IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 85

HC/Originating Summons No 1100 of 2015

Between

ASPLENIUM LAND PTE LTD

… Plaintiff

And

CKR CONTRACT SERVICES PTE LTD

… Defendant

GROUNDS OF DECISION

[Building and Construction Law - Dispute Resolution - Alternative Dispute Resolution Procedures]

ASPLENIUM LAND PTE LTD
v
CKR CONTRACT SERVICES PTE LTD

[2016] SGHC 85

High Court — Originating Summons No 1100 of 2015
Foo Chee Hock JC
14 December 2015; 2, 3 and 22 February 2016; 10 March 2016

12 May 2016

Foo Chee Hock JC:

1 The Plaintiff and Defendant entered into a contract for the construction of a residential condominium development, based on the amended Singapore Institute of Architects Articles and Conditions of Building Contract (9th ed, Reprint, August 2011) ("Conditions of Contract") (see para 5 of William Nursalim's affidavit dated 18 November 2015). The Plaintiff terminated the contract on 24 October 2014 (see Notice of Termination dated 24 October 2014 and para 7 of William Nursalim's affidavit dated 18 November 2015).

2 On 22 December 2014, the Defendant (contractor) served Payment Claim No 21 ("PC 21") on the Plaintiff (employer) and this

proceeded for adjudication in SOP/AA 27 of 2015 ("AA 27") on 6 March 2015 (Tab 7 of Plaintiff's Bundle of Documents ("PBOD"), see para 19). The adjudicator delivered his determination on 26 March 2015. On 2 April 2015, the Plaintiff lodged SOP/ARA03 of 2015 for a review of the adjudicator's determination, which resulted in a reduced adjudicated amount. Then on 7 October 2015, the Defendant served Payment Claim No 22 ("PC 22") on the Plaintiff. The Plaintiff provided their Payment Response No 22 ("PR 22") on 30 October 2015. On 12 November 2015, the Defendant lodged SOP/AA 423 of 2015 ("AA 423"). Most of these, and other events were detailed in the Plaintiff's chronology of events (see Plaintiff's Written Submissions dated 10 February 2016 ("P's WS") at para 16).

3 On 19 November 2015, the Plaintiff filed this originating summons seeking *inter alia* the following reliefs:

> 1. The Defendant forthwith withdraws the Adjudication Application No. SOP/AA 423 of 2015 dated 12 November 2015 made under the provisions of the Building and Construction Industry Security of Payment Act (Cap. 30B) and bears all costs of Adjudication Application No. SOP/AA 423 of 2015 consisting of the adjudication application fee and the adjudicator's fees and expenses.
> 2. A declaration that:
>
> a. Payment Claim No. 22 dated 7 October 2015 (**"PC 22"**) is invalid; and
>
> b. the adjudicator nominated or appointed in Adjudication Application No. SOP/AA 423 of 2015 has no jurisdiction to conduct the adjudication or determine Adjudication Application No. SOP/AA 423 of 2015.

> 3. The Defendant be permanently restrained from:
>
> a. taking any steps to prosecute any adjudication of the claims in PC 22 and/or Adjudication Application No. SOP/AA 423 of 2015 dated 12 November 2015;
>
> b. seeking to rely upon or enforce any adjudication determination rendered pursuant to SOP/AA 423 of 2015 in any manner whatsoever; and
>
> c. commencing any further adjudication proceedings in relation to the disputes which are presently the subject of arbitration proceedings commenced by the Defendant by way of a Request for Arbitration dated 10 November 2014.

4 The adjudicator had for his own reasons not proceeded with the hearing of AA 423 after being informed of the hearing of this originating summons (see correspondence at Tab 5 and 6 of P's WS).

5 The Plaintiff relied on two main grounds for seeking the reliefs in the present originating summons. The first was that the bulk of the claims in PC 22 comprised repeat claims that were prohibited under the adjudication scheme in the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("SOPA"). I shall refer to these claims as "prohibited repeat claims". Second, the Plaintiff argued that the remainder of the claims in PC 22, being claims for the period after the termination of the contract ("post-termination claims"), also could not come under SOPA's adjudication scheme. To be sure, the post-termination claims were not repeat claims in that they did not feature in PC 21; the Plaintiff had separate arguments for submitting that they were "outside the purview of" SOPA.

