IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 34

Originating Summons No 253 of 2016 (Summons No 1596 of 2016)

In the matter of Section 27 of the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) and Order 95 Rule 2 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)

And

In the matter of Adjudication Application No SOP/AA059 of 2016 between Rong Shun Engineering & Construction Pte Ltd as the Claimant and C.P. Ong Construction Pte Ltd as the Respondent and the Adjudication Determination dated 1 March 2016 issued thereunder

Between

Rong Shun Engineering & Construction Pte Ltd

… *Applicant*

And

C.P. Ong Construction Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Building and Construction Law] — [Sub-contracts] — [Claims by sub-contractor]
[Building and Construction Law] — [Statutes and regulations]

TABLE OF CONTENTS

Rong Shun Engineering & Construction Pte Ltd
v
C.P. Ong Construction Pte Ltd

[2017] SGHC 34

High Court — Originating Summons No 253 of 2016 (Summons No 1596 of 2016)
Vinodh Coomaraswamy J
27 May; 28 June 2016

28 February 2017

Vinodh Coomaraswamy J:

1 Before me is the typical application and cross-application arising out of an adjudication determination under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). The determination is dated 1 March 2016 and requires the respondent to pay the applicant the principal sum of $379,530.80. The applicant has applied for and obtained leave *ex parte* under s 27 of the Act to enforce the determination as though it were a judgment to the same effect. The respondent now applies to have the determination set aside.

2 The respondent seeks to set aside the adjudication determination on three alternative grounds:

(a) the adjudicator exceeded his jurisdiction by adjudicating upon a claim for payment which did not arise from a single contract.

(b) the adjudicator exceeded his jurisdiction by adjudicating upon the applicant's claim to recover a $37,000 retention sum when the applicant did not advance that claim in the payment claim.[1]

(c) the adjudicator breached the rules of natural justice by determining this retention sum claim without hearing from the respondent.[2]

The respondent argues further that, if any one of these grounds is upheld, the entire determination must be set aside. In particular, if either of the respondent's two challenges to the adjudicator's determination of the retention sum claim is upheld, the respondent's argument is that I have no power to set aside only that part of the determination as relates to the retention sum.

3 Having heard the parties' submissions and considered the evidence, I have decided as follows: (i) for a claim for payment to be a "payment claim" within the meaning of the Act, it must arise from a single contract; (ii) the applicant's payment claim in this claim did in fact arise from a single contract; (iii) the adjudicator exceeded his jurisdiction by adjudicating upon the retention sum claim; (iv) that aspect of his determination is therefore a nullity; (v) on the facts of this case, the respondent's natural justice challenge to the determination

[1] See also Respondent's submissions dated 27 June 2016 at page 58.

[2] LHW affidavit (dated 5 April 2016) at page 2, paragraph 5.

on the retention sum claim adds nothing to its jurisdictional argument; (vi) I have the power, under the common law doctrine of severance, to sever that part of the determination as deals with the retention sum claim and to uphold the remainder; and (vii) this is a case in which that power ought to be exercised.

4 I have therefore set aside only the part of the determination which deals with the retention sum claim. The remainder of the determination continues to carry interim finality for the applicant's interim benefit.

5 The respondent has appealed against my decision. I therefore now set out my reasons.

6 I begin with the facts.

Background facts

The parties' contractual relationship

7 On 28 December 2012,[3] the Housing & Development Board of Singapore ("HDB")[4] engaged the respondent as the main contractor to carry out addition and alteration works to 15 car parks in the eastern part of Singapore.[5] The main contract obliged the respondent to commence work on 28 January 2013 and to finish work within precisely a year, on or before 27 January 2014. The respondent's scope of works under the main contract included electrical works and fire alarm works.

---

[3] LHW affidavit (dated 5 April 2016) at page 3, paragraph 7.

[4] LHW affidavit (dated 5 April 2016) at page 3, paragraphs 9 to 11.

[5] LHW affidavit (dated 5 April 2016) at page 47.

8 Before the award of the main contract, during the tender phase in November 2012, the respondent had invited selected contractors to submit quotations for the electrical works and the fire alarm works.[6] The applicant was one of those contractors. It responded to the respondent's invitation by submitting two written quotations in two separate documents dated 20 December 2012. It quoted $550,108.57 for the electrical works and $289,334 for the fire alarm works.[7] Unless otherwise stated, all sums of money I shall set out in this judgment exclude goods and services tax.

9 The respondent made a counter-offer of $500,000 for the electrical works and $240,000 for the fire alarm works.[8] The applicant accepted the counter-offer. The total agreed price for both scopes of work was therefore $740,000.

10 On 7 January 2013, the applicant issued two revised quotations[9]. They were in terms virtually identical to the original quotations save that they each now bore the reduced prices for each scope of work as agreed.

11 The applicant commenced work in or about April 2013. It appears that the work was physically completed in April 2015.[10] In the course of carrying out the work, however, a dispute arose between the respondent and the applicant. The cause of the dispute was the applicant's use of metal conduits with Class 3 protection against corrosion instead of metal conduits with Class 4 protection,

---

[6] LHW affidavit (dated 5 April 2016) at page 4, paragraph 13.

[7] LHW affidavit (dated 5 April 2016) at pages 51 and 54.

[8] LHW affidavit (dated 5 April 2016) at paragraph 19, pages 51 and 54.

[9] LHW affidavit (dated 5 April 2016) at pages 56 and 62.

[10] LHW affidavit (9 June 2016) at paragraph 85.

as the contract specified.[11] As a result, the respondent claimed a cost adjustment for the omission and also the right to back charge to the applicant liquidated damages for the resulting delay in completing and handing over the works to the HDB.[12]

The progress claims and payment history

12 As a result of these disputes, the respondent initially delayed and eventually ceased payment to the applicant.[13] Between April 2013 and January 2016, the applicant submitted 24 progress claims to the respondent. The respondent paid a total of $409,000 to the applicant against its first ten progress claims[14] but paid nothing against its last 14 progress claims. The respondent's last payment to the applicant was on 30 December 2014 for progress claim 10 dated 14 February 2014.

13 The last progress claim presented by the applicant was progress claim 24 dated 20 January 2016 in the sum of $342,530.80.[15] It was an omnibus claim in two senses. It covered all work done from the commencement of the works in April 2013 until 20 January 2016. It also covered both scopes of work, *i.e.* both the electrical works and the fire alarm works.[16]

14 The respondent did not pay progress claim 24, whether in whole or in part.[17] It also did not provide a payment response, either within seven days as

[11] LHW affidavit (dated 5 April 2016) at paragraph 52.

[12] LHW affidavit (dated 5 April 2016) at paragraphs 49 to 50.

[13] LHW affidavit (dated 5 April 2016) at paragraphs 47, 77 to 80.

[14] LHW affidavit (dated 5 April 2016) at paragraph 57, page 258.

[15] LHW affidavit (dated 5 April 2016) at page 258.

[16] Respondent's submissions dated 27 June 2016 at paragraph 9.

required by s 11(1)(*b*) of the Act or before the dispute settlement period under s 12(5) of the Act expired on 3 February 2016.

The applicant applies for adjudication

15 On 5 February 2016, the applicant served notice on the respondent under s 13(2) of the Act that it intended to apply for adjudication in respect of progress claim 24.[18] In this notice, the applicant invited the adjudicator to adjudicate upon the applicant's claim to recover the retention sum. The applicant extended this invitation to the adjudicator even though the retention sum claim was not advanced in progress claim 24. Indeed, the applicant had expressly deducted the retention sum from its claim in progress claim 24 (see the computation reproduced at [93] below).

16 The applicant duly lodged its adjudication application with the Singapore Mediation Centre ("SMC")[19] and served it on the respondent.[20] The SMC appointed an adjudicator.[21] The respondent lodged an adjudication response.[22]

17 The parties attended an adjudication conference on 23 February 2016.[23] Neither party was legally represented at the adjudication conference, or indeed in the entire adjudication. The adjudicator permitted the applicant to present its

---

[17] LHW affidavit (dated 5 April 2016) at paragraph 47.

[18] Respondent's submissions dated 27 June 2016 at paragraph 9.

[19] LHW affidavit (dated 5 April 2016) at pages 393 to 396.

[20] Applicant's submissions dated 24 June 2016 at paragraph 12.

[21] LHW affidavit (dated 5 April 2016) at page 37, paragraph 14.

[22] CHT affidavit (20 April 2016) at page 29.

[23] LHW affidavit (dated 5 April 2016) at page 37, paragraph 17.

case. He prevented the respondent from making any submissions, holding that s 15(3) of the Act barred the respondent from addressing him on any issues because it had failed to serve a payment response.[24]

18 The adjudicator rendered his determination on 1 March 2016.[25] He awarded the applicant both: (i) the principal sum claimed in progress claim 24 in its entirety, *i.e.* $342,530.80; and (ii) the $37,000 retention sum.[26] The total value of the determination in the applicant's favour was therefore $379,530.80, leaving aside goods and services tax, interest and costs.

19 With the adjudication determination in hand, the applicant applied and obtained: (i) an order granting it leave to enforce the determination in the same manner as a judgment; and (ii) an order that judgment be entered against the respondent in terms of the determination. The respondent, in turn, applied to set aside the determination.

20 The respondent argues that the determination should be set aside on the three alternative grounds set out [2] above. The first two grounds relate to jurisdiction and the third relates to natural justice.

21 The respondent neither raised nor reserved the two jurisdictional grounds in the course of the adjudication. The respondent submits[27] that this is immaterial: a failure to raise a jurisdictional ground in a payment response or otherwise in the course of an adjudication does not estop a respondent from

---

[24] LHW affidavit (9 June 2016) at paragraphs 79 to 84.

[25] LHW affidavit (dated 5 April 2016) at page 45.

[26] Applicant's submissions dated 24 June 2016 at paragraph 15.

[27] Respondent's submissions dated 27 June 2016 at paragraphs 174 to 176.

taking that point before a court when applying to set aside a determination or when resisting an application to enforce a determination (see *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 at [35] (*"JFC Builders"*); *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776 at [46]). I accept that submission. I must therefore consider the two jurisdictional grounds on their respective merits.

22 I therefore now deal with each of the respondent's three grounds in turn.

First ground: validity of the payment claim

Three subsidiary questions

23 It is common ground that, as a result of the events I have outlined at [8] – [10] above, the respondent engaged the applicant as its contractor under a construction contract within the meaning of the Act for two scopes of work: the electrical works and the fire alarm works.[28] What is in dispute is whether the parties entered into one contract or two.

24 The applicant's case is that the parties entered into a single contract comprising two scopes of work. The respondent's case is that the parties entered into two separate contracts, each comprising a single scope of work. On that premise, the respondent argues that it is contrary to s 5, when it is read together with ss 10(1) and 10(3) of the Act,[29] for a payment claim to arise from more than one contract. Accordingly, the respondent submits, the determination is fundamentally and fatally flawed and must be set aside.

---

[28] Applicant's submissions dated 24 June 2016 at paragraph 9.

[29] Respondent's submissions dated 27 June 2016 at paragraphs 72 to 78.

25 Because the respondent did not raise this point in the adjudication, everyone involved – each party, their respective representatives and advisers, and the adjudicator – proceeded on the unspoken and unexamined assumption that it was unnecessary to determine how many contracts the parties had entered into.[30] As a result, the adjudicator made no express finding on this issue. Despite that, it is obvious from the tenor of his determination that he made an implicit finding that there was only one contract between the parties comprising two scopes of work with a total contract value of $740,000. Thus, he says (at [6]):[31]

> The sub-contract is evidenced in two signed negotiated quotations, (ref. no. RSEC-1212151) dated 20 December 2012 for Electrical Installation Works and (same reference and date) for Fire Alarm Installation Works. The Quotations, signed by both parties, have the figures $500k and $240k written on them respectively in place of the typed figures of $550,108.57 and $289,334.00. Subsequently, on 7 January 2013, the Claimant regularized the amendments with two typed quotations, namely RSEC-1211132R for Electrical Installation Works at $500,000 and RSEC-1212151R for Fire Alarm Installation Works at $240,000 together with their amended breakdown of tender sums. (hereinafter "the Quotations"). The total Contract Amount is therefore $740,000.00.

26 The parties' submissions on this first ground raise three subsidiary questions:

(a) Must a payment claim within the meaning of the Act arise from only one contract?

(b) If so, am I precluded from inquiring into whether progress claim 24 arose from only one contract, given that the adjudicator implicitly found that it did?

[30] Minute Sheet (28 June 2016) at page 14.

[31] LHW affidavit (dated 5 April 2016) at page 34, paragraph 6; page 40, paragraph 25; page 41, paragraph 29.

(c) If not, does progress claim 24 in fact arise from two contracts or from only one contract?

Must a payment claim arise from only one contract?

The parties' submissions

27 The respondent's argument on the first subsidiary question is primarily a textual argument. It submits that the text of the Act manifests a legislative intent that an adjudication application must be founded on "**one** payment claim for **one** progress payment for work done under **one** contract" (emphasis original).[32]

28 The applicant does not, in response, deal directly with this question, focusing instead on the remaining two questions on this first ground.

My decision: a payment claim must arise from only one contract

29 It is my view that the respondent is correct, subject only to a small qualification (see [37] below). The applicant is therefore wise not to contend otherwise.

