LH Aluminium Industries Pte Ltd *v* Newcon Builders Pte Ltd [2014] SGHC 254

Case Number	: Originating Summons No 159 of 2014 (Registrar's Appeal No 180 of 2014)
Decision Date	: 28 November 2014
Tribunal/Court	: High Court
Coram	: Lee Seiu Kin J
Counsel Name(s)	: Daniel Koh and Jin Shan (Eldan Law LLP) and Richard Yeoh Kar Hoe (David Lim & Partners LLP) for the plaintiff; Joseph Lee and Tang Jin Sheng (Rodyk & Davidson LLP) for the defendant.
Parties	: LH Aluminium Industries Pte Ltd — Newcon Builders Pte Ltd

Building and Construction Law

28 November 2014 Judgment reserved.

Lee Seiu Kin J:

Introduction

1 This is an appeal against the decision of the assistant registrar ("the AR") dismissing the defendant's application to set aside the adjudication determination dated 7 February 2014 under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act").

Facts

2 The defendant is the main contractor for the project described as "Additions and Alterations to Existing 3 Storey Commercial Development/Light Rapid Transit System Depot cum Station on Lot 3496C MK11 at Choa Chu Kang/Woodlands Road". The plaintiff was appointed as the sub-contractor for the aluminium and glazing installation works for the project by virtue of the letter of award dated 21 January 2011 ("the Contract"). It is not disputed that the Contract incorporated the Singapore Institute of Architects Conditions of Sub-Contract (3rd Ed, 2005) ("the SIA Conditions").

3 On 22 June 2013, the plaintiff served on the defendant "Payment Claim No 24" for the sum of $631,683.71. The defendant responded by issuing a payment response for the sum of $0. On 22 July 2013, the plaintiff served on the defendant another payment claim also entitled "Payment Claim No 24" for the same sum. No new work had been carried out by the plaintiff since June 2013. Again, the defendant issued a payment response for the sum of $0. On 22 August 2013, the plaintiff served a similar payment claim for the third time, to which the defendant issued a similar payment response. This was repeated by the plaintiff on 22 September, and 22 November 2013 which elicited the same payment response of $0 from the defendant. And on 2 December 2013, the plaintiff again served on the defendant "Payment Claim No 24" for the sum of $631,683.71 for work done up to 22 November 2013 ("the Final Payment Claim"). The defendant issued a payment response for the sum of $0 on 20 December 2013 ("the Final Payment Response"). This time round, the plaintiff submitted an adjudication application ("the Adjudication Application") on 3 January 2014, pursuant to which the defendant submitted an adjudication response ("the Adjudication Response") on 13 January 2014. The adjudication determination ("the Adjudication Determination") was made on 7 February 2014 in favour of the plaintiff.

4 On 24 February 2014, the plaintiff applied *ex parte* in originating summons no 159 of 2014 for leave to enforce the Adjudication Determination pursuant to s 27 of the Act. Leave was granted on 25 February 2014. On 14 March 2014, the defendant applied in summons no 1385 of 2014 to set aside the Adjudication Determination. The AR dismissed the application and the defendant appealed. I heard submissions by counsel for both parties on 18 August 2014 and I now give my decision.

Issues

5 The issues arising on appeal are:

(a) whether the Adjudication Application was premature because the "dispute settlement period" under s 12(2) of the Act had not ended;

(b) whether the Final Payment Claim was a "repeat claim" made in breach of s 10(1) of the Act; and

(c) whether the dispute between the parties had been substantially settled such that the plaintiff was not entitled to make the Adjudication Application.

Whether the Adjudication Application was premature

6 The defendant submits that pursuant to s 12(2) of the Act, the plaintiff is entitled to make an adjudication application only if the dispute is not settled or the payment response not provided by the end of the dispute settlement period. [note: 1] The dispute settlement period is defined under s 12(5) of the Act as the period of seven days after the date on which or the period within which the payment response is required to be provided under s 11(1) of the Act. The defendant contends that since the Adjudication Application was not made within the period of seven days after the expiry of the dispute settlement period, as required by s 13(3)(*a*) of the Act, the adjudicator ought to have rejected the Adjudication Application under s 16(2)(*a*) of the Act. [note: 2]

7 The defendant's case, therefore, turns on this question: what is the date on which or period within which the Final Payment Response is required to be provided under s 11(1) of the Act?