6 The Defendant's answer to the Plaintiff's case on prohibited repeat claims was focused on (what we referred to in arguments as) the "four heads of claim". What the Defendant did was to isolate various parts of PC 22 under each of the four heads and submit various reasons and arguments for saying that those claims were not prohibited repeat claims. The four heads had evolved after oral arguments and written submissions to their final form as set out in full at Annex A of the Defendant's Written Submissions dated 18 February 2016 ("D's WS"). These are summarised as follows:

(a) <u>First head – Reassessment at more than adjudicated amount in AA 27 and payments made so far</u>

The essence of this head related to the Plaintiff's reassessment of the Defendant's claims in PR 22, resulting in a "Final Valuation" which was *more than* the adjudicated amount and also what had been paid to the Defendant so far. The Defendant claimed the difference, asserting that the bulk of which consisted of "release of retention monies [for defects] under the Contract".

(b) <u>Second head – Reassessment at less than adjudicated amount</u>

The Defendant contended *further* that the Plaintiff should not have revalued any items in PR 22 at *less than* the adjudicated amount in AA 27. In doing so, the Plaintiff had deprived the Defendant of a sum of over $900,000.

(c) Third head (Materials on site) – Reassessment at more than adjudicated amount

The thrust here focused on the line item at S/No 22 of PR 22. In PR 21, the Plaintiff certified this item at nil (see item 19), whereas in PR 22 a sum of over $300,000 was allowed. The amount claimed in PC 21 and PC 22 (both at S/No 6) was the same.

The Defendant further argued that this was not a prohibited repeat claim because there was no adjudication of this item on the merits.

(d) Fourth head (Tools and equipment withheld at site) – Reassessment at more than adjudicated amount; and post-termination claims

There were two parts under this head. The first concerned the line item at S/No 26 of PR 22. This item was certified at nil in PR 21 (item 26) but in PR 22, the Plaintiff allowed an amount of over $200,000.

The second part (also in S/No 26 of PR 22) comprised additional claims for rental and value of materials/tools/equipment (see item 10 of PC 22 (p 360 of PBOD)) for the period from 24 October 2014 to 30 September 2015, which was after the termination of the contract. These were the post-termination claims referred

to above at [5]. As such they would be considered separately from the prohibited repeat claims.

7 The parties had canvassed numerous issues and had to reshape and redirect their arguments in response to new issues raised in the hearings and written submissions. In my view, the two essential issues that would be necessary and sufficient to determine this originating summons were:

(a) Whether PC 22 contained prohibited repeat claims; and

(b) Whether the post-termination claims under the fourth head of claim were prohibited under SOPA.

8 Implied in each issue was whether judicial intervention was necessary and justified at this stage.

Prohibited repeat claims

9 To reiterate, the Plaintiff's case was that the bulk of the claims in PC 22 were prohibited repeat claims under SOPA. It should be made clear that the discussion under this section covered all the four heads of claims, *less* the post-termination claims under the fourth head.

10 The logical starting point was to examine and compare PC 21 (Tab 3 of PBOD) and PC 22 (Tab 5 of PBOD). The following observations on the facts could be made: (a) the period covered in PC 21 was from 21 January 2013 to 24 October 2014 (when the Plaintiff terminated the contract); and (b) PC 22 was for the period from 21

January 2013 to 30 September 2015, which was almost a year after the termination of the contract. It could not be disputed that no further work was done by the Defendant after 24 October 2014, when they vacated the worksite.

11 Further, PC 22 was for the identical items of work, goods and services claimed in PC 21, save for some immaterial differences in the Defendant's valuations and the inclusion of the post-termination claims. The Defendant did not deny this and the fact that the identical claims had previously been adjudicated in AA 27. There had also been no issue raised concerning the payment of the adjudicated amount by the Plaintiff to the Defendant.

12 Before going further, it was imperative to examine the law to pinpoint the type of repeat claims that was prohibited under SOPA.

13 Both parties cited the Court of Appeal's decision 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*"). I begin by setting out an important passage (at [92]) from the judgment:

> We agree with the observations of the AR. A payment claim which has not been paid or partially paid before or without any adjudication under the Act is an unpaid claim. We see no reason why an untimely payment claim under reg 5(1) of the SOPR (whether served prematurely or out of time) should not be treated as an unpaid claim under s 10(4) of the Act. In our view, reg 5(1) of the SOPR does not limit such claims. *However, we qualify this conclusion to exclude amounts in previous*

> *claims which have been adjudicated upon on their merits for obvious reasons* (see *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69, and *Doolan v Rubikcon (Qld) Pty Ltd* [2008] 2 Qd R 117). In this connection, we should add that we do not approve the finding of the Assistant Registrar in *Doo Ree Engineering & Trading Pte Ltd v Taisei Corporation* [2009] SGHC 218 that s 10(1) of the Act prohibits all repeat claims (in that case, the repeat claim was a *non-adjudicated* premature claim).
>
> [emphasis added]

14 In this regard, I found the Plaintiff's reading of *Chua Say Eng* persuasive. A claimant may "roll-up" any payment claim which was not paid or paid in full (P's WS at para 144) but the Court of Appeal was careful to exclude "for obvious reasons" claims which had been adjudicated on the merits (see emphasised part in judgment above), clearly contemplating the sort of situation posed by the present PC 22.