30 It is true that no provision in the Act expressly stipulates that a payment claim within the meaning of the Act must arise from only one contract. However, the Act in all but one section consistently uses only the singular noun "contract" coupled with either the singular article "a" or "the". There is only one section in the entire Act which refers to "contracts", *i.e.* in the plural. That is s 4(2)(*c*). But that section deals only with the disapplication of the Act to a

[32] Respondent's submissions dated 27 June 2016 at paragraph 78.

prescribed "class of contracts". That provision is not relevant to this question or to the analysis of it which follows in this judgment.

31 I begin the analysis by considering four sections which are fundamental to the scheme of the Act. I consider them only insofar as they relate to construction contracts within the meaning of the Act, leaving aside for the moment supply contracts. These four sections are ss 2, 5, 10 and 12. They define or establish, in turn: (i) a progress payment, (ii) a claimant's entitlement to a progress payment; (iii) a claimant's power to serve a payment claim in respect of a progress payment; and (iv) a claimant's entitlement to make an adjudication application.

32 Section 2 defines a "progress payment". It speaks expressly of a progress payment as a payment arising under "a contract":

> "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* …;
>
> [emphasis added]

33 Section 5 confers, for present purposes, a statutory entitlement to a progress payment on every person who carries out construction work. It too speaks expressly of an entitlement to a progress payment arising under "a contract":

> **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.

34 A person who is or claims to be entitled to a progress payment under s 5 is defined by s 2 of the Act as "a claimant". A claimant has the power, under

s 10(1) of the Act, to serve a payment claim in respect of "a progress payment". Both ss 10(1)(*a*) and 10(1)(*b*) again refer expressly to "*the* contract":

> **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.
>
> [emphasis added]

The purpose of these subsections is to stipulate on whom a payment claim must be served, rather than to tie one payment claim back to one contract. But the clear tenor of the subsections is that the service which they contemplate takes place pursuant to only one contract in connection with any one payment claim.

35 Section 10(3)(*b*) then requires the payment claim to be "made in such form and manner…as may be prescribed". The form and manner is prescribed by rule 5 of the Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 1, 2006 Rev Ed). Rule 5(2)(*b*) once again contemplates a payment claim arising from only one contract. It requires a payment claim to "identify *the contract* to which the progress payment that is the subject of the payment claim relates" (emphasis added).

36 Finally, s 12(1) of the Act establishes a claimant's entitlement to make an adjudication application subject to certain conditions being met. This provision too uses the singular: "a … contract":

> **Entitlement to make adjudication applications**
>
> 12. —(1) Subject to subsection (2), a claimant who, in relation to *a construction contract*, fails to receive payment by the due date of the response amount which he has accepted is entitled to make an adjudication application under section 13 in relation to the relevant payment claim.
>
> (2) Where, in relation to *a construction contract* —
>
> …
>
> (3) A claimant who has served a payment claim in relation to *a supply contract* is entitled to make an adjudication application under section 13 in relation to the payment claim if —
>
> …
>
> [emphasis added]

37 The respondent is therefore correct that the Act mandates that a "payment claim" within the meaning of s 10 of the Act must arise from one contract. The respondent goes too far, however, when it asserts that the Act mandates "**one** payment claim for **one** progress payment for work done under **one** contract" (emphasis in original).[33] It is possible under the Act for a payment claim to comprise more than one progress payment, *i.e.* a claim for payment arising over more than one reference period. That can happen either when the conditions in s 10(4) of the Act are satisfied or under the principle in *Libra Building Construction Pte Ltd v Emergent Engineering Pte Ltd* [2016] 1 SLR 481 ("*Libra*") at [42(f)].

---

[33] Respondent's submissions dated 27 June 2016 at paragraph 78.

38 I would therefore recast the respondent's statement of principle as follows: the Act mandates that *one* adjudication application be founded on *one* payment claim which arises from *one* contract. That is in fact an alternative way in which the respondent puts the principle on which it relies.[34]

39 This principle is consistent with the two Australian cases on which the respondent relies.

40 The first case is the decision of McDougall J of the Supreme Court of New South Wales ("NSW") in *Rail Corporation of New South Wales v Nebax Constructions Australia Pty Ltd* [2012] NSWSC 6 ("*Nebax*"). In *Nebax*, the respondent argued that the adjudicator lacked jurisdiction over an adjudication because the applicant had either: (i) relied on one payment claim to initiate multiple adjudication applications; or (ii) submitted multiple payment claims under the same contract for the same reference period at the same time.

41 McDougall J considered the equivalent in the NSW security of payment legislation to ss 5, 10, 11, 12 and 13 of our Act. He upheld the respondent's jurisdictional objection in principle. In the course of doing so, he expressed the view that the NSW Act requires one payment claim to arise from a single contract (at [44]):

> It seems to me that, because s 13(5) prevents … the service of more than one payment claim per reference date per construction contract, and because the right to adjudication "of a payment claim" is clearly referable to a payment claim that complies with the various requirements of s 13, there can only be one adjudication application for any particular payment claim *for any particular contract.*
>
> [emphasis added]

[34] Respondent's submissions dated 27 June 2016 at paragraphs 84, 94 and 95.

42 Although we have no statutory equivalent in the Act to s 13(5) of the New South Wales legislation, the same result has been achieved in Singapore by the interpretation put upon our Act by *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*") and *Libra* ([37] *supra*).

43 The view expressed by McDougall J in *Nebax* ([40] *supra*) was undoubtedly *obiter*. Neither party contended in that case that there was more than one contract between the parties. But McDougall J adopted this *dictum* as part of his *ratio* in his decision in *Class Electrical Services Pty Ltd v Go Electrical Pty Ltd* [2013] NSWSC 363 at [6] and [39]. Further, Douglas J of the Supreme Court of Queensland adopted McDougall J's view as part of his *ratio* in the second case on which the respondent relies: *Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4 at [17] – [18].

44 It is true that the NSW security of payment legislation considered in *Nebax* ([40] *supra*) differs from our Act in certain respects. But that legislation was the model for our Act and is underpinned by the same policy. In my view, there is no material difference between the two acts on this issue. McDougall J's remarks, albeit against the backdrop of different security of payment legislation, are equally applicable in Singapore.

45 It is also true that s 2(1) of the Interpretation Act (Cap 1 2002 Rev Ed) provides that "unless there is something in the subject or context inconsistent with such construction…words in the singular include the plural…" Section 2(1) does not operate, in my view, to permit me to read the singular – "a contract" or "the contract" – as including the plural, *i.e.* more than one contract.

That construction would be inconsistent with the subject and context of the Act.

46 Adjudication is, by legislative intent, a fast and low-cost process intended to ease an applicant's cash flow under the principle of "pay now, argue later" (*Chua Say Eng* [42] *supra* at [77]). An adjudicator's determination of the parties' dispute carries interim finality. Pending the resolution of the parties' dispute with full finality, therefore, the legislation by design casts the risk of error in the adjudication on the respondent. The *quid pro quo* which the Act extracts from the applicant is that it must come strictly within the terms of the legislative scheme, many of which are intended as safeguards for the respondent.

47 A requirement that an adjudication be founded on a single contract safeguards the respondent in the same way as the requirement that a claimant present only one payment claim in any given payment claim period and for any given reference period. The purpose of the safeguard is to ensure that the respondent is able, within the limited time allowed by the Act, to examine and verify the facts and calculations relating to a payment claim and either to satisfy the claim or to serve a payment response (see Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) at [5.150]).

48 Applying s 2(1) of the Interpretation Act to read the singular "a contract" or "the contract" as including multiple contracts would permit a claimant to serve a payment claim which arises from more than one contract. Allowing claims and disputes which arise from several contracts – which may contain materially different terms, including materially different payment terms – to be

confounded in one payment claim and thereafter in one adjudication application has the potential to cause unfairness to the respondent, to increase the decision-making burden on the adjudicator and thereby to increase costs and to increase delay in adjudication. All of that is antithetical to the purposes of the Act.

49 By contrast, requiring one adjudication application to be founded on one payment claim which arises from one contract does not, in the vast majority of cases, create unnecessary technicality or a trap for the unwary. It is not a heavy administrative or financial burden to require a claimant who has several contracts with a respondent to issue a separate payment claim under each contract and, thereafter, to make a separate adjudication application founded on each payment claim. The rule, no doubt, gives respondents an incentive to argue for tactical rather than substantive reasons that the parties' contractual relationship arises from multiple contracts. But it will be tolerably clear in all but the most ambiguous of cases whether that assertion is correctly made. And that risk does not, in my view, outweigh the considerable and real prejudice that the contrary interpretation would cause to respondents as a class and to the purposes of the Act.

50 It therefore appears to me that the Act, both on its face and in its underlying purpose, does require a claim for payment to arise from a single contract in order to be a "payment claim" within the meaning of the Act. A consideration of s 2(1) of the Interpretation Act does not lead me to a different conclusion.

What is the effect of the adjudicator's implicit finding?

The parties' submissions

51 The second subsidiary question is a point taken by the applicant. The applicant submits that I should not go behind the adjudicator's implicit finding (see [25] above) that progress claim 24 arose from a single contract.

52 The respondent argues that I am not only free but obliged to examine the underlying facts and to determine for myself whether progress claim 24 arises from one contract or from two contracts.[35] That is because that question is a question of fact which goes to a jurisdictional issue. An adjudicator, under our Act, has no power to determine his own jurisdiction.[36]

My decision: the adjudicator's implicit finding is not binding

53 At the outset, I must say that it is not clear to me how I can find myself bound by what is at most an implicit finding in an adjudicator's decision on an issue to which he never applied his mind because it was never raised to him in the course of the adjudication. Be that as it may, I will consider the applicant's submissions on this issue on their merits.

54 The applicant relies heavily on *Air Design* ([51] *supra*). In that case, the respondent in an adjudication took the point that the adjudicator had no jurisdiction over the parties' disputes because they arose out of several separate contracts, only the first of which contained an agreement to adjudicate. The claimant's response was that the agreement to adjudicate in the first contract

---

[35] Respondent's submissions dated 27 June 2016 at paragraph 111.

[36] Respondent's submissions dated 27 June 2016 at paragraphs 108 and 110.

covered even the disputes under the later contracts because they were not separate contracts at all but were simply variations to the first contract. The adjudicator decided in favour of the claimant on both jurisdiction and on the substance of the disputes. The applicant commenced proceedings in the English High Court seeking summary judgment in the same terms as the adjudicator's decision. The respondent resisted summary judgment relying on the same jurisdictional point.

55 Akenhead J accepted that the adjudicator did not have the power to determine his own jurisdiction. But he held also that the issue of whether the later contracts were separate contracts or merely variations of the first contract was an issue which went *both* to jurisdiction and *also* to the substance of the parties' disputes. He found, therefore, that where "substance and jurisdiction overlap … it is within the [a]djudicator's jurisdiction to decide as matters within his or her substantive jurisdiction whether there have been in effect variations to the contract pursuant to which he or she has properly been appointed [a]djudicator" (*Air Design* ([51] *supra*) at [22]).

56 *Air Design* ([51] *supra*) is authority for the proposition that, under the English security of payment scheme, where a single issue goes both to the substance of the dispute between the parties and to the adjudicator's own jurisdiction, the adjudicator's decision on that issue will bind the parties on both substance and jurisdiction notwithstanding the general rule that an English adjudicator has no power to determine his own jurisdiction. In those circumstances, an error by the adjudicator in arriving at his decision on that single issue will not deprive him of the jurisdiction to decide the substance of the parties' dispute.

57 The applicant invites me to apply that proposition to the present case. It argues that the issue of whether the respondent engaged the applicant under a single contract or under two contracts is an issue which the adjudicator had to decide in order to arrive at his determination on the substance of the dispute between the parties. As long as the adjudicator asked himself the right question, he acted within his jurisdiction. That is so even if he got the answer to that question wrong.[37] The applicant therefore submits that the respondent is precluded from arguing before me that there were in fact two contracts between the parties.[38]

58 I do not accept the applicant's submission. The respondent is correct that the proposition in *Air Design* ([56] *supra*) has no application in the context of our security of payment scheme. That is because the *Air Design* proposition is inconsistent with the comprehensive and considerable authority of *Chua Say Eng* ([42] *supra)* by which I am bound.

59 In *Chua Say Eng* ([42] *supra)*, the Court of Appeal drew a distinction between two types of argument on a setting-aside application: (i) an argument asserting that an adjudicator was not clothed with the statutory authority to determine an adjudication application (at [37] and [66]); and (ii) an argument conceding that the adjudicator was clothed with that authority, but asserting that the claimant contravened a provision of the Act in invoking that authority (at [67]) or that the adjudicator contravened a provision of the Act in exercising that authority (at [37]).

---

[37] Applicant's submissions dated 24 June 2016 at paragraph 34.

[38] Applicant's submissions dated 24 June 2016 at pages 11 to 13.

60 If an argument of the first type is well-founded, the inevitable result is that the adjudication application and any determination which results from it is a nullity (*Chua Say Eng* ([42] *supra)* at [66]). If an argument of the second type is well-founded, nullity is not the inevitable result. Instead, invalidity is the result. And even invalidity ensues only if the provision in question is so important that there is a legislative purpose to invalidate an act done in contravention of that provision (*Chua Say Eng* at [67]).

61 Whichever type of argument a respondent raises, a court will have to assess and determine the argument for itself. It is not in any way bound to defer to any view the adjudicator may have expressed on it.

