IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2021] SGHC 72

Originating Summons No 1129 of 2020

Between

Frontbuild Engineering &
Construction Pte Ltd

… *Plaintiff*

And

JHJ Construction Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Building and construction law] — [Statutes and regulations] — [Building and Construction Industry Security of Payment Act]
[Building and construction law] — [Sub-contracts] — [Termination] — ["Pay when paid" provisions]

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v
JHJ Construction Pte Ltd

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Introduction

1 It is a well-known fact that cash flow is the lifeblood of the building and construction industry. To this end, the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) (the "Act") contains a multitude of complementary provisions that facilitate a fast, low cost adjudication system designed to expeditiously adjudicate and determine, on a temporary but nevertheless binding basis, disputes in relation to progress payment claims made under a construction contract to which the Act applies.

2 The Act and the adjudication mechanism provided therein are, however, not the *panacea* for any and all disputes that may arise in relation to progress payments under a construction contract. Indeed, s 4 of the Act contains, among others, provisions prescribing when the Act would *not* apply at all. For example,

s 4(2)(*c*) of the Act provides that the Act would not apply to a terminated contract in the circumstances enumerated in that sub-section.

3 On the other hand, in order to ensure that the purpose of the Act is not frustrated by ingenious drafting, the Act also imposes some restraints on the parties' freedom to contract. One such example may be found in s 9, which renders "pay when paid" provisions in a construction contract unenforceable and of no effect.

4 Does the Act go so far as to render "pay when paid" provisions in a construction contract unenforceable notwithstanding the termination of the contract? In particular, where a term in a construction contract purports to suspend payments upon termination of the contract, and makes the contractor's liability to pay any further sum owing to its sub-contractor contingent or conditional on the operation of some other contract or agreement, does s 4(2)(*c*) of the Act apply so as to render the entire Act *inapplicable* to the contract; or, would s 9 of the Act apply so as to render such a clause in the terminated contract unenforceable and of no effect? In short, what (if any) is the interplay between ss 4(2)(*c*) and 9 of the Act?

5 These were some of the interesting questions that arose in Originating Summons No 1129 of 2020 ("OS 1129"), which concerned an application by the plaintiff to, *inter alia*, set aside an adjudication determination dated 27 May 2020 (the "AD"). I heard OS 1129 on 14 December 2020 and delivered oral grounds for my decision on 14 January 2021. Whilst there has been no appeal against my decision, as the answers to the questions raised at [4] are relevant to the industry and to practitioners, I provide the written grounds for my decision.

Facts

The parties

6 Frontbuild Engineering & Construction Pte Ltd (the "plaintiff") was appointed by the People's Association as the main Contractor to carry out certain construction works at Fengshan Community Club (the "Worksite").[1] By a Letter of Award dated 27 March 2019, the plaintiff appointed JHJ Construction Pte Ltd (the "defendant") as its sub-contractor (the "Sub-Contract") for the supply of labour to carry out reinforcement concrete works (the "Sub-Contract Works").[2]

Background to the dispute

7 The Sub-Contract Works were part of the main works for the addition of a new storey to a three-storey building at the Worksite (the "Main Contract Works"). Under the "RC Works Schedule for Main Building" in the Sub-Contract, the date for completion of the Sub-Contract Works was 31 October 2019.[3] For various reasons (which are immaterial to the application and issues arising therein), the Sub-Contract Works could not be completed in time.

8 In or around February 2020, disputes began to brew. The plaintiff complained that on 21 and 22 February 2020, the defendant "did not deploy manpower to the worksite".[4] On 23 February 2020 (which was a Sunday), the defendant apparently attempted to enter into the Worksite but was unable to.

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1 Plaintiff's Written Submissions ("WS") at para 2; Defendant's WS at para 6; Affidavit of Xu Jun at para 10.

2 Plaintiff's WS at para 3; Defendant's WS at para 8; Affidavit of Xu Jun at para 12.

3 Affidavit of Xu Jun at p 76 (Exhibit XJ-1, Tab 1, Subcontract).

4 Plaintiff's WS at para 6(d)–6(e).

The defendant alleged that the plaintiff had prevented access to the Worksite. The plaintiff countered that the defendant had failed to obtain prior permission from the plaintiff before attempting to gain access to the Worksite on a Sunday.[5] On 4 March 2020, the plaintiff issued the defendant a written notice under clause 9(a) of the Sub-Contract demanding that it resume its works under the Sub-Contract.[6]

9 Clause 9 of the Sub-Contract provided as follows:

> 9. Termination of Sub-Contract
>
> The Main Contractor, without prejudice to any other rights or remedies including his right to treat this Sub-Contract as repudiated may terminate the Sub-Contract on any of the following grounds.
>
> a. If the Sub-Contractor has wholly or partly suspended work without justification or is failing to proceed with diligence and due expedition, and following expiry of 7 days written notice from the Main Contractor to that effect, has failed to take effective steps to re-commence work or is continuing to proceed without due diligence or expedition, as the case may be.
>
> b. If the Sub-Contractor has previously received a written notice under paragraph (a) thereof with which he has complied at the time but at any time thereafter has again suspended work or failed to proceed with diligence and due expedition.
>
> c. If the Sub-Contractor commits an act of bankruptcy or becomes insolvent or compounds with or makes any assignment for the benefit of his creditors and under such circumstances the employment of the Sub-Contract is automatically terminated.
>
> *In any of the above cases* the following shall apply, namely:
>
> …
>
> b. *No further payment shall be made to the Sub-Contractor until the whole of the Main Contract Works has been completed* and the Sub-Contractor shall indemnify the Main Contractor for the

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5 Plaintiff's WS at para 6(f); Defendant's WS at paras 12–13.

