Institute of Architects Standard Form of Building Contract (9th Ed, 2013), the application of the *contra proferentem* rule is expressly excluded:

> The Contract Documents shall be read and construed as a whole, and no special priority other than that accorded by law shall apply to any one document or group of documents, *nor shall the contra proferentem rule apply* either to these Articles or to the conditions of Building Contract. … [emphasis added]

36 As to the second contention, the Defendant argues that Negotiations E applies because the Plaintiff's conduct in relying on the 21-day period, which was found in Negotiations E, showed that the Plaintiff considered that to be the governing provision. Ms Mariapan referred me to an email from the Defendant to the Plaintiff dated 29 December 2014, sent 5.07 pm, asking for the payment response to progress claim No. 14 which was submitted on 19 December 2014 and that the Defendant should have received the same within seven days from their claim submission. The Plaintiff's senior project manager, Mr Chua Kok Liang, replied on the same day at 5.14 pm: "Response is 21 days as per contract." Mr Chua Kok Liang denies he was referring to Negotiations E, [note: 39] explaining that he knew under the Act and Clause 32.2 of the PSSCOC, he had a total of 21 days to submit his payment response because he had 14 days from the receipt of the payment claim under Clause 32.2 and a further seven days under s 12(4)(*b*) of the Act for the dispute settlement period.

37 I cannot see the foregoing emails amounting to conduct which operates as a bar to the Plaintiff alleging that Preliminaries E was the governing provision that had to be complied with. Even if the Plaintiff was under the mistaken assumption that the timeline under Negotiations E was applicable, the Plaintiff is not estopped from now relying on Preliminaries E as such a statement in the brief email, which has been explained by Mr Chua, cannot amount to "an unequivocal representation by [the Plaintiff] that [it] will not insist upon [its] legal rights against [the Defendant]" (see *Chai Cher Watt (trading as Chuang Aik Engineering Works) v SDL Technologies Pte Ltd and another appeal* [2012] 1 SLR 152 at [33]). Ms Mariapan also does not make the submission that such conduct can amend the properly construed terms of the contract.

38 I therefore do not accept both of the Defendant's contentions, and I find that the Payment Claim had been served out of time and that s 10(2)(*a*) of the Act has not been complied with.

Is a breach of s 10(2)(a) of the Act a breach of a mandatory condition?

39 The subsequent question which then arises is whether the Payment Claim which had been served out of time, and in breach of s 10(2)(*a*) of the Act, is a ground for setting aside the Adjudication Determination.

40 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 ("*Chua Say Eng*"), the Court of Appeal held (at [66]–[67]) that although the court should not review the merits of an adjudicator's decision, the court may set aside an adjudication determination on the basis that the claimant, in the course of making an adjudication application, had not complied with a provision of the Act which is so important that it is the legislative purpose that an act done in breach of the provision should be invalid (*ie*, a breach of a mandatory condition of the Act).

41 In *Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd* [2015] SGHC 141, Aedit Abdullah JC proffered his views (at [50]–[51]), albeit *obiter*, that s 10(2)(*a*) is framed in mandatory terms and must be observed strictly. I entirely agree.

42 Support for this view may be gleaned from the Court of Appeal's decision in *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 ("*W Y Steel Construction*"). There, in discussing the purpose of the Act, the Court of Appeal observed (at [22]) that under the Act, "the parties enter into an expedited and, indeed, an abbreviated process of dispute resolution in which *payment claims* and payment responses *must be made within the stipulated deadlines* to an adjudicator …" [emphasis added].

43 In the recent decision of *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] SGCA 42, the Court of Appeal reaffirmed its views (at [29]) that "timelines under the SOPA have to be strictly complied with". It also cited the observations in *W Y Steel Construction* (at [42]) that "[e]veryone in the building and construction industry must be aware, or at least taken to be aware, of the *rigorous application of the timelines in the Act, and if they ignore them, they do so at their own peril*" [emphasis added].

44 In *Newcon Builders v Sino New Steel Pte Ltd* [2015] SGHC 226 ("*Newcon Builders*") (at [36]), I highlighted that if a party wishes to avail itself of the statutory scheme for speedy payment, it has to ensure that the timelines, which is a key feature of the scheme, must be complied with. Although I was dealing with the submission of adjudication applications in that case, and not payment claims, the need to adhere to the strict timelines under the Act applies with equal force in the present case.

45 It should also be borne in mind that even if a sub-contractor is unable to invoke the statutory scheme due to its failure to meet these rigid timelines, it is not ultimately without remedy.

46 The option of litigation and arbitration is also still available at the end of the day (see *eg*, *Chin Ivan v H P Construction & Engineering Pte Ltd* [2015] SGCA 14 at [36]). One must always remember that the scheme under the Act is meant to provide temporary finality (see *W Y Steel Construction* at [22]) and it does not preclude, but instead contemplates, that claims may be finally determined eventually through litigation or arbitration. The consequences of requiring strict adherence to the timelines under the Act are therefore not as draconian as they appear.

47 Accordingly, I find that s 10(2)(*a*) is a mandatory condition and the breach thereof renders the Adjudication Determination liable to be set aside. As a result of this finding, it is not strictly necessary for me to consider the other grounds relied upon by the Plaintiff. However, for completeness, I will address them briefly.

