

RN & Associates Pte Ltd v TPX Builders Pte Ltd
[2012] SGHC 225

Case Number : Originating Summons No 373 of 2012
Decision Date : 07 November 2012
Tribunal/Court : High Court
Coram : Andrew Ang J
Counsel Name(s) : Philip Ling and Ang Hou Fu (Wong Tan & Molly Lim LLC) for the plaintiff; Looi Ming Ming (Eldan Law LLP) for the defendant.
Parties : RN & Associates Pte Ltd — TPX Builders Pte Ltd

Building and Construction Law – Sub-contracts – Claims by subcontractor

7 November 2012

Andrew Ang J:

1 This was an application brought by the plaintiff, RN & Associates Pte Ltd (“RN”), the main contractors on a project to carry out works in relation to proposed additions and alterations to an existing block of 11-storey flats at Nassim Road (“the Project”), to set aside the Adjudication Determination made in Adjudication Application No SOP/AA009 of 2012 dated 2 April 2012 (“the Adjudication Determination”) in favour of the defendant subcontractor, TPX Builders Pte Ltd (“TPX”).

2 The matter came before me on 18 July 2012 and 28 August 2012. After hearing submissions for both sides, I dismissed the application and now give the reasons for my decision.

Factual background

The contract and works

3 RN was engaged as the main contractor for the Project, known as “Nassim Regency”.

4 On 21 July 2009 and after “numerous discussions” between RN and TPX, the latter issued an offer to RN to carry out the works in relation to the Project (“the Works”) as RN’s main subcontractor for \$3,271,360. This offer included a schedule of works and, *inter alia*, the following terms (modified from the Singapore Institute of Architects’ Articles and Conditions of Building Contract for Minor Works, which was incorporated by reference):

- (a) Payment was to be made 30 days from the date of any claim for payment;
- (b) A maintenance period of 12 months from the issuance of the completion certificate; and
- (c) Monthly issue of interim certificates not later than 14 days from the date of receipt of the contractor’s application.

5 RN accepted on the same day. Under the contract, the Works were to be completed by 30 September 2009. However, the Works took substantially longer to complete, and the temporary occupation permit (“TOP”) was only obtained on 4 June 2010. It was not disputed that, in order to

expedite the completion of the Works, RN had to engage other subcontractors to undertake some of the items comprised in the Works under the contract. This was reflected in TPX's final payment claim, which set off the amount payable to these other subcontractors from the balance of the contractual sum.

6 The maintenance period under the main contract ended on 17 June 2011 although TPX laboured under the impression that it was an 18-month liability period. During the 18 months following TOP, TPX entered into protracted discussions with RN in relation to the final account. During this period RN disputed TPX's Payment Claim No 14 for \$1,542,748.97 on the basis of back charges incurred by RN as a result of the delay in completion of the Works. On 31 January 2012 and within a month of the expiry of the purported 18-month liability period, TPX issued a letter ("the 31 January letter") containing a final claim for payment of \$996,899.08 (after Goods and Services Tax) ("the Payment Claim"). The 31 January letter read as follows:

Payment Claim

Now that the 18-month maintenance/defect liability period for the Project has come to an *end*, we *are pleased* to submit our payment claim for the Project for the work done from 21 July 2009 to 4 December 2011, in the sum of **\$996,899.08** (after GST). This includes our claim for the return of the retention monies.

The supporting details are enclosed.

Your timely response to our payment claim would be much appreciated.

[emphasis in original underlined and bold; emphasis added in italics]

7 On 1 February 2012, RN issued a payment response to TPX ("the Payment Response"), referring to a previous claims assessment made by RN on 4 March 2011 as support for their refusal of the Payment Claim. The Payment Response read as follows:

We refer to your letter to us dated 31 January 2012.

Particulars of the calculation, our office did previously provide you with the tabulation of our claims assessment on 4th March 2011, which had explicitly substantiated on those works omitted from the schedule of works.

Subsequently, direct expense for the regular progress of the works has been materially affected by your non-performance and our set-off payments to engage other contractor(s) include [*sic*] your subcontractors and purchased materials to complete your leftover and outstanding works.

Consequently, we are unable to accept your claims and please be advise [*sic*] to reconsolidate your claims having consider [*sic*] to incorporate our statements to you.

The adjudication

8 The "dispute settlement period" under s 11(1)(b) read with s 12(5) of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOP Act") expired on 14 February 2012.

9 On 21 February 2012, and within seven days of the expiry of the dispute settlement period, as

required by s 13(3)(a) of the SOP Act, TPX filed its Adjudication Application pursuant to s 12(3)(b) of the SOP Act with the Singapore Mediation Centre ("SMC"). On 22 February 2012, SMC served the Adjudication Application on RN. RN filed its Adjudication Response through its solicitors on 29 February 2012, as required by s 15(1) of the SOP Act. It contained all information and documents which RN found necessary to support its case, pursuant to s 15(2) of the SOP Act.

10 By a letter dated 2 March 2012, three days after the expiry of the period for filing an Adjudication Response under s 15(1) of the SOP Act, RN tendered a Supplementary Bundle of Documents ("the first Supplementary Bundle"), claiming that it was essential to support its counterclaim against TPX for back charges incurred as a result of TPX's failure to complete the Works within the contract period concluding on 30 September 2009. This was only received by TPX on 5 March 2012, six days after expiry of the period for filing RN's Adjudication Response.

11 TPX strenuously opposed the inclusion of the first Supplementary Bundle arguing, in a letter dated 8 March 2012, that the late submission of the Supplementary Bundle rendered the prescribed timelines under the SOP Act nugatory. TPX also contended that consideration of the first Supplementary Bundle would breach TPX's rights to natural justice as it had not had sight of any of the documents in the bundles before they were received on 5 March 2012 and would not have a chance to respond to the same.