6 Plaintiff's WS at para 6(g); Affidavit of Pang Kai Heng at para 6.

> additional cost necessary to complete the remaining Sub-Contract Works and any loss or damage suffered as a result of the termination.
>
> [emphasis added]

Whilst clause 9 of the Sub-Contract was drafted such that it refers to clause 9(b) twice, for the purposes of these grounds of decision, unless indicated otherwise, I refer only to the latter clause 9(b).

10 It can be seen from the above that, under clause 9(b) of the Sub-Contract, the purported *consequences* of terminating the Sub-Contract in accordance with clause 9 were two-fold. The first consequence was that no further payment shall be made to the defendant "*until the whole of the Main Contract Works has been completed*" [emphasis added]. The second consequence was that the defendant "shall indemnify the [plaintiff] for the additional cost necessary to complete the remaining Sub-Contract Works and any loss or damage suffered as a result of the termination". The dispute before me only concerned the first consequence.

11 On 12 March 2020, the plaintiff issued the defendant a notice of termination of the Sub-Contract.[7] On 31 March 2020, the defendant issued and served on the plaintiff Payment Claim No. PC 9 (the "Payment Claim").[8] The Payment Claim was in respect of work done by the defendant for the period ending 31 March 2020.[9] Having received no payment response from the plaintiff, the defendant issued its Notice of Intention to apply for adjudication

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7 Affidavit of Pang Kai Heng at para 7; Plaintiff's WS at para 6(i).

8 Affidavit of Pang Kai Heng at para 8; Affidavit of Xu Jun at para 14; Plaintiff's WS at para 6(j); Defendant's WS at para 16.

9 Affidavit of Xu Jun at pp 38–44 (Exhibit XJ-1, Tab 2, Payment Claim No. PC9).

on 27 April 2020.[10] The claim was referred to adjudication and the AD was rendered by the Adjudicator on 27 May 2020. Under the AD, the Adjudicator determined that a sum of $204,210.67 was payable by the plaintiff to the defendant.[11] On 23 July 2020, the defendant commenced enforcement proceedings in the State Courts in DC/OSS 84/2020 and on 24 July 2020, obtained leave under s 27(1) of the Act to enforce the AD as an order of court to the same effect (the "Leave Order").[12]

12 In OS 1129, the plaintiff sought to set aside the AD and the Leave Order. Two preliminary and inter-related issues concerning whether the plaintiff's application to set aside the AD was out of time and whether the Leave Order had been properly served on the plaintiff also arose on the facts.

The parties' cases

13 The defendant raised a preliminary objection that the plaintiff's application to set aside the AD was out of time. The defendant submitted that its solicitors "had instructed their process server to serve a copy of the [Leave Order] on [the plaintiff] at [the plaintiff's] registered address … on 29 July 2020." The process server, in turn, confirmed that the Leave Order had been served on the plaintiff at its registered address at about 3.25pm that day.[13] Under O 95 r 2(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), the plaintiff was required to file its setting aside application "[w]ithin 14 days after

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10 Affidavit of Pang Kai Heng at para 9; Affidavit of Xu Jun at para 15; Plaintiff's WS at para 7(a); Defendant's WS at para 17.

11 Plaintiff's WS at para 7(g); Affidavit of Pang Kai Heng at pp 221–223.

12 DC/ORC 1857/2020.

13 Defendant's WS at paras 20–21; Affidavit of Sim Beng Chye at paras 4–5.

being served" with the Leave Order, *ie*, by 12 August 2020.[14] OS 1129 was filed on 9 November 2020, well after the expiration of the 14-day period.

14 The plaintiff averred that it was "unaware" of the service of the Leave Order on 29 July 2020.[15] Furthermore, the Leave Order was defective for failing to "state the effect of paragraph (4)" of O 95 r 2 of the ROC, as required by O 95 r 2(5). The plaintiff claims that the letter from the defendant's solicitors to the plaintiff enclosing the Leave Order likewise failed to state the same, and merely stated as follows:[16]

> Take Notice that should our client continue to not receive the funds within five (5) days from the date of this letter, we are instructed to proceed to enforce the Adjudication Determination SOP/AA 103/2020.

The plaintiff submitted that a breach of O 95 r 2(5) ROC would render service of the Leave Order void.[17] The plaintiff also submitted in the alternative that even if the breach of O 95 r 2(5) ROC did not render the service of the Leave Order void, it was "in the interest of justice" that the court granted it an extension of time for the filing of OS 1129.[18]

15 On the substantive issue in OS 1129, the plaintiff submitted that the Adjudicator had breached his duty under s 17(3)(*a*) of the Act by failing to take into account the effect of the termination of the Sub-Contract and the application

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14 Defendant's WS at para 24.