15 More guidance and light could be found in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 ("*Admin Construction*"). I would have thought that Quentin Loh J's succinct analysis should have put this issue to rest. Loh J stated at [52] and [53]:

> 52 *Terence Lee* made clear the following in relation to "repeat claims":
>
> (a) First, a subsequent payment claim can include a sum which has been previously claimed (and therefore in one sense a "repeat" claim), but ***has not been paid***. Section 10(4) of the Act specifically deals with this. *A fortiori*, I would imagine that if a piece of work was done within the relevant month but not included for any reason in the relevant payment claim, there cannot be a bar against it being included in a later payment claim.
>
> (b) Secondly, where a payment claim has been made, but has not been adjudicated upon, *eg*, because no

adjudication application was made, it still remains an "unpaid" claim and could be the subject matter of a later payment claim and adjudication; see *Terence Lee* at [92]. For example, a claimant may choose not to lodge an adjudication application as he is too tied up trying to carry out his works or the requirements in s 12 of the Act were not or not yet satisfied; therefore the subsequent payment claim may include ("repeat") items in common and they nonetheless remain unpaid claims for the purposes of s 10(4) of the Act.

(c) Thirdly, a payment claim that has been dismissed by an adjudicator for being served prematurely or as an untimely claim under reg 5(1) or a premature adjudication application may be the valid subject of a subsequent adjudication ***provided it was not adjudicated upon and dismissed on its merits;*** it does not provide any ground for an estoppel.

(d) ***Fourthly, a payment claim or any part thereof which has been validly brought to adjudication and dismissed on its merits cannot be the subject of a subsequent payment claim or subsequent adjudication.***

53 I accept that the Court of Appeal in *Terence Lee* did not expressly say that claimants could incorporate an unpaid payment claim into a subsequent payment claim which is *empty* in content (*ie*, with no claim for new work done). However, I think it follows from the foregoing that there is no prohibition against a "repeat" claim unless it falls within [52(d)]: see also the extra judicial comments by Chan Sek Keong, former Chief Justice who delivered the judgment in *Terence Lee*, in the Foreword to *Security of Payments and Construction Adjudication* ([43] *supra*). ***In principle this must be correct, viz, that any payment claim or claims, even if "repeated" in more than one payment claim, can only be the subject, on the merits, of one adjudication.***

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

16 In short, based on the authorities above and for our purposes, a repeat claim that was prohibited under SOPA was a payment claim which had previously been brought to adjudication and had been determined on its merits.

17 A separate question as to what a determination on the merits meant was raised by the Defendant under the third head. The claim therein - at S/No 6 of PC 22 - was dismissed by the adjudicator in AA 27 for insufficiency of evidence (see para 172 of Adjudication Determination). The Defendant argued that as such there was no adjudication on the merits, hence this claim was not a prohibited repeat claim. In my judgment, a dismissal of a claim for insufficiency or want of evidence must be an adjudication on the merits. There was no reason in principle for distinguishing between a dismissal of a claim based on absence of legal or factual basis; or acceptance or rejection of evidence; or insufficiency or lack of evidence. That clearly was the position reached in other jurisdictions when confronted with this issue: see for example, *AE & E Australia Pty Ltd v Stowe Australia Pty Ltd* [2010] QSC 135 at [45] and [46].

18 Section 10(1) of SOPA provided the legal basis for the prohibition against such repeat claims. The commentary by Chow Kok Fong in *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) ("*Security of Payments*") at paras 5.21 and 5.22 was germane to this issue:

REPEAT CLAIMS

The Claim Situation

[5.21] An issue which has caused considerable debate until the recent decision of the Court of Appeal in *Chua Say Eng* is whether a claimant is entitled to submit more than one payment claim in respect of a particular payment entitlement. On this proposition, if a contract provides for monthly progress payments and a claim had been submitted for progress payment in respect of work done in February 2012, the claimant is not entitled to subsequently submit a further payment claim in respect of the same reference period. ***In effect, the claimant is afforded one opportunity to make a claim in respect of any progress payment entitlement. This proposition arises from a strict construction of section 10(1) of the Act.*** Section 10(1) provides:

> A claimant may *serve one payment* claim in respect of a progress payment on
>
> (a) One or more persons who, under the contract concerned, is or may be liable to make the payment …
>
> …
>
> [emphasis added]

The phrase 'serve one payment claim' is read to mean that ***the claimant is entitled to only one payment.*** On this point, the Explanatory Statement issued together with the Singapore SOP Bill clarifies:

> Clause 10 provides that a claimant may serve *a single payment claim in respect of a progress payment* in the form and manner prescribed. The clause clarifies that the claimant can nonetheless *include*, in a subsequent payment claim, an amount in a previous payment claim in relation to the same contract which ***remains unpaid*** subject to certain specified conditions.

