Hon Industries Pte Ltd *v* Wan Sheng Hao Construction Pte Ltd [2011] SGHC 247

Case Number : Originating Summons No 628 of 2011

Decision Date : 16 November 2011

Tribunal/Court : High Court

Coram : Eunice Chua AR

Counsel Name(s) : Julian Sebastian Lim Huat Sing (Jlim & Chew Law Corporation) for the plaintiff; Lim Ker Sheon and Wee Qian Liang (Characterist LLC) for the defendant.

Parties : Hon Industries Pte Ltd — Wan Sheng Hao Construction Pte Ltd

Building and Construction Law

Civil Procedure

16 November 2011 Judgment reserved.

Eunice Chua AR:

1 Although it is settled law that an adjudication determination under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the SOPA") may be set aside where the adjudicator has exceeded his jurisdiction or acted in breach of natural justice, the precise contours of the former appear to be in a state of flux, whereas the latter has yet to receive significant attention. Nevertheless, this state of affairs proved no barrier to the present application, where both issues arise, and after hearing the submissions of counsel, I reserved judgment to properly consider the matter.

Background

2 The plaintiff and the defendant are both contractors in the business of building and construction. By a letter of award dated 12 April 2010, the plaintiff appointed the defendant to carry out various development works at MacRitchie Reservoir Park ("the site"). The defendant commenced works shortly after.

3 Disputes arose between the parties and by December 2010, the defendant had largely ceased work on the site. Nevertheless, it was not disputed that rectification works continued after that. On 31 March 2011, the defendant served a document titled "Progress Claim No. 8" on the plaintiff for the sum of $672,569.97. When this sum was not paid, the defendant filed an adjudication application, SOP/AA059, on 19 April 2011. An adjudicator ("the Adjudicator") was appointed on 27 April 2011. The plaintiff served its adjudication response on 29 April 2011.

4 After considering the submissions of the parties, the Adjudicator called for an adjudication conference ("the Adjudication Conference") on 4 May 2011. The parties were then given an opportunity to make final submissions. On 26 May 2011, the Adjudicator issued an adjudication determination ("the Adjudication Determination"), finding in favour of the defendant and ordering the plaintiff to pay the defendant the claimed sum of $672,569.97 plus interest and costs. The defendant obtained leave to enforce the Adjudication Determination on 28 June 2011 by way of Originating Summons No 486 of 2011. Dissatisfied, the plaintiff took out the present application on 25 July 2011to

set aside the Adjudication Determination on the following grounds:

(a) Progress Claim No. 8 was not a valid payment claim under the SOPA;

(b) even if Progress Claim No. 8 was a valid payment claim under the SOPA, it was served out of time and time-barred; and

(c) the Adjudicator breached the rules of natural justice.

5 It is worth noting that in the course of the adjudication, the plaintiff had raised the issue of the timeliness of the service of Progress Claim No. 8 only at the stage of making final submissions, after the Adjudication Conference had taken place. The issue of service was not one of the original issues agreed upon by the parties at the Adjudication Conference. As for the issue of the validity of Progress Claim No. 8 as a payment claim under the SOPA, this was never raised as an issue at any stage of the adjudication. Rather, the plaintiff had, throughout the adjudication process, sought to establish that it had, by way of a letter dated 12 April 2011, served on the defendant a valid payment response under the SOPA to Progress Claim No. 8.

Issues

6 The main issues that arose in the present application are as follows:

(a) Whether Progress Claim No. 8 constituted a valid payment claim ("the validity issue");

(b) If so, whether Progress Claim No. 8 was served on time ("the service issue"); and

(c) In any event, whether there were breaches of natural justice that warranted the setting aside of the Adjudication Determination.

7 The defendant also raised a preliminary issue of whether the plaintiff was estopped from raising the validity issue and the service issue because they had not been brought up during the Adjudication Conference. I will deal with the preliminary issue before considering the other issues.