15 Affidavit of Pang Kai Heng at para 21; Plaintiff's WS at para 10.

16 Plaintiff's WS at para 13.

17 Plaintiff's WS at paras 11–12.

18 Plaintiff's WS at para 15.

of s 4(2)(*c*) of the Act.[19] Relying on *Comfort Management Pte Ltd v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 ("*Comfort Management*") at [26]–[27] and [30], the plaintiff submitted that the Adjudicator must consider the matters set out in s 17(3) of the Act such as the provisions of the Act under s 17(3)(*a*) and the plaintiff's submissions and responses under s 17(3)(*g*), notwithstanding the fact that the plaintiff did not file any payment response to the Payment Claim.[20] The plaintiff was hence "entitled to make submissions solely in the nature of highlighting patent errors in the material properly before the [A]djudicator even when [it] has failed to file a payment response".[21]

16 Under s 17(3)(*a*) of the Act, the Adjudicator shall have regard to the provisions of the Act. Section 4(2)(*c*) of the Act, in turn, provides that the Act "shall not apply to":

> (*c*) any *terminated contract* to the extent that —
>
> (i) the terminated contract contains *provisions relating to termination that permit the respondent to suspend progress payments to the claimant until a date or the occurrence of an event specified in the contract*; and
>
> (ii) that date has not passed or that event has not occurred;
>
> …
>
> [emphasis added]

The plaintiff argued that the Adjudicator failed to consider the applicability of s 4(2)(*c*) of the Act on the facts of this case.[22] Relying on *SEF Construction Pte*

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19 Plaintiff's WS at paras 16 and 26.

20 Plaintiff's WS at paras 20–21.

21 Plaintiff's WS at para 22.

22 Plaintiff's WS at paras 23–26.

Ltd v Skoy Connected Pte Ltd [2010] 1 SLR 733 ("*SEF*"), the plaintiff invited this court to set aside the AD on the basis that the Act did not apply to the Sub-Contract, having been terminated on 12 March 2020. The plaintiff thus argued that "the learned Adjudicator ought to have found that [the Act] did not apply … at the time of the Adjudication Hearing" and the defendant was thereby "precluded from making any progress claim until after the [M]ain [C]ontract [W]orks had been completed" under clause 9(b) of the Sub-Contract.[23] In that regard, the patent errors committed by the Adjudicator were two-fold: first, in failing to apply s 4(2)(*c*) of the Act; and second, by misinterpreting the effect of clause 9(b) of the Sub-Contract.[24]

17 The defendant submitted that the Sub-Contract was not terminated under clause 9. As such, s 4(2)(*c*) of the Act was inapplicable on the facts and the defendant was entitled to submit the Payment Claim after 12 March 2020.[25] On the contrary, the plaintiff had committed two repudiatory breaches of the Sub-Contract and *the defendant* elected to terminate the same on 2 March 2020. The first repudiatory breach was in respect of the plaintiff allegedly taking over part of the Sub-Contract Works[26] and the second repudiatory breach was in respect of the plaintiff allegedly barring the defendant's workers from entering the Worksite from 27 February 2020 onwards.[27]

18 According to the defendant, the manner in which the Sub-Contract was terminated was significant insofar as it affected whether clause 9(b) of the Sub-

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23 Plaintiff's WS at para 31.

24 Plaintiff's WS at para 32.

25 Defendant's WS at para 28.

26 Defendant's WS at para 29.

27 Defendant's WS at para 32.

Contract could be relied upon by the plaintiff. Clause 9 of the Sub-Contract stipulated that it is only under any one of the situations specified in the clause that certain consequences, such as no further payments being made to the defendant "*until the whole of the Main Contract Works has been completed*" [emphasis added], would apply. Given that the Sub-Contract had been terminated by way of the defendant's acceptance of the plaintiff's repudiatory breach, clause 9 did not apply.[28] Relying on *Grouteam Pte Ltd v UES Holdings Pte Ltd* [2016] 5 SLR 1011, the defendant invited this court to make a finding that the plaintiff's actions amounted to a repudiatory breach of the Sub-Contract[29] and to find that clause 9 of the Sub-Contract was inapplicable on the facts.

19 In the alternative, the defendant submitted that the plaintiff cannot rely on the termination of the Sub-Contract to resist or delay payment. Relying on *Shimizu Corp v Stargood Construction Pte Ltd* [2020] 1 SLR 1338 ("*Shimizu*") for the proposition that "any termination must necessarily be *prima facie* valid" (at [37]), the defendant averred that the plaintiff's repudiation was "akin to an invalid termination" such that the plaintiff could not rely on the same to resist or delay payment.[30]

20 In the further alternative, the defendant submitted that clause 9(b) of the Sub-Contract was a "pay when paid" provision and accordingly, was rendered

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28 Defendant's WS at paras 56–57.

29 Defendant's WS at para 67.

30 Defendant's WS at paras 68–69.

unenforceable by virtue of s 9 of the Act.[31] Section 9 of the Act provides as follows:

> (1) A pay when paid provision of a contract is unenforceable and has no effect in relation to any payment for construction work carried out or undertaken to be carried out, or for goods or services supplied or undertaken to be supplied, under the contract.
>
> (2) In this section —
>
> …
>
> "pay when paid provision", in relation to a contract, means a provision of the contract *by whatever name called* —
>
> …
>
> (*c*) that otherwise makes the *liability to pay money owing*, or the due date for payment of money owing, *contingent or conditional on the operation of any other contract or agreement*; …
>
> [emphasis added]

Finally, the defendant also submitted that the material part of clause 9(b) of the Sub-Contract effectively sought to exclude the operation of the Act, which would be contrary to and void under s 36 of the Act.[32]

Issues to be determined

21 The preliminary issue primarily concerned whether the plaintiff's application was filed out of time. That in turn depended on whether the service of the Leave Order on 29 July 2020 was invalid such that the prescribed time period of 14 days had not elapsed by the time the plaintiff filed OS 1129.