> [5.22] In New South Wales and Victoria, the legislative intention arising from the speeches delivered during the reading of the respective SOP Bills appeared to be that a claimant should not be permitted to activate the adjudication process in respect of multiple payment claims. More specifically, the regime should not be used to re-agitate matters which have been disposed of earlier under the guise of a different claim premise.
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> [emphasis in original in italics; emphasis added in bold italics]

19 In *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 ("*JFC Builders*"), Woo Bih Li J decided at [47], [48] and [76] that the repeat claim (in the sense of "one which merely repeats an earlier claim without any additional item of claim" but which may have accounted for payment received since the earlier claim) was invalid. The learned author Chow Kok Fong observed that Woo J had so decided, notwithstanding that the "claim items [in the first claim] had not been the subject of an earlier adjudication" (para 5.51 of *Security of Payments*).

20 In the light of *Chua Say Eng* and *Admin Construction* which expressly disagreed (at [48] – [51]) with *JFC Builders*, I would respectfully differ from the view expressed in *JFC Builders* and hold that a repeat claim was prohibited only if it had previously been adjudicated on the merits (see also Foreword to *Security of Payments* by former Chief Justice Chan Sek Keong, at para 12). However, *JFC Builders* was significant in deciding that the effect of such a repeat claim was that it was invalid and should be set aside. Woo J said at [76] of *JFC Builders*:

> In the circumstances, I was of the view that a claimant is precluded from making a repeat claim. Section 10(1) is an important part of the scheme under SOPA and it is the legislative purpose that a breach of s 10(1) renders the payment claim invalid. Hence, Progress Claim No 8 was not a valid claim for the purpose of SOPA and the AD, which was based on Progress Claim No 8, was to be set aside.

21 Earlier at [43], Woo J held that:

> I was of the view that if the payment was in breach of s 10(1) SOPA, as alleged by the Plaintiff, that was not an irregularity which could be waived.

22 In the circumstances, I could not agree with the Defendant's contention (see D's WS at para 66) limiting the grounds of invalidity to breaches of s 10(3)(a) of SOPA and reg 5(2) of the Building and Construction Industry Security of Payment Regulations (Cap 30B, RG 1, 2006 Rev Ed) only.

23 That said, I found that the invalidity of a repeat claim was a matter that went to the jurisdiction of the adjudicator (see *Admin Construction* at [60]). In *Chua Say Eng*, after discussing the authorised nominating body's obligation under the scheme in SOPA to nominate an adjudicator (at [35]), the Court of Appeal stated (at [36]):

> In our view, if the respondent's objection to the jurisdiction or power of the adjudicator to conduct the adjudication is based on an invalid appointment, such a jurisdictional issue should be raised immediately with the court *and not before the adjudicator*. The reason is that since the objection is against the adjudicator's jurisdiction as an adjudicator, *he has no power* to decide if he has jurisdiction or not. *He cannot decide his own competency* to act as an adjudicator when such competency is being challenged by the respondent. An

> adjudicator who decides the issue may face one or other of the following consequences. If he accepts the respondent's objection and dismisses the payment claim, the claimant may commence court proceedings against him to compel him to adjudicate the payment claim. If he dismisses the respondent's objection and makes an award, the respondent could still raise the same objection in enforcement proceedings with respect to his award. *Accordingly, the adjudicator should proceed with the adjudication and leave the issue to the court to decide.*
>
> [emphasis added]

24 When read in the context of the issue under discussion, what the Court of Appeal meant must be that the adjudication should proceed on the non-jurisdictional issues only, leaving the jurisdictional issues to be raised "immediately with the court and not before the adjudicator". Hence, the judgment went on to discuss the consequences if the adjudicator proceeded to decide his own competency (see also [64] and [65] of *Chua Say Eng* amplifying on the role of the adjudicator).

