Libra Building Construction Pte Ltd *v* Emergent Engineering Pte Ltd [2015] SGHC 279

Case Number : Originating Summons No 311 of 2015

Decision Date : 27 October 2015

Tribunal/Court : High Court

Coram : Kannan Ramesh JC

Counsel Name(s) : Lee Hwai Bin, Melanie Chew Yang Nah and Tay Bing Wei (WongPartnership LLP) for the plaintiff; Namazie Mohamed Javad En and Tan Teng Muan (Mallal & Namazie) for the defendant.

Parties : Libra Building Construction Pte Ltd — Emergent Engineering Pte Ltd

Building and construction law – dispute resolution – alternative dispute resolution procedures

27 October 2015

Kannan Ramesh JC:

Introduction

1 The Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act") was enacted to solve a common problem in the construction industry of contractors going unpaid for work done or materials supplied. "A fast and low cost adjudication system to resolve payment disputes" (*Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1113) was introduced to facilitate efficient recovery of payments, thereby enhancing cash flow which was once described as the lifeblood of the construction industry (see *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [18]). It is therefore somewhat ironic that the Act has been bedevilled by litigation which has sought to open up fissures, fault-lines and crevices in its edifice. At first blush, the issues canvassed would appear uncontroversial, settled by the language of the Act. But closer examination leads to a different conclusion. The present application is an apt illustration. It cannot be gainsaid that the proliferation of such litigation is the very antithesis of the *raison d'etre* of the Act – speedy and cost-efficient recovery of progress payments. The time is perhaps ripe to re-assess the Act, iron out its wrinkles and creases, so that its language and purpose achieve better alignment.

2 Section 10(1) of the Act states that "[a] claimant may serve one payment claim in respect of a progress payment". The default position under the Act, pursuant to s 10(2)(*b*) of the Act read with reg 5(1) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed) ("the Regulations"), is that a claimant may serve a payment claim on the respondent at a *maximum* frequency of once a month, although there is nothing in the Act or the Regulations to stop the claimant from serving its claims less regularly. For the avoidance of doubt, I shall use the phrase "payment claim period" to describe the period that the claimant is permitted under the contract or reg 5(1) (where the contract is silent) to serve a payment claim in respect of a progress payment. It is important to note that this concept of a payment claim period is distinct from the period of work covered by a payment claim, which I will refer to as the "reference period". It is perfectly possible that the payment claim period and the reference period for any progress payment will not coincide. It is also important to note that the entitlement to progress payment is conceptually different from the payment claim period. The entitlement may accrue on such date or event as the

parties may contractually prescribe. It is not uncommon for progress payments to accrue monthly.

3 It was in this context that I had to decide whether s 10(1) of the Act, read with the other relevant provisions of the Act and the Regulations, means that a claimant is only allowed to serve one payment claim in a payment claim period or whether it means one payment claim *per reference period* in a payment claim period. Casting the question in another way: does the Act permit a claimant to serve in the same payment claim period multiple payment claims, each for different reference periods? Answering the question affirmatively would have an important implication – it would allow a claimant to "bank" and thereafter serve in the same payment claim period payment claims for different reference periods.

4 This is the central question in the present application, an application by the Plaintiff to set aside an adjudication determination dated 16 February 2015 ("the Determination") in favour of the Defendant. The central question was also in the cross-hairs of the dispute before the Adjudicator. The Adjudicator answered the question in the affirmative. I disagreed and set aside the Determination with costs to the Plaintiff on 20 July 2015. My view was founded on a construction of the terms of the contract between the parties, as well as the provisions of the Act and the Regulations. I should add that, after vigorously defending the Adjudicator's conclusion on the central question, counsel for the Defendant conceded the point when parties appeared before me for further arguments on 20 August 2015.

5 Other issues were also canvassed before me. I shall address those issues in this judgment as well. Unless otherwise indicated, references to sections, regulations and clauses in this judgment shall be references to sections in the Act, regulations in the Regulations and clauses in the contract between the parties, respectively.

Background facts

6 It is helpful to recount the material background facts as they are important to understanding how the central question arose. By a contract contained in a Letter of Acceptance dated 4 September 2014 ("the Contract"), the Defendant was awarded the sub-contract for the supply of labour, materials, plant and equipment for the civil and structural works, and wet trade finishes for a project at Singapore Polytechnic ("the Project"). The contract sum was $385,030.

7 Unfortunately the relationship between the Plaintiff and the Defendant simmered with antagonism from the outset, rapidly becoming fractious and unhealthy. Allegations of poor workmanship and delays festered open and deep wounds of discontent. The acrimony culminated in the Plaintiff alleging that the Defendant had repudiated the Contract by abandoning the Project on or about 30 December 2014. Unsurprisingly, the Defendant challenged the allegation with force.

8 Three payment claims issued by the Defendant were at the heart of the present application – Payment Claim 3 dated 5 December 2014 ("PC3"), Payment Claim 3 (revised) dated 26 December 2014 ("PC3R"), and Payment Claim 4 dated 31 December 2014 ("PC4"). It was common ground that PC3R was issued to replace PC3. This was done at the behest of the Plaintiff who had insisted on compliance with a certain format for payment claims. PC3 and PC3R were for work done up to end November 2014, and PC4 was for work done up to end December 2014. They therefore covered different reference periods. Adjudication Application No SOP AA029 of 2015 ("the Application") was eventually presented on PC4 for reasons which will become evident as we navigate the facts further.

9 The circumstances surrounding the issuance of PC4 were a matter of significant controversy. They form the pith and marrow of the Defendant's further arguments. I will come to those arguments

later. Returning to the facts, in substance, the Defendant alleged that the practice between the parties was for payment claims to be issued on any day in the month following completion of the work. This was evidenced by Payment Claim 1 dated 7 October 2014 for work in September 2014, Payment Claim 2 dated 7 November 2014 for work in October 2014, and PC3 for work in November 2014. However, in December 2014, following the issuance of PC3R, the Plaintiff's new general manager allegedly notified the Defendant's general manager Mr Yeow Ngui Siong ("Mr Yeow") that the Contract required all payment claims to be served *not by but on* the 30th of the month.

10 Mr Yeow alleged that he understood the Plaintiff's general manager as saying that PC3R was invalid because it had been submitted on 26 December 2014 instead of 30 December 2014. This prompted the Defendant to issue PC4 on 30 December 2014. Two points must be made here. First, the Defendant did not withdraw PC3R when it issued PC4. In fact, the Defendant's unequivocal position before the Adjudicator and me was that PC3R was valid and remained in force at all times. This failure, as I will explain later, proved to be the Defendant's undoing on the central question. Secondly, PC4 covered a different reference period from PC3R – it was for work up to December 2014 whilst the latter, as mentioned earlier, was for work up to November 2014. This was the bedrock of the Adjudicator's conclusion that PC3R and PC4 were both valid payment claims.

11 The Plaintiff denied the circumstances surrounding the issuance of PC4 as painted by the Defendant. In the main, it was unnecessary for me to decide the controversy as the turning point in my view was the Defendant's failure to withdraw PC3R when issuing PC4. The subsequent events were, however, relevant to the Defendant's further arguments – the Defendant raised the issue of approbation and reprobation there. I will now sketch the subsequent events.

12 On 6 January 2015, the Plaintiff issued Payment Response 3 to PC3R. The Plaintiff asserted therein that PC3R was invalid and/or served out of time. However, the Plaintiff did not stop there. The Plaintiff went on to deal substantively with the merits of the claim in PC3R. On 9 January 2015, the Defendant addressed Payment Response 3 in what appears to be a response under s 12(4)(*a*). There was also a general denial that PC3R was invalid. Payment Response 3 was replaced by Payment Response 3R on 13 January 2015, in which the Plaintiff re-emphasised the invalidity of PC3R.

13 On 9 January 2015, by way of a letter of the same date, the Plaintiff responded to PC4 ("the 9 January letter"). No effort was made in the 9 January letter to address the merits of the claim, unlike Payment Response 3. Instead, a jurisdictional challenge was mounted on the basis that the Contract did not permit the Defendant to serve two or more payment claims in the same payment claim period. PC4 was therefore alleged to be invalid as it was served second in time to PC3R in the same payment claim period, *ie*, the payment claim period for the December 2014 progress payment.

14 Accordingly, as at 13 January 2015, the Defendant was faced with a challenge to the validity of both PC3R and PC4, albeit on different grounds. The Defendant resolved, or so it thought, the problem by electing to rely on PC4. On 16 January 2015, the Defendant wrote to the Plaintiff to assert that: (a) PC4 was served on 30 December 2014 because of the alleged representation by the Plaintiff's general manager to Mr Yeow (see *supra* at [9]); and, (b) the Defendant would therefore be proceeding with an adjudication application on PC4. On 16 January 2015, the Defendant issued notice under s 13(2) of its intention to apply for adjudication on PC4. By a letter dated 20 January 2015, the Plaintiff replied challenging the validity of PC4 on the basis that PC3R had not been withdrawn. Notwithstanding this, on 23 January 2015, the Defendant proceeded to present the Application on PC4.

Issues before the Court

15 The issues before me in the first round of hearings mirrored part of the issues before the Adjudicator. They were as follows:

(a) Was PC4 valid notwithstanding that it was served second in time to PC3R in the same payment claim period, because it covered a different reference period from PC3R ("Issue 1")?

(b) Was the Determination null and void because the Defendant failed to annex to the Application an exact copy of PC4 ("Issue 2")?

16 On 20 July 2015, I ruled in favour of the Plaintiff on Issue 1 and against the Plaintiff on Issue 2. As Issue 1 went to jurisdiction, I set aside the Determination. On 24 July 2015, the Defendant requested further arguments on a ground that had not been previously advanced before me or the Adjudicator – that the Plaintiff could not rely on PC3R to invalidate PC4. As the argument went, doing so would allow the Plaintiff to approbate and reprobate on the validity of PC3R. Such conduct had allegedly caused the Defendant to lose the opportunity to file an adjudication application on PC3R. This argument (which I shall refer to as "Issue 3") raised two sub-issues:

(a) First, could the doctrine of approbation and reprobation confer jurisdiction on the Adjudicator under the Act when but for the same, jurisdiction did not exist ("Issue 3(a)")?