62 The proposition in *Air Design* ([51] *supra*) is inconsistent with *Chua Say Eng* ([42] *supra)*. The foundation of the *Air Design* proposition is an implied agreement between the parties that interim finality should attach to an adjudicator's determination of an issue which touches on both substance and also to jurisdiction. The parties' agreement has that effect in the English security of payment scheme because the juridical basis of the English security of payment scheme is the parties' agreement. The agreement is either an express agreement between the parties or an agreement imputed to them by the English security of payment legislation through the mechanism of implied terms. So while the English scheme, like ours, takes as its starting point that an adjudicator has no power to determine his own jurisdiction, the origin of that bar is different. In the English scheme, the bar originates from the parties' agreement. So too, the interim finality which is attached the adjudicator's decision in the English scheme originates from the parties' agreement. The parties' agreement, express or implied, therefore suffices to lift that bar and to allow interim finality to attach

to an English adjudicator's determination of an issue which touches on his own jurisdiction.

63 The juridical basis of adjudication in Singapore is statutory. The powers of an adjudicator under our security of payment scheme are fixed by the Act. The parties cannot enlarge those powers by any agreement of any kind, whether express or implied. *Chua Say Eng* ([42] *supra)* makes clear (at [36]) that an adjudicator has no power under the Act to decide his own jurisdiction. An adjudicator cannot gain the power to decide his own jurisdiction by the mere fact that an issue which goes to his jurisdiction happens also to go to the substance of the parties' dispute. In an exceptional situation, the adjudicator's statutory obligation under s 16(2)(*a*) of the Act to reject an adjudication application which has not been made in accordance with ss 13(3)(*a*), 13(3)(*b*) or 13(3)(*c*) of the Act may coincide with a respondent's argument on jurisdiction (*Chua Say Eng* at [64]). But even in that exceptional situation, the adjudicator's determination carries interim finality and binds the parties not because of their agreement but because the Act has empowered him to decide that issue. The statutory basis of adjudication in Singapore means that the *Air Design* proposition cannot apply to an adjudication under the Act.

64 It is also significant to me that the *Air Design* proposition ([56] *supra*) is not supported by any Singapore authority. Indeed, as the respondent points out, the proposition is positively contradicted by Loh J's approach in *UES Holdings Pte Ltd v Grouteam Pte Ltd* [2016] 1 SLR 312 ("*UES*").[39] The respondent in *UES* alleged that a payment claim had not been served "at such time as specified in or determined in accordance with the terms of the contract"

---

[39] Respondent's submissions dated 27 June 2016 at paragraphs 121 and 153.

as required by s 10(2)(*a*) of the Act. As in *Air Design*, that issue went both to the substance of the parties' dispute and also to jurisdiction. Loh J, hearing the respondent's application to set aside the determination, did not consider himself bound by the adjudicator's finding that service of the payment claim complied with the parties' contract. Instead, he construed the contract himself to determine the issue afresh. Having done so, he concluded that service of the payment claim did not comply with the parties' contract as required by s 10(2)(*a*). He held further that that provision was so important that invalidity was the legislatively-intended consequence of non-compliance (see *UES* at [39] – [47]). As a result, he set aside the determination.

65 I therefore accept the respondent's submission that I must determine for myself afresh whether the parties' contractual relationship comprises one contract or two.

Does the progress claim arise from one or from two contracts?

The respondent's submissions

66 The respondent submits that the parties' intention, ascertained objectively from their conduct, was to contract separately for two separate scopes of work. It relies on the following factors to make good this submission.

67 The respondent invited separate tenders for, and the applicant submitted separate quotations for, each scope of work.[40] Each quotation expressly limited its scope to the tender breakdown attached to it. That excluded all other works (including the works comprised in the other quotation) from its scope.[41] The

[40] Respondent's submissions dated 27 June 2016 at page 11.

[41] LHW affidavit (dated 5 April 2016) at pages 56 and 62.

prices which the respondent counteroffered were written separately on, and countersigned separately on, the separate quotations for each scope of work.

68 When the applicant issued revised quotations incorporating the counteroffered prices on 7 January 2013, it once again issued a separate revised quotation for each scope of work.[42] The reference numbers on each revised quotation differed from each other, suggesting that the applicant viewed them as separate contracts. Further, the revised quotations were no longer on identical terms. The quotation for the fire alarm works included a new clause – relating to a dry riser system – which was absent from the revised quotation for the electrical works and also from both original quotations.[43]

69 The applicant consistently submitted separate progress claims for each scope of work. It was only after disputes had arisen and after payment had slowed that the applicant started issuing consolidated progress claims covering both scopes of work.[44]

70 For all these reasons, the respondent submits that progress claim 24 arises from two contracts instead of one.

The applicant's submissions

71 The applicant submits that the parties' intention, ascertained objectively from their conduct, was to enter into a single contract comprising two scopes of work.[45] It relies on the following factors to make good this submission.

[42] Respondent's submissions dated 27 June 2016 at paragraphs 20 and 21.

[43] LHW affidavit (dated 5 April 2016) at pages 54 and 62.

[44] Respondent's submissions dated 27 June 2016 at page 17.

[45] Applicant's submissions dated 24 June 2016 at paragraphs 30 and 31.

72 The respondent invited the applicant to tender for both scopes of work together, in a single telephone call. That call was initiated by the respondent's managing director, Ong Chow Peng ("Ong"), to the applicant's managing director, Chua Hoi Teck ("Chua").[46]

73 The original quotation for the two scopes of work were both dated 20 December 2012, both bore the same reference number (RSEC-1212151) and were submitted together on the same day by Chua to Ong at his office.[47] Ong and Chua entered into and concluded a single set of negotiations for a discounted price for both scopes of works on the same day. The parties in their negotiations treated both scopes of work as being contained in a single contract because they arose from the same main contract and were to be performed at the same locations.[48] Although the applicant submitted separate quotations for the two scopes of works, it was the applicant's practice to do so. This practice cannot change the fact that both works were governed by a single contract.

74 During the period when the applicant issued a separate progress claim for each scope of work to the respondent, the applicant nevertheless served the separate progress claims together and the respondent always processed them as one.

75 For all these reasons, the applicant submits that its payment claim arises from one contract instead of two.

---

[46] Applicant's submissions dated 24 June 2016 at paragraph 31.1.

[47] Applicant's submissions dated 24 June 2016 at paragraph 31.2.

[48] Applicant's submissions dated 24 June 2016 at paragraph 31.3.

My decision: the progress claim arose from one contract

76 I accept the applicant's submissions. In my view, an analysis of the evidence shows that the parties' conduct evinced an intention, objectively ascertained, to enter into only one contract comprising two scopes of work.

77 I begin the analysis with the tender phase. The respondent's evidence is that it made a separate invitation to tender for each scope of work and suggests that it is therefore a mere coincidence that the applicant was awarded both scopes.[49] The respondent has not, however, produced any documentary or other independent evidence to support its suggestion. I do not accept it. I accept instead the applicant's evidence that the respondent extended a single invitation to the applicant to tender for both scopes of work.[50] This is consistent with the respondent's own evidence that, in the course of preparing its tender to the HDB for the main contract, the respondent "sent out invitations to different contractors, inviting them to quote for the electrical installation works … and for the fire alarm installation works…"[51] That approach is, to my mind, more consistent with the commercial realities at the time, bearing in mind that the two scopes of work arose from one main contract and were to be carried out in conjunction with each other at the same locations.[52]

78 I now turn to the quotations themselves. The two original quotations, both dated 20 December 2012, bore the same reference number, *i.e.* "RSEC-

---

[49] LHW affidavit (dated 5 April 2016) at page 4, paragraph 15.

[50] CHT affidavit (20 April 2016) at paragraph 28.

[51] LHW affidavit (dated 5 April 2016) at page 4, paragraph 13.

[52] CHT affidavit (20 April 2016) at page 11, paragraph 31.

1212151". This indicates to me that the applicant viewed the two quotations as, in contractual substance, capable of giving rise to a unified obligation.

79 This is fortified by the heading for each quotation: "ADDITION & ALTERATION WORKS TO MULTI-STORY CAR PARKS (BATCH 7)".[53] This heading repeats verbatim the title of the main contract between the respondent and the HDB, leaving out only the HDB's internal contract number. This indicates to me that the applicant attached paramount significance to the fact that both quotations arose from the same main contract and not to the fact that each quotation comprised a different scope of work. In this regard, I accept the applicant's evidence that its practice was to submit separate quotations for separate scopes of work even if those separate scopes of work were to be governed by a single contract.[54]

80 It is true that the applicant: (i) issued two separate quotations for each scope of work on 20 December 2012; (ii) each quotation incorporated a clause expressly providing that that quotation included only the items specified in the tender contract breakdown attached to that quotation; and (iii) that each quotation had annexed to it a different tender contract breakdown for each scope of work. That does suggest, as the respondent submits, that the parties entered into two contracts and not one. But in my view, none of these facts suffices to outweigh objectively the weight of the evidence I have analysed above pointing in the other direction. In my view, the quotations were separated for administrative convenience rather than with contractual effect. Further, the clause in question is a *pro forma* clause in the *pro forma* parts of the applicant's

---

[53] Applicant's bundle of cause papers (volume 1) at pages 51, 54, 56 and 62.

[54] CHT affidavit (20 April 2016) at page 10, paragraph 30.

quotations. It is therefore difficult to ascribe any specific objective intent to the applicant from the incorporation of that clause in these quotations as to whether it intended to form one contract or two with the respondent. It also appears to me that the objective intent of the parties, ascertained in context, was for the tender contract breakdown and the clause which referred to it to govern the *content* of the parties' contract rather than its *formation*. Those breakdowns do not, therefore, advance the respondent's submission that the parties' objective intent was to enter into two contracts rather than one.

81 I therefore find that the parties' objective intent, when the applicant accepted the respondent's counteroffer during their negotiations on 20 December 2012, was to enter into a single contract comprising two scopes of work.

82 Post-contractual events, by definition, come after a contract is formed. A contract is formed when acceptance meets offer supported by consideration. Acceptance met offer in this case on 20 December 2012, when the applicant accepted the respondent's counteroffer supported by consideration. The parties' contractual relationship therefore formed on 20 December 2012. I have found that contractual relationship to consist of a single contract comprising two scopes of work. Nothing which occurred after 20 December 2012 can, in any contractual sense, split the single contract which I have found the parties to have entered into into two separate contracts short of a contractually-binding variation. The respondent does not suggest that there was any such variation.

83 It is strictly speaking, therefore, unnecessary for me to deal with the parties' post-contractual conduct. This conduct includes the revised quotations dated 7 January 2013. It also includes the manner in which the parties dealt with

progress claim submission, with progress claim payment and with invoicing. Nevertheless, since the parties have made submissions on these points, I will touch on them. I am also conscious that, although the parties' post-contractual conduct is not admissible as an aid to construing or interpreting the content of their contractual obligations, that is not the task I am now undertaking. My task is to ascertain contractual formation, not contractual content.

84 As I have said, the revised quotations are, on my findings, post-contractual. It is thus irrelevant that the revised quotations, unlike the original quotations, contained different reference numbers. It is also irrelevant that the revised quotation for the fire alarm works included a new term. The effect of that new term was to exclude a dry riser system from the fire alarm works. That term no doubt became incorporated into the content of the parties' contract on and from 7 January 2013, probably as a binding variation. But, as I have said, the content of the parties' contract is not the question before me. The question before me is whether the parties objectively intended to enter into one contract or two. A dry riser system is relevant only to the fire alarm works. It has no relevance to the electrical works. To my mind, incorporating this new term in the revised quotation for the fire alarm works but not in the revised quotation for the electrical works validates the applicant's practice of confining each quotation to a single scope of work for administrative convenience. Incorporating this new term does not go so far as to suggest that the parties believed, in January 2013, that they had entered into two separate contracts for two separate scopes of work in December 2012.

85 The applicant initially issued separate progress claims for each scope of work. This was the case from progress claim 1 (dated 29 April 2013)[55] until

progress claim 17 (dated 30 November 2014).[56] The respondent suggests that this supports its submission that the parties intended their contractual relationship to consist of two contracts. As against that, however, I must set four points.

86 First, even when the applicant issued separate progress claims, *i.e.* from April 2013 to November 2014, it issued and submitted those separate progress claims to the respondent together, on the same day, under cover of the same email or fax transmission.[57]

87 Second, starting with progress claim 18 (dated 12 March 2015)[58], the applicant included both scopes of work in a single, consolidated progress claim.[59] The applicant presented consolidated progress claims in this way from progress claim 18 until the final progress claim, *i.e.* progress claim 24 dated 20 January 2016.[60]

88 Third, the respondent without exception made each of its payments to the applicant (against progress claims 1 to 10) by a single cheque for both scopes of work.

89 Finally, the applicant, also without exception, upon receipt of each cheque, issued a single tax invoice to the respondent covering the respondent's

---

[55] LHW affidavit (dated 5 April 2016) at pages 72 and 201.

[56] LHW affidavit (dated 5 April 2016) at page 192.

[57] CHT affidavit (20 April 2016) at page 10, paragraph 35.

[58] LHW affidavit (dated 5 April 2016) at page 255.

[59] CHT affidavit (20 April 2016) at paragraph 44.