25 The extra judicial comments by former CJ Chan in the Foreword to *Security of Payments* further clarified the position, as follows (at para 8):

> The time and effort devoted by adjudicators to deciding such jurisdictional issues… only to be duplicated by the High Court when the respondents take the rear-guard action of setting aside the adjudicator's application, can be avoided by separating the merits of the payment claim (ie the amount payable under a payment claim) from the legal objections to the adjudication application and confining the function of the adjudicator to the determination of the merits of the claim. *Any defence grounded on lack of jurisdiction and/or illegality should only be heard by the court as a threshold issue, instead of being heard, as has been the practice up to now, by the*

> *adjudicator at the adjudication stage. In Chua Say Eng, the Court of Appeal held that such an issue should not be decided by the adjudicator as he is not competent to so do.* It is also desirable that such jurisdictional issues should not be decided by an Assistant Registrar in the first instance (as is the current practice) but by a High Court Judge (as in Australia). This practice adds an unnecessary layer of judicial adjudication, resulting in additional costs and delay in resolving such issues.
>
> [emphasis added]

26 The Defendant argued that the last sentence in [36] of *Chua Say Eng* "recognises that the adjudication should proceed and that this court should not stay the adjudication that has been filed". I should answer the Defendant's arguments directly *on our facts*. Even if the Defendant was correct that the adjudicator should have proceeded, I had to deal with the matter in the position that I found it. AA 423 was "stayed" not by any interim or other order of court, but because the adjudicator decided "to hold in abeyance the proceedings …" pending the Court's decision here (Tab 5 and Tab 6 of P's WS). This state of the proceedings was fundamentally different from *Lau Fook Hoong Adam v GTH Engineering & Construction Pte Ltd* [2015] 5 SLR 516 ("*GTH Engineering*"), which the Defendant relied on, where the adjudication proceeded and the adjudicator's determination was issued subsequent to the filing of the originating summons but "prior to any determination of the jurisdictional issue by the court" ([6] of *GTH Engineering*).

27 Having been able to reach a decision now that PC 22 (including the post-termination claims discussed subsequently) was invalid, and that this was a jurisdictional question, there was no reason for AA 423 to proceed. So even if the adjudicator was legally wrong in not following

Chua Say Eng (see the last sentence of [36]) and should have proceeded with the adjudication, in a practical sense he was proved right not to incur all the costs of the adjudication just to have the determination set aside by the court finally.

28 It should be observed that accepting the authoritative statements at [36] of *Chua Say Eng* at face value, it would mean that if PC 22 had proceeded for adjudication, the adjudicator in AA 423, Mr Seah Choo Meng, would have redone exactly what the previous adjudicator in AA 27, Mr Naresh Mahtani, had done (*ie,* assess the value of the Defendant's work, goods and services). Mr Seah would have been prohibited from considering as a threshold question the jurisdictional issue of prohibited repeat claims before he proceeds with his assessment. And yet in the normal course of events, an adjudicator may be faced with this unsatisfactory state of affairs since the scheme under SOPA, with its short timelines, could result in the adjudication determination being issued before the decision in the court proceedings. The situation will be ludicrous and obviously never intended by SOPA if a further repeat claim is filed to a third adjudicator before the court delivers its decision.

29 It was then argued by the Defendant that in clarifying [36] of *Chua Say Eng*, *GTH Engineering* had highlighted a policy concern that parties may deploy "dilatory tactics" in the guise of jurisdictional challenges and subvert the intent of SOPA (see in particular [5] and [9] of *GTH Engineering*). In my judgment, the Defendant's argument did not take into account the differences in the positions between *GTH*

Engineering and our case. Courts will always be vigilant, especially in the context of SOPA, for dilatory tactics (as could be seen in this issue being flagged for discussion early in this case). It was clear to me that the question of dilatory tactics did not arise on the part of the Plaintiff. They were entitled to take the point on jurisdiction and were supported by *Chua Say Eng* in raising the jurisdictional issue to the court immediately.

30 It is postulated that where a jurisdictional challenge is validly submitted, a countervailing policy concern appears: that the adjudicator should not decide on such issues because that is the court's province (see [36] of *Chua Say Eng*). The interests of expedition, avoiding delay and saving costs are again weighed in the scales. This can be seen in former CJ Chan's suggestion to reduce costs and delay by having such matters heard by the High Court Judge (as is done in Australia), and not by an Assistant Registrar in the first instance (see Foreword to *Security of Payments*, para 8). Hence, the Court of Appeal in *Chua Say Eng* (at [36]) had exhorted that such jurisdictional matters should be raised before the court immediately.

31 Two other subsidiary questions remain, the resolution of which will comprehensively determine the prohibited repeat claims issue. These are on the relevance of the payment response and s 17(5) of SOPA.