(b) Secondly, was there approbation and reprobation on the facts ("Issue 3(b)")?

17 After hearing parties, I dismissed the further arguments on 20 August 2015.

The Plaintiff's submissions

18 The Plaintiff's submission on Issue 1 tracked the jurisdictional challenge to PC4 in the 9 January letter. The submission rested on the following planks:

(a) Clause 21(a) provided for monthly progress payments.

(b) Section 10(1) permitted service of only one payment claim in respect of a progress payment, as did the Contract.

(c) Section 10(1) did not permit multiple payment claims to be served in the same payment claim period even if they covered different reference periods.

(d) PC4 was null and void as it was issued after PC3R in the same payment claim period.

(e) The Adjudicator had no jurisdiction to hear the Application as it was presented on an invalid payment claim, PC4.

(f) Consequently, the Determination ought to be set aside.

19 As to Issue 2, the Plaintiff's argument was straightforward – the payment claim that accompanied an adjudication application ought to be an exact copy, as opposed to simply a copy, of the payment claim that was served in respect of a progress payment. In the present case, an exact copy had not been annexed to the Application for three reasons, which I will address in this judgment (*infra* at [88]-[105]). Accordingly, the Defendant had breached s 13(3)(*c*) read with reg 7(2)(*e*). The Adjudicator was therefore duty bound to reject the Application under s 16(2)(*a*) as it was not in accordance with s 13(3)(*c*).

20 As to Issue 3, the Plaintiff's submission rested entirely on the argument that its conduct could not lead to the conclusion that it had approbated or reprobated on the validity of PC3R.

The Defendant's submissions

21 As against this, in relation to Issue 1, the Defendant contended that:

(a) Clause 21(*a*) permitted service of multiple payment claims in the same payment claim period.

(b) Alternatively, s 10(1) and the framework of the Act permitted service of multiple payment claims for different reference periods in the same payment claim period.

(c) As PC4 and PC3R covered different reference periods, the former was a valid payment claim under s 10(1) and cl 21(*a*) notwithstanding it was served in the same payment claim period.

(d) Accordingly, the Adjudicator had jurisdiction to hear the Application.

22 As to Issue 2, the arguments were two-fold:

(a) There was no requirement under the Act for the payment claim that accompanies an adjudication application to be an exact copy of the payment claim which had been served.

(b) The payment claim that accompanied the Application was in substance the same as PC4.

23 As to Issue 3, in essence, the submission was as follows:

(a) The alleged representation by the Plaintiff's general manager to Mr Yeow in December 2014 (*supra* at [9]) caused the Defendant to issue PC4.

(b) The Plaintiff's subsequent challenge to the validity of PC3R was a representation that the Plaintiff accepted its invalidity.

(c) This induced the Defendant into believing that PC3R would not be relied on to invalidate PC4.

(d) The Defendant consequently elected to present the Application on PC4.

(e) By thereafter using PC3R to invalidate PC4, the Plaintiff was approbating and reprobating on the validity of the former.

(f) The Plaintiff's conduct was motivated by bad faith and designed to ensure that the Defendant lost the opportunity of presenting an application on PC3R.

Issue 1: Was PC4 invalid by reason of PC3R?

The statutory framework under the Act

24 It is apposite to set out first the statutory regime governing the service of payment claims. The starting point must be s 10, which provides as follows:

Payment claims

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.

(2) A payment claim shall be served —

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

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

(3) A payment claim —

(*a*) shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and

(*b*) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

(4) Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.

25 Where there is a lacuna in the agreement between the parties on the timing and frequency of service of a payment claim in respect of a progress payment, s 10(2)(*b*) points to the default setting in reg 5(1). Regulation 5(1) provides as follows:

Payment claims

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.

26 Section 10 and reg 5(1) were considered by the Court of Appeal in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Chua Say Eng*"). The Court of Appeal held (at [89]) that ss 10(1) and (2), and reg 5(1) did not compel the claimant to serve payment claims on a monthly basis for work done in the preceding month. The claimant could decide not to serve payment claims at monthly intervals. The Court of Appeal also held that the cumulative effect of s 10(1) read with reg 5(1) was to restrict the claimant to a maximum of one payment claim a month in respect of a progress payment

(at [90]). However, the seed of doubt that the Defendant planted and which resonated with the Adjudicator was whether the Court of Appeal had closed the door to service of multiple payment claims *for different reference periods* in the same payment claim period. Framing the question in another way, what did the Court of Appeal mean when it said the claimant was limited, under s 10(1) read with reg 5(1), to one payment claim in respect of a progress payment in a month? Did the Court of Appeal mean one payment claim *a month*, or one payment claim for *a reference period* a month, in respect of a monthly progress payment? This is the question at the core of the investigation on Issue 1. It should be noted that the payment claim under consideration in *Chua Say Eng* was monthly as prescribed in reg 5(1).

27 If the latter is the correct interpretation, s 10(1) ought to be read as one payment claim *for a reference period* in the same payment claim period. This interpretation would not invalidate PC4 as it covered a different reference period from PC3R.

28 The impact of accepting this interpretation could have significant ramifications for a respondent facing payment claims. It could open the door to service of multiple payment claims for different reference periods in the same payment claim period. A claimant could "bank" multiple payment claims for different reference periods and serve them all, within a short span of time or at the same time, in the same payment claim period. If this were to happen, the respondent could be left scrambling to timeously file complete and comprehensive payment responses to the deluge of payment claims. The starkness of the problem becomes more apparent when one bears in mind that in reality, more often than not, progress payments and therefore payment claims are monthly either because of the terms of the contract or reg 5(1). A deluge of payment claims in a month could severely debilitate the respondent. Indeed, as noted earlier (*supra* at [26]), the remarks of the Court of Appeal in *Chua Say Eng* were made in the context of monthly payment claims under reg 5(1). A respondent faced with multiple payment claims in a month would run the serious risk of slipping up on its payment responses – by not filing one, filing one late or being less than comprehensive in the payment response that is filed. This could be disastrous given the importance given to the payment response by the Act. A claimant could actually game the purpose of the Act, and in that process the respondent, by "banking" its payment claims.

29 I found these considerations to militate against reading s 10(1) as permitting service of multiple payment claims for different reference periods in the same payment claim period. As a result, I disagreed with the Adjudicator. Before I canvass my reasons, it would be germane to set out the analysis of the Adjudicator.

The Adjudicator's Analysis on Issue 1

30 In summary, the Adjudicator's analysis was as follows:

(a) *The Act conferred a right to "progress payment" based on an event or a date covering a period of work, ie, the reference period.*

(b) *Therefore, a payment claim was served with regard to a reference period.*

(c) *While Chua Say Eng decided that there could be only one payment claim served in respect of a progress payment, it did not decide that there could not be more than one payment claim for different reference periods in the same payment claim period (a month, in that case).*

(d) *What was prohibited was not service of multiple payment claims in respect of a payment*

claim period per se but service of multiple payment claims for the same reference period in a payment claim period.

(e) *To allow multiple payment claims for the same reference period would cause prejudice and confusion as regards the service of payment responses – the respondent would be confused as to which payment claim he had to address.*

(f) *However, such confusion and prejudice would not exist where the payment claims were for different reference periods.*

(g) *Section 13(5) of the New South Wales Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (NSW) ("the NSWA") shed helpful light on the issue – it provided that a claimant could not serve more than one payment claim in respect of each reference date under the construction contract.*

(h) *The link drawn between the payment claim and the reference date in the NSWA suggested that s 10(1) ought to be read as limiting the claimant to one payment claim per reference period in a payment claim period, and not one payment claim in a payment claim period.*

(i) *As PC3R and PC4 covered claims for different months and therefore different reference periods, the latter had not been served in breach of s 10(1) read with reg 5(1).*

31 I will now set out my reasons for disagreeing with the Adjudicator.

My reasons on Issue 1

Preamble

32 A payment claim that is served in compliance with s 10(1) is the bedrock upon which the adjudication process under the Act gravitates. It is the trigger and, if triggered improperly, would cause the process to fail. Get the payment claim wrong and an adjudication determination of that claim is liable to be set aside for want of jurisdiction on the part of the adjudicator. The starting point of the analysis must therefore be s 10(1).

33 To repeat, s 10(1) states that there may be served "one payment claim in respect of a progress payment". It would seem that s 10(1) cannot be contracted out of – the parties cannot contractually agree on service of multiple payment claims in respect of a progress payment. The terms of the contract are relevant only to the extent of regulating the frequency and time for service of a payment claim. This is set out in s 10(2)(*a*). Where the contract is silent in this regard, a default setting is stipulated in reg 5(1) read with s 10(2)(*b*).

34 Like s 10(1), cl 21(a) restricts the Defendant to one payment claim. Progress payments are monthly with payment claims to be served by the 30th of the month. It therefore has remarkable similarity to s 10(1) read with reg 5(1) save that the date for service of the payment claim has been adjusted to the 30th of the month (instead of the last day of each month following the month in which the contract was made, per reg 5(1)). Sub-clauses 21(a), (b) and (c), which are salient, provide as follows:

21. Progress Payment

a. Payment shall be monthly progress payments. The Sub-Contractor shall submit claims with measurement records (if applicable) of Sub-Contract Works done and or delivery orders duly endorsed by the Contractor's authorized site staff. The cut-off date for the progress claim shall be on 30th of each month.

b. Payment certificate or/and payment response shall be maximum 10 days from sub-contractor's progress claim submitted.

c. Payment shall be 20 days upon receipt of original tax invoice.

35 Given the similarity of cl 21(a), and s 10(1) and reg 5(1), the correct interpretation of s 10(1) and reg 5(1) would answer the central question in Issue 1. As the correct interpretation of s 10(1) and reg 5(1) was a key issue in *Chua Say Eng*, the question that naturally arises is: did *Chua Say Eng* decide Issue 1? I now consider whether it did.