8 I first consider the relevant terms in the Contract which relate to the service of payment claims and payment responses. Clauses 10.2 and 10.3 of the Contract provide as follows:

> 10.2 Payment Terms
>
> You are required [*sic*] present your monthly payment claim for work done to us, in time for checking and inclusion in our overall monthly progress claim for Main Contract and in any event shall be not later than 22nd day of each month
>
> 10.3 Payment Response
>
> Within 21 days after the payment claim is served, or the date stipulated for the service of a payment claim, whichever is later, the Payment Response shall be issued.
>
> [emphasis in original]

9 In addition, cll 14.4 and 14.5 of the SIA Conditions, which are incorporated into the Contract, state that:

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

(i) where pursuant to clause 14.1(a), the progress payment is to be based on periodic valuation, the Sub-Contractor shall submit the payment claim on the last day of each month following the month in which the Sub-Contract is made; or

(ii) where pursuant to clause 14.1(b), the progress payment is to be by stage instalments, on the certified completion of the relevant stage.

(b) If the time for the submission of any payment claim under the preceding paragraph falls due on a day which is Saturday, Sunday, Statutory or Public Holiday the Sub-Contractor shall submit the payment claim either on the day before or next following that date which itself is not a Saturday, Sunday, Statutory or Public Holiday.

(c) Provided that if the Sub-Contractor submits a payment claim before the time stipulated herein for the making of that claim, such early submission shall not require the Architect to issue the interim certificate or the Contractor his payment response in respect of that payment claim earlier than would have been the case had the Sub-Contractor submitted the payment claim in accordance with the Contract.

14.5 The Contractor shall respond to the payment claim by providing, or causing to be provided, a payment response to the Sub-Contractor within 21 days after the payment claim is served by the Sub-Contractor or the time by or the day on which the Sub-Contractor is required under clause 14.4 to submit his payment claim. This clause shall not apply to a supply contract, which shall be governed by clause 14.6 hereof.

10 It is not disputed that the Final Payment Claim was served on 2 December 2013. [note: 3] However, the defendant submits that the 21-day period under cl 10.3 of the Contract for the service of the payment response only started running from 22 December 2013. This is because cl 10.3 clearly contemplates that there is a "date stipulated for the service of a payment claim", and that date is provided in cl 14.4 of the SIA Conditions as the last day of each month following the month in which the contract is made. [note: 4] Since the Contract was dated 21 January 2011 ([2] above), the date stipulated for service of a payment claim would be the 21st day of each month. [note: 5] Further, as the plaintiff had served the Final Payment Claim on 2 December 2013, earlier than the 21st day of the month, such "early" service of the payment claim would be deemed to be served on the 21st day of the month by virtue of cl 14.4(c) of the SIA Conditions. [note: 6] If this is correct, it follows that the Final Payment Response and the Adjudication Application were premature. [note: 7]

11 I am unable to agree with the defendant. The defendant's submission is premised upon a convoluted reading of cll 10.2 and 10.3 of the Contract and cl 14.4 of the SIA Conditions which presupposes that they are consistent with each other. However, I do not think that they are consistent with each other insofar as "effect cannot fairly be given to both clauses" (see *Chitty on Contracts* vol 1 (Sweet & Maxwell, 31st Ed, 2012) ("*Chitty*") at para 12-078). In my view, cll 10.2 and 10.3 of the Contract and cll 14.4 and 14.5 of the SIA Conditions are two distinct and independent sets of rules governing the service of payment claims and payment responses. They have different dates for service of payment claims. It is also clear that cll 14.4 and 14.5 of the SIA Conditions were meant to be read as a whole. As such, it would be artificial to treat cll 10.2 and 10.3 of the Contract and cll 14.4 and 14.5 of the SIA Conditions as consistent and capable of being read harmoniously

together.