[60] LHW affidavit (dated 5 April 2016) at page 258.

single payment for both scopes of work.[61] There were thus 10 tax invoices, each one covering both scopes of work, for the 10 progress claims which the respondent paid. The respondent did not object to receiving a single tax invoice for each payment.[62] Each of these 10 tax invoices was headed "Proposed A & A Works to Multi-Storey Car Parks (Batch 7)". That is, of course, the title of the main contract. Each tax invoice made no reference to the two scopes of work. Instead, each invoice tracked the parties' cumulative progress payments and progress claims for both scopes of work against a single consolidated contract price of $740,000. That sum, of course, is the sum of the price agreed for both scopes of work.

90 To the extent that I am permitted to look at the parties' post-contractual conduct to ascertain the parties' objective intention when they formed their contractual relationship in December 2012, it appears to me that their conduct is more indicative of a desire to keep the accounting for the two scopes of work separate for administrative convenience than it is of an objective intention to enter into two separate contracts.

91 For these reasons, I find that progress claim 24 arose from a single contract. It was therefore a "payment claim" within the meaning of s 10 of the Act. The adjudicator was properly clothed with the statutory power to determine the substance of the parties' dispute arising from that payment claim.

92 I therefore reject the respondent's first ground for setting aside the determination.

---

[61] CHT affidavit (20 April 2016) at paragraph 46.

[62] Applicant's submissions dated 24 June 2016 at paragraphs 31.9.

Second ground: the retention sum claim

The factual background

93 The respondent's second ground arises from the adjudicator's decision to accept the applicant's invitation to adjudicate upon the applicant's claim for the $37,000 retention sum. In progress claim 24, the applicant computed its claim for $342,530.80 as follows:

Description	**Amount**
Original contract amount	$740,000.00
Additional variation works done	$51,530.80
Less omission	($3,000.00)
Less payment amount received	($409,000.00)
Less retention (-5%)	($37,000.00)
Total claim amount	**$342,530.80**

The last line item of this computation expressly deducted from the applicant's claim a retention sum of 5% of the total agreed price for both scopes of work, *i.e.* $37,000 being 5% of $740,000.[63]

94 In paragraph 7 of its notice under s 13(2) of the Act, the applicant invited the adjudicator to determine the retention sum claim even though it

[63] LHW affidavit (dated 5 April 2016) at page 391.

acknowledged it was not part of its payment claim. I set out the whole of paragraph 7 together with the concluding sentences of paragraph 6 for context:[64]

> 6. …[T]he Claimant has now become entitled to commence adjudication proceedings under the Act. The Claimant intends to apply for adjudication on the Payment Claim for the sum of **S$342,530.80 (excluding GST)**.
>
> 7. Though the Payment Claim No. 24 is for the sum of $342,530.80. The Claimant appeals to the Learned Adjudicator for approval to change the Claim Amount to $379,530.80. The differences of $37,000,00 is for the release of the retention amount. As such, the merit of the case remain unchanged.
>
> [emphasis in original]

95 Despite these paragraphs in the s 13(2) notice, the applicant did not include any claim for the retention sum in the adjudication application which followed. Indeed, Section E of the application expressly advanced the same final figure as set out in the payment claim. Thus, the application again quantified the applicant's claim as "S$342,530.80 (Exclude GST)" under "Payment Claim No. 24".[65] But attached to the application was a copy of the applicant's s 13(2) notice which, as I have said, included the invitation I have quoted above. In that indirect sense, therefore, it could be said that the application repeated the applicant's invitation to the adjudicator to determine its retention sum claim.

96 The adjudicator accepted the applicant's invitation and adjudicated upon the retention sum claim. Having done so, he determined that the applicant was entitled to recover the retention sum because the parties' contract did not give the respondent a right to retain it. His reasons are set out at [35] and [36] of the determination:[66]

---

[64] LHW affidavit (dated 5 April 2016) at paragraph 95 and pages 387 to 391.

[65] LHW affidavit (dated 5 April 2016) at page 395.

[66] Applicant's submissions dated 24 June 2016 at paragraph 54; LHW affidavit (dated 5 April

> 35. The Claimant did not claim for (sic) the Retention Sum in its Progress Claim No. 24. However, in its Adjudication Application, it asks for the release of the Retention Sum of $37,000.00 on two grounds:
>
> > 35.1 Firstly, the Terms and Conditions of the Quotations did not indicate that there would be an implementation of the Retention Sum. In fact, the Owner also did not impose such a condition on the Respondent.
> >
> > 35.2 Secondly, the Contract and Variation Works were completed more than a year ago and hence [the] retention sum, which usually is maintained during the Defects Liability period of 1 year, should be released.
>
> 36. I agree with the first argument that there is no contractual reason for the imposition of a retention fund. As such, although I have doubts over the second reason due to the lack of clarity on when the Defects Liability Period has or should have started, I find that the Retention Sum should be returned to the Claimant.

The parties' submissions

97 Against this factual background, the respondent advances its second ground for setting aside the adjudication determination. That ground is that the adjudicator had no power to determine the retention sum claim because it was not part of the applicant's payment claim. The respondent argues that that is the result of s 13(1) of the Act,[67] s 17(3)(*c*) of the Act[68] and the proposition that an adjudicator's jurisdiction is framed by the payment claim and the payment response: *Libra* ([37] *supra*) at [36].

2016) at page 42.

[67] Respondent's submissions dated 27 June 2016 at paragraphs 179 to 181.

[68] Respondent's submissions dated 27 June 2016 at paragraph 196.

98 In response, the applicant submits that the adjudicator was empowered to determine the retention sum claim by ss 17(3)(*b*), 17(3)(*c*) or 17(3)(*h*) of the Act.

99 I accept the respondent's submission and hold that the adjudicator exceeded his jurisdiction by adjudicating upon the retention sum claim.

My decision: the adjudicator exceeded his jurisdiction

100 I start once again with the provisions of the Act. Section 12(2) entitles a claimant to make an adjudication application arising from construction contract only in relation to its "payment claim". Section 13(1) provides that the subject-matter of an adjudication is a "payment claim dispute".

101 The language of ss 12(2) and 13(1), by relying on the term of art "payment claim" and incorporating it in the concept of a "payment claim dispute", limits the subject-matter of an adjudication application to one or more disputes which arise from a "payment claim". The payment claim therefore fixes the parameters of the substantive content of an adjudication application, subject only to any additional issues introduced by a duly-served payment response.

102 Any other interpretation would be grossly unfair to a respondent. Section 15(3) bars a respondent from raising in its adjudication response any reasons for withholding payment that were not set out in its payment response. If a claimant were allowed to add a new claim to an adjudication application after it had served its payment claim on a respondent, s 15(3) would operate to bar a respondent who had not served a payment response from defending that claim. That bar would operate even though the respondent could not have foreseen that

the claimant would make a new claim, could not have foreseen the content of that new claim and may have valid reasons for withholding payment on that new claim which it could and would have put in a payment response if that new claim had been made in the payment claim itself. An outcome which is unfair in that way cannot have been the intention of the Act. A respondent must be able to ascertain from the payment claim with completeness and certainty – at the time it receives the payment claim – each claim which it will have to address in its payment response if it chooses not to satisfy that claim. It must also be able to ascertain with completeness and clarity when it receives a payment claim the precise scope of the bar which will attach under s 15(3) if it chooses not to serve a payment response in accordance with the Act.

103 In the case before me, the applicant did not merely omit a claim from its payment claim. The applicant went further and expressly excluded the retention sum claim from its payment claim. That amounts to an unsolicited admission by the applicant that the sum was not due. Whatever the reason, the essential fact remains that the retention sum claim did not form part of the applicant's payment claim. As a result, the applicant had no entitlement under s 12(2) of the Act to apply for the retention sum claim to be adjudicated upon. No payment claim dispute within the meaning of s 13(1) arose in connection with the retention sum claim, or could arise once the respondent failed to serve a payment response. The adjudicator was never clothed with the statutory power to deal with the retention sum claim.

104 The applicant argues that ss 17(3)(*b*), 17(3)(*c*) or 17(3)(*h*) empowered the adjudicator to adjudicate upon the retention sum claim. These provisions permit the adjudicator, in determining an adjudication application, to have regard to matters extraneous to the payment claim. The extraneous matters

covered by these three subsections are, respectively: (i) the provisions of the contract to which the adjudication application relates; (ii) the adjudication application and the documents accompanying it; and (iii) any other matter which the adjudicator reasonably considers to be relevant to the adjudication. Thus, the applicant argues, the adjudicator was empowered by the Act to have regard to the following material in order to allow the retention sum claim: (i) the applicant's s 13(2) notice – as a document accompanying the adjudication application – which invited the adjudicator to award the retention sum to the applicant; (ii) the parties' contract, and the fact that it made no provision for a retention sum; and (iii) the applicant's submissions on the issue.

105 I cannot accept the applicant's submission. It is no doubt true that s 17(3) of the Act empowers the adjudicator to have regard to the matters extraneous to the payment claim which are set out in s 17(3)(*a*) to (*h*), including the three specific matters on which the applicant relies. But the adjudicator's powers under s 17(3) do not arise in a vacuum. Section 17(3) rests on the fundamental underlying premise that the adjudicator is exercising those powers to determine a payment claim dispute within the meaning of s 13(1) which is properly part of the subject-matter of an adjudication application made by a claimant entitled to do so under s 12(2) of the Act. Where that fundamental underlying premise is false, s 17 does not permit him to determine that dispute. An adjudicator is not properly seised of a payment claim dispute under the Act if the dispute does not arise from the payment claim read together with any payment response: *Libra* ([37] *supra*) at [96]. That was precisely the position of the retention sum claim in this adjudication.

106 The adjudicator adjudicated upon the retention sum claim when he was not clothed with the statutory authority to do so. The result is that that

determination is null and void (*Chua Say Eng* ([42] *supra*) at [66]). The next question is whether it is the entirety of the determination which is null and void or whether the adjudicator's determination on the retention sum claim can be severed from the remainder of his determination and annulled without affecting the interim finality attached to the remainder.

107 I consider that question after dealing with the respondent's natural justice ground.

Third ground: breach of natural justice

108 As an alternative to its second ground, the respondent submits that the adjudicator breached his obligation under s 16(3)(*c*) of the Act to comply with the principles of natural justice because he adjudicated upon the retention sum claim while barring the respondent from being heard on that claim.[69] It is not in dispute that the adjudicator did bar the respondent from raising any reasons to justify withholding payment to the applicant on progress claim 24, including any reasons to justify withholding the retention sum, on the basis that it had failed to serve a payment response and was therefore subject to the bar in s 15(3) of the Act. For the reasons which follow, however, it is not necessary to analyse the respondent's third ground in detail.

109 I have upheld the respondent's second ground and found that the adjudicator was not clothed with the statutory authority to adjudicate upon the retention sum claim. If I am right in that, no question of natural justice arises. The successful jurisdictional challenge wholly overshadows the natural justice challenge. It makes no sense to ask, let alone to decide, whether the adjudicator

[69] Respondent's submissions dated 27 June 2016 at paragraphs 226 to 227.

breached the rules of natural justice in determining a claim which he had no statutory authority to determine.

110 If I am wrong in my holding, and the adjudicator *was* clothed with the statutory authority to adjudicate upon the retention sum claim, then the bar in s 15(3) is a complete answer to the respondent's natural justice ground. The Act requires a respondent who intends to advance reasons for withholding payment in response to a valid payment claim to set those reasons out in a payment response served within the prescribed time. If a respondent fails to do that – either by omitting a particular reason from its payment response or by failing to serve a payment response at all – the bar in s 15(3) will operate not only to prevent the respondent from advancing those omitted reasons but also to curtail the adjudicator's jurisdiction even to consider any such reasons (see *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 at [33] – [34]).

111 To the extent that the respondent argues that this would be a result unfair to respondents as a class, I have accepted that argument in my holding that s 13(1) must be construed as precluding a claimant from adding to its claim for payment after it has served its payment claim (see [102] above).

112 For these reasons, it is my view that the respondent's third ground adds nothing to its second ground.

The proper order to be made: severance

113 The result of my findings at this point in the analysis is that the adjudicator had the statutory authority to adjudicate upon the applicant's payment claim but had no authority at all to adjudicate upon the applicant's retention sum claim, that claim being outside its payment claim.

114 That error is a jurisdictional error, not an error within jurisdiction. While it is certainly true that the adjudicator failed to comply with s 17(3) of the Act, that is not the gravamen of his error. His breach of s 17(3) did not come in the course of determining a claim which was properly before him. The gravamen of his error is that he purported to determine a claim which was never in law before him. His failure to comply with s 17(3) came in the course of committing the far more fundamental jurisdictional error and is wholly subsumed within it. In relation to the retention sum claim, therefore, the adjudicator committed an error of the first type in *Chua Say Eng*, not of the second type (see [59] above). Nullity must therefore the consequence.

115 The question then is whether it is only the adjudicator's determination of the retention sum claim which is a nullity or whether his entire determination is a nullity.

The parties' submissions

116 The respondent submits that I have no power to do anything but set aside the entire determination as a nullity. Relying on Australian authority from NSW, Queensland and Western Australia, the respondent argues that an adjudicator has a statutory duty to determine the amount which a respondent is to pay to a claimant. If he falls into jurisdictional error in determining any component of that amount, the entire determination is tainted and cannot stand. That is so even if that component is a severable part of the determination and the remainder of the determination is untainted by error.