The Second Ground of Challenge

The Plaintiff's case

48 With respect to the Second Ground of Challenge (*ie*, the Notice of Intention and the Adjudication Application were served out of time), the Plaintiff similarly argues that it is the timelines in the Preliminaries which should apply and not those contained within the SOCN. Pursuant to Item A of Sect1.1/10 of the Preliminaries ("Preliminaries A"), the PSSCOC applies to the Sub-contract. Clause 32 of the PSSCOC in turn provides that the Plaintiff be given 14 days for the submission of a payment response. Negotiations E, which the Defendant relies upon, allows 21 days for the same. The Plaintiff similarly relies upon s 6 of the First Schedule to argue that Preliminaries A take precedence over Negotiations E. The result of the Plaintiff's submission is that, even if it is assumed that the Payment Claim was validly served on 20 April 2015, the time period for the submitting of the Adjudication Application ran from 12 to 18 May 2015. [note: 40] The Adjudication Application, which was served on 20 May 2015, was therefore served out of time.

The Defendant's case

49 As it did with the First Ground of Challenge, the Defendant similarly argues that because Negotiations E is the operative clause, the Plaintiff had 21 days to issue the Payment Response. Accordingly the 7-day dispute settlement period under s 12(5) of the Act expired on 18 May 2015 and the Defendant was entitled to lodge the Adjudication Application between 19 May 2015 and 25 May 2015. [note: 41] The Notice of Intention and Adjudication Application, which were both served on 20 May 2015, were therefore submitted within time.

My Decision – Second Ground of Challenge

50 As established above (at [19]), pursuant to the Preliminaries, the PSSCOC applies to the Sub-contract. Clause 32 of the PSSCOC therefore applies to govern the timelines for the issuing of a payment response. In this regard, for the same reasons I had determined the First Ground of Challenge (*ie*, Negotiations E had been superseded and s 6 of the First Schedule accords priority to the Preliminaries), I find that the 14-day timeline under the Preliminaries applies.

51 Because the Plaintiff had 14 days to submit the Payment Response, and after taking into account the seven-day dispute settlement period under s 12(5) of the Act, the Plaintiff had to submit the Adjudication Application within the timeframe of 12 to 18 May 2015 (assuming that the Payment Claim was validly served on 20 April 2015). The Notice of Intention and Adjudication Application, which had been served on 20 May 2015, had therefore been served out of time and the Adjudication Determination is also liable to be set aside on this basis (see *eg*, *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 and *Newcon Builders*).

The Third Ground of Challenge

The Plaintiff's Case

52 With respect to the Third Ground of Challenge, the Plaintiff argues that the Adjudication

Application was defective because the relevant extracts of the PSSCOC were not attached to the Adjudication Application. [note: 42] The extracts of the PSSCOC are relevant because clause 32.2(1) of the PSSCOC governs the timeline for the submission of payment responses and clauses 19 and 20 of the PSSCOC govern variation claims. The Plaintiff highlights that variation orders formed a substantial part of the overall sum which the Defendant was claiming for in its Payment Claim. [note: 43]

53 According to the Plaintiff, the Defendant's failure to attach these documents meant that s 13(3)(*c*) of the Act had been breached. Section 13(3)(*c*) provides that an adjudication application shall contain such documents as may be prescribed and reg 7(2)(*d*) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, S 2/2005) ("the Regulations) goes on to stipulate that every adjudication application shall contain an extract of the terms or conditions of the contract that are relevant to the payment claim dispute.

The Defendant's case

54 The Defendant argues that the PSSCOC is not a document which is relevant to the payment claim dispute, and that even if it were, the failure to attach this document does not amount to a breach of a mandatory condition of the Act.

My Decision – Third Ground of Challenge

55 I am of the view that the Defendant did not fail to provide extracts of the terms or conditions of the contract that are relevant to the payment claim dispute as required under 13(3)(*c*) of the Act read with reg 7(2)(*d*) of the Regulations. The Defendant had always taken the position, although incorrectly so, that it was Negotiations E which governed the timeline for the submission of the Payment Response and not the PSSCOC. Therefore, it did not think that the PSSCOC's terms on payment responses were relevant. Additionally, as pointed out to me by the Defendant, clauses 10 and 11 of the Sub-contract, which would take precedence over any PSSCOC terms, already stipulate for the valuation of variations. [note: 44] The Defendant, therefore, similarly did not think that the PSSCOC's terms on variations claims were relevant to the dispute.

56 It was noted in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at para 9.68 that adjudicators have generally considered objections under reg 7(2)(*d*) to be unduly technical, particularly when it is considered that, notwithstanding the omission of certain terms from the extracts, the respondent has not been prejudiced. The learned author further notes that it has been suggested that the test is whether, on the extracts of the documents as furnished, the respondent understands the case it has to meet and is afforded a basis to formulate its case. I think, with respect, that must be right. In addition, I would add that the provisions of the PSSCOC are well known within the building industry. This Plaintiff cannot say it was prejudiced because Clause 32.2(1) was not attached to the adjudication application.