12 In *Law Relating to Specific Contracts in Singapore* (Michael Hwang SC, editor-in-chief) (Sweet & Maxwell Asia, 2008), it was observed at para 5.3.7 that:

> **Priority of documents**
>
> On a construction project of any substantial size, the sheer weight of detail which is found in the contract documentation gives ample scope for discrepancies and inconsistencies. These may arise within one particular document, as where the contract bills contain two inconsistent provisions. *They may also arise between two documents, as where something in the bills conflicts with something in the conditions. Inconsistencies can, to a large extent, be resolved if the contract expressly provides an order of precedence between the different documents or specifies that a certain class of documents should prevail over others.* When no order of precedence is specified, the more specific document ought to prevail over a standard form document. Words in writing would also usually prevail over any printed terms.
>
> [emphasis added]

13 In the present case, cl 3 of the Contract provides for, *inter alia*, the order of precedence in the event of conflict or inconsistency:

> 3.0 **NOMINATED SUB-CONTRACT**
>
> ...
>
> This Letter of Acceptance, your tender submission, the specifications thereto and the following letters, faxes and other documents shall be binding and form an integral part of the Sub-Contract Documents:
>
> 3.1 Tender Documents/Correspondence
>
> a) Your completed Tender documents submitted on 25 November 2010 including the Condition of Contract (Third Edition, April 2005) for use in conjunction with the Main Building Contract (Lump Sum Contract, Seventh Edition, April 2005) published by the Singapore Institute of Architects, as amended by the Particular Conditions of Sub-Contract (the "Conditions of Sub-Contract");
>
> ...
>
> 3.2 This Letter of Acceptance ref: Newcon/Junction 10/Letter/10/611 dated 21 January 2011.
>
> All correspondence and documents listed in paragraphs 3.0 above are to be taken as mutually explanatory of one another. *In the event of conflict or inconsistency between the terms and conditions in these correspondence and documents, the terms and conditions in the latest by chronological order shall prevail and take precedence.*
>
> ...
>
> [emphasis added]

14 As I have found earlier ([11] above), cll 10.2 and 10.3 of the Contract and cll 14.4 and 14.5 of the SIA Conditions are clearly inconsistent with each other. Since cl 3 of the Contract provides that the terms in the Contract shall take precedence over the terms in the SIA Conditions, it follows that the service of the payment claims and payment responses would be governed by cll 10.2 and 10.3 of the Contract.

15 In any event, I find that the terms of the SIA Conditions are incorporated by virtue of cl 3 of the Contract only insofar as they are not inconsistent with the express terms of the Contract. Since cll 14.4 and 14.5 of the SIA Conditions are inconsistent with cll 10.2 and 10.3 of the Contract, the latter would prevail. Such an approach has been accepted in Singapore: *Aldabe Fermin v Standard Chartered Bank* [2010] 3 SLR 722 at [108]; *Kumagai-Zenecon Construction Pte Ltd (in liquidation) and another v Arab Bank plc (Low Hua Kin, third party)* [1997] 1 SLR(R) 277 at [25]. According to Sir Kim Lewison, *The Interpretation of Contracts* (Sweet & Maxwell, 5th Ed, 2011) at p 114:

> The terms of the clauses which are incorporated into the parties' contract may not always be entirely appropriate to the contract into which they are incorporated. The proper approach to construing an incorporated document was laid down by the House of Lords in *Thomas (TW) & Co Ltd v Portsea Steamship Co Ltd*, and by the Court of Appeal in *Hamilton & Co v Mackie & Sons*. In the latter case, Lord Esher M.R. took the approach of reading in the whole terms of the incorporated document, and then treating any term which was inconsistent with the incorporating document as insensible and to be disregarded. In the former case, Lord Gorell and Lord Robson approached the matter from the standpoint of reading in so much of the incorporated document as is not inconsistent with the subject-matter of the incorporating document. The two approaches may differ slightly but they usually achieve the same result. The process was described by Buckley L.J. in *Modern Buildings Wales Ltd v Limmer and Trinidad Ltd* as follows:
>
> > "Where parties by an agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety, in my judgment, but subject to this: that if any of the imported terms in any way conflicts with the expressly agreed terms, the latter must prevail over what would otherwise be imported."

See also Sir Kim Lewison and David Hughes, *The Interpretation of Contracts in Australia* (Lawbook Co, 2012) at p 85; *Chitty* at para 12-079.