Did Chua Say Eng decide Issue 1?

36 I am of the view that *Chua Say Eng* did decide the central question in Issue 1. The Court of Appeal shut the door to service of multiple payment claims in the same payment claim period, regardless of whether the claims are for different reference periods or otherwise (where reg 5(1) applied, that payment claim period would be monthly). I do not share the Adjudicator's conclusion that *Chua Say Eng* had left the door open.

37 The following *dicta* in *Chua Say Eng* (at [90]) makes the point clear:

> Accordingly, there is nothing in the language of reg 5(1) of the SOPR to compel a claimant to make monthly payment claims for work done in the previous month, whether or not he wants to do so. The Act is intended to facilitate the payment of progress payments at monthly intervals. If a claimant chooses not to make a payment claim at monthly intervals, because, for example, he is not experiencing any cash flow problems or because it is not convenient for him to do so, there is no reason to compel him to do otherwise. If a claimant decides to serve payment claims at longer than monthly intervals, e,g, quarterly payment claims, it would also benefit the respondent, who need not pay monthly claims. In our view, the mandatory language of reg 5(1) of the SOPR in relation to service of the payment claim, when read with s 10(1) of the Act, serves to impose a maximum frequency of one payment claim per month. It bars the claimant from making more than one monthly claim in respect of a progress payment. Imposing such a maximum frequency for making payment claims is fair and reasonable to both parties.

38 Two points emerge from this passage. First, though the Act facilitates monthly progress payment, reg 5(1) does not compel the claimant to make monthly payment claims. The claimant can therefore hold over his payment claims. Secondly, reading reg 5(1) with s 10(1), the claimant is restricted to a maximum frequency of one payment claim per progress payment per month, regardless of whether it holds over the payment claims or not. That reg 5(1) must be read with s 10(1) was made clear by the Court of Appeal (see [88] of *Chua Say Eng*).

39 It is axiomatic that if payment claims are held over, the spectre of multiple payment claims for different reference periods being collectively served in the same payment claim period would arise. In observing that the language of compulsion in reg 5(1) was not in relation to the making of a payment claim but its service, the Court of Appeal in *Chua Say Eng* was in fact contemplating a scenario where payment claims were held over. The Court of Appeal's conclusion that a claimant who holds over is limited to only one monthly payment claim in respect of a progress payment must be seen in this

context. In fact, I would suggest that the Court of Appeal went so far as to offer a solution as to how such a scenario should be resolved. It was pointed out that s 10(3) might be resorted to where payment claims were held over – a claimant must state the reference period for a payment claim (see [89] of *Chua Say Eng*). The Court of Appeal was expressing, in my opinion, the view that where the claimant holds over, the payment claim ought to specify a longer reference period reflecting the enlarged period of work covered by the claim. It was for this reason that I had remarked at the outset of this judgment that the reference period and the payment claim period may not necessarily coincide. Therefore, instead of multiple payment claims, the Court of Appeal was of the view that there should be one payment claim covering a longer reference period.

40 There are two further pointers in *Chua Say Eng* to this conclusion. First, there is the reference in [91] and [92] to repeat payment claims under s 10(4). The Court of Appeal agreed with the observation of the Assistant Registrar at first instance that "s 10(4) was meant to widen the scope of s 10(1) by providing the option of including in a payment claim unpaid amounts made in earlier claims" (at [91]), subject to those claims not having been adjudicated upon on the merits. The Court of Appeal appeared to incline towards the view that the proper treatment for repeat claims was to consolidate them under an overarching payment claim, as envisaged by s 10(4), rather than have multiple repeat payment claims. Such multiple repeat claims must by definition cover different reference periods. If this was the more appropriate approach for repeat payment claims, in the Court of Appeal's view, it is difficult to see why different treatment ought to apply to fresh claims.

41 Secondly, I refer to the example cited in [94] of *Chua Say Eng*. The scenario sketched was of a claimant who held over payment claims for two calendar months. The Court of Appeal envisaged only one payment claim, when a claim was eventually made.

42 These paragraphs point to the conclusion that *Chua Say Eng* had answered the central question in Issue 1 in the negative. In summary, the scheme of the statutory provisions governing the submission of payment claims in light of the holding in *Chua Say Eng* on Issue 1 is as follows:

(a) there is to be only one payment claim served in respect of a progress payment – s 10(1);

(b) multiple payment claims for different reference periods in the same payment claim period are impermissible;

(c) the time for and frequency of service of a payment claim is first and foremost a matter of contract – s 10(2)(*a*);

(d) where the contract is silent, the default setting is one payment claim per month served on the last day following the month in which the contract was made – reg 5(1);

(e) reg 5(1) read with s 10(1) imposes a maximum frequency of one payment claim a month; and

(f) where payment claims are held over, one payment claim ought to be served stipulating the enlarged reference period – s 10(3)(*a*).

43 If I am incorrect in the conclusion I have drawn from *Chua Say Eng* on Issue 1, I remain nevertheless of the view that the central question in Issue 1 ought to be answered in the negative. A careful review of the relevant provisions of the NSWA and the parliamentary debates which led to their enactment, and a line of case authorities from New South Wales which have considered the same point, inexorably lead me to conclude that service of multiple claims for different reference

periods in the same payment claim period is impermissible. It is to the New South Wales position that I now turn.

The NSWA

44 The NSWA has a similar structure and purpose to the Act. The Act was modelled on similar legislation from other jurisdictions including the NSWA. There are, however, important differences. As noted by this court in *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776 ("*Australian Timber*") (at [55]), the provisions of the Act are a "… product not of unthinking duplication, but considered adaptation instead" resulting in linguistic variations in the Act. Therefore, it behoves me to bear this in mind when examining the relevance of Australian decisions on the NSWA to the Act. With this cautionary note in mind, I turn to the provisions of the NSWA that are salient to Issue 1.

45 My review suggests that there is no material difference between the salient provisions of the NSWA and the Act. For ease of reference, I have at Annex 1 of this judgment set out a tabulation comparing the salient provisions of the NSWA and the Act. I make five broad observations.

46 First, "progress payment" is defined in very similar language in both statutes save that the NSWA has an expanded definition to make clear that a final payment under a construction contract is also a "progress payment". This is not a material difference as it was decided by this court in *Tiong Seng Contractors (Pte) Ltd v Chuan Lim Construction Ltd* [2007] 4 SLR(R) 364 ("*Tiong Seng Contractors*") (at [27]) (approved in *Chua Say Eng* (at [95])) that a final payment would be regarded as a "progress payment" under the Act.

47 Secondly, the accrual of the right to a progress payment arises in the same circumstances in both statutes. Section 8(1) of the NSWA is similar to s 5 save that it stipulates that the right to a progress payment accrues on and from each "reference date" (this language is absent from s 5). However, there is in fact no operational difference between the two statutes. "Reference date" as defined in ss 8(2)(*a*) and (*b*) of the NSWA tracks the language of ss 10(2)(*a*) and 10(2)(*b*) read with reg 5(1). Therefore, the right to progress payment under the NSWA and the Act arises in the same circumstances.

48 Thirdly, the right to serve a payment claim under the NSWA and the Act also arises in the same circumstances. "Payment claim" under the NSWA is defined with reference to s 13 of the NSWA. Section 13(5) of the NSWA is in particular salient. It states that a claimant cannot serve more than one payment claim "in respect of each reference date under the construction contract". This is fundamentally similar to s 10(1) read with s 10(2) and reg 5(1). Under s 8(1) of the NSWA, entitlement to a progress payment arises on a reference date, which is defined in s 8(2) of the NSWA in language which is very similar to s 10(2) and reg 5(1). This in turn triggers a right to serve one payment claim for the corresponding progress payment, the time for service of which is to be determined in accordance with the terms of the contract – ss 8(2)(*a*) and (*b*) of the NSWA. Again, the language tracks ss 10(2)(*a*) and (*b*) read with reg 5(1).

49 Fourthly, s 13(2) of the NSWA, like s 10(3), requires the payment claim to identify the amount and period of construction work covered by the claim.

50 Fifth, s 13(6) of the NSWA, like s 10(4), permits repeat payment claims to be included in a payment claim.

51 The observations I have made suggest quite clearly that insofar as the right to progress

payment and the entitlement to serve a corresponding payment claim are concerned, the provisions of the NSWA and the Act are *in pari materia*. This makes the Australian decisions on these provisions of the NSWA relevant to the interpretation of the corresponding provisions in the Act. It would also make the Hansard on the NSWA pertinent in construing the intent behind provisions of the Act. I should footnote here that the Hansard on the Act sheds little light in this regard.

(1) The Hansard on the NSWA and some Australian decisions

52 I first start with the Hansard on the NSWA. It would seem that "reference date" in s 8 was amended and s 13(5) of the NSWA introduced to prevent abuse by claimants. M Morris Iemma, New South Wales' Minister of Public Works and Services, when speaking at the second reading of the amendment bill on 12 November 2002 had this to say:

> The changes are not only designed to prevent abuses of the intent of the legislation by respondents. We recognise the potential for claimants to abuse also the intent of the legislation. Consequently, the bill restricts claimants to one payment claim under the Act in respect of each reference date. Reference dates will be either dates specified in the construction contract for making progress claims or, if not stated, the last day of each month of the year. … [emphasis added in underline]

53 The Minister's remarks would suggest that the restriction to one payment claim in respect of each reference date was to prevent claimants from abusing the purpose of the NSWA. It is certainly arguable that the "banking" of payment claims falls within what is regarded as abuse. As I have mentioned above at [28], a claimant can ambush a respondent by serving multiple payment claims over a compressed period of time thereby making the respondent scramble to submit a payment response to each of them. This deluge, coupled with the tight timelines for submission of a payment response, could have the unfortunate consequence of the respondent submitting an inadequate payment response or not submitting one at all. Given the deleterious effect of such an omission, the argument for frowning upon such activity is certainly there. Statutes such as the NSWA exist to facilitate the cash flow of contactors, and not to empower them to game a respondent into conceding payment for an unmeritorious claim.