117 In response, the applicant's primary submission is that I have a discretion to withhold the remedy of a setting aside order and that I should on the facts of this case exercise that discretion to uphold the entire determination,

including the determination on the retention sum claim. I reject that submission. I start by accepting that such a discretion exists, while pointing out that it is to be exercised only rarely. In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190 ("*Chase Oyster*"), McDougall J referred to the relevant decisions in NSW and the Australian High Court and confirmed that the discretion extends at common law to permit a court to decline the remedy of *certiorari* sought to quash a decision tainted with jurisdictional error in extraordinary cases (at [275]):

> To my mind, the decisions to which I have referred support the proposition that there remains a residual discretion not to grant *certiorari* … even in a case of clear jurisdictional error. I have no doubt that, in the ordinary case, an order would be made "almost as of right". But to state the position thus is not to deny but, rather, to affirm the discretion, in an extraordinary case, not to make the order.

I do not consider it appropriate, on the facts of this case, to exercise the discretion and uphold the entire determination. I bear in mind the fundamental jurisdictional nature of the error. I also bear in mind that the amount involved in that error – $37,000 – is not on any view *de minimis*.

118 The applicant's alternative submission, relying on English authority, is that an adjudication determination is severable. I therefore have the power to sever and set aside only that part of the determination which I have found to be a nullity due to jurisdictional error. The remainder of the determination, being untainted by error, will stand and continue to carry interim finality.[70] For the reasons which follow, I have accepted that alternative submission.

---

[70] Applicant's submissions dated 24 June 2016 at paragraph 70.

The position under the Act

119 My starting point is that the power to set aside an adjudication determination is a common law power which exists outside the Act. The Act brings into effect an entirely new and bespoke adjudication regime. To that end, it makes detailed statutory provision for every aspect of that regime from creating a new statutory entitlement to a progress payment in s 5 to setting out a statutory right to enforce an adjudication determination as a judgment of the court in s 27. But nowhere in the Act does it create a power to set aside an adjudication determination, let alone define the grounds on which that power ought to be exercised. There is thus no provision in the Act equivalent to s 48 of the Arbitration Act (Cap 10, 2002 Rev Ed) or to article 34(1) of the UNCITRAL Model Law on International Commercial Arbitration read with s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed). The power to set aside an adjudication determination is not part of the bespoke adjudication regime created by the Act. It is created by and regulated by the common law.

120 In *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 ("*Citiwall*") the Court of Appeal confirmed that the power to set aside an adjudication determination is a common law power. It is an aspect of the High Court's supervisory jurisdiction, *i.e.* the inherent power at common law of a superior court "to review the proceedings and decisions of inferior courts and tribunals or other public bodies discharging public functions" (see at [42]). The Court of Appeal also confirmed in *Citiwall* that an application to set aside an adjudication determination is *akin* to judicial review and that the remedy for a successful challenger is *akin* to a quashing order (at [50]). A quashing order is, of course, the current name for the ancient prerogative writ of *certiorari*.

121 The applicant submits that a superior court has the power at common law to grant *certiorari*, not only against the whole of an inferior tribunal's decision, but also against a severable part of that decision. By analogy therefore, and on the authority of *Citiwall* ([120] *supra*), the High Court has the power to set aside an adjudication determination either in its entirety or in a severable part.

122 The applicant cites two authorities for that proposition. The first is the decision of the House of Lords in *Director of Public Prosecutions v Hutchinson* [1990] 2 AC 783 ("*Hutchinson*"), a criminal law case which turned on administrative law principles. The second is a decision of Akenhead J at first instance in *Cantillon Limited v Urvasco Limited* [2008] BLR 250 ("*Cantillon*"), a security of payment case under the English scheme.

123 I now analyse each of the two cases relied upon by the applicant in turn.

The English approach

Hutchinson

124 The applicant relies on *Hutchinson* ([122] *supra*) to argue that, at common law, a court before which a measure is successfully challenged in part need not quash the entire measure but may sever and quash only its offending part while upholding the remainder of the measure as valid and subsisting.

125 The actual question before the House of Lords in *Hutchinson* ([122] *supra*) was whether certain subsidiary legislation which the House had found to be *ultra vires* in part and *intra vires* in part was severable so as to support the defendants' convictions of criminal offences under the part that was *intra vires*. The House of Lords held unanimously that there was a power at common law

to sever and annul in part. On the facts, however, the House of Lords held unanimously that the subsidiary legislation in question did not come within the principles on which that power could be exercised. The defendants' convictions were therefore quashed.

126 Lord Bridge delivered the leading speech. He held that the test of severance at common law is a double test comprising textual severability and substantial severability. He defined each aspect of the double test as follows (at 804):

> What is involved is in truth a double test. I shall refer to the two aspects of the test as textual severability and substantial severability. A legislative instrument is textually severable if a clause, a sentence, a phrase or a single word may be disregarded, as exceeding the law-maker's power, and what remains of the text is still grammatical and coherent. A legislative instrument is substantially severable if the substance of what remains after severance is essentially unchanged in its legislative purpose, operation and effect.

127 Although the House of Lords in *Hutchinson* ([122] *supra*) was unanimous in the result, the law lords divided on the principles on which the power to sever could be exercised at common law. The division was between Lord Bridge for the majority and Lord Lowry in the minority. The issue which divided them was whether it is possible to modify the text of the measure in question in order to achieve severance when textual severance proves impossible. Lord Bridge's view (at 811) was that textual modification is possible, so long as it leaves unaltered the substantial purpose and effect of the impugned measure:

> When textual severance is possible, the test of substantial severability will be satisfied when the valid text is unaffected by, and independent of, the invalid. The law which the court may then uphold and enforce is the very law which the legislator has enacted, not a different law. But when the court must modify

> the text in order to achieve severance, this can only be done when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision.

128 Lord Lowry's view (at 818) was that textual modification could not be used to achieve substantial severability. In other words, there could be no severance without textual severance:

> My Lords, the accepted view in the common law jurisdictions has been that, when construing legislation the validity of which is under challenge, the first duty of the court, in obedience to the principle that a law should, whenever possible, be interpreted *ut res magis valeat quam pereat*, is to see whether the impugned provision can reasonably bear a construction which renders it valid. Failing that, the court's duty … is to decide whether the whole [of]… the challenged legislation or only part of it must be held invalid and ineffective. That problem has traditionally be resolved by applying first the textual, and then the substantial, severability test. If the legislation failed the first test, it was condemned in its entirety. If it passed that test, it had to face the next hurdle. This approach, in my opinion, has a great deal in its favour.

129 Lord Bridge's approach gained the agreement of all the law lords save for Lord Lowry. It was also adopted and applied by the Privy Council in *Commissioner of Police v Davis* [1994] 1 AC 283 at 298 to 299 per Lord Goff. I therefore take Lord Bridge's approach as correctly expressing the common law position.

130 *Hutchinson* ([122] *supra*) is not, of course, directly applicable to the case before me. It analyses the severability of delegated legislation in administrative law. It does not analyse a superior court's inherent supervisory power to quash the decision of an inferior tribunal. But my function in exercising that power is analogous to the House of Lords' function in *Hutchinson*. As in *Hutchinson*, I have to determine the consequence which should properly follow when a decision-maker exercises a power which Parliament has delegated to it contrary

to Parliament's intent in one respect and in accordance with that intent in another respect.

131 Further, the House of Lords in *Hutchinson* ([122] *supra*) did not see a conceptual distinction between severance when striking down subsidiary legislation in part and severance when quashing the decision of an inferior tribunal in part. Thus, Lord Lowry cited (at 815) with approval the decision of McNeill J in *R v Secretary of State for Transport ex parte Greater London Council* [1986] QB 556 ("*ex parte GLC*"). That case establishes (at 581) that the remedies of both declaration and *certiorari* are available to quash an unlawful and divisible part of an order or decision while upholding the remainder. What precisely is a divisible – and therefore severable – part of that order or decision is left to be determined in English law on the principles in *Hutchinson*.

132 The common law power of severance which the House of Lords recognised in the field of administrative law in *Hutchinson* ([122] *supra*) is in fact a power which runs through the common law as a whole. In *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 ("*Gantley"*), Vickery J in the Supreme Court of Victoria had to consider whether a payment claim served under the Victorian security of payment legislation was severable. He held that it was, taking the view (at [101] – [104]) that *Hutchinson* was merely one aspect of a general common law doctrine of severance:

> The approach of Lord Bridge [in *Hutchinson*] is analogous to the principle of severance which applies in other areas of the common law. For example, under a contract where a term or part of a contract is uncertain, severance may be ordered if it does not result in materially altering the nature of the bargain which the parties have struck. Further, in relation to a will, part of which has been induced by undue influence, the offending

> part may be severed from the remainder if it does not materially alter the meaning of what remains.

133 *Hutchinson* ([122] *supra*) read with *ex parte GLC* ([131] *supra*), *Gantley* ([132] *supra*) and *Citiwall* ([120] *supra*) suffices as authority for the proposition that the High Court hearing an application to set aside an adjudication determination issued under the Act has the power to quash the determination in part, provided that the part to be quashed meets Lord Bridge's test of severability in *Hutchinson*.

134 The respondent submits that *dicta* in two decisions of the Court of Appeal preclude me from equating the power to set aside an adjudication determination to a writ of *certiorari*.[71] The two decisions are *Chua Say Eng* ([42] *supra* at [51]) and *Citiwall* ([120] *supra* at [50]). I reject this submission. The respondent has misconstrued what the Court of Appeal said in each case.

135 At [51] of *Chua Say Eng* ([42] *supra*), the Court of Appeal said:

> The decision in *Chase Oyster* that, on the basis of the decision in *Kirk*, an order of *certiorari* was available to quash or set aside an adjudicator's award made on a jurisdictional error is not relevant to the scope of the Act as it *concerned a constitutional issue which does not arise in Singapore under the Act.* As we explained earlier…, s 27 of the Act is not *in pari materia* with s 25(4)(a)(iii) of the NSW Act. *What is of relevance to the courts in Singapore is whether they should follow Brodyn or Chase Oyster in dealing with a breach of the requirements of the Act* (Sungdo ([11] *supra*) *is not relevant to this issue as it concerned the narrow question of the non-existence of a payment claim).*
>
> [emphasis added]

136 What the Court of Appeal does in this paragraph is to point out that it is a constitutional issue peculiar to Australia arising from the Australian High

---

[71] Respondent's submissions dated 27 June 2016 at paragraphs 265 and 266.

Court's decision in *Kirk v Industrial Court (NSW)* [2010] HCA 1 ("*Kirk"*) and the interaction between Australian federal law and state law which compelled the NSW Court of Appeal in *Chase Oyster* ([117] *supra*) to reject its own earlier decision in *Brodyn Pty Ltd t/as Time Cost and Quality v Davenport* [2004] NSWCA 394 ("*Brodyn*"). That constitutional issue arose because s 25(4)(a)(iii) of the NSW security of payment legislation precludes a respondent in a NSW adjudication from challenging the determination in an application to set aside a civil judgment founded on it. The effect of *Brodyn*, on one view, was to erode the distinction between a jurisdictional error and non-jurisdictional error under the NSW legislation and as a matter of NSW state law. On that view of *Brodyn*, a respondent's application to set aside a judgment founded on an adjudication determination could fail even if the respondent established jurisdictional error. That aspect of *Brodyn* could not stand as a proposition of NSW state law after the High Court's decision in *Kirk*.

137 The constitutional issue which required the NSW Court of Appeal in *Chase Oyster* ([117] *supra*) to reject *Brodyn* ([136] *supra*) does not arise and cannot arise in Singapore. Apart from anything else, s 27 of our Act contains no provision which could be read as barring a respondent from challenging an adjudication determination on grounds of error, whether jurisdictional or otherwise, on an application to set it aside. Our Court of Appeal was therefore making the simple and indisputable point at [51] of *Chua Say Eng* ([42] *supra*) that it was not similarly compelled by a constitutional argument to reject *Brodyn* and adopt *Chase Oyster* in Singapore.

138 *Chua Say Eng* ([42] *supra*) is most certainly not authority that the common law principles which govern *certiorari* have no application to the power to set aside an adjudication determination which is akin to *certiorari*. No

doubt the two bodies of principles are not necessarily identical. And no doubt the two bodies may well develop in future along different lines at common law. But *Chua Say Eng* is not authority that the two bodies have nothing at all in common. The principles which they have in common include the doctrine of severance and the discretion to withhold its grant in an extraordinary case where there is an equally effective and convenient alternative remedy.

139 The respondent has also misconstrued *Citiwall* ([120] *supra*). The point made by the Court of Appeal at [50] in *Citiwall* is that the Act and the subsidiary legislation made to support it – including s 27 of the Act and O 95 of the Rules of Court (Cap 332, R 5, 2004 Rev Ed) – have modified the *procedure* by which the High Court's supervisory power is invoked to set aside an adjudication determination. The Court of Appeal in *Citiwall* said nothing about the *content* of that power.

140 The view I have taken of the power to set aside a determination is neither endorsed nor contradicted directly by anything in the Act or in the case law interpreting and applying the Act. There is nothing in the Act or the case law which requires a court to exercise its power to set aside a determination by setting aside the entire determination. Equally, there is nothing in the Act or the case law which prohibits a court from setting aside a part of a determination which it finds to be severable. That is not surprising. As I have already mentioned, the Act makes no attempt to describe, prescribe or circumscribe in any respect the content of the court's power to set aside an adjudication determination. And the question of severability has not been considered in any case law under the Act to date.