16 I shall now proceed to consider the date for the service of the payment response under cl 10.3 of the Contract. To do so, I must first ascertain the "date stipulated for the service of a payment claim". At first blush, the "date stipulated for the service" would be understood to mean the date on which such service is to be made. However, no such date is provided in the Contract. The only date linked to service of payment claim is in cl 10.2 which states that the payment claim shall be served "not later than 22nd day of each month". This is not the date on which a payment claim must be served, but the date *on or before* which it is to be served. However, the only sensible construction of cl 10.3 is that the "date stipulated for the service" is a reference to the date provided in cl 10.2 as this is the only provision in the Contract of a date linked to service of a payment claim. This is further supported by the fact that the words "whichever is later" in cl 10.3 contemplates that service of the payment claim may be made on a date earlier than the "date stipulated". Therefore, the "date stipulated for the service of a payment claim" in cl 10.3 is the 22nd day of each month as provided in cl 10.2.

17 I now consider the question that I have identified earlier (at [7]), *ie*, what was the date on which or period within which the Final Payment Response was required to be served under s 11(1) of the Act.

18 Section 11(1) of the Act provides:

> **Payment responses, etc.**
>
> **11.**—(1) A respondent named in a payment claim served in relation to a construction contract shall respond to the payment claim by providing, or causing to be provided, a payment response to the claimant —
>
> (*a*) by the date as specified in or determined in accordance with the terms of the construction contract, or within 21 days after the payment claim is served under section 10, whichever is the earlier; or
>
> (*b*) where the construction contract does not contain such provision, within 7 days after the payment claim is served under section 10.

19 Further, s 10(2)(*a*) of the Act states that:

> (2) A payment claim shall be served —
>
> (*a*) at such time as specified in or determined in accordance with the terms of the contract; ...

20 Section 11(1)(*a*) of the Act, when read together with s 10(2)(*a*), provides that the payment response should be served on the earlier of two possible dates:

> (a) first, by the date specified in or determined in accordance with the terms of the construction contract, and
>
> (b) second, 21 days after the payment claim was served under s 10.

21 At this juncture, I pause to consider the effect of s 11(1)(*a*) of the Act. This is explained in Chow Kok Fong, *Security of Payments and Construction Adjudication* (LexisNexis, 2nd Ed, 2013) ("*Security of Payments and Construction Adjudication*") at paras 6.9 and 6.10:

> **Compliance with Timeline**
>
> *Limit on Contractual Period*
>
> The timeline for the service of the payment response derives from the terms of the underlying contract. Where the underlying contract specifies a date by which the payment response is to be provided, section 11(1)(a) stipulates that the payment response has to be furnished by the specified date, or within 21 days from the service of the payment claim, whichever is earlier. *Thus, in a situation where the contract stipulates a period for the payment response, the stipulated period applies subject only to a limit of 21 days*.
>
> *Default period*
>
> Where the construction contract is silent in that it does not specify a date for the service of the payment response, the default period of seven days applies. [Section 11(1)(b) of the Act.] This represents a considerable shortening of the period allowed from the situation in section 11(1)(a). *Consequently, it is important that if the respondent is not to be disadvantaged by the operation of the default timeline, the contract has to contain an explicit provision for the period for the*

provision of a payment response.

[emphasis added]

22 Such an explanation is consistent with the speech by the Minister of State for National Development, Mr Cedric Foo Chee Keng, at the second reading of the Building and Construction Industry Security of Payment Bill, reproduced in *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1115 (Cedric Foo Chee Keng, Minister of State for National Development):

> ... The [Building and Construction Industry Security of Payment] Bill requires the respondent to issue the payment response *within* 21 days of receiving the payment claim. If the response period is not specified in a contract, a default period of seven days has been prescribed in the Bill. *This will ensure timely response to the claims*. [emphasis added]

23 In other words, the date on which (or period within which) a payment response is to be served under s 11(1)(*a*) of the Act could depend on the terms of the contract. In the present case, cl 10.3 provides for the payment response to be served within the *later* of two dates: (a) 21 days after service of payment claim; or (b) 21 days after the date stipulated for service of payment claim. The Final Payment Claim was validly served on 2 December 2013. Pursuant to limb (a), the Final Payment Response was to be served on 23 December 2013 (21 days after service of payment claim) while under limb (b) it was to be served on 12 January 2014 (21 days after date stipulated for service, which was 22 December 2013 ([16] above)). Therefore, "the date determined in accordance with the terms of the construction contract" for the service of the Final Payment Response (*ie*, first limb of s 11(1)(*a*) of the Act ([20(a)] above)) is 12 January 2014, being the later of the two dates. However, the date determined under the second limb of s 11(1)(*a*) of the Act ([20(b)] above), *ie*, "within 21 days after the payment claim is served under section 10", is 23 December 2013. This is the earlier date as between the two limbs under s 11(1) of the Act ([20] above). Therefore, in answer to the question posed in [7] above, the date on which the Final Payment Response is required to be provided under s 11(1) of the Act is 23 December 2013.