The preliminary issue

8 In my judgment, the plaintiff was not estopped from raising the validity issue and the service issue.

9 Dealing with the service issue first, I observe that the service issue *was* considered by the Adjudicator in the Adjudication Determination as it had been raised by the plaintiff in its final submissions. I saw no reason to limit the scope of what was permissible for the plaintiff to argue in the present application to the issues agreed on at the Adjudication Conference where the Adjudicator had not so limited himself in the Adjudication Determination; the defendant provided no authorities to persuade me otherwise. There was therefore no basis for the defendant to object to the consideration of the service issue in the present application on the ground of estoppel.

10 This, however, could not be said of the validity issue, which did not arise in any form throughout the entire adjudication process. Nevertheless, the plaintiff argued that the fact that the validity issue did not arise in the adjudication process was no bar to it being raised before a court, because the validity issue went to the jurisdiction of the adjudicator.

11 The plaintiff relied on *Chip Hup Hup Kee v Ssangyong Engineering & Construction* [2010]

1 SLR 658 ("*Chip Hup*") at [44], where Judith Prakash J stated:

> ...if the tribunal concerned does not have [jurisdiction in the strict sense of capacity to hear], *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*.
>
> [emphasis added]

The plaintiff recognised that Prakash J concluded (at [59] of *Chip Hup*) that the adjudicator possessed jurisdiction to hear and determine the adjudication application filed by the claimant *as soon as he accepted the appointment made by the Singapore Mediation Centre*, but submitted that in the light of subsequent decisions of the High Court, the validity issue should be taken to be a jurisdictional one.

12 Before exploring this matter further, I note at this juncture that the service issue appears to have been recognised as a jurisdictional issue the determination of which may lead to the setting aside of an adjudication determination (see Prakash J's decision in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") at [45(b)]; Lee Seiu Kin J's decision in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459 ("*Sungdo*") at [32]; and Tay Yong Kwang J's decision in *Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) v Lee Wee Lick Terence (alias Li Weili Terence)* [2011] SGHC 109 ("*Chua Say Eng*") at [29]).

13 The validity issue presents more difficulty as the judgments of the High Court do not speak with one voice on the matter. To provide a brief overview of these positions, I can do no better than quote Tay J's summary of the law in *Chua Say Eng* at [13]–[21], describing the developments after *Chip Hup*:

> 13 About two months after her decision in *Chip Hup*, Prakash J set out her views in [*SEF Construction*] on the court's role when asked to set aside an adjudication determination or a judgment arising from the same. She said at [42]:
>
> > 42 Accordingly, instead of reviewing the merits (in any direct or indirect fashion), *it is my view that the court's role must be limited to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to and that the process of the adjudication, rather than the substance, is proper*. After all, in any case, even if the adjudicator does make an error of fact or law in arriving at his adjudication determination, such error can be rectified or compensated for in subsequent arbitration or court proceedings initiated in accordance with the contract between the claimant and the respondent and intended to resolve all contractual disputes that have arisen.
> >
> > [emphasis added]
>
> 14 To further elucidate the limits of the court's role, Prakash J had regard to the New South Wales Court of Appeal ("NSW CA") case of *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 ("*Brodyn*"). In *Brodyn*, Hodgson JA first stated (at [51]) that the scheme of the equivalent New South Wales Act ("the NSW Act") "appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law." The judge went on (at [53]) to consider what the conditions for the existence of an adjudicator's determination were:

The basic and essential requirements appear to include the following:

1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss 7 and 8).

2. The service by the claimant on the respondent of a payment claim (s 13).

3. The making of an adjudication application by the claimant to an authorised nominating authority (s 17).

4. The reference of the application to an eligible adjudicator, who accepts the application (ss 18 and 19).

5. The determination by the adjudicator of this application (ss 19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss 22(1)) and the issue of a determination in writing (ss 22(3)(a))."

[emphasis added]

As for more detailed statutory requirements of the NSW Act such as "section 13(2) as to the content of payment claims; section 17 as to the time when an adjudication application can be made and as to its contents", Hodgson JA disapproved of the approach which asked "whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error" as he thought that approach "tended to cast the net too widely". He preferred to ask "whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination." (see *Brodyn* at [54])

15 At [44] and [45] of *SEF Construction*, Prakash J adopted Hodgson JA's discussion on the basic and essential requirements ...