141 Given that the Act has left setting aside to the common law, and given that *Chua Say Eng* ([42] *supra*) and *Citiwall* ([120] *supra*) do not exclude the operation of the common law doctrine of severance in exercising the power to set aside, it appears to me that it is entirely appropriate that that power should be exercisable against a severable part of an adjudication determination. The doctrine of severance is based on the principle of *ut res magis valeat quam pereat*. Applying that principle to an adjudication determination permits the court to give the maximum effect permitted by law to an adjudication determination, and thereby to advance the purposes of the Act.

Cantillon

142 The second case on which the applicant relies to argue that an adjudication determination can be set aside in part is the decision of the English High Court in *Cantillon* ([122] *supra*). Akenhead J concluded in that case, albeit *obiter*, that an adjudicator's decision under the English security of payment scheme was severable, but only along the same lines, and to the same extent, as the disputes before the adjudicator were several. Akenhead J formulated (at [63]) the following six principles of severability under the English security of payment scheme:

> (a) The first step must be to ascertain what dispute or disputes has or have been referred to adjudication. One needs to see whether in fact or in effect there is in substance only one dispute or two and what any such dispute comprises.
>
> (b) It is open to a party to an adjudication agreement … to seek to refer more than one dispute or difference to an adjudicator. If there is no objection to that by the other party or if the contract permits it, the adjudicator will have to resolve all referred disputes and differences. If there is objection, the adjudicator can only proceed with resolving more than one dispute or difference if the contract permits him to do so.
>
> (c) If the decision properly addresses more than one dispute or difference, a successful jurisdictional challenge on that part of

> the decision which deals with one such dispute or difference will not undermine the validity and enforceability of that part of the decision which deals with the other(s).
>
> (d) The same in logic must apply to the case where there is a non-compliance with the rules of natural justice which only affects the disposal of one dispute or difference.
>
> (e) There is a proviso to (c) and (d) above which is that, if the decision as drafted is simply not severable in practice, for instance on the wording, or if the breach of the rules of natural justice is so severe or all pervading that the remainder of the decision is tainted, the decision will not be enforced.
>
> (f) In all cases where there is a decision on one dispute or difference, and the adjudicator acts, materially, in excess of jurisdiction or in breach of the rules of natural justice, the decision will not be enforced by the court.

I will refer to these principles as *Cantillon* principles (a) to (f).

143 The respondent submits that I cannot adopt and apply the approach in *Cantillon* because the juridical basis of adjudication in England is different from that in Singapore[72]. I accept that distinction, of course. As I have already pointed out and accepted, the juridical basis of adjudication in England is the parties' agreement whereas the juridical basis of adjudication in Singapore is statute. But that distinction in my view assists the applicant rather than the respondent. It explains why *Cantillon* principles (a) to (f) turn on the distinction between a single-dispute adjudication and a multiple-dispute adjudication rather than on *Hutchinson* severability, without in any way detracting from the availability of *Hutchinson* severability in Singapore.

144 I begin by observing that *Cantillon* principle (e) is the analogue of *Hutchinson's* test of textual severability. But principles (c), (d) and (f) are not analogues of substantial severability. Instead, those principles make severability

[72] Respondent's submissions dated 27 June 2016 at paragraph 327.

turn entirely on the distinction between a one-dispute adjudication and a multiple-dispute adjudication. That distinction is artificial. But that distinction is also necessary because adjudication in English law is founded on the parties' agreement – express, implied or imputed.

145 The modification is artificial because it makes severance on *Cantillon* principles (c), (d) and (f) available only in a multiple-dispute adjudication. But every dispute comprises a cascade of sub-disputes. Whether a claimant has referred to adjudication one indivisible dispute made up of sub-disputes or several distinct and divisible disputes is a question which depends in large part, if not entirely, on the level of generality with which one undertakes the inquiry necessary to answer it. There is therefore a real risk of artifice in the *Cantillon* approach: the answer will always be in the eye of the beholder. To that extent, *Cantillon* principles (c), (d) and (f) could be said to be artificial in that they elevate form over substance.

146 But this artificial distinction is entirely necessary in English law. The parties' agreement is the sole basis for attaching interim finality to an adjudicator's decision and for enforcing that finality by entering summary judgment on the decision. The parties' agreement is therefore the only basis on which to justify attaching interim finality to part only of an adjudicator's decision and then enforcing that finality by entering summary judgment for that part. In other words, it is impossible to effect severance in English law without undermining interim finality and enforceability unless it is possible at the same time to separate the parties' agreement to interim finality and enforceability. The parties' agreement can be separated only where the disputes can be separated. It is for that reason that Akenhead J was compelled to hold in *Cantillon* ([122] *supra*) that a court can cleave an adjudicator's decision in

English law only along the same lines and to the same extent as it can cleave the disputes before the adjudicator.

The English approach after Cantillon

147 The English cases which have come after *Cantillon* ([122] *supra*) have recognised to a certain extent the artificiality inherent in *Cantillon* principles (c), (d) and (f). They have begun by recognising that *Cantillon* principle (f) is not absolute and that even a decision on a one-dispute adjudication may be severed. These English cases, all of which the applicant relies on,[73] are *Quartzelec Ltd v Honeywell Control Systems Ltd* [2008] EWHC 3315 (TCC),[74] *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC),[75] *Pilon Ltd v Breyer Group plc* [2010] BLR 452,[76] *Working Environments Ltd v Greencoat Construction Ltd* [2012] BLR 309 ("*Greencoat*"),[77] *Lidl UK GmbH v R G Carter Colchester Ltd* [2012] EWHC 3188 (TCC) ("*Lidl*"),[78] *Beck Interiors Ltd v UK Flooring Contractors Ltd* [2012] BLR 417[79] and *Stellite Construction Ltd v Vascroft Contractors Ltd* [2016] EWHC 792 (TCC).[80]

148 It suffices for present purposes to consider only two of these decisions.

---

[73] Applicant's submissions dated 24 June 2016 at paragraphs 78 to 83.

[74] Applicant's bundle of authorities at Tab 23.

[75] Applicant's bundle of authorities at Tab 15.

[76] Applicant's bundle of authorities at Tab 22.

[77] Applicant's bundle of authorities at Tab 29.

[78] Applicant's bundle of authorities at Tab 20.

[79] Applicant's bundle of authorities at Tab 10.

[80] Applicant's bundle of authorities at Tab 26.

149 In *Greencoat* ([147] *supra*), a claimant referred a single dispute to an adjudicator. The respondent served a withholding notice under the parties' contract, *i.e.* outside the adjudication, raising 12 items of claimed deductions. The adjudicator took all 12 items into account in his decision in the adjudication. Akenhead J, hearing the claimant's application to enforce the decision, held that the adjudicator had rightly taken 10 of those items into account but had committed a jurisdictional error in taking the remaining two into account. *Cantillon* principle (e) was satisfied. But principle (f) was not, because only one dispute had been referred to the adjudicator. Akenhead J nevertheless severed the part of the decision tainted by the adjudicator's error and allowed the claimant's application to enforce the remainder. Akenhead J did not, however, make clear how severance on these facts could be reconciled with *Cantillon* principle (f).

150 *Lidl* ([147] *supra*) was again a one-dispute adjudication. A claimant referred a dispute over liquidated and ascertained damages to adjudication. It was common ground before Edwards-Stuart J that the adjudicator had exceeded his jurisdiction by answering a question on liquidated damages which was not put to him. The claimant argued that it was nevertheless entitled to enforce the adjudicator's decision on the basis that that part of the decision could be severed. The respondent relied on *Cantillon* principle (f) to argue that the adjudicator's decision was entirely unenforceable because the claimant had referred only one dispute – a dispute over liquidated damages – to adjudication. Edwards-Stuart J rejected this argument, severed the adjudication decision and permitted the claimant to enforce that part of the decision unaffected by error.

151 Edwards-Stuart J expressly acknowledged in *Lidl* ([147] *supra*) that *Cantillon* principle (f) is not absolute. Where an adjudicator exceeds his

jurisdiction by deciding a matter which the parties have not referred to him, severance is permissible by way of exception to *Cantillon* principle (f), so long as *Cantillon* principle (e) is satisfied (at [61]):

> … At first sight it may appear that the decision in *Greencoat* conflicts with the general principle that a decision cannot be severed where only one dispute or difference has been referred. The rationale underlying this principle is, I think, that where a single dispute or difference has been referred it will generally be difficult to show that the reasoning in relation to the part of the decision that it is being sought to sever had no impact on the reasoning leading to the decision actually reached, or that the actual outcome would still have been the same. If this is the case, the part cannot safely be severed from the whole. However, where, in the case of the referral of a single dispute additional questions are brought in and adjudicated upon, whether by oversight or error, there should be no reason in principle why any decision on those additional questions should not be severed provided that the reasoning giving rise to it does not form an integral part of the decision as a whole. However, failing this, the entire decision will be unenforceable.

152 In *Construction Act Review: Adjudicators' Decisions – Severability Update* [2014] Const LJ 249[81] by Peter Sheridan, the author analyses *Greencoat*, *Lidl* and the other cases listed at [147] above. The same author also wrote *Construction Act Review – Severability of Adjudicators' Decisions* [2004] Const LJ 71[82] which influenced Akenhead J's decision in *Cantillon*. In his later article, the author concludes that *Cantillon* principle (f) is no longer absolute. He therefore proposes to reformulate as follows:

> (f) An adjudicator's decision on a single dispute, partly made without jurisdiction, may be severed so as to give effect to the part of the decision made within jurisdiction provided that the remaining valid part of the decision may be identified in terms of liability and quantum, without adjustment or contribution to the content of the valid part by the court.

---

[81] Respondent's bundle of authorities (volume IV) at Tab E2.

[82] Respondent's bundle of authorities (volume IV) at Tab E2, footnote 1.

153 This formulation comes very close to approximating Lord Bridge's test of substantial severability in *Hutchinson* (see [126] above), with its language adapted to the specialised field of adjudication. However, even with this proposed revision, the *Cantillon* principles still rest on the distinction between a one-dispute adjudication and a multiple-dispute adjudication. For that reason, even the proposed revision to *Cantillon* principle (f) restricts itself to jurisdictional error. If the domain of principle (f) is confined to the one-dispute adjudication, then it is axiomatic that a breach of natural justice would undermine the validity of the entirety of the adjudicator's decision on that single dispute. It is for that reason that *Cantillon* principle (f) does not attempt to accommodate a breach of natural justice.

The Singapore approach

Synthesising a principle for jurisdictional error

154 The power to set aside an adjudication determination in part under our security of payment scheme is no more than the court's common law power to quash the decision of an inferior tribunal in part. In applying that power to the specialised field of adjudication in Singapore, it is not necessary to draw an artificial distinction between a one-dispute adjudication and a multiple-dispute adjudication in order to have a juridical basis for attaching interim finality and enforceability to the remaining part which is upheld. Both of those consequences result in Singapore from the force of statute, not the agreement of the parties. Those two consequences continue to attach by force of statute even if a determination is set aside in part.

155 It appears to me, therefore, that an adjudication determination under the Act is severable for jurisdictional error on the following principles, drawing on

both *Hutchinson* ([122] *supra*) and *Cantillon* ([122] *supra*) and adapted to the local context:

(a) The court may set aside a severable part of an adjudication determination (what is a severable part being ascertained in accordance with paragraphs (b) to (d) below) for jurisdictional error without undermining by that act alone the interim finality and enforceability of the remainder of the determination under the Act.

(b) Subject to paragraph (e) below, a part of a determination is severable for jurisdictional error only if it is both textually severable and substantially severable from the remainder of the determination.

(c) A part of a determination is textually severable if the textual elements of the adjudicator's determination on that part, including his reasons in writing supporting that part given under s 17(2) read with s 16(8) of the Act, may be disregarded, with what remains of the adjudicator's reasons still being grammatical and coherent.

(d) A part of a determination is substantially severable if the remainder of the determination which is to be upheld as valid and which is to carry interim finality and be enforced may be identified in terms of liability and quantum, without adjustment or contribution to the content of the valid part by the court.

(e) By way of exception to paragraphs (c) and (d) above, the court may modify the text of the adjudicator's determination in order to achieve severance if the court is satisfied that it is effecting no change in the substantial effect of the adjudication determination after

accounting for the jurisdictional error and its necessary editorial consequences.

156 I have accommodated in these principles only a challenge which succeeds for jurisdictional error. I have not attempted to accommodate a challenge which succeeds on natural justice grounds. There is no doubt that, in a suitable case, a severable part of a determination which is tainted by a breach of natural justice may be set aside without disturbing the remainder. But identifying when that can occur is unnecessary for my decision and is best done when the issue actually arises for decision.

157 The respondent submits strenuously that by severing an adjudication determination on these principles, I am guilty of judicial legislation. I do not accept that characterisation. As I have held, the Act leaves the content of the power to set aside an adjudication determination entirely to the common law. At common law, the power to quash includes a power to quash in part. No parliamentary legislation is required to create that power. No judicial legislation is involved in recognising and applying it.

The retention sum claim is severable on this principle

158 Applying the principles at [155] above to the case before me, it seems to me that the adjudicator's determination on the retention sum claim is both textually severable and substantially severable.