24 The dispute settlement period is the period of seven days after the date which the payment response is required to be provided under s 11(1) of the Act. In this case, the dispute settlement period is from 24 to 31 December 2013. The Adjudication Application was made on 3 January 2014, not more than seven days after 31 December 2013 (see s 13(3)(*a*) of the Act). It was therefore not premature.

25 For ease of reference, I will set out the relevant timelines in the table below:

Event	Stipulated date	Actual date
Service of Payment Claim	No later than 22nd day of each month ([16] above)	2 Dec 2013
Service of Payment Response	Within 21 days after 2 December 2013 ([23]–[24] above)	20 Dec 2013
Dispute Settlement Period	The period of seven days after 23 December 2013 (s 12(5) of the Act)	24–31 Dec 2013

Adjudication Application	Within seven days after 31 December 2013 (s 13(3)(*a*) of the Act)	3 Jan 2014

26 I now proceed to consider the defendant's second submission.

Whether the Final Payment Claim was a "repeat claim" made in breach of s 10(1) of the Act

27 The defendant submits that the Adjudication Determination should have been set aside as the Final Payment Claim was a "repeat claim" made in breach of s 10(1) of the Act. This is because the Final Payment Claim merely "repeats an earlier claim without any additional item of claim". [note: 8] As described in [3] above, the plaintiff had repeatedly served on the defendant "Payment Claim No 24" for the same amount between June and December 2013, and the defendant had consistently issued corresponding payment responses of $0. The defendant argues that s 10(1) of the Act, read together with s 10(4) of the Act, prohibits repeat claims. [note: 9] The plaintiff raises two arguments in response: first, the defendant is estopped from challenging the validity of the Final Payment Claim at the setting aside stage, and second, the Act does not prohibit repeat claims as long as they have not been adjudicated and dismissed on the merits. I will first address the issue of estoppel, followed by the issue of repeat claims.

Estoppel

28 The plaintiff argues that the defendant is estopped from challenging the validity of the Final Payment Claim at the setting aside stage because the defendant had not raised any objection to the Final Payment Claim either in the Final Payment Response or the adjudication response. [note: 10] In support of this argument, the plaintiff cites *RN & Associates Pte Ltd v TPX Builders Pte Ltd* [2013] 1 SLR 848 ("*TPX Builders*"), where Andrew Ang J ("Ang J") found that the plaintiff was estopped from arguing that the defendant's payment claim was invalid because the plaintiff had raised no objection to the payment claim when it served its payment response (at [35]–[40]). In addition, the plaintiff points to *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 ("*Terence Lee*") at [65], where the Court of Appeal stated that "[i]f the respondent's objection is that there is no valid payment claim, this should be raised as soon as possible in the payment response so as not to delay the adjudication process", and argues that the Court of Appeal "adopted the same approach" as Ang J in *TPX Builders*. [note: 11]

29 However, I note that there are other cases that were not cited by the plaintiff which took a different stance on this issue.

30 In *JFC Builders Pte Ltd v LionCity Construction Co Pte Ltd* [2013] 1 SLR 1157 ("*JFC Builders*") at [35], Woo Bih Li J ("Woo J") disagreed with the approach in *TPX Builders* and took the view that a payment claim made in breach of the Act would undermine the jurisdiction of the adjudicator and thus the validity of the determination. As such, estoppel would not preclude a party from challenging the validity of the payment claim when seeking to set aside the adjudication determination. Woo J also stated at [38]–[39] that:

> 38 For completeness, I would mention that in another case which I recently heard, a claimant relied on the last sentence of [65] of [*Terence Lee*] to contend that failure to serve a payment response precluded a respondent from raising any ground to challenge an [adjudication

determination]. That sentence states: "... If the respondent's objection is that there is no valid payment claim, this should be raised as soon as possible in the payment response so as not to delay the adjudication process."