12 The adjudication conference was held on 13 March 2012 before the appointed Adjudicator. After the conference, the Adjudicator was sent copies of the parties' submissions, bundles of authorities, bundles of documents and two further Supplementary Bundles submitted by RN *after* the deadline for filing RN's Adjudication Response. Final submissions were tendered on 27 March 2012 and the time for adjudication was extended to 2 April 2012 at the initiation of the Adjudicator and with the consent of the parties.

13 On 2 April 2012, the Adjudicator gave his Adjudication Determination. He decided, *inter alia*, that:

(a) All three Supplementary Bundles ("the Supplementary Bundles") were to be excluded as they did not fall under the list of documents in s 17(3) of the SOP Act which an adjudicator was to have regard to, and as they concerned a counterclaim which had not been raised in the Payment Response, a matter which the Adjudicator was not permitted to consider according to s 15(3)(a) of the SOP Act; and

(b) TPX's calculations in the Payment Claim were correct, particularly in relation to the figures for the Revised Sub-contract Amount, the Revised VO Amount, and the amount of set-off for the works undertaken by the other subcontractors. In deciding what the amount of set-off should be, the Adjudicator could not make reference to the Supplementary Bundles which had been excluded.

14 Accordingly, the Adjudicator ordered that RN pay TPX \$996,899.08 ("the Adjudicated Sum") within seven days and, pursuant to s 30(2) of the SOP Act, that RN should bear the costs of the Adjudication Application amounting to \$12,171.25.

The application to set aside

15 It should be noted, at this juncture, that RN had the right to have the Adjudication Determination reviewed pursuant to s 18 of the SOP Act. This would have entailed RN paying the full Adjudicated Sum to TPX pending the outcome of the review following s 18(3) of the SOP Act. RN

chose not to do so but, instead, withheld payment of the Adjudicated Sum and brought an action in Originating Summons No 373 of 2012 to set aside the Adjudication Determination.

16 RN made the following arguments for setting aside under O 95, r 3 of the Rules of Court (Cap 322, 2006 Rev Ed):

- (a) The Payment Claim was not a valid Payment Claim within the meaning of s 10 of the SOP Act;
- (b) The Payment Claim was not served on RN within the deadlines stipulated in the SOP Act; and
- (c) The Adjudicator erred in refusing to admit RN's Supplementary Bundles, notwithstanding that they had been submitted after the deadline for filing RN's Adjudication Response.

Issues

17 I should note at the outset that RN's first two grounds of appeal are based on the same issue, viz, that TPX's Payment Claim had been served on RN 18 months after the expiry of the time limit and therefore constituted an invalid payment claim which deprived the adjudicator of jurisdiction. That TPX's Payment Claim was actually served on RN is not in dispute. It follows that a finding in favour of TPX on RN's first submission also disposes of its second submission.

18 The issues in this case are two-fold:

- (a) Whether any defects in service of the Payment Claim deprived the Adjudicator of jurisdiction; and
- (b) Whether there was a breach of natural justice from the Adjudicator's refusal to admit RN's Supplementary Bundles.

My decision

Whether defects in service of the Payment Claim deprived the Adjudicator of jurisdiction

19 Counsel for RN, Mr Philip Ling ("Mr Ling"), submitted that the validity of the Payment Claim was a jurisdictional fact which, if decided wrongly in this court's estimation, would deprive the Adjudicator of jurisdiction and entitle RN to set aside the Adjudication Determination. Mr Ling further argued that TPX's Payment Claim was invalid as it had been given outside of the time limits specified in s 10 of the SOP Act.

20 Counsel for TPX, Ms Looi Ming Ming ("Ms Looi"), submitted to the contrary that whether the Payment Claim was valid or not did not go to the jurisdiction of the Adjudicator, but was a fact within jurisdiction which the Adjudicator was entitled to decide and whose findings could not be impeached in a setting aside application. In any event, Ms Looi argued that the Payment Claim had been served within the 18-month maintenance period and was not invalid.

21 Central to this dispute is a disagreement as to the source of the Adjudicator's jurisdiction under the SOP Act. It was argued before me that two contrasting points of view have been adopted by the High Court.

22 Judith Prakash J in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering &*

Construction Co Ltd [2010] 1 SLR 658 ("*Chip Hup Hup Kee*") (at [54]) found that the source of an adjudicator's jurisdiction arose from his appointment by an authorised nominating body under s 14(1) of the SOP Act and his acceptance of such appointment, and not by virtue of the payment claim being in proper order. That the validity of a payment claim under the SOP Act was a question for the adjudicator, and not the supervisory court, to decide was affirmed in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") (at [46]).

23 Lee Seiu Kin J in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459 ("*Sungdo Engineering*") disagreed. Lee J found (at [32]) that jurisdiction was affected by an invalid payment claim or service thereof. He reasoned that the appointment of an adjudicator under s 14(1) of the SOP Act arose from a series of events initiated by the service of a payment claim on the respondent under s 10 of the SOP Act, and an invalid payment claim would vitiate the entire process which resulted in the appointment of an adjudicator. Lee J's opinion was endorsed by Tay Yong Kwang J in *Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) v Lee Wee Lick Terence* [2011] SGHC 109 (at [28]) ("*Weng Fatt Construction Engineering*").