159 The adjudication determination is textually severable because the adjudicator gave his reasons for allowing the retention sum claim in only two paragraphs of his determination and nowhere else. If I disregard those

paragraphs and the reasons they comprise entirely, the remainder of his reasons remain both grammatical and coherent.

160 There is a slight difficulty with textual severance in that the adjudicator awards to the applicant in paragraph 37 of his reasons the sum of $379,530.80. That figure is the sum of the principal value of the payment claim ($342,530.80) plus the value of the retention sum claim ($37,000). In that same paragraph, the adjudicator certifies the adjudicated amount to be $406,097.96, being the composite figure of $379,530.80 with goods and services tax added to it at 7%. This adjudicated amount also appears in paragraph 3.1 of the determination. I cannot textually sever these figures in these two paragraphs of the determination without disposing of the entire adjudicated amount and discarding the essential content of the determination.

161 I am satisfied, however, that the principle at [155(e)] above permits me to substitute the figure $342,530.80 for $379,530.80 in paragraph 37; and, having added goods and services tax of 7% to this smaller figure, to substitute the figure $366,507.96 for $406,097.96 in both paragraphs 3.1 and 37 as the adjudicated amount.

162 The adjudication determination is also substantially severable. It is not mere happenstance that the adjudicator's decision on the retention sum claim is textually severable. The content of the applicant's payment claim and the content of the retention sum claim are entirely separate and involve separate considerations of fact and law. With respect to the applicant's payment claim, the adjudicator considered whether the works carried out by the applicant justified the payment claim. With respect to the retention sum claim, the adjudicator considered whether the parties had contractually agreed that the

respondent was to withhold a retention sum.[83] The adjudicator's decision on the retention sum can be severed from the remainder of the determination without any interference with his determination on the applicant's payment claim and without the court adjusting to or contributing to the content of the valid part of the determination apart from, as I have mentioned, the arithmetical consequences of the jurisdictional error.

163 The effect of severance is to quash the adjudicator's determination on the retention sum claim and to uphold the remainder of the determination as being valid and as carrying interim finality. That remainder can be identified easily and with certainty both in terms of liability and quantum. Liability remains with the respondent despite severance. For the reasons I have given above, the quantum of the remaining claim is precisely $366,507.96, including goods and services tax.

164 In addition to awarding the adjudicated amount to the applicant, the adjudicator also awarded interest on the adjudicated amount and the costs of the adjudication to the applicant. The interest component poses no impediment to severance. The adjudicator awarded interest which accrues at 5.33% on the adjudicated amount on and from 14 February 2016. The editorial change to the adjudicated amount automatically changes the principal on which interest accrues without need for further editorial change.

165 As for the costs award, there is no difficulty in satisfying substantial severability on the liability for costs. The adjudicator awarded the entire costs of the adjudication to the applicant. Those costs comprise $600 as the authorised

---

[83] LHW Affidavit (dated 5 April 2016) at page 43 (the determination at page 12).

nominating body's fee and $4,800 as his own fees. The respondent did not file a payment response and therefore was rightly barred under s 15(3) from advancing any reasons against payment, both in respect of the payment claim and in respect of the retention sum claim. As a result, it is possible to say with certainty that the applicant: (i) would have been entirely successful even if the applicant had not invited the adjudicator to determine the retention sum claim; and (ii) remains entirely successful even after severance. Severance does not require any editorial adjustment to the respondent's liability for costs. Even if it were to appear to me that an adjustment was necessary because, hypothetically, the adjudicator had apportioned the costs between the parties in his determination and that apportionment could no longer stand after the severable part had been set aside, that erroneous apportionment would have been in my view an error by the adjudicator within his jurisdiction rather than a jurisdictional error. Even on that hypothesis, therefore, that error would not have entailed setting aside either the costs award or the entire determination on the principles in *Chua Say Eng* ([42] *supra*) and would have been no impediment to severance.

166 Substantial severability on the quantum of costs is slightly more difficult. The award of the authorised nominating body's fee does not in itself pose a difficulty. That is a fixed fee of $600. It would have been the same fixed fee even if the adjudicator had not fallen into jurisdictional error. The quantum of this element of costs is therefore unaffected by the severance. The difficulty lies in the adjudicator's fees. Those fees are fixed at $300 per hour. Although that is subject to a statutory maximum, that maximum was not in any event reached in this case.

167 The adjudicator's fees of $4,800 therefore represent 16 hours of the adjudicator's time-costs. I cannot tell how many of those 16 hours the adjudicator spent adjudicating upon the payment claim and how many he spent adjudicating upon the retention sum claim. But it seems to me that, to the extent that an adjudicator includes in his determination of the costs payable by a respondent to him in an adjudication an element of his own time-costs for determining a part of the claim while labouring under a jurisdictional error, his determination on the quantum of costs is not liable to be set aside if his determination of that part is set aside as a result of that jurisdictional error. I say that for two alternative reasons.

168 First, it appears to me that an adjudicator's error in including an element of improperly incurred time-costs in his determination of his own fees in an adjudication is once again an error within his jurisdiction. There is no indication in the Act that its legislative purpose is to invalidate either the costs aspect of the determination or the entire determination as a result of such an error (see *Chua Say Eng* [42] *supra* at [66] – [67]).

169 Alternatively, if I am wrong on that, and there was jurisdictional error in relation to the determination on costs, I would hold on the facts of this case that this is an appropriate case in which to exercise the court's discretion to withhold the remedy of a setting aside order in relation to the costs determination. The sum in question is *de minimis*, being a relatively small proportion of the $4,800 in fees which is in turn a relatively small proportion of the total value of the adjudication amount, whether before or after severance. And there is an alternative remedy which is adequate and appropriate, bearing in mind the quantum involved, which is to leave it to the respondent to recover any overpayment on fees as damages in arbitration or litigation brought by it to

determine with full finality the parties' rights and liabilities arising from their disputes comprised in this adjudication.

170 For these reasons, there is no need to make any editorial adjustment to the costs element of the determination in order to achieve substantial severance of the retention sum claim. The costs element of the determination is to stand as determined by the adjudicator, both as to liability and quantum.

The Australian approach

171 The respondent argues that my approach to severance is heterodox and urges me to adopt instead the approach taken in the Australian cases. The submission is that the Australian cases are of more persuasive authority than the English cases because the various Australian state jurisdictions, like Singapore, have a security of payment scheme which is statutory rather than one based on the parties' agreement.

172 The respondent submits that the effect of the Australian cases is to establish that, in a jurisdiction which has enacted a statutory security of payment scheme, an adjudication determination is not severable unless there is specific statutory authority permitting severance. There is specific statutory authority only in the Victorian and in the Queensland security of payment legislation. More specifically, the NSW security of payment legislation – which served as a model for our own legislation – has no such statutory authority.

173 The Australian cases on which the respondent relies, in chronological order, are:

(a) the NSW cases of *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 ("*Multiplex*"),[84] *Lanskey Constructions Pty Ltd v*

Noxequin Pty Ltd (in liq) [2005] NSWSC 963 ("*Lanskey*")[85] and *Watpac Construction (NSW) Pty Ltd v Austin Corp Pty Ltd* [2010] NSWSC 347 ("*Watpac*");[86]

(b) the Queensland cases of *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd & Ors* [2011] QSC 145 ("*James Trowse*")[87] and *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd & Ors* [2013] QCA 394 ("*BM Alliance*");[88] and

(c) the Western Australia case of *Alliance Contracting Pty Ltd v James* [2014] WASC 212 at [87] ("*Alliance Contracting*").[89]

I have considered each of these cases. None of them is authority contrary to the position which I have taken on severability.

174 I make three overarching points which touch on the decisions in all of these cases before I consider each case in turn.

175 The first overarching point I make is that in none of these cases did the claimant argue that the power at common law to quash a decision of an inferior tribunal in part could be exercised to quash an adjudicator's determination in part. None of these case therefore considered – let alone rejected – the very point which the claimant canvasses before me and which I have accepted. To that

---

[84] Respondent's bundle of authorities (volume II) at Tab B12.

[85] Respondent's bundle of authorities (volume II) at Tab B8.

[86] Respondent's bundle of authorities (volume II) at Tab B20.

[87] Respondent's bundle of authorities (volume II) at Tab B6.

[88] Respondent's bundle of authorities (volume II) at Tab B3.

[89] Respondent's bundle of authorities (volume II) at Tab B1.

extent, therefore, none of these cases is even persuasive authority that the common law power to quash in part does not apply to the court's power to set aside an adjudication determination.

176 The second overarching point is that none of these Australian cases contemplates a situation such as the present, where an adjudicator exceeds his jurisdiction by determining a claim which he had no statutory authority whatsoever to determine. That was precisely the scenario which the English court had to consider in *Greencoat* ([147] *supra*) and *Lidl* ([147] *supra*). That is the type of case in which severance poses the least conceptual difficulty. For that reason, I consider the English approach to be more persuasive. I do not consider that purposes of the Act are advanced by denying outright any power to sever even in the straightforward case – such as a case involving a clear jurisdictional error like the one before me – simply because severance will be difficult and may be impossible in more complex cases. I consider that the purposes of the Act are advanced by recognising the common law doctrine of severance as applying to any application to set aside an adjudication determinations for jurisdictional error, subject to satisfying the tests of textual severability and substantial severability which have been set out.

177 The third overarching point is related to the first two. Each of these Australian cases proceeds on the assumption that – because adjudication is a creature of statute – a power to quash an adjudication determination in part must also be created by statute. That argument from statute has been addressed in the case before me by my finding that our power under our Act to set aside an adjudication determination is not a creature of statute at all; and also by my acceptance of the authority of *Hutchinson* ([122] *supra*) and *Cantillon* ([122] *supra*) at common law.

178 In my view, Vickery J in *Gantley* ([132] *supra*) took the correct approach to the question, albeit in the context of a payment claim rather than an adjudication determination. He too was presented with a submission that the court had no power to sever a payment claim because the Victorian security of payment legislation did not permit it. He did not hesitate to reject this submission as being contrary to the purposes and objects of security of payment legislation generally (at [115]):

> I do not accept this submission. The question should be whether the Act, either expressly or impliedly, operates to exclude the common law doctrine of severance. I find that it does not. Indeed, the purposes and objects of the Act … are best served by processes which, so far as possible, ought to accommodate reasonable flexibility and avoid unnecessary technicality.

179 The respondent submits that I should not place any weight on *Gantley* ([132] *supra*) because s 23(2B)[90] of the Victorian security of payment legislation contains an express power to permit a court to set aside an adjudication determination in part, *i.e.* "to the extent that it has been made in contravention" of the Victorian equivalent of s 17(3) of the Act. That distinction is not, to my mind, to the point. The fact is that Vickery J held that the common law doctrine of severance applied to a payment claim because the Victorian legislation did not expressly or impliedly prohibit severance of a payment claim. So too, in the case before me, I have held that the common law doctrine of severance applies to an adjudication determination because the Act does not expressly or impliedly prohibit severance of an adjudication determination.

180 I will now deal with each of the Australian cases in turn.

---

[90] Respondent's bundle of authorities (volume I) at Tab A8, page A253.

Multiplex

181 In *Multiplex* ([173(a)] *supra*), Palmer J found that an adjudicator had made a jurisdictional error in relation to one item worth $99,609 in a determination worth over $529,000. He held, however, that the court had no power to dissect the adjudicated sum in order to quash the determination in part because arriving at the "adjudicated amount" was a duty imposed on the adjudicator by the NSW equivalent of s 17(2) of our Act (at [91]):

> The first point to note is that although the jurisdictional error in this case has affected only one disputed claim … the court cannot quash just the decision which affects [that claim], leaving the rest of the Determination intact. That is because the adjudication process is required by s 22(1) of the Act [*in pari materia* with s 17(2) of our Act] to produce only three findings: the adjudicated amount (if any), the date on which that amount becomes payable and the rate of interest payable. Only these findings are reflected in the adjudication certificate which is issued under s 24(3) of the Act and filed as a judgment under s 25(1). The adjudicator has no power to correct the adjudication amount where it is shown to have been produced by error of law, whether or not jurisdictional. There is power to correct a determination under s 22(5) only in accordance with what might loosely be called the 'slip rule'. None of the circumstances provided in s 22(5) is applicable in the present case.

182 Having held that he had no power to sever the adjudication determination, however, Palmer J did not leave unresolved the practical problem which that finding gave rise to. He relied (at [94]) on the "well-established [principle] that relief in the nature of the prerogative writs may be withheld in the Court's discretion if there is another 'equally effective and convenient remedy'". He declined, however, to exercise that discretion on the facts of the case because: (i) the amount in question was high, almost 20% of the total value of the determination; (ii) there was no evidence that the dispute was in the process of being resolved with full finality; and (iii) there was no

evidence how long it would take for their dispute to be resolved with full finality. He accordingly quashed the determination in its entirety.

183 It appears to me, with respect, that the inevitable pragmatic difficulties which are posed by an adjudication determination which is valid in part and void in part are best resolved by accepting that the common law power to quash in part extends to adjudication determinations rather than by relying on the discretion to withhold the power to quash on the basis that there is an equally effective and convenient alternative remedy. Where an adjudication determination is void in part, *i.e.* affected by the first type of error in *Chua Say Eng* ([42] *supra)*, it would be an affront to the scheme of the Act to exercise a discretion to withhold an order confirming that part as being void by quashing it. But it would, in my view, be equally an affront to the scheme of the Act to quash even the valid parts of a severable determination when a power exists at common law to quash only a part of it and when there is nothing in the Act to exclude that power.