54 The facts in the decision of the Supreme Court of New South Wales in *Hill as Trustee for the Ashmore Superannuation Benefit Fund v Halo Architectural Design Services Pty Ltd* [2013] NSWSC 865 ("*Hill v Halo*") aptly illustrate the point. Briefly, between 8 November 2012 and 7 December 2012, the claimant served ten payment claims on ten different dates, each for work done in ten separate months, *ie*, different reference periods. All the claims bar four were settled. An adjudication application was brought in respect of the four unsettled payment claims.

55 The key issue before the court was: did s 8 read with s 13 of the NSWA prohibit multiple payment claims for different reference periods being served with regard to a reference date, *ie*, "banking" of payment claims? The court concluded that this was not permissible. The court was of the view that "on and from" each reference date in s 8(1) of the NSWA meant that the progress payment to which a claimant was entitled was one in respect of all construction work done up to that date. The court reasoned that service of a payment claim "in respect of" each reference date in s 13(5) of the NSWA ought to have the same meaning as "on and from" in s 8(1) of the NSWA, *ie*, the payment claim ought to be for all work done up to that reference date. Accordingly, service of multiple payment claims for different reference periods in respect of the same reference date was not permissible. The court observed that the provisions of the NSWA which concern the submission of an adjudication application contemplate only one payment claim per application. This it was felt lent support to the conclusion.

56 I should observe that given the similarity between ss 8 and 13(5) of the NSWA of the one part and ss 10(1) and (2) of the Act and reg 5(1) of the other, *Hill v Halo* would seem to be an authority on point to Issue 1. While I accept that s 10 does not have the language "on and from each reference date" found in s 8(1) of the NSWA, the operative question before the court was whether s 13(5) read with s 8 of the NSWA only allowed one payment claim to be served in respect of a progress payment. The operative question and the central question are the same.

57 I next turn to *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6 ("*Rail Corporation*"), which was referred to in *Hill v Halo*, similarly a decision of the Supreme Court of New South Wales. The facts are again instructive. The claimant purported to make one payment claim. However, enclosed in that claim were five invoices. Five adjudication applications were presented on each invoice. One of the issues before the court was whether the payment claim was in compliance with s 13(5) of the NSWA, as there were multiple payment claims in relation to a reference date. The court found that there was in fact one payment claim segregated into separate portions of work. Accordingly, the specific point on s 13(5) of the NSWA did not fall for consideration. However, the court said that s 13(5) of the NSWA prevented the service of more than one payment claim per reference date. It would therefore not be incorrect to infer that if the court had found on the facts that multiple payment claims had been served, the conclusion would have been different, *ie*, that s 13(5) of the NSWA had not been complied with. *Hill v Halo* read *Rail Corporation* as involving one overarching claim (see [36] of *Hill v Halo*). This would only fortify the inference I have drawn from the judgment in *Rail Corporation*.

58 Two subsequent decisions of the Supreme Court of New South Wales considered the same issue as in *Hill v Halo – Kitchen Xchange v Formacon Building Services* [2014] NSWSC 1602 ("*Kitchen Xchange*") and *Southern Han Breakfast Point Pty Limited v Lewence Construction Pty Ltd* [2015] NSWSC 502 ("*Southern Han*"). I begin with *Kitchen Xchange* where the facts bear a remarkable similarity to the present facts. The claimant served a payment claim on 4 June 2014. That claim was withdrawn. On 12 June 2014, a second payment claim was served. A payment schedule, which is the equivalent under the NSWA of a payment response, was served by the respondent to the second payment claim. However, on 23 June 2014, the claimant served a third payment claim. The third payment claim included an additional item of claim. An adjudication application was presented on the third payment claim. An issue arose on whether there was compliance with s 13(5) of the NSWA. The court found that the second and third payment claims were served in respect of the same reference date. The court made the following observations (at [21]-[29]):

(a) *section 13(5) of the NSWA was intended to have a prohibitory effect;*

(b) *a payment claim which was not in compliance with the section would not attract the statutory regime under the NSWA and could not put into motion the procedure for recovery of the progress payments;*

(c) *any other approach would nullify the purpose of the statutory prohibition; and*

(d) *section 13(5) was intended to prohibit the vice of repetitive claims on the same reference date.*

59 Accordingly, in the absence of evidence that the second payment claim had been withdrawn, the third payment claim was held in *Kitchen Xchange* to have breached s 13(5) of the NSWA and therefore invalid. The adjudication determination was consequently set aside.

60 While I recognise that emphasis was placed in *Kitchen Xchange* on the words of prohibition in s

13(5) of the NSWA – "cannot serve more than one payment claim" – which are absent in s 10(1), that does not in any way affect the relevance of the authority. In my view, it cannot reasonably be argued that the perhaps less strident words of s 10(1) are malleable to a construction that more than one payment claim may be served in the same payment claim period. There is no scope for interpreting "may serve one payment claim" in s 10(1) as permitting service of more than one payment claim, without mutilating the statutory language. Indeed, to construe s 10(1) in that way would be to go against the grain of the holding in *Chua Say Eng*.

61 Finally, I turn to *Southern Han* where *Hill v Halo* was cited without disapproval. The court reiterated that s 13(5) of the NSWA was meant to safeguard against abuse by a claimant. After citing the portion of Hansard referred to earlier (*supra* at [52]), the court had this to say (at [39]):

> It is apparent from this passage that the requirement of a reference date and the requirement that only one claim can be made in respect of each reference date was intended to be an important mechanism by which abuses of the right to make a payment are to be preserved.

62 This is a reiteration of the purpose of s 13(5) of the NSWA – that it was introduced to safeguard against abuse by claimants of the legislative intent and purpose of the NSWA. I see no reason why s 10(1) should not be regarded in the same vein as s 13(5) of the NSWA given their common underpinnings. In this regard, it is difficult to understand how the Adjudicator could have concluded that s 13(5) of the NSWA supported his conclusion. The section in fact points to a contrary conclusion.

(2) Information kits

63 Information kits issued by the regulatory authorities in Singapore and New South Wales on the Act and the NSWA are useful (to an extent) in construing the provisions of the Act (see *Tiong Seng Contractors* (at [18]), and also *Chua Say Eng* (at [87])). While traditionally not a part of the material that is usually relied upon for the construction of statutes, they nonetheless provide a useful insight into the industry's perception of how the provisions of the Act and the NSWA operate or ought to operate.

64 The New South Wales Government Information Kit on the NSWA is instructive. At Information Sheet 2, the following is said:

> "Can I resubmit a claim"
>
> Only one claim can be made under the act for each reference date. The reference date is either the date stated in the contract for making the claims or, if there is no date, it is the last day of each month."
>
> [emphasis added in underline]

The position in the information kit echoes the approach that resonates in the Australian decisions discussed above.

65 The statement is even more unequivocal in the information kit issued by the Building and Construction Authority. Paragraph 2.3 is apposite. It provides that:

> A claimant is entitled to serve a payment claim within the period (payment claim date) stated in the contract or mutually agreed in writing. If there is no period provided in the contract, a

payment claim may be made at such intervals as the claimant so elects. However, a claimant must not make more than 1 payment claim within each month following the month in which the contract is made. …

Only one claim for a particular amount of work done or goods/services supplied can be made under the Act for each claim date.

[emphasis added in underline]

66 It would appear that the BCA information kit takes a similar position to the information kit issued by its New South Wales counterpart and, as I have already stated, in a manner consistent with *Chua Say Eng*.

The Position in New Zealand and the United Kingdom

67 The New Zealand equivalent of the Act is the Construction Contracts Act 2002 (No 46 of 2002) (NZ) (the "CCA"). The NSWA served as a useful model for the CCA (see the New Zealand Law Commission study paper titled "Protecting Construction Contractors: An Advisory Report to the Ministry of Commerce" (November 1999) at para 32). There is similarity between the statutory language of the CCA and the NSWA, though there are material differences. Of relevance for present purposes is s 20(1) of the CCA which permits the submission of only one payment claim per progress payment. This is akin to s 13(5) of the NSWA and s 10(1). Unfortunately, there is a dearth of case authority from New Zealand on s 20(1) of the CCA. However, given that its parentage is the NSWA, there is sound reason to believe that a similar position to New South Wales will be taken in New Zealand. For completeness, I set out s 20 of the CCA below:

20 Payment claims

(1) A payee may serve a payment claim on the payer for each progress payment,—

(a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or

(b) if the contract does not provide for the matter, at the end of the relevant period referred to in section 17(2).

(2) A payment claim must—

(a) be in writing; and

(b contain sufficient details to identify the construction contract to which the progress payment relates; and

(c) identify the construction work and the relevant period to which the progress payment relates; and

(d) indicate a claimed amount and the due date for payment; and

(e) indicate the manner in which the payee calculated the claimed amount; and

(f) state that it is made under this Act.

(3) If a payment claim is served on a residential occupier, it must be accompanied by—

(a) an outline of the process for responding to that claim; and

(b) an explanation of the consequences of—

(i) not responding to a payment claim; and

(ii) not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).

(4) The matters referred to in subsection (3)(a) and (b) must—

(a) be in writing; and

(b) be in the prescribed form (if any).

68 The UK equivalent to the Act is the Housing Grants, Construction and Regeneration Act 1996 (c 53) (UK) ("HGCR"). Though the purpose of the HGCR is similar to the Act and the NSWA, the language adopted is quite different. Having said that, the threat posed to a respondent by multiple payment claims was highlighted in *Caledonian Modular Ltd v Mar City Development Ltd* [2015] EWHC 1855 (TCC) (at [48]) in the following terms:

> 48 Such a sequence would make a mockery of the notice provisions under the Act and the Scheme. It would encourage a contractor to make fresh claims every few days in the hope that, at some stage, the employer or his agent will take his eye off the ball and fail to serve a valid payless notice, thus entitling the contractor to a wholly undeserved windfall. The whole purpose of the Act and the Scheme is to create an atmosphere in which the parties to a construction contract are *not* always at loggerheads. I consider that the claimant's approach would achieve the opposite result. [emphasis added in underline]

69 These words are salutary of the threat that permitting service of multiple payment claims in the same payment claim period poses. It is a threat we must heed and guard against.