24 All four decisions drew from the New South Wales Court of Appeal decision of *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Another* [2004] 61 NSWLR 421 ("*Brodyn*"). *Brodyn* was an application to quash an adjudicator's decision made under the New South Wales Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (New South Wales) ("the NSW Act") on which the SOP Act is based. The respondent in that case argued that the payment claim served by the claimant was invalid, thus depriving the adjudicator of his jurisdiction to make a ruling. Hodgson JA, on behalf of the court, listed some essential conditions for the existence of an adjudicator's determination (at [53]) which I also find useful as a summary of the process of adjudication under the SOP Act:

- (a) The existence of a construction contract between the claimant and the respondent, which condition has been modified by s 4 of the SOP Act to permit only contracts made in writing on or after 1 April 2005;
- (b) The service by the claimant on the respondent of a payment claim (s 13 of the NSW Act and s 12(3) read with s 13(1) of the SOP Act);
- (c) The making of an adjudication application by the claimant to an authorised nominating authority (s 17 of the NSW Act and s 13 of the SOP Act);
- (d) The reference of the application to an eligible adjudicator, who accepts the application (ss 18 and 19 of the NSW Act and s 14 of the SOP Act);
- (e) The determination by the adjudicator, in writing, of the application by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss 19(2), 21(5), 22(1) and 22(3)(a) of the NSW Act and ss 17(2), 17(4) and 17(8) of the SOP Act). I venture to add that the SOP Act also makes clear that this determination should be made within the time period specified in s 17(1) of the SOP Act, subject to an extension of time by consent of the parties.

25 The two contrasting views outlined at [22] and [23] above (and the corresponding positions taken by Mr Ling and Ms Looi) followed different interpretations of the *Brodyn* criterion (b), viz, what is the meaning of "service by the claimant on the respondent of a payment claim". Mr Ling argued that this presupposes a *valid* payment claim, while Ms Looi argued that the payment claim need not be valid to be properly served on the respondent.

26 My decision rests on four grounds:

(a) When dealing with an adjudication under s 12(3)(b) of the SOP Act, the validity or otherwise of a payment claim becomes moot as the source of the dispute centres on the payment *response*;

(b) RN was estopped from raising the point of validity of TPX's Payment Claim at the setting aside stage by its failure to challenge the Payment Claim at the point at which it was served;

(c) In any event, the validity of a payment claim is not a jurisdictional fact but a question of mixed fact and law which falls within the Adjudicator's jurisdiction; and

(d) Even if I were to take the contrary position that the validity of a payment claim is a jurisdictional fact, the application would still fail on the *Wednesbury* reasonableness test to which it is subject (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223).

Payment claim dispute under s 12(3)(b) of the SOP Act

27 It is useful to note at the outset the meaning of the word "jurisdiction". The Court of Appeal in *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR(R) 597 ("*Ng Swee Lang*") clarified the meaning of jurisdiction within the context of the Strata Title Board's jurisdiction to hear a case on strata title. It opined (at [25]):

... The word "jurisdiction", when used in the context of a court or tribunal having the power to *determine disputes arising from a particular subject matter*, simply means the *authority vested in that body over the subject matter*. This is what is meant when we say, for example, that the High Court has jurisdiction over all admiralty matters as defined by the High Court (Admiralty Jurisdiction) Act (Cap 123, 2001 Rev Ed). ... [emphasis added]

In other words, "jurisdiction" in the context of a court or tribunal refers to *subject matter* jurisdiction.

28 In this case, an adjudicator has jurisdiction over a "payment claim dispute". The *Singapore Parliamentary Debates Official Reports* (16 November 2004) vol 78 at col 1116 ("the Parliamentary Report") which contains the report of the Second Reading of the SOP Bill, states that "[t]he [SOP] Bill provides for adjudication as a faster and less costly process to resolve *payment disputes*" [emphasis added]. Section 2 of the SOP Act interprets "adjudication" and "adjudicator" as follows:

"adjudication" means the adjudication of a *payment claim dispute* in accordance with Part IV, and includes an adjudication review under that Part;

...

"adjudicator" means a person appointed under this Act to determine a *payment claim dispute* that has been referred for adjudication, and includes a review adjudicator or a panel of review adjudicators appointed under section 18(5)(b);

[emphasis added]

29 Mr Ling's reasoning assumed that the service of a valid payment claim is the only way in which a payment claim dispute can arise. This is clearly contradicted by s 12(3) of the SOP Act which lists

two “trigger events” which give rise to an “entitlement” to make an application:

- (a) the claimant fails to receive payment by the due date of the claimed amount; *or*
- (b) the claimant disputes the response amount and the response amount is less than the claimed amount.

30 The grounds under s 12(3)(a) and s 12(3)(b) of the SOP Act are disjunctive, as denoted by the addition of the word “or” after s 12(3)(a). The Parliamentary Report also envisioned that these were different situations which could legitimately give rise to an adjudicator’s appointment and subsequent jurisdiction. The Parliamentary Report states (at col 1116):

The claimant will have a *valid reason to make an adjudication application* under the following situations:

- (a) Payment response has not been received from the respondent within the specified period; *or*
- (b) Amount in a payment response is disputed; *or*
- (c) Payment is not received by the due date.

[emphasis added]

31 Unlike in *Sungdo Engineering* ([23] *supra*), where there was no payment response which the claimant could dispute, the “entitlement” for TPX’s application was that it disputed the amount under the *Payment Response*. The Payment Response, and not the original payment claim, was the locus of the dispute. Section 12(3)(b) of the SOP Act reads as follows:

12.—(3) A claimant who has served a payment claim in relation to a supply contract is entitled to make an adjudication application under section 13 in relation to the payment claim if —

...

- (b) *the claimant disputes* the response amount, where the response amount is less than the claimed amount.

[emphasis added]

32 Whereas in s 12(3)(a) a failure to respond to the payment claim within the prescribed seven days is generally taken as the respondent having disputed the payment claim, in s 12(3)(b) it is the *payment response* which the *claimant* now disputes. The payment response supplants the initial payment claim, notwithstanding that sequentially and logically the payment claim preceded the payment response.