16 Although sub-paragraph (b) of [45] in *SEF Construction* … included the service by the claimant on the respondent of a payment claim, Prakash J made clear at [46] of *SEF Construction* that whether a purported payment claim was actually a payment claim under the SOPA was an issue for the adjudicator ...

17 Prakash J next decided the case of *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260 ("*AM Associates*"), in which she applied her holdings in *SEF Construction*. The respondent in the adjudication proceedings there applied to set aside the adjudication determination on the basis that the payment claim it was served with ("Payment Claim 1") was not a valid payment claim under the SOPA. Prakash J held (at [20]):

... It was not my place to determine whether Payment Claim 1 was a valid payment claim or not. This was an enquiry that fell squarely within the jurisdiction of the Adjudicator and it is one that he recognised and dealt with. *What the court would be concerned with is whether prior to making an adjudication application the claimant had served a purported payment claim*. In this case, Payment Claim 1 had been served by AMA and *whether it was actually a "payment claim" within the meaning of that term under the SOP Act, was a mixed question of law and fact for the Adjudicator*, who would be privy to the facts, *to decide*.

[emphasis added]

Sungdo Engineering

18 Shortly after the *AM Associates* decision, Lee Seiu Kin J ("Lee J") decided the case of [*Sungdo*]. …

…

20 Significantly, Lee J disagreed with Prakash J's statements at [56] of [*Chip Hup*] …, stating (at [32]) that:

> ... While I agree that the jurisdiction of the adjudicator is not vested until his appointment by an ANB ("authorised nominating body"), *I am, with respect, unable to agree that jurisdiction is not affected by an invalid Payment Claim or service thereof*. The power of the ANB to appoint an adjudicator arises from the receipt of an adjudication application from a claimant, and that is predicated by a whole chain of events initiated by the service of a Payment Claim by the claimant on the respondent under s 10 of the Act. It must follow that if the claimant had failed to serve a Payment Claim, or to serve something that constitutes a Payment Claim, the power to appoint an adjudicator for that particular claim has not arisen.
>
> [emphasis added]

As for Prakash J's view at [46] of *SEF Construction* (see [16] above) that whether or not a purported payment claim is actually a payment claim under the SOPA is an issue for the adjudicator and not the court, Lee J went on to say at [34] that

> ... In principle, if the validity of a Payment Claim goes to jurisdiction, I do not see how a court is precluded from examining this issue on judicial review and I would, with respect, disagree with this.

21 Lee J then distinguished *SEF Construction* on the basis that in any event, the 2008 Letter did not *purport* to be a payment claim under the SOPA as nothing therein stated that it was so. Finally, notwithstanding Lee J's disagreement in principle with Prakash J, he stated that in practice, where a document did purport to be a payment claim under the SOPA, the court should only review an adjudicator's decision that it was indeed a valid payment claim under the SOPA on the basis of *Wednesbury* unreasonableness (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223)…

14 In short, although Prakash J has, *inter alia*, in *SEF Construction* taken the position that the validity issue is an issue for the adjudicator and not for the court, implying that it is not a matter for the court's consideration in a setting aside application, Lee J had respectfully disagreed in *Sungdo*, concluding that the court may review an adjudicator's decision on the validity issue and that where a document purports to be a payment claim under the SOPA, the court may conduct its review on the basis of *Wednesbury* unreasonableness.

15 Tay J in *Chua Say Eng* (at [28]) agreed with the position taken by Lee J, having regard to the New South Wales Court of Appeal decision of *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190. That case was decided after *SEF Construction*, and had departed from the position in *Brodyn Pty Ltd v Davenport* [2004] NSWCA (which was followed in *SEF Construction*) to favour a less restrictive approach towards the question of what constitutes a jurisdictional issue in the context of an

application to set aside an adjudication determination.