Relevance of the payment response

32 The first subsidiary question was the relevance of the Plaintiff's payment response in PR 22. The determination of this question would effectively wipe out the Defendant's four heads of claim relating to the issue of prohibited repeat claims. The post-termination claims under the fourth head will be considered and dealt with in a subsequent section.

33 I had some difficulty understanding the Defendant's case here. The argument appeared to be that since the operative concept here was issue estoppel, and the Plaintiff had changed their valuation of the works in various instances in PR 22 (especially where these were increased), that had altered the issues and made PC 22 a different claim from PC 21, *ie,* precluded PC 22 from being a prohibited repeat claim.

34 I found that the Defendant's case had several false premises. For one, the operative concept that invalidated repeat claims was not necessarily issue estoppel. Be that as it may, the Defendant chose only to accept the instances where the Plaintiff increased the valuations in PR 22 above the adjudicated amounts, willy-nilly rejecting the instances where the Plaintiff decreased the valuations. The Defendant could not show any basis for blowing hot and cold.

35 The firm answer to the Defendant's reliance on the Plaintiff's revaluations in PR 22 lay in the fact that the Plaintiff's payment response stated clearly that PC 22 was a repeat claim – see PR 22 at p 418 of PBOD. That that was the primary position of the Plaintiff was clearly reserved – see letter dated 30 October 2015 from the Plaintiff to

the Defendant. All the revaluations by the Plaintiff were made "without prejudice" to this primary position.

36 The Plaintiff submitted that the purpose of the revaluations in PR 22 was to take into consideration the latest position for consistency with the pending arbitration in May 2016. This was not challenged by the Defendant. Having stipulated that their primary defence was that PC 22 was a repeat claim, one could understand that the Plaintiff had to do this because of the nature of the scheme under SOPA, which allowed for "interim" payments which may be revisited in court proceedings or arbitration. Therefore, the revaluations in PR 22, having been submitted for a specific purpose, were irrelevant to the prohibited repeat claims issue.

37 Finally, taking a step back from the Defendant's arguments, one would have thought that in deciding whether PC 22 was a prohibited repeat claim, the relevant documents would be PC 21 and PC 22; and not PR 22. While I could not rule that the payment response was irrelevant in all cases, I agreed with the Plaintiff that based on the way the case was argued by the Defendant, the different valuations in PR 22 were irrelevant. The fact that the Plaintiff changed some of the valuations in PR 22 did not change the nature of the claims in PC 22. Indeed it would be odd if the justiciability of PC 22 depended on a subsequent document (PR 22) which the Defendant could not even have foreseen. The solution was actually simple: references to and analysis of the two payment claims would establish the Plaintiff's case that PC

22 (leaving aside the post-termination claims) was a prohibited repeat claim.

Section 17(5) of SOPA

38 The remaining subsidiary question related to the effect of s 17(5) of SOPA, which the Defendant relied on "directly". Section 17(5) of SOPA reads,

> (5) If, in determining an adjudication application, an adjudicator has determined in accordance with section 7 —
>
> (a) the value of any construction work carried out under a construction contract; or
>
> (b) the value of goods or services supplied under a contract,
>
> the adjudicator (or any other adjudicator) shall, in any subsequent adjudication application that involves the determination of the value of that work or of those goods or services, give the construction work or the goods or services, as the case may be, the same value as that previously determined unless the claimant or respondent satisfies the adjudicator concerned that the value thereof has changed since the previous determination.

39 The Defendant's main argument appeared to be that the changes in PR 22 showed that the Plaintiff had changed their position. Therefore, the "facts surrounding the premise of the adjudicator's decision" had changed (see Annex A of D's WS, in particular under the third and fourth heads).

40 In my view, once the intent of, and the particular situation that s 17(5) was designed to apply to were understood, the support that the

Defendant claimed from the section would vanish. In *Security of Payments*, the learned author provided the legal and industry view (at paras 16.58, 16.59 and 16.61) as follows:

EFFECT OF EARLIER DETERMINATIONS

Policy Considerations

[16.58] From policy considerations it is clearly desirable that, once the value of a particular item of work done or goods supplied in respect of a contract has been determined in an earlier adjudication, neither party should be entitled to have the inquiry and result revisited. This would prolong a process which was basically designed to provide a temporary resolution until full curial proceedings. Indeed, if valuations can be reviewed and revised uncontrollably, the administration of the adjudication process will be truly untenable. It therefore seemed expedient to the legislators to provide in the Act that the value so determined should be binding on an adjudicator dealing with a subsequent payment dispute arising from the same contract.