33 The cases cited by both parties, in particular *Sungdo Engineering*, related to a payment claim under s 12(3)(a) and are distinguishable. *Sungdo Engineering* concerned a payment claim which had been served but payment whereof had not been received by the due date. There was no payment dispute as a reasonable respondent could not have discerned that he had been served with a payment claim, and the respondent’s failure to respond could not be taken as his having disputed the sums claimed. In other words, there was no subject matter jurisdiction, as the SOP Act was not intended to cover situations where the lack of an opportunity to make payment, rather than a *bona*

fide dispute as to the payment claim, was the cause of the adjudication application.

34 As the facts of the present case arose under s 12(3)(b) of the SOP Act, the validity of the Payment Claim is irrelevant to the jurisdiction of the Adjudicator as subject matter jurisdiction arises from a dispute over the *Payment Response amount*. The Adjudicator thus rightly examined the *Payment Response* as the important document triggering the Adjudication Application. He found (at [10] of the Adjudication Determination):

Both parties have accordingly taken the position and proceeded on the basis that a valid payment response was served. No argument was raised by either party as to the validity of the Payment Response under the Act and Regulation 6 of the Building and Construction Industry Security of Payment Regulations (the "**Regulations**"). I have accordingly proceeded on the basis that the Payment Response is a valid payment response for the purposes of the Act. [emphasis in original]

The issue of estoppel

35 Given that RN raised no objection to TPX's Payment Claim dated 31 January 2012 when it served its Payment Response, I found that RN was estopped from arguing at the setting aside stage that TPX's Payment Claim was invalid. The purpose of prescribing the form which a payment claim should take in s 10 of the SOP Act was clearly to ensure that the main contractor (RN, in this case) was put on notice of the sums owing to the subcontractor (TPX) so that he could make prompt payment without the need for an adjudication application.

36 This was not a case of RN being ambushed by an unanticipated payment claim. RN was aware at all times, and as early as 27 May 2010 before TOP, of the fact that sums were owed to TPX for work done. The TOP for the Project was obtained on 4 June 2010. By May 2010, the parties were already in discussion regarding the final amount, if any, payable by RN. On 27 May 2010, TPX submitted to RN a document which set out the final sum payable (inclusive of Goods and Services Tax) and included an itemised list of charges. Under "Subject", it was written "Progress Payment Claim No. 14". RN refused to pay and disputed the payment amounts. On 15 October 2010, TPX's Alan Teo sent a chaser e-mail with the title "37 Nassim Road Final Account". The sum owing under this final account was \$1,297,239.72, adjusted downwards from the initial claim of \$1,542,748.97. RN's Richard Ng ("Ng") wrote back on 19 October 2010, referencing an earlier conversation he had with TPX's Teo Yong Pheng and Tang Xiu Xing and stating that he thought there was "some mistake from your part". It was clear to me that both parties were involved in negotiations over the final figure for payment.

37 On 20 October 2010, Alan Teo was tasked with following up Ng's comments, with the added proviso that Teo Yong Pheng "hope[d] to get the matter settled [*sic*] within a month". Details of the supposed mistake in tabulations were sent from RN to TPX in an e-mail from RN's Ng dated 8 November 2010. TPX took almost a month to assess these calculations, responding on 1 December 2010, *via* fax, with a document addressing Ng's concerns in his e-mail dated 8 November 2010 and annexing the relevant calculations done by TPX. TPX followed up *via* fax on 16 December 2010 with a "revised SUMMARY of our claim, amounted to S\$990,673.28", and requesting a reply within two weeks' time. RN replied formally in a letter dated 4 March 2011, setting out a list of RN's back charges. By 11 November 2011, TPX was still sending RN tax invoices "for our Final Claim for your necessary action". This toing and froing of correspondence, which Mr Ling described as "a protracted discussion over the final account for more than 18 months" (see Plaintiff's Skeletal Submissions at para 9), culminated in the 31 January letter.

38 I found that RN was cognisant of TPX's need for prompt payment, but sought to delay and withhold payment by protracted discussions over the amount claimed. RN suffered no prejudice from late service of the Payment Claim. There was no indication from the correspondence, nor did RN claim, that it thought that TPX had somehow given up its claim to payment for work done. All that late service of a payment claim did was to give RN more time to make payment for the work done. I found that any delay in issuance of the Payment Claim on 31 January 2012 was the result of discussions between the parties in the hope of reaching an agreement without adjudication proceedings.

39 By contrast, TPX would be unfairly prejudiced if late service of a payment claim were to preclude it from seeking speedy and low cost adjudication under the SOP Act. To allow RN to claim the service of the Payment Claim out of time as a basis for depriving the Adjudicator of his jurisdiction would be to allow RN to rely on its own wrongdoing, viz, its refusal to, and delay of, payment dating back to 27 May 2010 when it first received notice of the sums owing.

40 Given that the delay was caused by RN's attempts at negotiating these sums downwards, it does not lie in RN's mouth to now claim that TPX's Payment Claim was served out of time. If RN wished to dispute the form of TPX's Payment Claim, it should have done so when the Payment Claim was served instead of serving a Payment Response which, by its nature, acknowledged the validity of the Payment Claim. In the circumstances, I also found it unnecessary to examine the question of whether the Payment Claim was served on time.