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31 Defendant's WS at para 70.

32 Defendant's WS at para 83.

22 The crux of the substantive application concerned whether the Adjudicator had failed to consider the applicability of s 4(2)(*c*) of the Act and its impact on the Adjudicator's jurisdiction so as to render the AD susceptible to being set aside. The plaintiff relied on s 4(2)(*c*) of the Act to argue that the Act was inapplicable to the Payment Claim and the dispute that was referred to adjudication. The defendant on the other hand relied on s 9 of the Act to contend that the relevant portion of clause 9(b) of the Sub-Contract was unenforceable and of no effect in the first place as it was or operated as a "pay when paid provision".

23 In my view, considering where the battle lines were drawn in relation to the substantive application, the critical question that needed to be answered first was this – what was the interplay, if any, between ss 4(2)(*c*) and 9 of the Act? At the end of the hearing on 14 December 2020, I directed the parties to tender supplementary written submissions within seven days of the hearing to address this question.

Preliminary Issues

The Leave Order was validly served

24 In relation to service of the Leave Order, the only contention raised by the plaintiff was that it was "unaware" of the service of the Leave Order on 29 July 2020.[33] I did not think that a lack of *awareness* necessarily supported an allegation that the service itself was improper or invalid. On the contrary, I found on the evidence that the Leave Order was validly served on the plaintiff. The defendant served the Leave Order at the plaintiff's registered address on 29

[33] Plaintiff's WS at para 10.

July 2020 and I accepted as true the affidavit of service deposed to by the defendant's solicitors' process server.

Whether the Leave Order was defective

25 It was common ground between parties that the Leave Order did not contain the requisite notice required under O 95 rr 2(4)–2(5) of the ROC.[34] Those rules stipulate that:

> (4) Within 14 days after being served with the order granting leave, the debtor may apply to set aside the adjudication determination and the adjudication determination shall not be enforced until after the expiration of that period or, if the debtor applies within that period to set aside the adjudication determination, until after the application is finally disposed of.
>
> (5) The copy of the order served on the debtor must state the effect of paragraph (4).

26 Nevertheless, the defendant submitted that such defect "ultimately did not cause any prejudice given that [the plaintiff] appears to have omitted to take action to set aside the [Leave Order] for reasons entirely due to its own carelessness and had somehow misplaced the [Leave Order]".[35] On the facts, the defendant only took steps to enforce the Leave Order in September 2020 by way of garnishee proceedings, almost two months after it had been served on the plaintiff. Counsel for the plaintiff, Mr Kyle Sim, accepted that the plaintiff could not demonstrate any prejudice that had been caused as a result of the defect in the Leave Order. At the hearing before me, counsel for the defendant, Mr Ang Minghao, made an oral application for the defect in the Leave Order to be cured.

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34 Defendant's WS at para 25.

35 Defendant's WS at para 26.

27 In my judgment, the defect in the Leave Order was quite clearly an "irregularity" falling within O 2 r 2(1) of the ROC and which could be cured under O 2 r 2(2). In the circumstances of this case and particularly when there was no prejudice caused to the plaintiff as a result of the irregularity, I allowed the defendant's oral application and exercised the court's curative power to cure the defect in the Leave Order.

28 As noted at [14], the plaintiff also sought an extension of time to file OS 1129, in the event that I found that the Leave Order had been validly served and was not void. It was common ground between the parties that the relevant considerations in determining if an extension of time ought to be granted are the length of delay, the reason(s) for the delay, the merits of the intended application, and whether there was undue prejudice to the defendant if the extension of time was granted.

29 Having considered the circumstances of this case, the factors mentioned at [28], and the fact that both parties were prepared to and did present their respective arguments on the substantive issues arising in OS 1129, I exercised my discretion in favour of allowing the plaintiff an extension of time until 9 November 2020 when OS 1129 was filed.

30 With the preliminary issues out of the way, I now turn to address the substantive issues in OS 1129.

Whether the AD and the Leave Order should be set aside

The court's supervisory jurisdiction

31 The principles applicable when the court hears an application to set aside an adjudication determination are well established. In *Comfort Management*,

the Court of Appeal held at [71] that the court's task in such an application is to "assess whether any mandatory provision under the Act has been breached". In the present context, that provision would be s 17(3)(*a*) read with ss 4(2)(*c*) and 9 of the Act. It is also well-established that in making this assessment, the court does not and indeed, "cannot consider the merits of the adjudication determination". In a case where no payment response is served by the adjudication respondent (as was the case with the plaintiff in OS 1129), the responses that an adjudication respondent may raise in the adjudication proceedings are limited to highlighting patent errors in the material properly before the Adjudicator (*Comfort Management* at [68]). It is in that sense that "whether there are patent errors is the decisive test for whether the adjudicator has breached his duty under s 17(3)" (*Comfort Management* at [81]).

32 The test for what constitutes a patent error is also well established. In essence, it refers to "an error that is obvious, manifest or otherwise easily recognisable". The above definition formulated by caselaw is now encapsulated in s 2 of the Act. Further, the error must be in "the *material* that is properly before an adjudicator" [emphasis in original] (*Comfort Management* at [22]). As noted in *Comfort Management* at [23], by its very definition, patent errors would constitute an "exceptional and extremely narrow category of errors."