16 It appears then, at present, that the weight of authority reflects an approach where the failures to comply with the specifications of time and other requirements laid down in the SOPA become open to the court's scrutiny on the basis that the parties' rights to avail themselves of the unique mechanism provided by the SOPA depended on strict compliance with it. However, where an adjudicator had previously considered such jurisdictional issues, then consistent with the aim of the SOPA to "[maintain] cash flow in the [construction] industry" by providing "a fast track procedure for an interim decision in respect of a disputed payment claim" (*per* Prakash J in *Chip Hup* at [57]), an adjudicator's determination ought not to be reviewed too extensively. In *Sungdo* and *Chua Say Eng*, the threshold for review has been pegged at the standard of *Wednesbury* unreasonableness. In particular, with respect to the validity issue, the key question for the court to determine would be whether a purported payment claim had been made according to the rules established in *Sungdo* and *Chua Say Eng*. Although in the present case the validity issue had not arisen for consideration by the Adjudicator, it was not disputed by the plaintiff and defendant that the reasoning in *Sungdo* and *Chua Say Eng* remained relevant.

17 I therefore proceed to consider the substance of the plaintiff's claims in respect of both the service issue and the validity issue.

Whether Progress Claim No. 8 constituted a valid payment claim

18 The plaintiff argued that Progress Claim No. 8 was not a valid payment claim for the following reasons:

(a) it was not intended by the defendant as a payment claim under the SOPA, and even if it did, such intention was not communicated to the plaintiff;

(b) it was made in breach of reg 5(1) of the Building and Construction Industry Security of Payment Regulations 2005 (Cap 30B, Reg 1, 2006 Rev Ed) ("the SOP Regulations") as two payment claims had been served in the month of March 2011; and

(c) it was made in breach of s 10(1) of the SOPA as the defendant had served more than one payment claim for a progress payment.

Whether Progress Claim No. 8 was intended as a payment claim under the SOPA and if so, whether such intention was communicated

19 The plaintiff's first argument was a factual one. According to the plaintiff, its usual course of dealings with the defendant was such that a payment claim would only be made by the defendant after the plaintiff had issued an interim certification of the value of the works done by the defendant. The defendant's unilateral issuance of Progress Claim No. 8 was not in line with this usual practice. Additionally, the plaintiff also argued that after the works had ceased in December 2010, the defendant began haphazardly submitting various progress claims, sometimes two times in the same month and differing in format and style. In this context, it could not be said that the intention to make a payment claim via Progress Claim No. 8 had been communicated to the plaintiff. Further, the cover letter enclosing Progress Claim No. 8 stated that it was submitted "for work done ending up to 25th March 2011 for your kind certification". The plaintiff also relied on an alleged admission in an affidavit made on behalf of the defendant where a director of the defendant had stated that "Progress Claim No. 8 was *simply a progress claim asking for payment*" [emphasis added] to argue that it was not intended as a payment claim under the SOPA.

20 Counsel for the defendant emphasised that the plaintiff had not challenged the validity of Progress Claim No. 8 as a payment claim under the SOPA until the present application, despite being represented by counsel throughout. It also relied on *Sungdo* (at [17]) for the proposition that "there is no requirement for a payment claim to expressly state that it is made under the SOPA for it to be a valid payment claim under [the SOPA]".

21 I was not persuaded by the plaintiff's arguments and set out the material parts of the cover letter to Progress Claim No. 8 for ease of reference:

Attn: Ms Samantha Ng / Mr Oh Kim Guan /Mr William Neo

PROPOSED REDEVELOPMENT TO MACRITCHIE RESERVOIR PARK PHASE 2

CONTRACT NO: CW-DD/3090216

SUBJECT : SUBMISSION OF PROGRESS CLAIM NO.8

Dear Sir/Madam,

With reference to the abovementioned, we are pleased to submit herewith the **Progress Claim No.8** for workdone ending up to 25th March 2011 for your kind certification.