41 Allowing parties to take the position that an adjudicator has no jurisdiction only at this late stage of the proceedings, where the issue had not been raised before, would be tantamount to allowing open-ended adjudication of the validity of a payment claim – the very thing the SOP Act seeks to avoid (see [49] below). I found the reasoning of the New South Wales Supreme Court in *Brookhollow Pty Ltd v R&R Consultants Pty Ltd & Anor* [2006] NSWSC 1 (at [46]–[48]) to be extremely persuasive in this respect:

46 An assertion that service of a payment claim is prohibited under s.13(4) or (5) [roughly equivalent to ss 10(2) and (3) of the SOP Act] is like a defence in bar. For example, in the case of an action at law or in equity founded upon an oral contract for an interest in land it is open to a defendant to elect whether to raise a defence in bar founded on the Statute of Frauds. Similarly, it would be open to a respondent served with a payment claim under the Act to elect whether to raise a defence in bar that service of the claim is prohibited by s.13(4) or (5). A respondent to a payment claim may have a reason for electing not to raise such a defence: the payment claim may raise for determination an issue which will inevitably have to be determined in subsequent payment claims and the respondent may wish the issue to be resolved sooner rather than later.

47 However, if the respondent does not elect to raise a defence in bar founded on s.13(4) or (5), adjudication of that defence will require examination of the relevant terms of the contract, possibly the facts relating to the work performed and the time of performance and possibly also the content of previous payment claims. That examination may well be contentious and may involve issues of fact and law upon which minds may legitimately differ.

48 In my opinion, the scheme of the [Australian] Act in general and of s.13 and s.14 [ss 10 and 11 of the SOP Act] in particular requires that a defence in bar to a payment claim founded on s.13(4) or (5), like any other defence said to defeat or reduce the claim, must be raised in a timeously served payment schedule. If it is not, then the defence may not be relied upon to set aside or restrain enforcement of the adjudication determination as a nullity, nor may it be relied upon as a defence to entry of judgment ...

Validity of the Payment Claim not a jurisdictional fact

42 Had RN raised its objections to the time of service of TPX's Payment Claim and its purported non-compliance with s 10 of the SOP Act, the Adjudicator could have made a finding on whether the purported non-compliance affected TPX's right to bring its Adjudication Application, but it was not for me to revisit at the setting aside stage.

43 The relevance of the payment claim to jurisdiction in *Brodyn* ([24] *supra*) did not need to be decided as it was held (at [63]) that it was valid. Hodgson JA added, however, (at [66]) and which is quoted with approval in *SEF Construction* (at [46]):

There is also a question whether this point could in any event lead to a conclusion that the determination was void [for want of jurisdiction]. If there is a document served by a claimant on a respondent that purports to be a payment claim under the Act, questions as to whether the document complies in all respects with the requirements of the Act are generally, in my opinion, for the adjudicator to decide. Many of these questions can involve doubtful question of fact and law; and as I have indicated earlier, in my opinion the legislature has manifested an intention that the existence of a determination should not turn on answers to questions of this kind. ...

44 It is clear from Hodgson JA's *dicta* in *Brodyn* that service by the claimant to the respondent of a payment claim was not intended to be used as a means of re-opening the question, at the setting aside stage, of whether the payment claim was made in accordance with the formal requirements of the New South Wales equivalent of s 10 of the SOP Act.

45 I found that there was an important distinction to be made between the *existence* of a payment claim and the *validity* of a payment claim. The former is an essential pre-condition of an adjudicator's jurisdiction under the SOP Act, while the latter is a mixed question of law and fact within the Adjudicator's jurisdiction. The existence or otherwise of essential pre-conditions to a valid claim are matters for the adjudicator and are not for objective determination by the court; see *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd* [2007] NSWSC 941 at [30(d)]. In this regard, I found Prakash J's opinion in *Chip Hup Hup Kee* (at [44]) helpful:

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

46 The question of *existence* asks whether the Payment Claim is, on its face, a claim for progress payments outstanding. This was implicitly acknowledged in *Weng Fatt Construction Engineering* ([23] *supra*) (at [31]). Tay J distinguished the payment claim in that case from the payment claim in *Sungdo Engineering* ([23] *supra*), and found that "[u]nlike the 2008 Letter in *Sungdo Engineering*, Payment Claim No 6 here specified clearly on its face that it was a payment claim". In other words, the real question was whether or not the payment claim "purported" to be one (see Hodgson JA's *dicta* in *Brodyn* quoted at [43] above), and *not* whether the payment claim had fulfilled the formal requirements listed in s 10 of the SOP Act. It is a matter of no small importance that the payment claim Lee J was faced with in *Sungdo Engineering* was a very unusual one. It was an informal

document which, to the learned judge's mind, obscured any purpose which the claimant might have had to make a formal claim for payment. Lee J opined (at [34]) that "the 2008 Letter did not purport to be a payment claim under the Act as nothing therein states that it is so". In those circumstances, there was simply *no payment claim* nor any intention for the document to function as a payment claim (see, in particular, *Sungdo Engineering* at [22]). If there was no payment claim, then there could be no payment claim dispute to resolve and the jurisdiction of the tribunal is not triggered (see [28] above).

47 Given that the Adjudicator's jurisdiction was only over a payment claim dispute, the relevant question was not whether there had been a valid payment claim, but whether there *had been a payment claim which resulted in a payment claim dispute*. The validity of a payment claim may be a ground for the respondent to *refuse* the payment claim pursuant to s 10 of the SOP Act, and to ask for the payment claim to be re-issued in the relevant format, but a payment claim dispute may still arise from an invalid payment claim. Any determination of validity would hence fall *within* the Adjudicator's jurisdiction.

48 I found that this approach best accords with the purpose of the Legislature. As I have opined in *Ng Swee Lang v Sassoon Samuel Bernard* [2008] 1 SLR(R) 522 (at [43]) and which was not the subject of that appeal:

To conclude, the modern approach in Singapore as well as in England, Australia and Canada is to treat the question as one of statutory construction to be answered by looking at the whole scheme and purpose of the Act ([1] *supra*) and by weighing the importance of the particular requirement in the context of that purpose and asking whether the Legislature would have intended the consequences of a strict construction, having regard to the prejudice to private rights and the claims of the public interest (if any).