[16.59] … This is regardless of the fact that the same adjudicator may preside at the subsequent adjudication. Thus, if an adjudicator has valued the supply and installation of a particular type of door at $500 per unit in computing the adjudicated amount, the adjudicator is required under the Act to retain this valuation in respect of a subsequent payment claim arising from the same project. The courts in both the United Kingdom and Australia have been forthcoming in supporting this intent as exemplified by the decision of the Technology and Construction Court in *Palmers Ltd v ABB Power Construction Ltd* (1999) and the decision of the New South Wales Supreme Court in *Walter Construction Group Ltd v CPL (Slurry Hills) Pty Ltd* (2003).

…

Experience in Practice

> [16.61] Nevertheless, where an adjudication determination is made during the course of a project, the rulings contained therein will normally be relied on by the parties in the conduct and regulation of their relationship with one another *for the remainder of the project*. As a result, most adjudicators would consider it a disservice to the parties to vary or alter earlier rulings unless there are very compelling reasons for so doing. …
>
> [emphasis added]

41 The exception to s 17(5) applied where "the value thereof has changed since the previous determination". The learned author of *Security of Payments* opined (at para 16.62) that the exception applied only "where the facts surrounding the premise of the valuation have changed". This could conceivably apply (in my view) to situations where there were variations in or additions to the construction work, or the goods or services supplied. The exception must be "specifically raised" and required "compelling evidence" (see para 16.62 of *Security of Payments*) of the change in facts. I considered that the author's views were sensible having regard to the obvious policy and purpose that the section served.

42 In our case, the Defendant failed to show that the facts surrounding the premise of the valuation in PC 21 had changed. In PC 22, the Defendant submitted the same claims which had been previously valued and adjudicated on their merits in AA 27. The Defendant was unable to show how the operative facts that formed the basis of the first valuation had changed such that the exception in s 17(5) applied. The

Defendant's argument, which was premised on the different valuations in PR 22, missed the point and was an instance of the Defendant's misguided reliance on the payment response (see discussion above on the relevance of the payment response). The Defendant's other argument on s 17(5) was tantamount to saying that it generally permitted repeat claims (see para 56 - 58 of D's WS). That was a misreading that was contrary to s 10(1) of SOPA and the clear pronouncements in cases like *Chua Say Eng* and *Admin Construction* (see discussion above on prohibited repeat claims). This was sufficient to dispose of the Defendant's reliance on s 17(5) of SOPA.

43 However, the Plaintiff raised the additional argument that s 17(5) operated only where there was ongoing work (paras 216, 217 and 221 of P's WS). The Plaintiff relied on *Security of Payments* at para 16.61 ("... for the remainder of the project") and para 16.62 ("where the facts … have changed"). Hence it could not apply here where the Defendant's employment had been terminated on 24 October 2014 and no further works were carried out. I agreed with this contention. This was reinforced by the indisputable fact that the claims under the four heads (excluding the post-termination claims) were adjudicated and determined on their merits in AA 27.

Post-termination claims

44 The above determinations had dealt with the bulk of the Defendant's claims in PC 22 under all four heads. The remaining post-termination claims under the fourth head (see [5] above) need to be

examined now. The Plaintiff argued that these post-termination claims did not fall within SOPA's adjudication scheme for payment claims. I was informed by counsel that this was the first time this issue was being decided in the Singapore High Court.

45 The Plaintiff relied on cl 32(8)(b) of the Conditions of Contract to entitle them to "make use of all temporary buildings, plant, tools, equipment, goods or unfixed materials upon the Site, all of which shall vest in and be deemed to be the property of the Employer". In the event that this was challenged, it was for the Defendant to claim against the Plaintiff for damages at general law, with the possible causes of action being for breach of contract or the tort of conversion. Upon final completion of the project, the Defendant can remove his property pursuant to, and subject to the conditions in cl 32(8)(h).

46 Section 5 of SOPA spelt out the "[e]ntitlement to progress payments" as follows:

> 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.

47 However since the contract here was terminated, the Defendant's claim could no longer come under s 5 of SOPA for the carrying out of construction work or supply of goods and services *under* the contract and hence, the Defendant was not entitled to a progress payment under the same section. That being the case, and considering that s 10(1) provided that "a claimant may serve one payment claim in respect of a progress payment", the above post-termination claims could not be the

subject of a payment claim and the adjudicator had no jurisdiction to adjudicate them. In my view, the Plaintiff's argument succeeded.