CLAIM SUMMARY

	TOTAL VALUE OF WORK DONE AS AT 25/03/2011	$ **1,314,752.39**
	Less Retention Sum (10%)	$ (131,475.24)
		$1,183,277.15
	Less Profit Entitlement (6.5%)	$ (76,913.01)
	TOTAL CLAIM	$1,106,364.14
	Less previous payment	$ (477,794.35)
	THIS CLAIM AMOUNT	$ 628,569.79
	Add 7% GST*	$ 43,999.89
	TOTAL THIS CLAIM AMOUT WITH GST	$ **672,569.67**
SINGAPORE DOLLARS : SIX HUNDRED SEVENTY-TWO THOUSAND FIVE HUNDRED SIXTY-NINE AND CENTS SIXTY-SEVEN ONLY		

Please refer the attached Breakdown for details.

We trust that the aforesaid claim is in order and look forward to your prompt payment.

Thank you.

Yours Faithfully

For **Wan Sheng Hao Construction Pte Ltd**

[signed]

Jessica Chen

Director

Enc. Detailed Breakdown and Attachments

Acknowledgement of Receipt of the Claim

[signed]

Signature

HR [handwritten]

Name / Position

31/3 [handwritten]

Date

22 First, it was apparent that Progress Claim No. 8, was "a business-like document" and from its contents, it was apparent that it was claiming that a sum of money was due (see *Chua Say Eng* at [31]). Although a sentence in the cover letter had referred to work done for the plaintiff's "certification", it must have been evident to the plaintiff that payment was sought from the rest of the document, for example, in the penultimate sentence "[w]e trust that the aforesaid claim is in order and look forward to your prompt payment". The reference to "certification" was also consistent with the dealings between the parties described by the plaintiff where the whole purpose of certification by the plaintiff was so that the defendant could obtain payment for work done. The plaintiff's argument taken to its logical conclusion would mean that due to the earlier course of dealings between the parties, the defendant would be barred from making any claims for payment unless the plaintiff had on its own initiative certified payments as being due. This was not commercially sensible.

23 Second, as established in *Sungdo* (at [17]), it was not necessary for the payment claim to state expressly that it was made under the SOPA, although this would have been the clearest way to communicate such an intention. The only formal requirements for validity under the SOPA are found in s 10(3) and reg 5(2) of the SOP Regulations that provide for every payment claim to be in writing, to identify the relevant contract and contain details of the claimed amount (see *Chua Say Eng* at [38]). It is not disputed that any of these formal requirements have not been met in respect of Progress Claim No. 8.

24 Third, an important factor was that the plaintiff had by seeking to prove that it had made a valid payment response in the course of the adjudication whilst not taking any issue with the validity of the payment claim, apparently understood at the material time that Progress Claim No. 8 was intended as a payment claim under the SOPA. In this context, counsel for the plaintiff's argument that

the plaintiff had been "ambushed" by Progress Claim No. 8, which was "disguised" as a valid payment claim, rang hollow. It was apparent from the plaintiff's arguments in the adjudication that it had treated Progress Claim No. 8 as a payment claim under the SOPA.

25 Fourth, although it was true that previous progress claims had been made where non-payment was not followed with an adjudication application, including: (a) a $464,412.20 "PROGRESS CLAIM FOR WORK DONE UP TO: 31/Dec/2010" on 17 January 2011; (b) a $502,755.53 "Progress Claim For Work Done Up To: 25/Dec/2010" on a subsequent unstated date; and (c) a $395,755.53 tax invoice "Being 7th Progress Claim" on 10 March 2011, this was but one factor and considering all the circumstances of the case, would not lead me to conclude that Progress Claim No. 8 was not intended as a payment claim under the SOPA. Further, these earlier claim documents were of a different nature from Progress Claim No. 8, which was accompanied by a formal cover letter, with provision for the plaintiff to sign as "Acknowledgement of Receipt of the Claim". I also did not think that the statement in the affidavit made on behalf of the defendant, read in context, could be treated as an admission that the defendant did not intend Progress Claim No. 8 to be a payment claim under the SOPA.