49 The SOP Act was introduced to provide a faster and less costly way of allowing subcontractors to get paid (see [28] above) and to "weed out the practice of delaying or withholding payment without valid reasons" (see the Parliamentary Report at col 1119). I found that the Legislature could not have intended for the jurisdiction of the Adjudicator to be ousted where the main contractor was relying on his own delay and withholding of payment to dispute the validity of a payment claim.

50 Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2005), commenting on the importance of the procedural prescriptions of the SOP Act also presupposed that this was a matter for the Adjudicator to decide, stating (at p 130):

... A payment claim which does not comply with these requirements may be challenged on the basis that it is not a payment claim falling within the Act and hence not entitled to the advantage of the enforcement machinery afforded by the Act, in particular, the recourse to adjudication. It would, of course, be for *the adjudicator* to decide whether the procedural non-compliance is sufficient to prevent the claim from being received as a claim made under the Act: see *Hawkins Construction (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* (2002). [emphasis added in bold italics]

51 The implication of Mr Ling's submissions was that the Adjudicator's jurisdiction was dependent on the subcontractor's rigorous compliance with every element of s 10 of the SOP Act, regardless of whether or not the main contractor had notice of payment due or was prejudiced. In *Ng Swee Lang* (CA) ([27] *supra*), a similar argument had been advanced in the context of s 84A(1) of the Land Titles (Strata) Act (Cap 158, 1999 Rev Ed) ("the Strata Titles Act"). The appellants argued that since the majority owners had not complied with s 84A(1) of the Strata Titles Act, the tribunal had no

jurisdiction to hear the matter. The Court of Appeal dismissed this argument (at [27]) and instead opined:

... But what exactly does this argument mean in the context of the jurisdiction of the Board to hear that application? In our view, counsel surely did not mean to say that whether or not the Board has jurisdiction to deal with a collective sale application depends on the majority owners' compliance with s 84A(1). *Such an argument would elevate the majority owners' compliance into the source of the Board's jurisdiction, which would be a very strange proposition of law.* As we pointed out earlier (at [25] above), the Board's jurisdiction over collective sales is implied from the power vested in it to hear collective sale applications, and s 84A(1) itself refers to ss 84A(6) and 84A(7) in relation to the Board's power to approve or disapprove such applications. In short, s 84A(1) itself does not vest the Board with any jurisdiction or powers at all. What it does is to prescribe the basis on which majority owners may apply to the Board for a collective sale order. On this analysis, s 84A(1) is not a jurisdictional provision. [emphasis added]

52 In the same way, Mr Ling's submission had the effect of elevating the subcontractor's compliance with s 10 of the SOP Act into the source of the Adjudicator's jurisdiction, which would be a very strange proposition of law. The Adjudicator's jurisdiction over payment claim disputes is expressly given in ss 2 and 12 of the SOP Act to hear payment claim disputes which manifest themselves either over a payment claim or a payment response.

53 For the reasons given at [36] to [38] above, I found that a payment claim clearly existed. Unlike the letter in *Sungdo Engineering*, the 31 January letter was a formal one, specifying the project name and contract number, with the words "Payment Claim" clearly written below the title, bold-typed, and repeated twice in the course of the letter. RN's response on 1 February 2012, which was a straightforward rejection of "your claims", acknowledged that what it had received was a Payment Claim.

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

13.—(3) An adjudication application —

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

(b) shall be made in writing addressed to the authorised nominating body requesting it to appoint an adjudicator;

(c) shall contain such information or be accompanied by such documents as may be prescribed;

...

55 The SOP Act has chosen the grounds under s 13(3)(a), (b) and (c) of the SOP Act to circumscribe the adjudicator's jurisdiction in relation to an adjudication application. In my view, these grounds requiring the adjudicator to reject an application are exhaustive, and so long as the adjudicator acts in accordance with s 16(3) of the SOP Act, *viz*, independently, impartially and in a timely manner, avoiding unnecessary expense, and complying with the principles of natural justice,

then he acts within his jurisdiction and there are no grounds for setting aside. The validity of a payment claim has nothing to do with these requirements.

Adherence to the Wednesbury test of reasonableness

56 In any event, even if I had accepted that the validity of a payment claim was susceptible to substantive review on a *Wednesbury* reasonableness standard, as espoused by Lee J in *Sungdo Engineering* ([23] *supra*) and endorsed by Tay J in *Weng Fatt Construction Engineering* ([23] *supra*), I found that the Adjudicator's decision on the validity of the Payment Claim was *Wednesbury* reasonable.

57 The *Wednesbury* reasonableness standard is a monolithic and extremely high standard, which has not been met on these facts. Lord Greene opined in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* ([26(d)] *supra*) (at 229 and 230):

... there may be something *so absurd that no sensible person could ever dream that it lay within the powers of the authority*. ... It is *so unreasonable that it might almost be described as being done in bad faith*. ...

... *but to prove a case of that kind would require something overwhelming*.

[emphasis added]

58 An examination of the Adjudication Determination does not show in any way that the Adjudicator had been "overwhelming[ly]" unreasonable. The Adjudication Determination contained clear reasons for finding that TPX's Payment Claim was valid, taking into account (at [9]–[10] and [100]–[101]) that TPX's Payment Claim had been clearly communicated to RN with the words "payment claim" stated in bold, RN had treated it as such and issued a payment response in the knowledge that TPX had intended to issue a payment claim, and both parties had proceeded on the basis that the Payment Response was valid. He reasoned (at [99]) that if RN had genuinely thought that the 31 January letter had failed to communicate itself as a payment claim, RN would have made it clear in its Payment Response. Nothing in these findings was unreasonable in the slightest, and certainly not so unreasonable that no sensible person could have made such a decision. As I have already stated (at [53] above), the 31 January letter *did* purport to be a payment claim.