33 With the abovementioned principles in mind, I turn to the arguments raised. First, I accepted the Adjudicator's finding that "the termination by the [plaintiff] on 12th March 2020 is valid" at face value.[36] This was a finding that went to the merits of the AD, and therefore could not be revisited by the court in a setting aside application. In my judgment, the defendant's submissions as

[36] AD at para 295

set out at [17]–[18] amounted to a backdoor attempt to review the merits of the underlying dispute; it sought to invite the court to consider whether it would have reached the same decision as the Adjudicator on that issue. As the court's supervisory jurisdiction does not include an examination of the merits of the AD, I rejected the defendant's submissions in that regard.

The effect of termination of the Sub-Contract on the defendant's right to submit payment claims

34 Nevertheless, the finding of a valid termination of the Sub-Contract by the plaintiff did not *ipso facto* mean that the defendant was therefore not entitled to submit any payment claims thereafter. On the contrary, the right of a party to submit a payment claim and the validity of any payment claim submitted after a construction contract has been terminated depends, first and foremost, on the terms of the contract which govern the parties' rights; thus, the contract and its terms retain primacy. As clearly explained by the Court of Appeal in *Shimizu* at [36] and re-emphasised in *Orion-One Residential Pte Ltd v Dong Cheng Construction Pte Ltd and another appeal* [2020] SGCA 121 ("*Orion-One*") at [48], the overarching role of the Act is only a "gap-filling" one. The contract and its terms remain the primary focus of the parties' rights and obligations insofar as submission of progress payment claims are concerned; this remains true also for the submission of payment claims post-contract termination. It is in that sense that some provisions of the Act, for example ss 6 and 7, are applicable only where a contract is "*silent* as to the amount of a progress payment which a party is entitled to, or does not provide any mechanism for the valuation of construction work carried out or goods or services supplied" [emphasis in original] (*Shimizu* at [29]).

35 However, this is not to say that the *sole* function of the Act is limited to that of "gap-filling". The Act also *limits* parties' freedom to contract and certain provisions in the Act clearly and expressly do so. For example, s 9 of the Act effectively prohibits "pay when paid provisions" entirely (no matter how they may be described in the contract) by "rendering them completely unenforceable" (*Shimizu* at [30]). These limitations have been put in place by the Legislature to ensure that the overarching purpose of the Act (*ie,* of facilitating cash flow) is not otherwise stultified by allowing parties unlimited contractual freedom.

36 Reverting to the case at hand, the central issue that I had to consider was whether s 4(2)(*c*) of the Act takes primacy over s 9 of the Act. The significance of an affirmative answer to this question is that the Act would *not* apply to "any terminated contract", such as the Sub-Contract in this case, thereby rendering the applicability of s 9 of the Act a non-starter. At one level, it might *appear* that there is some tension between s 4(2)(*c*) and s 9 of the Act. If so, the question remains whether any such apparent tension can be resolved by the application of accepted principles of statutory interpretation.

The interplay between sections 4(2)(c) and 9 of the Act

37 Whether s 4(2)(*c*) of the Act takes primacy over s 9, or *vice versa*, is a matter of statutory interpretation. Under s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) (the "IA") an "interpretation that would promote the purpose or object underlying the written law … shall be preferred to an interpretation that would not promote that purpose or object". The correct approach to the purposive interpretation under s 9A of the IA was clearly set out and explained by the Court of Appeal in *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [37]. The court's task is as follows:

> (a) First, ascertain the possible interpretations of the provision, having regard not just to the text of the provision but also to the context of that provision within the written law as a whole.
>
> (b) Second, ascertain the legislative purpose or object of the statute.
>
> (c) Third, compare the possible interpretations of the text against the purposes or objects of the statute.

38 At the first step, the court determines the ordinary meaning of the words of the legislative provision with the aid of "a number of rules and canons of statutory construction, all of which are grounded in logic and common sense" (*Tan Cheng Bock* at [38]). For example, one rule is the presumption that the "same word is to bear the same meaning throughout" a given legislation (*Woon Brothers Investments Pte Ltd v Management Corporation Strata Title Plan No 461 and others* [2011] 4 SLR 777 at [19]). At the second step, the court begins by presuming that a statute is a coherent whole such that any specific purpose underlying a particular provision is not contrary to the general purpose (*Tan Cheng Bock* at [41]). In that regard, primary internal textual sources such as the long title of a statute, the words of the particular provision and other provisions, including the structure of the statute as a whole (*Tan Cheng Bock* at [44]) as well as secondary extraneous material such as Hansard may be helpful in indicating a provision's specific purpose (*Tan Cheng Bock* at [43]). Ultimately, it must always be borne in mind that "the primary source of information as to the legislative intent should be the text itself" (*Tan Cheng Bock* at [45]).

39 As set out at [22], there were two possible competing interpretations of ss 4(2)(*c*) and 9 of the Act. The first possible interpretation, as submitted by the plaintiff, was that s 4(2)(*c*) of the Act should be interpreted on its own and takes primacy over s 9 of the Act such that "pay when paid provisions" in *terminated* construction contracts remained enforceable as the Act would not apply at all to

the terminated contract until the conditions in s 4(2)(*c*) of the Act had been met. The second possible interpretation, as submitted by the defendant, was that s 4(2)(*c*) of the Act was to be interpreted in light of s 9 of the Act such that "pay when paid provisions" in construction contracts, including a terminated contract, were strictly unenforceable.