26 In *Sungdo*, Lee J came to the conclusion that the payment claim in question was not a valid payment claim under the SOPA for five reasons: (a) the defendant did not communicate its intention to the plaintiff that it was a payment claim under the SOPA (there was no mention in the covering letter of a claim being made under the SOPA or any other communication that would alert the plaintiff of the nature of the document); (b) *the plaintiff did not treat it as a payment claim* (no payment response was provided); (c) events prior to the service of the letter suggested that it was not a payment claim (there were previous instances where invoices had been submitted but no adjudication application followed, *a writ was filed in court and parties had filed pleadings before the alleged payment claim was sent*); (d) the contents of the covering letter did not suggest it was a payment claim due *inter alia*, to its *informality* (the alleged payment claim was titled "Letter from Italcor to Sungdo", contained a festive greeting, the person signing the letter was not identified, and the date was handwritten); and (e) it was *against public policy* to leave scope for potential claimants to ambush respondents by making multiple submissions of documents and applying for adjudication the minute the respondent failed to provide a payment response *even after litigation had been commenced*. I have set out these reasons in some detail to illustrate the unusual circumstances present in *Sungdo*. Based on the facts I have enumerated above (at [21]–[25]), the present case was evidently quite different from *Sungdo*.

Whether Progress Claim No. 8 was made in breach of reg 5(1) of the SOP Regulations

27 It is not disputed that reg 5(1) of the SOP Regulations applied in the present case and provided as follows:

> **5.**—(1) Where a contract does not contain any provision specifying the time at which a payment claim shall be served or by which such time may be determined, then a payment claim made under the contract shall be served by the last day of each month following the month in which the contract is made.

28 The plaintiff argued that relying on Tay J's analysis in *Chua Say Eng* and on a literal interpretation of reg 5(1), only one payment claim may be served each month by the last day of each month. It argued that the document titled "TAX INVOICE" dated 10 March 2011 and described as "Being 7th Progress Claim" and containing a breakdown of the "Total Work Done As At 25/12/2010" ("the 10 March 2011 document") (referred to at [25] above) was a purported payment claim and there were therefore two purported payment claims in March 2011. This was not permissible under reg 5(1).

29 Without going into the correctness of the plaintiff's interpretation of the law, this argument hinged on the 10 March 2011 document being a payment claim or at least a purported payment claim under the SOPA. I find that this could not be the case as the 10 March 2011 failed to comply with reg 5(2)(*c*) of the SOP Regulations, which required a payment claim to contain details of the claimed amount, including:

(i) a breakdown of the items constituting the claimed amount;

(ii) a description of these items;

(iii) the quantity or quantum of each item; and

(iv) the calculations which show how the claimed amount is derived

30 The only calculation contained in the 10 March 2011 document was:

Item	Description	Quantity	Unit Price	Amount
1)	Total Work Done As At 25/12/2010			$1,028,388.29
	Add: Variation Order			$97,766.59
	Total			$1,126,154.88
	Less: 10% Retention			$ (112,615.49)
	Net Amount:			$1,013,539.39
	Less: Profit Entitlement			$ (65,880.06)
	Sub-Total			$947,659.93
	Less : Previous Payment (1st to 5th)			$ (477,794.35)
	This Claim			$469,864.98
	Add 7% GST			$32,890.55
	Total Amount Included GST			$502,755.53
	Less : 6th Claim Yet to Received – WSH/008/11			$ (107,000.00)
	Total Amount Including GST [handwritten]			$395,755.53

There was no breakdown of the work done or a particularisation of the description, quantity, quantum or the unit price of each item of work. Unlike Progress Claim No. 8, such a detailed breakdown was also not attached. The 10 March 2011 could not therefore be a payment claim under the SOPA.

31 I would also add that apart from failing to meet the formal requirements for validity under the SOP Regulations, it was clear to me that the 10 March 2011 document could not have been a

purported payment claim under the SOPA, *ie*, it could not have been intended as a payment claim under the SOPA (see *Sungdo* at [20]). It took the form of an unremarkable tax invoice and it was marked "Attn: Account Department", without any specific person's attention being drawn to it. It was signed by an "Authorized Signature" who was not identified and contained the handwritten words "Total Amount including GST", reflecting a certain degree of informality. There was additionally no attempt made whatsoever to describe and quantify the work done as evident from the lack of content in the columns "Quantity" and "Unit Price". These facts did not suggest any sort of intention for the 10 March 2011 to be treated as a payment claim under the SOPA.