59 I find that there was nothing in the Adjudicator's decision or enquiry into the facts which could have deprived him of jurisdiction, even on a *Wednesbury* reasonableness standard.

60 It remains for me to add that RN chose the wrong procedure for bringing a challenge to the validity of the Payment Claim. The scheme of the SOP Act allows for sums above \$100,000 to be subject to adjudication review under s 18. This would allow for an opening of the merits of the case and a re-hearing. A review under s 18 of the SOP Act (along with any potential right to appeal subsequently) is entirely *different* from the setting aside proceedings that were before me. The rationale behind an adjudication review was discussed in the Parliamentary Report, where it was stated (at col 1137 and 1138):

... Sir, there are two situations here. One of which is if the adjudicator rules in favour of the claimant. When the adjudicator rules in favour of the claimant, the claimant is then entitled to the payment by a certain due date. In such a case, the respondent may feel aggrieved and opined [*sic*] that the adjudication determination is unfair. Therefore, we have stipulated that for amounts where the difference is larger than \$100,000, a right of review by the respondent is

covered in the Bill, and this is really to be fair to all parties.

Beyond this review, I think the right of appeal to a court or to an arbitrator is always available to anyone, and it is not correct for this Bill, while trying to solve one aspect of the problem faced by the industry, to deny that right of appeal to a court of law itself. There may be other issues under Tort Law that needs to be addressed. ...

61 The balance of justice has *already* been decided statutorily. RN could have appealed on the merits by asking for an adjudication review under s 18 of the SOP Act, but it had first to pay TPX the Adjudicated Sum pursuant to s 18(3). This would simultaneously promote prompt payment, which is the intention of the SOP Act, and also provide a safety net against errant adjudicators who make mistakes of law and fact within their jurisdiction. RN having chosen not to apply for an adjudication review, it is not for me to set aside the Adjudication Determination on grounds which properly belong to an adjudication review. Any mistake as to validity requires an examination of the evidence and an application of the law and is a substantive issue going to the merits, which the Adjudicator has the right to decide and which I cannot interfere with.

Whether the refusal to consider the Supplementary Bundles was a breach of natural justice

62 Mr Ling claimed that the rule of *audi alteram partem* has been infringed as the Supplementary Bundles were an essential part of RN's case and their exclusion meant that RN did not have opportunity to be fully heard.

63 Ms Looi argued that the Adjudicator had considered all the relevant material and was entitled to find that the Supplementary Bundles were irrelevant. She also argued that, in any event, the admission of the Supplementary Bundles would have made no difference to the outcome and could not be a ground for setting aside.

64 I found that Mr Ling's concept of *audi alteram partem* was simply too broad. The right to have one's case heard is not a right to have an adjudicator consider all material which the parties think are relevant. The adjudicator may make a decision on what considerations are relevant. The concept of *audi alteram partem* is an open-textured one which "depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates": Lord Bridge of Harwich in *Lloyd v McMahon* [1987] 1 AC 625 at 702.

65 I now turn to the statutory framework of the SOP Act. Section 15(3)(a) of the Act, which was also considered by the Adjudicator, reads as follows:

15.—(3) The respondent shall not include in the adjudication response, and the adjudicator shall not consider, any reason for withholding any amount, including but not limited to any cross-claim, counterclaim and set-off, unless —

(a) where the adjudication relates to a construction contract, the reason was included in the relevant payment response provided by the respondent to the claimant; ...

66 The starting point must be that the Adjudicator does not have the jurisdiction under the SOP Act to consider any counterclaim or claim for set-off unless it falls within the exception contained within s 15(3)(a). According to RN, the Supplementary Bundles were intended to provide support for its counterclaim against TPX for the sum of \$1,392,628.61 in back charges. This fell within the exception in s 15(3)(a). The Payment Response had made reference to RN's "set-off payments" and also its claims assessment dated 4 March 2011, which contained tabulations of the original contract

sums set out against the actual amounts that TPX had claimed, RN's labour back charges, subcontractors' back charges and material back charges running into a total of 26 pages. I found that the Adjudicator was not precluded by s 15(3) from looking at the Supplementary Bundles in reaching his decision.

67 Nonetheless, two important factors weighed against the admission of the Supplementary Bundles into evidence. First, those Supplementary Bundles were given after the deadline for filing an adjudication response. The 7-day deadline given in s 15(1) of the SOP Act is intended to prevent the process of adjudication being protracted by attempts to raise new arguments and to adduce new evidence. Any challenge on the basis of natural justice must be seen in context of the SOP Act's purpose of speedy resolution of payment claim disputes. Section 16(2)(b) of the SOP Act mandates that an adjudicator must reject any adjudication response not lodged within the seven days prescribed by s 15(1). The barring of a defence outside of time limits is not deemed a breach of natural justice, without more. Where new evidence and new submissions are sought to be adduced *after* time limits have expired, a refusal to admit them on the basis of prejudice to the other party would not constitute a breach of the rule of *audi alteram partem* as RN has already had ample opportunity to file these documents within the time limits provided by s 15(1) of the SOP Act. That these documents were not admitted as of right was a result of RN's own conduct in failing to follow the clear timelines stipulated in the SOP Act.