Lanskey

184 In *Lanskey* ([173(a)] *supra*), a claimant put forward a payment claim which was final in nature. It was therefore essential that the adjudicator ascertain the value of the work which the claimant had actually completed. The respondent advanced 69 deductions in response to the payment claim. The adjudicator mischaracterised all 69 of the deductions as being in the nature of a set-off for defective work. In fact, a number of the deductions were not for defective work but were for incomplete work. These deductions totalled in value A$12,435.39 out of the determination's total value of A$145,849.90. As a result of his mischaracterisation, the adjudicator failed to determine the value of the work completed. This error led Associate Justice Macready to hold that the

adjudicator had denied the respondent natural justice (at [15]) and had failed exercise his power *bona fide* to determine the dispute before him (at [19]). The judge also held, following Palmer J's reasoning in *Multiplex* ([173(a)] *supra*), that he had no power to sever the adjudication determination (at [20] – [22]).

185 *Lanskey* ([173(a)] *supra*) simply followed *Multiplex* ([173(a)] *supra*) without adding to Palmer J's analysis. For the same reason I have given above, and in light of the three overarching points I have made about all the Australian cases, I do not consider that *Lanskey* is authority against the approach I have taken in this case.

Watpac

186 In *Watpac* ([173(a)] *supra*), McDougall J quashed an adjudication determination in its entirety even though a breach of natural justice affected only a part of it. In the course of his judgment he said this (at [27] – [29]):

> [27] [Counsel for the respondent] referred also to the decision of the [NSW] Court of Appeal in *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales* (2007) 23 BCL 205. The particular significance of that decision is that it supports the proposition that there is no concept in relation to determinations, of partial invalidity. … If it seems to me to follow from this that if a determination lacks some essential condition … then the consequences, of invalidity, follow.
>
> [28] … On either basis [*i.e.* if a statutory precondition of validity is not satisfied or if there has been a substantial denial of natural justice] there is lacking something essential to validity. On either basis, the resulting determination must be void. And what is void is the determination, not the particular part affected by the relevant invalidating circumstance.
>
> [29] To put it another way: if the court were to strike down part only of the determination, it would be, in effect, rewriting it. That would usurp the function entrusted by the [NSW] Act to adjudicators. In addition, it may not always be obvious to see how a denial of natural justice has affected the outcome: for example, where the omitted or irrelevant matter had the

> capacity to [affect] … the adjudicator's overall view of the "credibility" or substance of a party's case.

187 The key point about *Watpac* ([173(a)] *supra*) is that it dealt with the difficult issue of a breach of natural justice. A breach of natural justice can be of many types and can have many consequences. Some breaches may affect the determination of every aspect of every dispute before the adjudicator. It must follow in such a case that the entire determination must to be set aside. Some breaches may affect only what is clearly a severable part of a determination. It suffices in such a case to sever and set aside only that part. Yet other breaches may affect a severable part of a determination but do so in a manner which suggests that the adjudicator misapprehended his entire task. It may follow, but not necessarily so, that the entire determination must be set aside. A further difficulty in analysing the difficulties in a breach of natural justice case is that the counterfactual analysis necessary to effect severance is far more complicated. That analysis carries a great risk of the court contributing to the content of the determination or of the court substituting its judgment for that of the adjudicator. It is for these reasons that I have left it to a case in which the issue actually arises for an error consisting of a breach of the rules of natural justice to be accommodated within the principles I have ventured to suggest at [155] above.

188 A jurisdictional error is of an entirely different nature. A jurisdictional error is far more likely to result in nullifying or invalidating only a severable aspect of the determination. The jurisdictional error in the case before me illustrates this. The part of the determination which is affected by the error is severable both as to liability and quantum. The counterfactual is obvious beyond doubt. What the adjudicator's determination would have been if he had not fallen into jurisdictional error can be ascertained with absolute certainty. There

is no danger of the court substituting its own decision on the content of the dispute for the adjudicator's determination.

189 For all these reasons, therefore, it appears to me that *Watpac* ([173(a)] *supra*) is not persuasive authority against the approach I have taken.

James Trowse

190 In *James Trowse* ([173(b)] *supra*), an adjudicator determined that a claimant was entitled to A$167,522.32. The respondent applied for judicial review of the determination alleging that the adjudicator had made a number of errors. Atkinson J held that the determination was unaffected by error save that the adjudicator had breached the rules of natural justice in awarding the claimant A$22,101 for a particular variation claim. As a result, she quashed the entire determination, holding (at [56]) that severance was not possible under the Queensland security of payment scheme. She relied on s 26(1)(*a*) of the Queensland legislation – to the same effect for present purposes as s 17(2)(*a*) of our Act – to hold (at [57] – [59]) that the Queensland statute: (i) empowers and obliges the adjudicator to arrive at a single sum which by statute carries interim finality and bind the parties; and (ii) does not, in the absence of express statutory authority to that effect (as there was in Victoria), allow a Queensland court to dissect that sum:

> [56] The Victorian [security of payments legislation] includes provisions not found in its interstate equivalents which may render the adjudicator's decision partially void…. In the absence of any such provision, it is not possible to sever the adjudication determination.
>
> [57] The statutory scheme in Queensland provides for an adjudication decision for one amount only. Pursuant to s 26 of [the Queensland legislation], an adjudicator is to decide the amount of the progress payment, if any, to be paid by the respondent to the claimant (the adjudicated amount) ….

> [58] The adjudicated amount is a statutorily created sum that once determined is final and binding upon the parties. …
>
> [59] Save a slip rule, there is no mechanism available to sever any unlawful finding from an adjudicated amount, in particular a part of the adjudicated amount that is infected by jurisdictional error as found in this case.

191 I make only one point on *James Trowse* ([173(b)] *supra*) in addition to my three overarching points. Atkinson J herself accepted (at [55]) that her all-or-nothing approach was "not necessarily an attractive result". That is why, no doubt, the Queensland security of payment legislation was thereafter amended by introducing a new s 100(4) which expressly empowers a Queensland court to set aside an identifiable part of an adjudicator's decision on grounds of jurisdictional error while allowing the part of the decision not affected by the error to remain binding on the parties. There appears to me to be no reason that Singapore law should countenance such an unattractive result and wait for legislative cure when the common law power to quash in part offers an immediate solution and is not prohibited by our Act.

BM Alliance

192 The next case which the respondent relies on is the decision of Muir JA in the Queensland Court of Appeal in *BM Alliance* ([173(b)] *supra*). That was an appeal from a decision of Applegarth J at first instance (at [2013] QSC 67). In *BM Alliance*, a respondent applied for a declaration that an adjudication determination was void as a result of three jurisdictional errors. Applegarth J upheld only one of those three errors. That error affected a claim worth A$4.3m out of the total award of A$28m. Instead of declaring the entire determination void, however, Applegarth J accepted the claimant's undertaking to repay the A$4.3m to the respondent as an adequate alternative remedy for the respondent.

He therefore exercised his discretion to withhold *certiorari* to declare the entire determination void. The respondent appealed.

193 The Queensland Court of Appeal allowed the appeal and declared the entire determination to be void. Muir JA, giving the principal judgment, held that: (i) an administrative decision arrived at in jurisdictional error lacks legal foundation and has no legal effect whatsoever unless statute intends to the contrary (at [62] and [66]); (ii) there was no basis in the provisions of the Queensland statute or in its underlying purposes or policy to find such a contrary intent (at [68] and [76]); and (iii) the respondent therefore had a right to have the entire determination declared void and not just the A$4.3m tainted by jurisdictional error (at [77]).

194 *BM Alliance* ([173(b)] *supra*) is not a decision on the applicability of severance to adjudication determinations. Applegarth J's decision at first instance did not sever the adjudication determination. Nor did Muir JA on appeal hold that adjudication determinations are not severable. Instead, the case turned on whether it is appropriate to exercise the court's discretion to withhold prerogative relief even though jurisdictional error has been established, on the grounds that there is a more convenient and satisfactory remedy available to the respondent. The decision of the Queensland Court of Appeal reaffirms that the remedy of *certiorari* is to be withheld only in extraordinary cases. That is not the approach I have taken to the retention sum claim.

Alliance Contracting

195 In *Alliance Contracting* ([173(c)] *supra*), a claimant referred a number of disputes over variations to adjudication. The respondent raised a number of set-offs and cross-claims in its response. The adjudicator resolved the rival

contentions and found that the net result was that the claimant owed the respondent the net sum of A$6.2m. But he held that he had no jurisdiction, on an adjudication commenced by a claimant, to award a sum *against* the claimant. He therefore determined merely that the claimant was not entitled to recover any sum from the respondent.

196 The respondent sought judicial review of the adjudicator's determination. The respondent confined its challenge to the adjudicator's determination that he had no jurisdiction to award a sum against the claimant. By doing that, the respondent sought to leave intact his determination that the claimant owed the respondent A$6.2m. Beech J in the Supreme Court of Western Australia held that: (i) the adjudicator was correct in determining that he had no power to award a sum against the claimant (at [75]); and (ii) that if the respondent were correct and the adjudicator had committed jurisdictional error, the entire determination would have to be quashed, there being no power to sever (at [91]).

197 *Alliance Contracting* ([173(c)] *supra*) does not support the respondent's submissions to me. First, Beech J dismissed the application because the adjudicator had not been guilty of any jurisdictional error. What he said about severance was clearly and merely *obiter*. Second, what the respondent was trying to do in that case, rather audaciously, was not to sever the adjudicator's decision along lines of divisible substance on the *Hutchinson* principles. Instead, the respondent was attempting to sever and nullify the adjudicator's reasoning on a single issue: whether he had the power to award a sum against the claimant. As Beech J himself said (at [91]) the power of severance does not allow a party to cherry-pick favourable findings *within* even a divisible part of an adjudication determination (at [91]):

> In my view, the adjudication cannot be divided into component steps in its reasoning, and one or more separate steps then impugned by judicial review. It is the adjudication that is liable to judicial review, not elements of the reasoning adopted in the adjudication. If the adjudicator made the jurisdictional error alleged by [the respondent], the adjudication is liable to be quashed. The substance of what is sought by [the respondent] is to preserve the whole of the adjudication, except for the adjudicator's conclusion that he had no power to award a sum in favour of [the respondent]. I am not persuaded that it would be open to grant the relief sought by [the respondent].

Conclusion on the Australian authorities

198 For the reasons I have given, I do not find the respondent's submissions based on the Australian authorities to be persuasive. There is nothing in the Australian cases which demonstrates to me that I do not have the power to sever the determination or that I should not exercise the power to order that the determination be set aside in part, *i.e.* to the extent of the retention sum of $37,000 plus $2,590 goods and services tax, and upheld as to the remainder.

Conclusion

199 I conclude by repeating and summarising my holdings and findings. The applicant's payment claim was based on a single contract. The adjudicator did not act in excess of jurisdiction in determining the payment claim. But the retention sum claim was not part of the payment claim. The adjudicator therefore exceeded his jurisdiction in purporting to determine the retention sum claim. That is an error of the first type in *Chua Say Eng* ([42] *supra)*. That aspect of the determination is therefore a nullity. I have declined to permit the entire determination to stand by exercising my discretion to withhold the remedy of setting aside. But I do have the power to set aside a severable part of the determination rather than the entire determination. The determination of the retention sum claim is a severable part of the determination. It is both textually

severable and substantially severable. Although some editorial adjustments are necessary to carry through the arithmetical consequences of the severance, those adjustments are permissible and do not detract from severability. I have therefore exercised the power to sever in order to set aside that part – and only that part – of the determination, comprising $37,000 plus $2,590 in goods and services tax.

200 The applicant is entitled to the costs of this application. The respondent has failed in its attempt to set aside the determination in its entirety. Although the applicant too has not succeeded in its primary submission that I should uphold the determination in its entirety, it has succeeded in its alternative submission that the adjudicator's determination of the retention sum claim should be severed and that part set aside alone. It is also fair to say that the applicant did not press its primary submission with great enthusiasm. I therefore consider the event on this application to be in the applicant's favour without qualification. Costs must follow that event.

201 I have therefore ordered that the respondent pay to the applicant the costs of and incidental to this application, such costs fixed at $8,000 plus reasonable disbursements.

202 The applicant is entitled to have released to it the sum of money which the respondent paid into court as security under s 27(5) of the Act. However, in ordering the release of that sum, I must reflect my decision to set aside the determination to the extent of the retention sum claim. The sum paid by the respondent into court has an element of post-determination interest calculated in accordance with the adjudicator's determination. I cannot, therefore, simply

order that the Accountant General release $37,000, with or without goods and services tax, to the respondent.

203 The retention sum claim ($37,000) represents 9.749% of the adjudicated amount ($379,539.80). I have therefore ordered the Accountant General to release to the respondent 9.749% of the sum which the respondent paid into court together with the further interest accrued on that part of the money while it has been held by the Accountant General. The balance of the sum paid into court by the respondent together with the further interest accrued on it must be released to the applicant.

Vinodh Coomaraswamy
Judge

Daniel Koh, Poonaam Bai, and Lorenda Lee (Eldan Law LLP) for the applicant;
Tan Tian Luh and Ngo Wei Shing (Chancery Law Corporation) for the respondent.