40 The plaintiff submitted that the applicability of s 9 of the Act "must necessarily flow from the contract in question being one [to which the Act] applies".[37] According to the plaintiff, this was because the "flow of enquiry by any adjudicator … when determining if he has the appropriate jurisdiction to make a determination starts with the question of whether or not a contract exists between the parties" with reference to s 4 of the Act.[38] One of the "basic requirements" necessary for an AD is the "existence of a contract between the [parties], to which the [Act] applies (s 4)" (*SEF* at [45(a)]; *Comfort Management* at [74]). Insofar as the Sub-Contract had been terminated, the Act was inapplicable to the payment dispute such that s 9 of the Act was also inapplicable. Further, as clarified by the Court of Appeal in *Shimizu* at [26], since there is no "dual railroad track system" where a party possessed a statutory entitlement to a progress payment which is separate and distinct from a party's contractual entitlement, the plaintiff submitted that "there was neither a contractual or statutory entitlement to payment" since clause 9(b) of the Sub-Contract provided that "no further payment shall be made until the completion of the Main Contract works".[39]

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37 Plaintiff's Supplemental Written Submissions ("SWS") at para 4.

38 Plaintiff's SWS at para 21.

39 Plaintiff's SWS at paras 8–9.

41 The defendant submitted that "the meaning of (contractual) '*provisions*' referred to" in s 4(2)(*c*) of the Act should "bear a consistent meaning with the same word used elsewhere … in the absence of any contrary intention expressed by Parliament".[40] Therefore, where a given "pay when paid" provision is rendered unenforceable by s 9 of the Act, "the prohibition against such contract provisions should be consistently applied".

42 The defendant also submitted that nothing in the Act or extraneous materials "suggest that the presumption that Parliament intended the same meaning to be applied to the word 'provision' has been rebutted".[41] At the second reading of the Building and Construction Industry Security of Payment (Amendment) Bill (Bill 38/2018) (*Singapore Parliamentary Debates, Official Report* (2 October 2018) vol 94), when Parliament sought to introduce the current s 4(2)(*c*) of the Act, the then Minister of State for National Development Mr Zaqy Mohamad clearly stated that the preservation of rights to payment for construction companies "remains the principle that underpins the amendments".

43 I agreed with the defendant that s 4(2)(*c*) of the Act should be construed in context, having regard to the entire piece of legislation and not in isolation. In doing so, the court should strive to achieve a harmonious construction of provisions within the same statute, particularly where that construction would promote the purpose of the legislation and thereby, give effect to the intention of Parliament. As such, s 4(2)(*c*) of the Act should be construed in light of the other provisions of the Act such as s 9.

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40 Defendant's SWS at para 6.

41 Defendant's SWS at para 7.

44 While I agreed with the plaintiff that s 4 sets out the parameters for when the Act does or does not apply, I disagreed that it is to be interpreted or given primacy in the sense contended for by the plaintiff. I found the plaintiff's reliance on *SEF* at [45(a)] misplaced. *SEF* was not concerned with and did *not* touch on the interpretation of s 4 of the Act, either generally or in relation to s 4(2)(*c*) specifically. Judith Prakash J (as she then was) was summarising, in *general terms*, the basic requirements that a court, in exercising its supervisory powers under s 27 of the Act, should be concerned with. *SEF* does not stand as authority that s 4 of the Act takes primacy over other provisions in the Act.

45 I also found the plaintiff's reliance on certain parts of *Shimizu* to be misplaced. The plaintiff focused on the Court of Appeal's comment that a contractor making a claim for progress payments under the Act "must show that there is a basis for claiming such payment under the terms of the contract in question" (*Shimizu* at [28], citing *Far East Square Pte Ltd v Yau Lee Construction (Singapore) Pte Ltd* [2019] 2 SLR 189 ("*Far East Square*") at [30]). However, those very same paragraphs in *Shimizu* and *Far East Square* clarified that the rationale for requiring a contractor to show such contractual basis for progress payments is that the right to be paid must first crystallise *pursuant to the underlying construction contract*. The Act therefore does not confer upon a contractor the right to be paid; it only facilitates the enforcement of such a right by, for example, providing for the process of making and receiving progress payment claims and responses in the manner stipulated when the underlying contract is silent on the same. The right upon which a contractor makes a claim for a progress payment remains a purely contractual right as opposed to a statutory one.

46 It was therefore not open to the plaintiff to argue that the defendant could not possibly satisfy the requirement expounded at [45] (*ie*, showing a contractual basis for a claim for progress payments) because clause 9(b) of the Sub-Contract purportedly suspended all payments to the defendant after 12 March 2020 and made them contingent or conditional upon the completion of the "whole of the Main Contract Works". The plaintiff's argument was somewhat circular as it *assumed* that the relevant part of clause 9(b) was valid and enforceable in the first place. As the Court of Appeal in *Shimizu* took pains to clarify, s 9 of the Act "limits the parties' freedom to contract" by rendering "pay when paid provisions" completely unenforceable (at [30]). The plaintiff did not advance any submissions on the statutory limitation contained in s 9 of the Act to parties' freedom to contract which clause 9(b) of the Sub-Contract, in effect, sought to circumvent.