The Act contemplates only one payment claim

70 As noted above at [60], s 10(1) is unequivocal – only one payment claim may be served in each payment claim period. The use of "may" is permissive rather than compulsive in relation to the making of a payment claim. However, there is nothing in the language of s 10(1) that opens the door to more than one payment claim in a payment claim period. Consistent with this, ss 10(2), (3) and (4) each contemplate only one payment claim, as does reg 5(1). The sections in the Act on payment response, the adjudication application and the adjudication response, like their sister provisions in the NSWA, also contemplate only one payment claim. Indeed, the entire adjudication process is predicated on one payment claim being the subject matter of adjudication. To allow multiple payment claims for different reference periods to be served in the same payment claim period is to shoehorn unwarranted language into the Act.

71 Indeed, there is no necessity to resort to contorting and mutilating the language and tenor of the Act to allow for service of multiple claims for different reference periods in the same payment claim period. As noted in *Chua Say Eng*, s 10(3) specifically caters for a claimant who holds over. Such a claimant is therefore not disenfranchised. I make one further comment. Section 10(4) of the

Act states quite clearly that unsatisfied and unadjudicated (on the merits) repeat payment claims may be "re-served" on a consolidated basis under an overarching payment claim. The intent appears to be to consolidate all the claims under one roof, presumably with a view to avoiding the need for multiple payment responses and adjudication applications. This is an approach I would encourage. If repeat payment claims are given a statutory nudge in this direction by this option, that begs the question why a different approach ought to be encouraged for fresh payment claims, particularly in light of s 10(3). There is no conceivable reason for the adoption of one approach for repeat payment claims and another for fresh claims which have been held over. The end objective is one of streamlining the adjudication process by consolidating the claims under one roof, resulting in a consolidated payment response, and a consolidated adjudication. This avoids or at the very least reduces the confusion as to which payment claim needs to be responded to. Also, this ameliorates if not eliminates the risk of not addressing a payment claim either in whole or in part because of a misjudgement as to which is a valid payment claim. Consistency of treatment for both repeat and fresh claims must surely be a desirable outcome. As noted above at [39]-[40], I believe the Court of Appeal in *Chua Say Eng* intended this result.

Some remarks on Clause 21

72 As an opening observation, I note that the Adjudicator did not touch on the terms of the Contract. This is unfortunate. It is evident from a review of cl 21(a) that the parties contemplated only one payment claim in each payment claim period, to be served no later than the 30th of the month. That payment claim was to be met in turn by a payment response within ten days (cl 21(b)) and payment within twenty days (see cl 21(c)). Therefore, the Defendant's contractual expectation was to receive monthly progress payments upon service of monthly payment claims by the 30th of any given month. Parties had agreed on one payment claim per month. There is no room in cl 21 to burrow in the words "per reference period" to qualify the monthly payment claim. In fact, the Defendant did not advance the argument that the contractual intention of the parties was in fact that. Therefore, if the parties had agreed to only one payment claim in each payment claim period, it is difficult to understand why that bargain was not given effect to by the Adjudicator. As long as cl 21(a) was not inconsistent with s 10(1), it ought to have been given effect to.

73 In fact, the parties might have contractually provided for one payment claim per month to prevent the sort of abuse or confusion "banking" of payment claims could cause. A respondent faced with the possibility of being served with multiple payment claims for different reference periods in the same payment claim period might want to contractually avert that risk of being inundated. Clause 21 or clauses of that ilk could be the result of a desire to eliminate that risk. The Adjudicator ought to have recognised this.

Could the Defendant have saved PC4?

74 Could the Defendant have saved PC4 by withdrawing PC3R when it served PC4? The adjunct questions that arise are: (a) could PC3R have been withdrawn in the first place and if so, could such withdrawal have been unilateral; and, (b) could such withdrawal be implied by the service of PC4? Though these questions do not specifically arise for consideration in light of my conclusion on the correct interpretation of s 10(1), they do merit consideration. I am of the view that these questions ought to be answered in the affirmative.

75 The argument that withdrawal can be unilateral and implied by the service of a subsequent payment claim in the same payment claim period was made in *Kitchen Xchange*. The court declined to address the argument instead finding on the evidence that there was nothing to indicate that an earlier payment claim was withdrawn by the service of a subsequent payment claim (see *Kitchen*

Xchange at [27]). I am, however, prepared to be more robust. I see no reason why, as a matter of principle, a payment claim cannot be withdrawn unilaterally and why such withdrawal cannot be implied from the circumstances. I will explain.

76 It must be remembered that while the Act creates a statutory right to progress payments, it does not compel a claimant to make a payment claim if its cash flow demands do not dictate that it does so – see *Chua Say Eng* at [90]. The option of triggering the right to payment of a progress payment by serving a payment claim is the claimant's. Indeed, the entitlement to progress payment and the due date for the payment are first and foremost a matter of contract – see the definition of "progress payment" in s 2 and the manner in which the due date for payment is ascertained in s 8. The same is true as to the timing and frequency of service of a payment claim – see s 10(2). One is therefore in substance dealing with a contractual right to payment, which upon service of a payment claim, is elevated to a statutory right under the Act.

77 Seen in this light, I see no reason why the beneficiary of the right – the claimant – cannot withdraw it if it so choses. The DNA of the right is contractual and therefore amenable to being waived or not asserted, or indeed withdrawn. Ultimately, it is the claimant's entitlement to pursue its right to payment as it sees fit, subject of course to the strictures of the Act. While it is true that service of a payment claim does trigger the adjudication process under the Act, there is no compulsion to take that process forward and, indeed right to the very end by filing and pursuing an adjudication application to determination. If a claimant can elect not to take a payment claim forward, it surely can choose to withdraw the same. In my view therefore, the Defendant could have withdrawn PC3R unilaterally.

78 Can a claimant substitute a payment claim with another? I would again say "yes" provided service of the second payment claim is made within the same payment claim period. A payment claim which falls outside that payment claim period would not necessarily be invalid. I would suggest that a payment claim served in such circumstances ought to be regarded as a payment claim served in respect of the next payment claim period provided there is nothing in the contract that prohibits this. Indeed, *Chua Say Eng* at [94] appeared to make the same point (see also *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648 ("*L H Aluminium*") at [46] which says much the same).

79 Can the withdrawal be implied from the circumstances? This is a more difficult question given the need for certainty as to whether there is a payment claim that requires a payment response. In principle, I again do not see why the withdrawal cannot be implied from the circumstances. If a payment claim can be expressly withdrawn, why can't it be impliedly withdrawn in the right circumstances? Further, if a claimant can be estopped from asserting that a payment claim has been served (see the discussion *infra* at [109]), I do not see why its conduct cannot in an appropriate situation be regarded as an implied withdrawal of a payment claim. The claimant would surely be estopped from asserting that the first payment claim retains sustenance, and by the same token, obliged to accept that the second payment claim is the salient one. Granted that where estoppel applies, it is the respondent rather than the claimant who is asserting the argument. However, if the circumstances are clear that there has been a withdrawal and substitution, I do not see why there should be a difference. The same factual matrix could give rise to both. The investigation is ultimately factual – whether a payment claim has been served triggering the adjudication process. However, given the serious consequences that befall a respondent who fails to respond to a payment claim, the circumstances must be abundantly clear that the earlier payment claim has been withdrawn by service of a subsequent payment claim in the same payment claim period.

80 As will become apparent from the discussion under Issue 3(b) herein, the present facts do not

warrant the conclusion that PC3R was withdrawn by service of PC4. Indeed, the Defendant's further arguments go against the grain of that conclusion. The argument assumes that an adjudication application could have been presented on PC3R notwithstanding PC4, if the Plaintiff had not allegedly misrepresented its position on the validity of PC3R.

81 There is an easy solution to pierce the mist of controversy – greater contractual precision through better drafting. The contract could simply deem that a second payment claim in time served in the same payment claim period would substitute the earlier payment. Alternatively, the contract could deem the second payment claim as having been served in the next payment claim period, *ie*, it is held over to the next progress payment, assuming of course that it covers a different reference period from the earlier payment claim. Such clauses could help obviate inadvertent non-compliance with s 10(1).

Concluding remarks on Issue 1

82 For these reasons, my conclusion is that a claimant may serve only one payment claim in a payment claim period. I am of the view that service of multiple payment claims for different reference periods served in a single payment claim period is not in accordance with s 10(1). The salient provisions of the Act, the decision in *Chua Say Eng*, and equivalent provisions of the NSWA as interpreted by the Australian decisions discussed earlier all clearly point to this conclusion. The conclusion is the same regardless of whether the payment claim period is as specified in reg 5(1) or a different period under the contract *per* s 10(2)(*a*). Section 10(1) is the operative provision.

83 On the present facts, the Defendant was entitled to serve only one payment claim a month, under s 10(1) read with cl 21(a). PC3R would have been the relevant claim for the payment claim period for the progress payment in December 2014. PC4, having come after PC3R in the same month (the payment claim period here), would not have been a valid payment claim under s 10(1) read with cl 21(a). The vitality of a payment claim is essential to the sustenance of the adjudication determination as the adjudication application is presented on its back. Given that PC4 was invalidated by PC3R, the Determination ought to be set aside.