39 As can be seen, that sentence does not go so far as that claimant's contention. All that sentence said was that a respondent's objection "should" be raised as soon as possible. I agree that a respondent's objection should be raised as soon as possible. However, that is a far cry from saying that absence of a payment response precludes a respondent from challenging an [adjudication determination] on any ground.

31 Woo J acknowledged at [40] that the Court of Appeal in *Terence Lee* had suggested that the validity of a payment claim is to be determined by the court and not the adjudicator (see *Terence Lee* at [64]–[65]).

32 Shortly thereafter, Woo J was asked to consider the same issue in *Australian Timber Products Pte Ltd v A Pacific Construction & Development Pte Ltd* [2013] 2 SLR 776 ("*Australian Timber*"). He considered that the estoppel argument was not persuasive for essentially the same reasons as he explained in *JFC Builders* (at [36]–[40]). However, Woo J gave an additional reason (at [41]–[46]):

41 There is a further reason why it seems to me that the court at the setting-aside stage should ordinarily be entitled to review the validity of a payment claim, namely, that this is a matter *which would potentially affect the jurisdictional substratum of an adjudication determination*. The decision in *[Terence Lee]* ([7] *supra*) is instructive in this respect. The Court of Appeal there had to address an issue framed in the following terms (at [39]):

> [W]e would agree with Lee J's holding in *[Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd [2010] 3 SLR 459 ("Sungdo Engineering")]* that *if* the validity of a payment claim or the service of a payment claim goes to the competence of an adjudicator to hear and determine an adjudication, such issues must be subject to review by the court. The critical word in Lee J's ruling is 'if', and it gives rise to the question: 'Does the non-compliance with the requirements of the Act go to the competence of an adjudicator?' **Hence, the critical question is whether an invalid payment claim or an invalid service of a valid payment claim, as distinguished from a non-existent or inoperative payment claim or a payment claim which has not been served on the respondent at all, goes to the validity of an adjudicator's appointment and his competence to adjudicate a payment claim**. [emphasis in original in italics; emphasis added in bold]

As mentioned, the Court of Appeal answered the question thus: it was only if any of the statutory provisions not complied with in the course of making an adjudication application *was so important that it was the legislative purpose that an act done in breach of the provision should be invalid*, that the resulting adjudication determination would also be rendered invalid and be set aside by the court (*[Terence Lee]* at [67]). For convenience, I shall hereafter term such a provision a "legislatively important provision".

42 In my view, if a payment claim does *not* comply with a legislatively important provision in the Act or the SOPR, the resulting invalidity of the adjudication determination is premised on the absence of jurisdiction necessary to support the making of the determination in the first place. This is apparent from the way the Court of Appeal in *[Terence Lee]* derived the concept of a legislatively important provision in the first place.

43 In *[Terence Lee]*, the Court of Appeal had occasion to review certain Australian authorities, most notably, *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393 ("*Chase Oyster*"). *Chase Oyster* was a decision on the New South Wales Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) ("the NSW Act"). Spigelman CJ, Basten JA and McDougall J all agreed that the breach of a legislatively important provision in the NSW Act would go to the *jurisdiction* of the person or body exercising the power or authority to adjudicate on the payment claim dispute in question (*Chase Oyster* at [37]-[38], [96] and [166]).

44 *Chase Oyster* was cited approvingly in *[Terence Lee]*, where the Court of Appeal held that non-compliance with a legislatively important provision in the Act would invalidate the resulting adjudication determination.

45 I was therefore persuaded that the Court of Appeal, by enunciating the need to inquire into whether a particular provision in the Act was a legislatively important provision, was in fact endorsing the conceptual divide between matters which went to jurisdiction and those which did not.

46 ... Since this inquiry went to the jurisdiction of the adjudicator, it would also be proper for a court having supervisory jurisdiction to conduct the inquiry notwithstanding that the objection was not taken in a payment response or before the adjudicator.