47 In light of the context of the Act as a whole, s 4(2)(*c*) of the Act does not, in my judgment, take primacy over s 9 of the Act. The conclusion I have reached is consistent with and gives effect to the *raison d'être* of the statutory framework, which was to ensure that sub-contractors are not left at the mercy of main contractors: (a) withholding payments for reasons *unrelated* to the subcontractors' performance; and (b) making such payments contingent on performance of some other contract. In contrast, if the plaintiff's interpretation was accepted, s 9 of the Act could easily be circumvented by dint of contract drafting, thereby rendering it otiose in many cases. I did not consider this to be a consequence intended by the Legislature; nor would it promote the purpose of the Act or s 9 in particular. Therefore, when s 4(2)(*c*) of the Act is construed to determine if the Act applies to a particular terminated construction contract, any termination and suspension of payment provisions in that contract are to be given effect *only if* they do *not* fall foul of s 9 of the Act. In my view, such an

interpretation would not only allow a harmonious construction of ss 4(2)(*c*) and 9 to be achieved in circumstances where those provisions intersect, but would also be consistent with the purpose of the Act.

48 Following from [47], when an adjudicator construes a termination clause in a construction contract that also contains a provision on the suspension of further payments to the counterparty following termination of that contract, the adjudicator is in my judgment required to consider if that provision on suspension of payments also falls within the ambit of a "pay when paid provision" as defined in s 9 of the Act. If it does, the adjudicator is obliged to *disregard* it as that contractual provision is, under s 9 of the Act, treated as unenforceable and of no effect "in relation to any payment for construction work carried out…. under *the contract*" [emphasis added].

49 Whilst there is a dearth of caselaw on "pay when paid" provisions, I was able to draw support for the conclusions I reached at [47] from *AMJ Pte Ltd v AMK Pte Ltd* [2012] SCAdjR 581 (*"AMJ"*), which was a published adjudication determination of Mr Chow Kok Fong. *AMJ* also involved a sub-contract which was terminated by the adjudication respondent. The learned adjudicator found at [62]–[67] that a number of provisions in the sub-contract which purported, in various ways, to peg the adjudication respondent's obligation to pay its sub-contractor to certain events occurring under the *main contract* were all caught by s 9 of the Act as "pay when paid provisions". The adjudicator ruled that those provisions in the sub-contract were unenforceable and should *not* be accorded any effect in the adjudication. In essence, the adjudicator in *AMJ* ruled that s 9 of the Act was applicable notwithstanding that on the facts of the case, the underlying construction contract had been terminated.

50 I conclude this section by highlighting that both ss 9(1) and 9(2) of the Act refer to a "pay when paid provision" in a "contract". The term "contract" is, in turn, defined in s 2 of the Act as "a construction contract or a supply contract, *and includes a construction contract … that has been terminated*." [emphasis added]. Thus, it is clear that Parliament intended for s 9 of the Act on the effect of "pay when paid" provisions to *also* apply to a *terminated construction contract*. This serves to further fortify the conclusions I reached at [47].

Whether the Adjudicator failed to consider s 4(2)(c) of the Act

51 I turn now to consider whether the Adjudicator failed to have regard to s 4(2)(*c*) of the Act as contended for by the plaintiff. In short, I disagreed that the Adjudicator failed to consider s 4(2)(*c*) of the Act in the AD.

52 Mr Sim for the plaintiff did not seriously contest the point that the relevant part of clause 9(b) of the Sub-Contract was indeed a "pay when paid" provision within the meaning of s 9 of the Act. The Adjudicator found that clause 9(b), which made the liability to pay money "*contingent on the completion of the Main Contract works* which the [defendant] has no control of", was "equivalent to a 'pay when paid' requirements and thus not valid" [emphasis added].[42]

53 I agreed with the submissions advanced by the defendant that clause 9(b) of the Sub-Contract did, in substance, operate as a "pay when paid" provision. On its plain wording, the operative part of clause 9(b), *viz, "No further payment shall be made to the Sub-Contractor* ***until the whole of the Main Contract***

[42] AD at para 295.

Works has been completed", had the effect of making "the liability [of the plaintiff] to pay money owing … *contingent or conditional on* ***the operation of any other contract or agreement***" [emphases added] (s 9(2)(*c*) of the Act). As noted by the District Court in *Baek Jae Pte Ltd v K-Inc Konstruct Pte Ltd* [2018] SGDC 11 at [31], the wording of s 9(2), and in particular, the use of the phrase "by whatever name called", indicates that "the legislature intended to cast the net wide" with regard to the ambit and reach of s 9(1). In my judgment, the material part of clause 9(b) of the Sub-Contract as highlighted above plainly contravenes both the letter and spirit of s 9 of the Act.

54 In the present case, a close reading of the AD as a whole and paragraph 295 in particular would demonstrate that the Adjudicator *did* in fact consider the interplay between ss 4(2)(*c*) and 9 of the Act. The Adjudicator's conclusion was that the termination of the Sub-Contract by the plaintiff was valid and that accordingly, no payment claim may be served by the defendant post-termination under clause 9(b). In my view, that was in substance a finding that s 4(2)(*c*) of the Act might be *prima facie* applicable, even if the Adjudicator did not expressly say so. In that same paragraph, the Adjudicator went on to consider the impact of s 9 of the Act on the material part of clause 9(b) of the Sub-Contract and found that it was not valid on account of it being a "pay when paid" provision. The Adjudicator then concluded "that the submission of [the Payment Claim] *is valid*" [emphasis added]. In my view, the Adjudicator's conclusion, read in context, was that the Payment Claim fell *within the ambit of the Act*. In fact, at paragraph 284 of the AD, the Adjudicator expressly noted and was mindful of the fact that he was, among others, also under a duty to consider if the Payment Claim fell within the ambit of the Act.[43] I thus rejected

[43] AD at para 284.

the plaintiff's contention that the Adjudicator had failed to consider s 4(2)(*c*) of the Act or that there was a failure by the Adjudicator to comply with s 17(3)(*a*) of the Act.