84 In the final analysis, the common thread that emerges is one of safeguard against abuse by claimants. The Act facilitates the cash flow of the construction industry by creating a statutory right of payment for claimants through an expeditious process that requires strict adherence to timelines (see the importance of strict adherence to timelines notwithstanding the *de minimis* principle in the Court of Appeal decision in *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] SGCA 42 ("*Citiwall*") (at [27]-[30]) for responses, notices, and adjudication applications and responses). It creates a fast-track segue to dispute resolution in the courts or arbitration by offering cash-starved claimants temporary relief, leaving the substantive disputes to be resolved in the usual way on another occasion (see *Citiwall* at [28]). The New Zealand Court of Appeal decision in *Salem Ltd v Top End Homes Ltd* [2005] NZCA 406 (at [22]) rightly observed that the intention of legislation such as the Act is to "pay first and argue later". That, however, is not an invitation to abuse. A balance has to be struck between the interest of the claimant and the respondent. As noted in *Kitchen Xchange* and the Hansard on the NSWA, there is a need to safeguard against abuse by claimants. Claimants who decide, for whatever reason, to hold over their payment claims are obviously not in pressing need of the relief under the Act. Allowing such claimants to "bank" their claims is not in keeping with the legislative intent of the Act and indeed, can lead to abuse. A safeguard is therefore necessary, and in my view exists in s 10(1). The observations of the court in *Kitchen Xchange* on the vice of multiple claims at [29] are particularly germane:

> The vice of submission of repetitive payment claims is obvious… It is clearly deleterious to a

respondent to be forced to reply individually often at the expense of time, labour and money, to repetitive payment claims which all relate to the same reference date. On the other hand, should the respondent take the view that it has done enough, it is courting the risk that a particular document will be held and thus, sufficient to initiate the process of recovery.

85 The observations of Lee Seiu Kin J in *LH Aluminium* (at [46]) as regards repeat claims are equally pertinent to the risk posed by multiple claims which are not repeat claims:

> 46 In my view, s 10 of the Act is equivocal as to whether a repeat claim is permitted and it is a matter of judicial policy in interpreting the Act so as to achieve its objectives. On the one hand, as Woo J pointed out in [68] of *JFC Builders* ([30] *supra*), permitting repeat claims opens the Act to abuse by rendering the deadline nugatory as a claimant could merely issue and serve a repeat claim. On my part, I do not think this is a real problem in view of the holding in *Terence Lee* ([28] *supra*) at [94] that a payment claim served just after the deadline for that month could be construed as a payment claim within the deadline for the following month. In my view, the more serious concern is that this paves the way for a claimant to ambush the respondent by repeatedly serving the same payment claim month after month. The present case is a good example of sustained repeat claims. The first payment claim was served on 22 June 2013 and this was repeated four times over the next five months. The danger for a respondent is that the moment he slips up and fails to serve a payment response within the deadline, the claimant could file an adjudication application (although that is not a feature in the present case). Because s 15(3)(*a*) of the Act forbids consideration of a late payment response, the claimant would be virtually certain of obtaining an adjudication determination in his favour. *JFC Builders* is an example of such an ambush: a payment claim was submitted on 15 December 2010 for about $360,000 and the respondent made payment of $125,000. The following month, on 24 January 2011, the claimant submitted a payment claim for the balance of about $235,000 in respect of the same period in the December payment claim. The respondent failed to provide a payment response in time and the claimant successfully obtained an adjudication determination in its favour. *Doo Ree* ([38] *supra*) is yet another example. The claimant had submitted a payment claim on 29 November 2008 for the sum of about $254,000. The respondent did not provide a payment response in time and an adjudication application was made. However, the adjudicator held that the claim was premature under s 13(3)(*a*) and dismissed it pursuant to s 16(2)(*a*) of the Act. On 30 January 2009, the claimant submitted a second payment claim for the reduced sum of $202,349.41 but in relation to the same works as the earlier claim. The respondent provided a payment response in which the claim was refuted on the basis that this was a repeat of the earlier payment claim. The claimant did not make an adjudication application in this instance, but two months later, on 31 March 2009, filed a payment claim for the same sum of $202,349.41. The respondent did not provide a payment response to this claim and the claimant filed an adjudication application. [emphasis added in underline]

86 These are observations I align myself with completely. Indeed, they apply with greater force in the present context of fresh payment claims filed in the same payment claim period. At the heart is the risk of abuse by the claimant. Disputes such as the present will result if the door is not firmly shut on service of multiple payment claims in the same payment claim period.

87 Finally, a footnote to Issue 1. Clause 21(a) bears similarity to clauses in several standard form contracts that are in use in Singapore. A schedule of these clauses is annexed hereto as Annex 2. The differences between cl 21(a) and these clauses, insofar as they relate to Issue 1, do not appear material. While an argument was made that the views expressed above on cl 21(a) read with s 10(1) may apply to those clauses as well, I declined to take a firm view on this without more careful consideration of those clauses in the full context of the agreements in which they were found.

Issue 2: Is an exact copy of the payment claim required?

88 The Plaintiff had a second string to its bow if PC4 was held to be a valid payment claim. The arrow that the Plaintiff shot was that the Application was filed in breach of s 13(3)(*c*) read with reg 7(2)(*e*). In the main, the submission was that the Application did not annex *a complete and exact* copy, as opposed to a copy, of PC4.

89 Section 13(3)(*c*) provides as follows:

> **Adjudication applications**
>
> 13.—(1) A claimant who is entitled to make an adjudication application under section 12 may, subject to this section, apply for the adjudication of a payment claim dispute by lodging the adjudication application with an authorised nominating body.
>
> (2) An adjudication application shall not be made unless the claimant has, by notice in writing containing the prescribed particulars, notified the respondent of his intention to apply for adjudication of the payment claim dispute.
>
> (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;
>
> …
>
> [emphasis added in underline]

90 Regulation 7(2)(*e*) provides as follows:

> **Adjudication applications**
>
> 7.—(2) Every adjudication application shall —
>
> …
>
> (*e*) be accompanied by a copy of the relevant notice of intention to apply for adjudication, a copy of the relevant payment claim and a copy of the payment response (if any) thereto.
>
> …
>
> [emphasis added in underline]

91 The Plaintiff's submission was that s 13(3)(*c*) directed an adjudication application to be accompanied by such documents as might be prescribed. As reg 7(2)(*e*) prescribed a copy of the payment claim, the failure to annex an exact copy of the payment claim was fatal. Given that the

Defendant allegedly did not annex an exact copy of PC4 to the Application, the Adjudicator was duty bound to reject the same pursuant to s 16(2)(*a*). Section 16(2)(*a*) provides as follows:

> (2) An adjudicator shall reject —
>
> > (*a*) any adjudication application that is not made in accordance with section 13(3)(*a*), (*b*) or (*c*)…

92 The Plaintiff levied three complaints as regards the copy of PC4 that was annexed to the Application ("APC4"), arguing that:

(a) the Defendant had included additional pages and information in APC4;

(b) the Defendant had switched the order of several pages found in PC4; and

(c) the Defendant had altered or modified the contents of certain pages in PC4.

93 I disagreed with the Plaintiff's submission on three grounds. First, I took the view that it was sufficient that the copy of the payment claim that was to accompany the Application need only be a copy, and not an exact copy, of the payment claim. In other words, it was not important whether an exact copy had been annexed to the Application. However, it was important whether there has been any change to the claim or the basis of the claim in the accompanying payment claim. Secondly, the alleged deviations in APC4 were so trivial that they must surely be subject to the *de minimis* principle. Thirdly, non-compliance with s 13(3)(*c*) read with reg 7(2)(*e*) would not result in the invalidity of the application, in light of the legislative purpose of the Act. I should add that the Adjudicator also disagreed with the Plaintiff on this submission.

94 It is axiomatic that the service of a payment claim initiates the adjudication process under the Act. It is important that it contains sufficient detail to enable the respondent to know the case it needs to meet and to decide the course of action it wishes to take. The Act and the Regulations therefore prescribe the details that need to be included in the payment claim – see s 10(3) and reg 5(2). However, notably, while prescribing the details that need to be contained in a payment claim, the Act and the Regulations stop short of stipulating a format for the same. This is deliberate in my view for one obvious reason. The Act was enacted to facilitate recovery of progress payments through a simplified and expeditious process for recovery of progress payments. A formalistic and pedantic approach would go against that grain. Contractors and sub-contractors could flounder if a rigid format for payment claims was insisted upon. Indeed, as noted in *Australian Timber* (at [56]-[61]), the Australian authorities have adopted a test to determine compliance with the formal conditions prescribed for the contents of a payment claim that are not overly demanding of the claimants. It is important to use an objective lens to ascertain whether the statutory criteria has been complied with, always bearing in mind that the "*actors in the construction industry often operate on tight deadlines and do not always communicate ideally in a formal manner*" (*Australian Timber* at [63]).

95 Indeed, it was recognised in *Chua Say Eng* (at [75]) that a payment claim need not be cast in formal tones or legalese provided it contained the information that was prescribed by the Act and the Regulations. It could be voluminous or might contain confusing elements such as an informal or unbusiness-like tone. It did not have to state that it was a payment claim to qualify as one under the Act – see *Australian Timber* at [19]. The position in New Zealand is also illuminating. Section 20(2) of the CCA is very similar in tenor to s 10(3) and reg 5(2). The New Zealand cases, while acknowledging that s 20(2) of the CCA is cast in mandatory language, have said that technical quibbles that the

section has not been complied with would be given short shrift – see *eg*, *George Developments Ltd v Canam Construction Ltd* [2006] 1 NZLR 177 ("*George Developments*") (see *infra* at [98]). Adopting the same approach for the Act would in my view undoubtedly facilitate its object.

96 Seeing as how there is an absence of formalities as regards a payment claim, it is difficult to see why an application that is not accompanied by an exact copy of the payment claim will be regarded as invalid. Regulation 7(2)(*e*) does not say that an exact copy is required and I see no reason why it should be read in that manner. It is relevant to remember why the payment claim has to accompany the adjudication application. The payment claim and the payment response frame the issues in the claim before the adjudicator and hence his jurisdiction – see in particular ss 17(3)(*c*) and (*d*). It is material whether the adjudicator has before him the claim that initiated the adjudication process under the Act and which the respondent has met in its payment response. It is, however, not material whether that payment claim is an exact reproduction. If the Plaintiff is right, by simply adding or substituting to a payment claim a page or two of the documents in support would invalidate the adjudication application even if there is no alteration to the claim. The difficulty presented by the Plaintiff's submission is evident from just this one example.