[emphasis in original]

33 The estoppel argument was also raised in *Admin Construction Pte Ltd v Vivaldi (S) Pte Ltd* [2013] 3 SLR 609 ("*Admin Construction*"). Quentin Loh J ("Loh J") considered, *inter alia*, the decisions by Ang J and Woo J and arrived at the conclusion that the estoppel argument must fail. He agreed that the Court of Appeal in *Terence Lee* had definitively clarified that a challenge to the validity of a payment claim amounts to a challenge to the validity of the appointment of the adjudicator, and that such challenges were not matters for the adjudicator to decide but for the court to decide (at [58]–[60]). Accordingly, Loh J held that the plaintiff is not estopped from challenging the validity of the payment claim at the setting aside stage. I should add that Loh J's decision in *Admin Construction* on this issue had been cited with approval by Tan Siong Thye J in *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 at [31]–[32].

34 I agree, for the reasons given by Woo J in *JFC Builders* and *Australian Timber* and Loh J in *Admin Construction*, that a party should not be estopped from challenging the validity of the payment claim when seeking to set aside the adjudication determination before the court. Accordingly, I find that the plaintiff's estoppel argument must fail.

Repeat claims

35 The crux of the defendant's next argument is that the Final Payment Claim is a claim that merely repeats earlier claims without any additional item of claim and this is prohibited under s 10(1) of the Act.

36 Sections 10(1) and 10(4) of the Act provides as follows:

Payment claims

10.—(1) A claimant may serve one payment claim in respect of a progress payment on —

(*a*) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or

(*b*) such other person as specified in or identified in accordance with the terms of the contract for this purpose.

...

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

37 The defendant argues that a literal reading of s 10(1), together with s 10(4), clearly shows that s 10(1) prohibits repeat claims. [note: 12] Specifically, the defendant highlights two points: first, s 10(1) states that a claimant may only serve "one payment claim" in respect of a progress payment, and second, s 10(4) uses the word "including" to indicate that the amount that was the subject of a previous payment claim should form part, and not the whole, of the subsequent payment claim. [note: 13]

38 The defendant's argument is supported by *Doo Ree Engineering & Trading Pte Ltd v Taisei Corp* [2009] SGHC 218 ("*Doo Ree*"). In that case, the assistant registrar was presented with the issue of whether the service of repeat claims is permitted under the Act. The assistant registrar held that, on a plain reading of ss 10(1) and 10(4) of the Act, the service of repeat claims is not permitted under the Act. The assistant registrar explained (at [16]) that:

> … As expressly stated in s 10(1), a claimant can serve "one" payment claim for a particular progress payment. Turning to s 10(4), which allows an amount that was the subject of a previous payment claim to be included in a subsequent payment claim, this provision does not, on its face, allow for the service of repeat claims, as the word "include" would indicate that the amount that was the subject of a previous payment claim, should form *part*, and *not the whole*, of the subsequent payment claim (see *The Oxford English Dictionary* (J A Simpson & E S C Weiner eds) (Clarendon Press, 2nd Ed, 1989) at vol VII, p 801 where the term "include" is defined as, *inter alia*, "[t]o contain as a member of an aggregate, or a constituent part of a whole"; see, also, *Black's Law Dictionary* (Bryan A Garner chief ed) (West, 9th Ed, 2009) at p 831 where the term "include" is defined as, *inter alia*, "[t]o contain as part of something").

The assistant registrar went on further to note that there is nothing in the records of parliamentary debates to indicate that the plain reading is erroneous (at [17]), and that cases from New South Wales and Queensland support the adoption of a plain reading of s 10 of the Act (at [18]–[27]).

39 However, the Court of Appeal in *Terence Lee* did not agree with the view of the assistant registrar in *Doo Ree* (at [91]–[92]):

> 91 Both the Adjudicator and the AR referred to s 10(4) of the Act which provides for payment claims to include amounts that were the subject of earlier claims. ... The AR was of the view that s 10(4) was meant to widen the scope of s 10(1) of the Act by providing an added option of

including in a payment claim unpaid amounts made in earlier claims.