Whether the Adjudicator failed to recognise any patent error in the material before him

55 I also disagreed that the Adjudicator failed to recognise any patent errors in the material before him.

56 At paragraph 276 of the AD, the Adjudicator indicated that he had given "due and careful consideration to all the submissions, authorities and documents" before him. Paragraphs 283 and 284 of the AD also quite clearly indicated that the Adjudicator was mindful of his duty to "consider the material properly before [him] and consider *if there are patent errors*" [emphasis added], and that he should not merely rubber stamp the Payment Claim. For example, the Adjudicator considered whether the defendant had established a *prima facie* case that the construction work which was the subject of the Payment Claim had been completed and the value of such work. This was particularly relevant in this case where the plaintiff failed to serve a payment response. In such a case, s 15(3) of the Act precludes the adjudication respondent from raising any objection in its adjudication response not contained in its payment response. Nor can the Adjudicator have regard to any such objections. The adjudication respondent's response in the adjudication is, effectively, limited to highlighting to the Adjudicator patent errors in the material properly before the Adjudicator. Nonetheless, as part of his basic duty under s 17(2) of the Act to determine the adjudicated amount (if any), the Adjudicator proceeded to satisfy himself that the defendant had established, on a *prima facie* basis, that the construction works which formed the subject of the Payment Claim had been completed and

the value of such works. In doing so, it was clear that the Adjudicator was following the Court of Appeal's guidance in *Comfort Management* at [26].

57 There was, in my view, no failure on the Adjudicator's part to recognise any patent errors, as contended by the plaintiff. The Adjudicator also did not rubber stamp the claim but assessed independently whether the Act applied, whether the defendant had carried out the works claimed in the Payment Claim and the value of those works up to the date the Sub-Contract was terminated by the plaintiff.

Conclusion

58 I disagreed with the plaintiff that the Adjudicator failed to recognise a patent error in the material before him, failed to consider s 4(2)(*c*) of the Act or breached his duty under s 17(3)(*a*) of the Act. I was amply satisfied that the Adjudicator had properly discharged his duties under the Act in rendering the AD. In my judgment, the Adjudicator correctly considered clause 9(b) together with ss 4(2)(*c*) and 9 of the Act. The Adjudicator's approach was also consistent with the Court of Appeal's comments in *Shimizu* at [30] and [31] regarding the limitation on parties' freedom to contract under the Act.

59 There was no dispute that the Sub-Contract was, apart from clause 9(b), silent on the submission of payment claims post-termination for work done up to the termination of the Sub-Contract. The Sub-Contract also did not contain any terms to the contrary. Thus, the Act, including s 10, could be applied to fill the gaps in the Sub-Contract as necessary. The submission of the Payment Claim by the defendant was thus valid and the AD could not be faulted in any way.

60 In light of the conclusions I have reached, it was not necessary for me to consider the defendant's alternative argument that s 36 of the Act would have applied so as to render the material part of clause 9(b) of the Sub-Contract void.

61 For the foregoing reasons, I dismissed OS 1129 with costs to be paid by the plaintiff to the defendant. I fixed costs at $6,500 with disbursements to be agreed or, failing agreement, taxed.

62 After I made the orders at [61], Mr Sim made an oral application on behalf of the plaintiff for the security paid into court by the plaintiff to be released and paid out to the plaintiff. Mr Sim submitted that there was no longer a need for the security to remain in court or to be paid to the defendant. This was because on 12 November 2020, judgment in default of appearance had been entered by the plaintiff against the defendant under Order 13 of the ROC for, *inter alia*, a sum of $412,300 plus interest in HC/S 1058/2020 ("Suit 1058") which had been commenced by the plaintiff against the defendant.[44] As such, notwithstanding the dismissal of OS 1129, there were no outstanding monies owed to the defendant once the liquidated judgment amount in Suit 1058 was set-off against the adjudicated sum under the AD.

63 Mr Ang objected to the plaintiff's application and stated that the defendant would be applying to set aside the default judgment against it in Suit 1058. Mr Ang contended that there would be irreparable damage if the default judgment was successfully set aside and the security, if released to the plaintiff, cannot be paid back. Mr Ang also submitted that in any case, but for OS 1129, the adjudicated amount determined under the AD would have been paid in June

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44 HC/JUD 569/2020.

2020. Alternatively, Mr Ang proposed that the issue of payment out be held over until the defendant's application to set aside the default judgment in Suit 1058 is heard and the court gives directions in respect of the same.

64 In balancing both parties' interests, I decided that the fairest option was to maintain the *status quo*, at least for the time being. I directed that the defendant file its application to set aside the default judgment entered by the plaintiff in Suit 1058 by 28 January 2021. I also ordered that the sum paid into court by the plaintiff was to remain in court until further order, pending the outcome of the defendant's setting aside application.

S Mohan
Judicial Commissioner

Kyle Leslie Sim Siang Chun (Shen Xiangchun) (Wee, Tay & Lim LLP) for the plaintiff;
Ang Minghao and Tan Ting Ting (Patrick Ong Law LLC) for the defendant.