97 There is another reason that militates against the Plaintiff's submission – the informality of the payment claim. That the payment claim may be informal in itself suggests that the claimant may wish to buttress it with additional information when submitting the adjudication application. The Act applies to an industry that quite often operates with a degree of informality. Indeed s 13(3)(*d*) recognises this by allowing additional material in support of the adjudication application to accompany the same. If such material is incorporated into the payment claim, the payment claim that accompanies the adjudication application will surely not be an exact copy. Ought it then to be set aside? Surely not.

98 I am again fortified in my view by the approach taken in New Zealand to technical non-compliance with s 20(2) of the CCA. In *George Developments*, it was felt that substantive compliance ought to be the test, and technical quibbles and glitches ought to be given short shrift. The following passage is helpful (at [42]):

> [42] As is noted in Smellie Progress Payments and Adjudication (2003) at 31, "Although [the s 20(2)] requirements are mandatory, technical quibbles that they have not been complied with will probably receive scant attention". The learned author notes the New South Wales case of *Hawkins Construction v Mac's Industrial Pipework* [2001] NSWSC 815 where Windeyer J considered the validity of a payment claim under legislation equivalent to the New Zealand Act and said at paragraph 8:
>
> > "8 [Counsel] contended that the payment claims served on the plaintiff … were ineffective because they did not comply with section 13(2)(a) and (c) of the Act. The arguments were that they contained the incorrect contract number and abbreviated the name of the Act under which the claim was made … As to the first, while the contract number may have been wrong in some cases, the claims did identify the work done. The second argument was that because the payment claims abbreviated the name of the Act, they did not fulfil a statutory requirement to name the Act. This argument might have had some weight in 1800. In 2001, an argument based on the absence of the word "and" and the letters "USTRY" has no merit. It should not have been put.
>
> [43] We acknowledge that the approach of this appellant was not as pedantic as those confronting Windeyer J, but the general observation that technical quibbles should not be allowed to vitiate a payment claim that substantively complies with the requirements of the Act is critical and needs to be weighed alongside the "technocratic" interpretation advanced by George.

[emphasis added in underline]

99 The same approach was taken in the decision in *Protectavale Pty Ltd v K2K Pty Ltd* [2008] FCA 1248 (in relation to s 14 of the Building and Construction Industry Security of Payment Act 2002 (No 15 of 2002) (Vic)), where the Federal Court of Australia eschewed an overly demanding and unduly technical approach to the issue of compliance (at [11]). In the same vein, the mandatory language of s 13(3)(*c*) and reg 7(2)(*e*) ought not to be read as requiring an exact copy of the payment claim. To conclude otherwise would be to allow technical quibbles of non-compliance to prevail over the object of the Act. The test ought to be whether there has been compliance with the statutory requirements as assessed through an objective lens applying a not overly demanding and technical standard (*Australian Timber* at [61] and [63]). In the round, it must not be forgotten why the payment claim has to be annexed to the application – so that the payment claim that was served is placed before the adjudicator. As the payment claim and the payment response frame the issues before the adjudicator, he should therefore have the correct documents before him. Having the correct documents does not mean an exact copy of those documents.

100 I would hasten to add that what I have said ought not to be construed as leaving the door open to replacing, altering or modifying the contents of a payment claim in terms of the information that is prescribed in s 10(3) and reg 5(2). That would place before the adjudicator a different set of documents from those which had framed the issues between the parties. This joinder of issues is fundamental to the adjudication process as it defines the adjudicator's jurisdiction. Even in such circumstances, it may not necessarily follow that non-compliance will invariably result in invalidity of the adjudication provided the correct documents are eventually before and considered by the adjudicator (see the discussion *infra* at [105]). I, however, express no firm view on this point.

101 I now turn to the three complaints of the Plaintiff. I shall take the first and second collectively as the explanation offered by the Defendant for both is the same. The Defendant acknowledged the complaints but submitted that it had included additional drawings in support of the claim, and re-arranged certain documents – all drawings – to give the Adjudicator better clarity and context to the claim. In response, the Plaintiff conceded that the Defendant was entitled to include supporting documents and information in the Application in light of s 13(3)(*e*). However, the Plaintiff submitted that it was quite another matter to pass APC4 off as PC4. I found the submission startling. If additional documents could be introduced when filing the Application, how does it matter if they were introduced as part of PC4 or independently annexed to the Application? Indeed, annexing them to PC4 would give it its full colour thereby benefiting the Adjudicator. The complaint seemed to me to smack of the technical quibbles that the New Zealand cases unequivocally say ought to be frowned upon.

102 Nothing specifically was submitted on why re-arrangement of the drawings was impermissible, probably because nothing of substance could have been said. It is difficult to comprehend how re-arrangement of pages could mean that PC4 has changed in any material manner. It did seem that the complaint bordered on the frivolous.

103 I turn to the third and last of the Plaintiff's complaints – that there had been alteration or modification to certain pages of PC4. Instinctively, this did raise warning signs of non-compliance of a fundamental nature. However, closer examination suggested that it was also without substance. The Defendant explained that the differences between PC4 and APC4 arose primarily from a failure to retain in its files a copy of PC4. I accepted the explanation as it appeared credible on its face and there was nothing to controvert it. Indeed, the Plaintiff did not challenge the explanation.

104 In any event, the deviations complained of were of such a minor variety that they would be subject to the *de minimis* principle. In the final analysis, the Plaintiff's complaints were best described

in Shakespearean language as "much ado about nothing".

105 Finally, even if there was non-compliance with reg 7(2)(*e*), that would not render the Application null and void. It is important to examine whether s 13(3)(*c*) read with reg 7(2)(*e*) was so important a provision that non-compliance would defeat the legislative purpose of the Act. This was the test laid down in *Chua Say Eng* (at [67]) and followed in *Australian Timber* (at [30]). I am of the view s 13(3)(*c*) did not carry such importance. In *Australian Timber*, this court considered whether non-compliance with s 10(3)(*a*) and reg 5(2) rendered a payment claim invalid. The court held it did not. Regulation 5(2) stipulates the information that needs to be set out in the payment claim. It would seem that not annexing an exact copy of the payment claim is less egregious than not complying with reg 5(2). I am therefore of the view that even if there was non-compliance with reg 7(2)(*e*), the Application was not null and void.

Issue 3(a): Further arguments of approbation and reprobation

106 In its request for further arguments dated 24 July 2015, the Defendant shifted ground. The Defendant's counsel accepted that service of multiple payment claims for different reference periods in the same payment claim period was not consistent with s 10(1) and cl 21(a). However, the Defendant submitted that the Plaintiff had approbated and reprobated on the validity of PC3R. The submission had two inter-related prongs. First, the Defendant argued that the Plaintiff had acted in bad faith by misrepresenting the invalidity of PC3R throughout the period when the Defendant could have presented an adjudication application on the same. This induced the Defendant to present the Application on PC4. Secondly, by the time the Plaintiff had made its position clear on PC4 – identified by the Defendant as the Plaintiff's letter dated 20 January 2014 – time for filing an adjudication application on PC3R had lapsed. The Plaintiff ought to be therefore barred from using PC3R to invalidate PC4 as the Plaintiff's shift of ground had prejudiced the Defendant.

107 I had significant difficulties with the arguments both on the facts and in law. I should observe that the arguments appeared to lift off from an earlier argument of estoppel based on an alleged representation in December 2014 by the Plaintiff's general manager that all payment claims must be submitted on the 30th of the month, and which the Defendant purportedly relied on in serving PC4.

108 The doctrine of approbation and reprobation precludes a party who has exercised a right from exercising another right which is alternative to and inconsistent with the right that has been exercised – see *Treasure Valley Group Ltd v Saputra Teddy and another (Ultramarine Holdings Ltd, intervener)* [2006] 1 SLR(R) 358 (at [31]). It has its roots in the common law doctrine of election. In principle, I see no reason why the doctrine ought not to apply to payment claims under the Act for the same reason why estoppel has been recognised as being applicable. Both doctrines have a common seed – the disapproval of inconsistent behaviour.

109 *Chua Say Eng* recognised (at [33], [73] and [74]) that estoppel might operate in the context of payment claims. The same point was made in *Australian Timber* (at [30]) following *Chua Say Eng*. The example sketched in *Chua Say Eng* illustrates the role that estoppel might play. The situation was one where the payment claim satisfies all the requirements under the Act, but is expressly stated not to be a payment claim. The Court of Appeal held that the claimant would be estopped then from asserting that it had served a payment claim under the Act. Similarly, where a party elects to rely on a payment claim for the purpose of the Act, there really should be no reason why that election should not be binding. Such a party should not be allowed to resile from the election by relying on an inconsistent position.

110 There is an easy answer why this must be so. The Act recognises that, subject to its

provisions, the entitlement to progress payment, and the right to serve a payment claim, are contractual. The statutory right to payment under the Act is triggered by the terms of the contract. Having a contractual underpinning means that principles that frown on inconsistent conduct such as estoppel and the doctrine of approbation and reprobation would apply to the question of whether the right to payment has been triggered. A claimant, faced with two inconstant courses of conduct and having elected one, must be treated as bound to that election. However, the difficulty the Defendant faced with its argument was that it ran straight into the wall that is s 10(1).