68 Even if I had considered, notwithstanding the clear wording of the SOP Act, that time lines could be extended, I found that there must be compelling reasons to do so. Mere inadvertence, which was RN's excuse for failing to file the Supplementary Bundles in time (see Plaintiff's Skeletal Submissions at para 50), does not and cannot constitute such a reason. Given that RN was well aware of its counterclaim at the time of filing the Adjudication Response and as early as 4 March 2011 when it sent to TPX a list of revised tabulations of back charges, and that these were voluminous documents which RN claimed to have been important, I also found it rather odd that RN had simply not realised that its supporting documents were being left out or forgotten to raise them during negotiations over the disputed sums. More likely than not, this was yet another tactic employed by RN to delay proceedings. The observations of the learned Assistant Registrar in the first instance decision of *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 (at [75]) were helpful in bearing out this point:

In my view, there are two points which should be borne in mind. The first is that natural justice requires that a respondent be given a fair *opportunity* to be heard. There is no requirement that in every case a party is actually heard and it is entirely possible for a party to forfeit his right to be heard through some procedural default. ***In the instant case, it is clear that the SOP Act does afford a respondent the opportunity to be heard. In regard to the hearing of a respondent's reasons why payment was withheld, the SOP Act specifies that such hearing is contingent on the reasons being provided in the payment response tendered within certain timelines***. What has really happened in this case was that the Respondent chose not to avail itself of the opportunity to be heard on its reasons for withholding payment. [emphasis in original in italics; emphasis added in bold italics]

69 This is made more serious by the fact that TPX claimed, and RN did not dispute, that it had not seen any of the documents contained within the rather voluminous three volumes of the Supplementary Bundles and would not have had a chance to respond to them within the time given for adjudication. I found that TPX had effectively been ambushed by RN's attempt to admit the Supplementary Bundles. Its submission before the Adjudicator in a letter sent by fax and mail and dated 8 March 2012, to the effect that the admission of the Supplementary Bundles would be a breach of natural justice to its detriment, was not without basis.

70 I was bound to consider the kind of decision that the Adjudicator was to make under the Act, viz, a "fast and low cost adjudication system" (see the Parliamentary Report at col 1113) on the payment claim dispute. Even if TPX were to have the opportunity to review and respond to the documents contained in the Supplementary Bundles, it would have had to face further delays and higher costs to do so. This did not sit well with the kind of decision that the Adjudicator was meant to deliver. This was particularly so when viewed in light of the background circumstance that TPX had first attempted to claim the payments due under the 21 July 2009 contract on 27 May 2010, some 28 months earlier. There had already been considerable delay and withholding of payment in direct defiance of the intent of the SOP Act.

71 Second, s 17(3) of the SOP Act sets out exhaustively the things which an Adjudicator must have regard to. Section 17(3) reads as follows:

17.—(3) Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:

- (a) the provisions of this Act;
- (b) the provisions of the contract to which the adjudication application relates;
- (c) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto;
- (d) the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto;
- (e) the results of any inspection carried out by the adjudicator of any matter to which the adjudication relates;
- (f) the report of any expert appointed to inquire on specific issues;
- (g) the submissions and responses of the parties to the adjudication, and any other information or document provided at the request of the adjudicator in relation to the adjudication; and
- (h) any other matter that the adjudicator reasonably considers to be relevant to the adjudication.

72 Even during the hearing, RN could not show how the Supplementary Bundles fitted in with any of the matters contained within s 17(3) of the SOP Act. The most promising provision that RN could have relied on was s 17(3)(g) and in particular the phrase "any other information or document provided at the request of the adjudicator in relation to the adjudication". However, the Adjudicator never asked for the Supplementary Bundle of Documents. The Payment Claim, Payment Response, Adjudication Application and Adjudication Response were intended to be self-contained documents providing all the information and evidence needed to support the parties' respective cases. It was only when the Adjudicator required additional information that such information would be sought.

73 In the present case, the Adjudicator had taken steps to streamline the issues early on in the case. On 9 March 2012, he wrote to the parties directing that a conference be held on 14 March 2012 at 4pm ("the Conference") to discuss the issue of, *inter alia*, the admission of the Supplementary Bundles. During the Conference, submissions were made and written submissions were

permitted to be filed subsequent to the Conference addressing all issues, including the admission of the Supplementary Bundles. It cannot, therefore, be said that the Adjudicator had simply dismissed the Supplementary Bundles out of hand. In this context, I found that the affidavit of Ng on behalf of RN claiming (at para 61) that “the Plaintiff had no opportunity to address the Adjudicator on why the said Documents should have been admitted” is spurious at best. In fact, extensive thought had gone into understanding what the scope of evidence provided by the Supplementary Bundles were, and it was decided by the Adjudicator that this was not material that he required under s 17(3)(g) of the SOP Act. This was a decision that the Adjudicator was entitled to make after having considered all the materials and matters listed under s 17(3) of the SOP Act.

74 In order for Mr Ling to have made the case for RN that there had been a breach of natural justice, he had to establish a “substantial denial of the measure of natural justice that the Act requires to be given” (see *Brodyn* at [55]). In the circumstances and given the nature of the SOP Act, the character of the decision-making body, and the kind of decision the Adjudicator was being called upon to make, I was unable to find that there had been a breach of natural justice as claimed by RN.

75 In any event, I was satisfied that the admission of the Supplementary Bundles would have made no difference to the outcome, as there was a wealth of material and correspondence between the parties with itemised lists of costs which the Adjudicator had reference to, in addition to oral and written submissions from the parties. The fact that there would be no difference to the outcome merely underscored my finding that there had been no substantial breach of justice from a failure to admit the Supplementary Bundles.

Conclusion

76 For the reasons given above, I dismissed RN’s application and ordered that the Adjudicated Sum be paid out to TPX, with costs fixed at \$18,000 inclusive of disbursements.

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