32 I therefore find that Progress Claim No. 8 was not in breach of reg 5(1) of the SOP Regulations.

Whether Progress Claim No. 8 was made in breach of s 10(1) of the SOPA

33 Section 10(1) of the SOPA provides as follows:

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

34 "Progress payment" is in turn defined by 2 of the SOPA to mean:

> ... a payment to which a person is entitled for the carrying out of construction work, or the supply of goods or services, under a contract, and includes —
>
> (*a*) a single or one-off payment; or
>
> (*b*) a payment that is based on an event or a date;

35 The plaintiff argued that because works had ceased at the site by December 2010 with only rectification works carrying on thereafter, Progress Claim No. 8 although expressed as being for work done "up to 25th March 2011", was actually for work done up to 31 December 2010. As the Defendant had previously submitted other progress claims for work in that period, (see above at [25]) a further claim for progress payment for works done up to December 2010 could not be made because this would be in breach of s 10(1) of the SOPA, which only allowed "*one* payment claim in respect of *a* progress payment" [emphasis added].

36 This argument hinged on the proposition that rectification works were not works in respect of which a progress claim could be made. When questioned, counsel for the plaintiff submitted that rectification works were not "construction work, or the supply of goods or services" under s 2 of the SOPA that would entitle the defendant to a progress payment because rectification works would be paid for out of the retention monies held back by the plaintiff. However, there was no provision in the contract between the parties to that effect, neither was there any other evidence on the practices of the construction industry that could establish such a proposition. In any event, I observe that excluding rectification works from the concept of "construction work, or the supply of goods or services" which would entitle a claimant to a progress payment, would be contrary to s 3 of the SOPA, which defined "construction work", "goods" and "services" in a manner that could not on a reasonable interpretation be read as excluding rectification works.

37 I therefore rejected the plaintiff's argument that Progress Claim No. 8 was in breach of s 10(1) of the SOPA and consequently decided against the plaintiff in respect of the validity issue.

Whether Progress Claim No. 8 was served on time

38 The second challenge brought by the plaintiff to set aside the Adjudication Determination was the service issue. The plaintiff argued that because all the works under the contract it had with the defendant had ceased by December 2010 and only rectification works were carried out after December 2010, in accordance with the interpretation of s 10(2) of the SOPA and reg 5(1) of the SOP Regulations given by Tay J in *Chua Say Eng*, Progress Claim No. 8 was served out of time as it should have been served by 31 January 2011.

39 The defendant argued that the Adjudicator had ample opportunity to consider the service issue and came to the conclusion that because the contract continued between the plaintiff and the defendant at the material time, with the defendant continuing to carry out rectification works as well as payment negotiations with the plaintiff well into February 2011, Progress Claim No. 8 was served on time (by 31 March 2011), regardless of which interpretation of s 10(2) of the SOPA and reg 5(1) of the SOP Regulations was adopted. There was therefore no reason to challenge the Adjudicator's decision as being unreasonable on a *Wednesbury* basis. The defendant also sought to distinguish *Chua Say Eng* on the basis that this was a case where the defendant was entitled to claim not only the additional sums due for further works that were completed in March 2011, but also for all monies previously unpaid at that point under s 10(4) of the SOPA.

40 Suffice it to say, and for the reasons stated in [36] above, I saw no reason to disagree with the Adjudicator.

Whether there were breaches of natural justice that warranted the setting aside of the Adjudication Determination