111 The language of s 10(1) is unequivocal and mandatory – only one payment claim may be served in respect of a progress payment. It would surely be incorrect to conclude that the doctrine of approbation and reprobation could allow two or more payment claims in the same payment claim period to be presented notwithstanding the limitation in s 10(1). This would be to disfigure the language of the section, and in the process undermine its purpose. In fact, I believe that the position has been settled by *Chua Say Eng* and the subsequent decisions of this court in *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157, *Admin Construction Pte Ltd v Vivaldi (s) Pte Ltd* [2013] 3 SLR 609 and *LH Aluminium*, following *Chua Say Eng*. It was held there that estoppel does not prevent a party from raising a jurisdictional challenge in a setting aside application even if it had not been raised before the adjudicator. If a failure to raise a jurisdictional challenge before an adjudicator does not operate as an estoppel, I do not see how the doctrine of approbation and reprobation can do any better to confer jurisdiction. At the nub of the analysis is whether the requirements of the Act necessary to confer jurisdiction on the adjudicator have been satisfied. The inequitable conduct of one party cannot in and of itself result in the re-writing of the statutory language so that jurisdiction can be conferred. As a matter of first principle, I have significant difficulty in understanding how inconsistent conduct by a party can confer jurisdiction on an adjudicator in the face of contrary statutory language.

Issue 3(b): Was there in fact approbation and reprobation?

112 My conclusion on the applicability of the doctrine of approbation and reprobation was sufficient to dispose of the Defendant's further arguments. However, as much was made by the Defendant of the Plaintiff's conduct, I will address the same for completeness. For a start, as noted earlier, the circumstances surrounding the issuance of PC4 were a matter of significant controversy. It would have been impossible to have resolved it on the basis of affidavit evidence alone. In the course of arguments, I invited the Defendant's counsel to apply for leave to cross-examine deponents of the relevant affidavits on this issue. The invitation was, however, not accepted. Nonetheless, even if I were to take the Defendant's allegation at face value and at its highest, all that was alleged was that the Plaintiff's general manager had said was that the payment claims under the Contract had to be issued on the 30th of the month. The Plaintiff's general manager did not represent that there could be two payment claims in the same payment claim period, even if they were for different reference periods. As noted earlier, cl 21(a) contemplated only one payment claim per month (even if the payment claims were for different reference periods). That being the case, even if the Defendant had been told, following the service of PC3R, to submit a fresh payment claim on the 30th of the month, a reasonable interpretation of that would be for PC3R to be substituted with a payment claim served on 30 December 2014. It certainly could not have been understood as an invitation to serve two payment claims for the progress payment for December 2014. Fatally, the Defendant did not withdraw PC3R when it served PC4. The difficulties did not stop there.

113 The Defendant alleged that the Plaintiff represented in Payment Response 3 that PC3R was invalid because it had been served out of time. I am not sure that there was a representation that PC4 would be regarded as valid to begin with, let alone one of fact. The Plaintiff was, as it was entitled to, mounting a jurisdictional challenge on the validity of the PC3R. In doing so, it was stating

its position on the validity of PC3R based on a construction of cl 21(a) and the Act. At the same time, in the 9 January letter, the Plaintiff also challenged the validity of PC4 on the basis that it had been served after PC3R in the same payment claim period. Again, this could not on any basis be characterised as a representation, let alone one of fact. Further, it would have been apparent that the real challenge from the Plaintiff was to PC3R. Payment Response 3, unlike the 9 January letter, also delved into the merits of the claim. That ought to have indicated to the Plaintiff where the real contest lay.

114 The Defendant was therefore left in a position of having to decide which of its payment claims, PC3R or PC4, it wished to proceed with to adjudication. It made that election on 17 January 2015 by serving a notice on PC4 under s 13(2). It should be noted that as a precursor to that notice, by an email dated 16 January 2015, the Defendant wrote to the Plaintiff to notify that it would be proceeding on PC4 because of the alleged representation of the Plaintiff's general manager in December 2014. This email was not in evidence. Even if it was, it would have made no difference because the Plaintiff had made its position quite clear that PC4 was being challenged as well.

115 Having made the election on 17 January 2015, the Defendant had to stand or fall by the same. The adjudication process under the Act had been initiated. The fact that the Plaintiff wrote on 20 January 2015 reiterating that PC4 was invalid as PC3R had not been withdrawn did not advance the Defendant's cause at all. The Defendant's argument that this came after the time for applying for adjudication on PC3R had expired forgets two facts. First, this letter did nothing more than reiterate the position in the 9 January letter. Secondly, the Defendant had elected to proceed with PC4 on 17 January 2015 in full knowledge of the challenge that was being made to the same in the 9 January letter. There was simply no basis for the Defendant to argue that it was led into believing that PC4 would not be challenged. The Defendant chose its own path knowing full well that it was fraught with the danger and pitfalls of a jurisdictional challenge. Unfortunately it did not choose wisely. The facts do not provide any sustenance for the Defendant's further arguments.

116 In conclusion, I found that the evidence did not suggest that the Plaintiff approbated and reprobated on the validity of PC3R. In fact, they point to the contrary conclusion. Even if they did, such conduct could not in my view result in jurisdiction being conferred on the Adjudicator to hear the Application.

Conclusion

117 For the above reasons, I allowed the present application with costs fixed at $5,000 inclusive of disbursements for the first round of hearings and $2,500 inclusive of disbursements for the hearing involving the further arguments.

Annex 1

NSWA	**The Act or the Regulations**

Section 4 "**payment claim**" means a claim referred to in section 13. … … "**progress payment**" means a payment to which a person is entitled under section 8, and includes (without affecting any such entitlement): (a) the final payment for construction work carried out (or for related goods and services supplied) under a construction contract, or (b) a single or one-off payment for carrying out construction work (or for supplying related goods and services) under a construction contract, or (c) a payment that is based on an event or date (known in the building and construction industry as a "milestone payment").	**Section 2** "payment claim" means a claim made by a claimant for a progress payment under section 10… … "progress payment" means 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…
Section 8 **Rights to progress payments** (1) On and from each reference date under a construction contract, a person: (a) who has undertaken to carry out construction work under the contract, or (b) who has undertaken to supply related goods and services under the contract, is entitled to a progress payment. (2) In this section, **"reference date"**, in relation to a construction contract, means: (a) a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract, or (b) if the contract makes no express provision with respect to the matter--the last day of the named month in which the construction work was first carried out (or the related goods and services were first supplied) under the contract and the last day of each subsequent named month.	**Section 5** **Entitlement to progress payments** **5.** Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment. [See also s 10(2) and reg 5(1) below]
Section 13	**Section 10**

Payment claims

(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the **"claimant"**) may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment.

(2) A payment claim:

(a) must identify the construction work (or related goods and services) to which the progress payment relates, and

(b) must indicate the amount of the progress payment that the claimant claims to be due (the **"claimed amount"**), and

(c) if the construction contract is connected with an exempt residential construction contract, must state that it is made under this Act.

…

(4) A payment claim may be served only within:

(a) the period determined by or in accordance with the terms of the construction contract, or

(b) the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied),

whichever is the later.

(5) A claimant cannot serve more than one payment claim in respect of each reference date under the construction contract.

(6) However, subsection (5) does not prevent the claimant from including in a payment claim an amount that has been the subject of a previous claim.

…

Payment claims

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.

(2) A payment claim shall be served —

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

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

(3) A payment claim —

(a) shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and

(b) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

(4) Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the secondmentioned payment claim relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.

Regulation 5(1)

Payment claims

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.

Annex 2 – Other standard form clauses resembling cl 21(a)

Standard forms for main contracts

Clause 31(2) of the Articles and Conditions of Building Contract (Lump Sum Contract, 9th Edition)

31(2)(a) The Contractor shall be entitled to serve on the Employer a payment claim (a copy of which shall be forwarded to the Architect) as follows:

(i) where pursuant to Sub-Clause (1)(b) hereof, the interim payment is to be based on periodic valuation, the Contractor shall submit the payment claim on the last day of each month following the month in which the Contract is made (or otherwise by such time or on such day specified in the Appendix): or

(ii) where pursuant to Sub-Clause (1)(a) hereof, the interim payment is to be by stage instalments, on the completion of the relevant stage.

Clause 32.1 of the Public Sector Standard Conditions of Contract for Construction Works 2014

32.1 Payment Claims

(1) The Contractor shall submit to the Employer (with a copy to the Superintending Officer), at monthly intervals (on the day of each month specified by the Superintending Officer following the month in which the Contract is made), a claim for payment (hereafter referred to as the "Payment Claim") in such form as the Superintending Officer may from time to time prescribe. For the purposes of payment claims made under this Clause, the Payment Claim shall have the same meaning ascribed in the Building and Construction Industry Security of Payment Act (hereafter referred to as the "Act").

Standard forms for sub-contracts

Clause 14.4 of the Conditions of Sub-Contract for use in conjunction with the Main Contract (Lump Sum Contract and Measurement Contract, 8th and 9th Edition) (Sub-Contract, 4th Edition)

14.4(a) The Sub-Contractor shall be entitled to serve on the Contractor a payment claim as follows:

(i) where pursuant to Sub-Clause 1(a) hereof, the interim payment is to be based on periodic valuation, the Sub-Contractor shall submit the payment claim on the last day) of each month following the month in which this Sub-Contract is made: or

(ii) where pursuant to Sub-Clause 1(b) hereof, the interim payment is to be by stage instalments, on the completion of the relevant stage."

Clause 27(1) of the Standard Conditions of Nominated Sub-Contract 2008 for use in conjunction with the Public Sector Standard Conditions of Contract for Construction Works 2008

17(1) The Sub-Contractor shall submit to the Contractor, at monthly intervals (on the day of each month specified by the Contractor following the month in which the Sub-Contract is made),

a claim for payment (hereafter referred to as "Payment Claim"). For the purposes of payment claims made under this Clause, the Payment Claim shall have the same meaning ascribed in the Building and Construction Industry Security of Payment Act (hereafter referred to as the "Act"). The Payment Claim shall be made in compliance with the requirements of the Act and shall show the amounts (hereafter referred to as the "Claimed Amount") to which the Sub-Contractor considers himself to be entitled up to the last day of the monthly interval in question in respect of the value:-

(a) of the Sub-Contract Works; and

(b) of any variations authorized under and all other amounts due under the Sub-Contract; and

(c) of the Plant, materials, goods and articles delivered upon the Site for use in the Sub-Contract Works.

...