48 My conclusion was reinforced by the analysis of Applegarth J in *McConnell Dowell Constructors (Aust) Pty Ltd v Heavy Plant Leasing Pty Ltd* [2013] QSC 269 ("*McConnell*"). While I appreciated that the Queensland statutory adjudication regime did not operate identically with our SOPA, and it was not entirely clear whether the payment claim in *McConnell* was in respect of work done or the supply of goods and services after the termination of the "construction contract", I found the reasoning in the following passage from *McConnell* most appropriate in supporting the Plaintiff's position that the tools and equipment withheld at the site after the termination of the contract were not supplied "under a contract" pursuant to s 5 of SOPA (see also the D's WS at paras 152 and 164):

> [53] HPL submits that the provision for McConnell to "take over" all of its plant, equipment and materials meant that HPL supplied those goods so as to constitute a "construction contract." McConnell rejects that submission and refers to the relevant provision as a "forfeiture clause." Leaving aside such an appellation, the point McConnell makes is that it took over the plant, equipment and materials, rather than their being supplied by HPL under an agreement or other arrangement. I agree. This was not a hire agreement or other arrangement to supply goods, even if the value of any unfixed goods and materials that were taken over by McConnell on determination and used by it and a fair payment for hire of its plant may feature in the cl 26.5 calculations. The plant, equipment and materials were taken over, rather than being supplied, and the apparent purpose of their being taken over was to reduce the delay and cost to McConnell of having to source replacement plant, equipment and materials. The

> provision was not in the nature of a hire agreement, even if the benefit to McConnell of using HPL's plant was calculated by reference to a fair payment for hire.

49 In accepting the Plaintiff's argument, I found further support in cl 32(5) of the Conditions of Contract, which reads as follows:

> **Damages Contractor's Only Remedy**
>
> Upon receipt of any notice rescinding the Contract or a Notice of Termination under Sub-Clause (1) or (2) hereof and whether or not such notice or Notice of Termination is supported by a Termination Certificate or is based upon any alleged default or repudiation by the Contractor, the Contractor shall be bound to yield up possession and to remove his personnel and labour force from the Site, and irrespective of the validity of the rescission or Notice shall be limited to his remedy by way of compensation as set out in Sub-Clause (1) hereof (if applicable) or, if not, in damages.

50 While I acknowledge that the label attached to the relief was not conclusive (see [41] of *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd & Ors* [2005] NSWCA 228 and also para 154(b) of D's WS), I found that properly construed, the parties had agreed that the relief available to the Defendant upon a wrongful termination of the contract by the Plaintiff shall be by way of compensation in the nature of damages. In my judgment, the clause was properly invoked to exclude the adjudicator's jurisdiction.

Order of Court

51 To conclude, I found that, leaving aside the post-termination claims under the fourth head, all the claims in PC 22 had been made in

PC 21 and adjudicated on their merits in AA 27. For the reasons above, I was of the view that the Defendant's arguments on the four heads of claim, premised essentially on the Plaintiff's revaluations in PR 22 and s 17(5) of SOPA were unmeritorious and failed to show that these mentioned claims were permitted to be reventilated under the adjudication scheme of SOPA. Hence, these were all prohibited repeat claims.

52 Turning to the post-termination claims, I found that they could not be the subject of adjudication under SOPA because they could not be the subject of a payment claim.

53 With that in mind, I made the following orders:

> 1. The Defendant forthwith withdraws the Adjudication Application No. SOP/AA 423 of 2015 dated 12 November 2015 made under the provisions of the Building and Construction Industry Security of Payment Act (Cap. 30B) on the grounds that Payment Claim No. 22 dated 7 October 2015 is invalid and that the adjudicator appointed in Adjudication Application No. SOP/AA 423 of 2015 has no jurisdiction to conduct the adjudication or determine Adjudication Application No. SOP/AA 423 of 2015.
>
> 2. Costs of this application be paid by the Defendant to the Plaintiff to be agreed, if not taxed.
>
> 3. The Defendant's oral application for stay pending appeal was dismissed.

54 For completeness, I should add that my findings above on the invalidity of PC 22 and the adjudicator's lack of jurisdiction were final determinations, with the order to the Defendant to withdraw AA 423 (in

its present position) flowing naturally from the findings. As such, the submissions on the considerations for the grant of interim injunctive relief (see P's WS at paras 266 – 278, and D's WS at paras 166 – 183) were not germane to our situation.

Foo Chee Hock
Judicial Commissioner

Christopher Chuah, Candy Agnes Sutedja and
Daniel Ow (WongPartnership LLP) for the Plaintiff;
Mohan Pillay, Yeo Boon Tat and Josephine Tong (MPillay)
for the Defendant.