41 Under s 16(3)(*c*) of the SOPA, an adjudicator is obliged to "comply with the principles of natural justice.

42 The breach of natural justice complained of by the plaintiff was essentially that the Adjudicator had, in the Adjudication Determination, referred to other unpublished adjudication determinations known to the Adjudicator and that were not cited by the parties. The plaintiff complained that by failing to allow it an opportunity to address the Adjudicator on these other adjudication determinations, the Adjudicator had acted in breach of the natural justice principle *audi alteram partem*. Citing *SEF Construction*, *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR 86 ("*Soh Beng Tee*"), the New Zealand High Court decision in *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 ("*Rotoaira*") and the English Court of Appeal decision of *Fox v PG Wellfair Ltd* [1981] 2 Lloyd's Rep 514, the plaintiff argued that as long as the adjudicator had incorporated his own opinions and ideas into the Adjudication Determination, which were not reasonably foreseeable to the parties, and to the extent that this had created surprise and deprived them of the right to address full arguments on those opinions and ideas, the Adjudication Determination ought to be set aside as being in breach of natural justice.

43 The defendant, on the other hand, argued that the plaintiff's contention could not stand as both parties had ample opportunity to present their cases to the Adjudicator. In any event, the defendant also submitted that no prejudice was caused to the plaintiff as it was clear from the Adjudication Determination that the references to the previous adjudication determinations did not materially affect the Adjudicator's conclusions. The defendant relied on the summary of principles in

Soh Beng Tee at [65], which was a case decided in relation to an arbitration award, particularly for the statement that "an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied".

44 It is first important to recognise that what is required by natural justice depends heavily on the context in which it operates. Prakash J in *SEF Construction* at [52] endorsed the views expressed by Assistant Registrar Lim Jian Yi in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 at [50] as follows:

> Justice, whether performed by a court, a tribunal or any quasi-judicial body, is a balancing exercise between thoroughness and timeliness. More formal settings, such as litigation through a court, would tend to emphasis the former. The adjudication process under the [SOPA] instead chooses a quicker, but somewhat less thorough, means of achieving justice. This is a general theme which pervades the [SOPA] and in itself is not a ground for saying that natural justice has been denied.

45 The Court of Appeal in *Soh Beng Tee* also recognised at [65(b)] that fairness was "a multidimensional concept and it would be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges". The "overriding burden [was] on the applicant to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award" (*Soh Beng Tee* at [65(d)]). This was a question of fact and degree to be determined in the individual case (*Rotoaira* at 162). Although said in the context of examining an arbitration award, these principles are equally applicable here.

46 In the present case, it was not disputed that the Adjudicator had in the Adjudication Determination made various references to other adjudication determinations that the parties had not cited to him. To that extent, he had caused surprise. However, this should not in itself lead to the setting aside of the Adjudication Determination, particularly where these unpublished adjudication determinations, when read in context, served merely as examples and illustrations and could not have affected the outcome of the case. In respect of the reference to AA SOP No 62 of 2011, which the oral and written submission of the plaintiff focussed on, the Adjudicator had clearly indicated that he would not be relying on the interpretation of the SOPA and the SOP Regulations contained in that case but regarded *Chua Say Eng* as authoritative. He had also stated that whether he followed the interpretation in AA SOP No 62 of 2011 or that in *Chua Say Eng*, the same result would follow as his decision on the service issue rested on a factual determination that the contract between the plaintiff and the defendant continued into February 2011.

47 It was true that the parties were not invited to address the specific adjudication determinations cited by the Adjudicator, but it could not be denied that they had ample opportunity to address the *issues* in question whether at the Adjudication Conference or through the various rounds of submissions submitted to the Adjudicator. It cannot be said that a reasonable litigant in the shoes of the plaintiff could not have foreseen the possibility of *reasoning of the type revealed in the award* merely because the particular examples and references provided by the Adjudicator were not previously known to it.

48 In my judgment, the Adjudicator had complied with the *audi alteram partem* principle. The Adjudicator had made known his concerns on the (contentious) service issue, and had invited parties to address him on *Chua Say Eng* and the first instance decision of *Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) v Lee Wee Lick Terence @ Li Weili Terence* [2010] SGHC 333, and they had done so. Although his decision on the service issue did not accept either the plaintiff's

or the defendant's submission in their entirety, he was not required or obliged to do so (see *Rotoaira* at 463; *Soh Beng Tee* at [65(e)]).

Conclusion

49 For the above reasons, I dismissed the setting aside application.