57 This, to me, is an eminently sensible test to adopt especially when one considers the statutory scheme for the submission of adjudication applications and responses under the Act. Pursuant to s 15(2)(*d*), when a respondent submits its adjudication response, it is entitled to attach such documents which it considers to be relevant to the adjudication response. The respondent therefore has the opportunity to furnish documents which were *not* attached to the adjudication application, but which the respondent deems to be relevant to its case. The statutory scheme places the onus on *each* party to place before the adjudicator, documents which they respectively consider to be relevant for the purposes of resolving the dispute. In a situation such as the present, where the

Defendant had provided the terms and extracts of the contract which it considers relevant to support its claim *and* this gave the Plaintiff a basis to formulate its own case, it cannot be said that s 13(3)(*c*) of the Act read with reg 7(2)(*d*) had been breached. I clarify at this juncture that this is not a subjective test whereby so long as a party attaches extracts of the contract which it subjectively considers to be relevant, that would suffice for the purposes of meeting the requirement under reg 7(2)(*d*) of the Regulations. Rather, the test is an objective one – do the extracts attached, objectively speaking, give the respondent a basis to formulate its own case? In my view, this requirement was satisfied in the present case.

58 Therefore, the absence of the earlier mentioned extracts from the PSSCOC is not in breach of s 13(3)(*c*) of the Act read with reg 7(2)(*d*) of the Regulations and the Third Ground of Challenge advanced by the Plaintiff is accordingly not made out. Nevertheless, in the light of my decision on the First and Second Grounds of Challenge, this is not fatal to the Plaintiff's application.

Conclusion

59 For the aforementioned reasons, I allow the Plaintiff's application and set aside the Adjudication Determination, with the usual consequential orders. There will be liberty to apply, generally, in the event any further orders are required.

60 I will hear the parties on costs.

[note: 1] 1st affidavit of Chua Kok Liang, 9 July 2015 ("Chua's 1st affidavit"), at para 5; Affidavit of Ng Chin Hong, 20 July 2015 ("Ng's affidavit"), at para 10.

[note: 2] Chua's 1st affidavit, at para 6.

[note: 3] Chua's 1st affidavit, at para 9.

[note: 4] Ng's affidavit, at paras 12–13.

[note: 5] Ng's affidavit, at para 12.

[note: 6] Chua's 1st affidavit, at paras 11–13.

[note: 7] Chua's 1st affidavit, at para 35.

[note: 8] Chua's 1st affidavit, at para 38.

[note: 9] Chua's 1st affidavit, at pp 85–116.

[note: 10] Chua's 1st affidavit, at pp 126–127.

[note: 11] Ng's affidavit, at para 19.

[note: 12] 2nd affidavit of Chua Kok Liang, 14 August 2015 ("Chua's 2nd affidavit"), at para 20.

[note: 13] Minute Sheet of Quentin Loh J, 21 August 2015, at p 9.

[note: 14] Chua's 1st affidavit, at p 109.

[note: 15] Chua's 1st affidavit, at para 40.

[note: 16] Ng's affidavit, at para 21.

[note: 17] Chua's 1st affidavit, at paras 45–47.

[note: 18] Chua's 1st affidavit, at p 125.

[note: 19] Plaintiff's written submissions, dated 19 August 2015 ("Plaintiff's written submissions"), at paras 86–87.

[note: 20] Chua's 1st affidavit, at paras 48–50.

[note: 21] Ng's affidavit, at para 17.

[note: 22] Ng's affidavit, at paras 18–19.

[note: 23] Ng's affidavit, at paras 29–30; Defendant's written submissions, at paras 61–63.

[note: 24] Defendant's written submissions, at para 66.

[note: 25] Ng's affidavit, at pp 17–18.

[note: 26] Ng's affidavit, at para 26.

[note: 27] Defendant's written submissions, at paras 47–48.

[note: 28] Defendant's written submissions, at paras 57–58.

[note: 29] Chua's 1st affidavit, at p 143.

[note: 30] Chua's 1st affidavit, at p 125.

[note: 31] Chua's 1st affidavit, at p 120

[note: 32] Chua's 1st affidavit, at p 1149

[note: 33] See Chua's 2nd affidavit, at pp 178 and 195.

[note: 34] Chua's 1st affidavit, at para 50.

[note: 35] Chua's 1st affidavit, at para 46; Plaintiff's written submissions, at para 72.

[note: 36] Plaintiff's written submissions, at paras 76–77.

[note: 37] Chua's 1st affidavit, at p 184.

[note: 38] Minute Sheet of Quentin Loh J, 21 August 2015, at p 9.

[note: 39] See Chua's 2nd affidavit, at paras 37–41.

[note: 40] Plaintiff's written submissions, at para 160.

[note: 41] Defendant's written submissions, at para 70.

[note: 42] Chua's 1st affidavit, at para 76; Plaintiff's written submissions, at paras 184–186.

[note: 43] Plaintiff's written submissions, at para 186; Minute sheet of Quentin Loh J, 21 August 2015, at p 6.

[note: 44] Minute Sheet of Quentin Loh J, 21 August 2015, at p 10.

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