92 We agree with the observations of the AR. A payment claim which has not been paid or partially paid before or without any adjudication under the Act is an unpaid claim. We see no reason why an untimely payment claim under reg 5(1) of the SOPR (whether served prematurely or out of time) should not be treated as an unpaid claim under s 10(4) of the Act. In our view, reg 5(1) of the SOPR does not limit such claims. However, we qualify this conclusion to exclude amounts in previous claims which have been adjudicated upon on their merits for obvious reasons (see *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69, and *Doolan v Rubikcon (Qld) Pty Ltd* [2008] 2 Qd R 117). *In this connection, we should add that we do not approve the finding of the Assistant Registrar in [Doo Ree] that s 10(1) of the Act prohibits all repeat claims (in that case, the repeat claim was a non-adjudicated premature claim).*

[emphasis added]

40 Following the Court of Appeal decision in *Terence Lee*, there was a split in judicial opinion on whether repeat claims are allowed under the Act (*see JFC Builders* and *Admin Construction*). On the one hand, Woo J in *JFC Builders* considered that s 10(1) of the Act prohibits the making of a repeat claim (defined as "one which merely repeats an earlier claim without any additional item of claim, whether for additional or repair work or otherwise" (at [47])). Woo J stated (at [67], [68] and [76]) that:

67 In my view, s 10(1) does impliedly preclude a claimant from making a repeat claim. Otherwise there would be no purpose in having s 10(1). Furthermore, it is because s 10(1) contains this implied prohibition that s 10(4) starts off by stating "Nothing in subsection (1) shall prevent ...". If there is no prohibition in s 10(1) in the first place, then the starting words in s 10(4) are unnecessary. ...

68 It also seemed to me that it is an abuse to allow a claimant to make repeat claims which he will do if, for example, he has missed the deadline under SOPA to serve his earlier payment claim. Indeed, the deadline to do so would also be rendered largely nugatory if he can resurrect a new deadline by merely issuing and serving a repeat claim.

...

76 In the circumstances, I was of the view that a claimant is precluded from making a repeat claim. Section 10(1) is an important part of the scheme under SOPA and it is the legislative purpose that a breach of s 10(1) renders the payment claim invalid. ...

41 Woo J acknowledged that the Court of Appeal in *Terence Lee* at [92] did not agree with the assistant registrar's view in *Doo Ree* that s 10(1) of the Act prohibits all repeat claims (at [77]). However, Woo J highlighted that it was *obiter dicta* and that (at [78]):

It is not clear to me whether the Court of Appeal was referring to a repeat claim as I have described it ... Moreover, no reasons were given for its view. ...

42 Accordingly, Woo J took the view that s 10(1) of the Act prohibits the making of a repeat claim notwithstanding the *obiter dicta* of the Court of Appeal in *Terence Lee*.

43 On the other hand, Loh J in *Admin Construction* opined that there was no prohibition against a repeat claim unless the payment claim or any part thereof had been validly brought to adjudication

and dismissed on its merits. In this respect, Loh J explained that while he instinctively empathised with the view of Woo J in *JFC Builders* (see [40]–[41] above), he thought that the Court of Appeal decision in *Terence Lee* had "put the matter beyond doubt" (at [51]). Loh J stated that (at [52]–[53]):

> *52* *Terence Lee* made clear the following in relation to "repeat claims":
>
> (a) First, a subsequent payment claim can include a sum which has been previously claimed (and therefore in one sense a "repeat" claim), but has not been paid. Section 10(4) of the Act specifically deals with this. *A fortiori*, I would imagine that if a piece of work was done within the relevant month but not included for any reason in the relevant payment claim, there cannot be a bar against it being included in a later payment claim.
>
> (b) Secondly, where a payment claim has been made, but has not been adjudicated upon, *eg*, because no adjudication application was made, it still remains an "unpaid" claim and could be the subject matter of a later payment claim and adjudication; see *Terence Lee* at [92]. For example, a claimant may choose not to lodge an adjudication application as he is too tied up trying to carry out his works or the requirements in s 12 of the Act were not or not yet satisfied; therefore the subsequent payment claim may include ("repeat") items in common and they nonetheless remain unpaid claims for the purposes of s 10(4) of the Act.
>
> (c) Thirdly, a payment claim that has been dismissed by an adjudicator for being served prematurely or as an untimely claim under reg 5(1) or a premature adjudication application may be the valid subject of a subsequent adjudication provided it was not adjudicated upon and dismissed on its merits; it does not provide any ground for an estoppel.
>
> (d) Fourthly, a payment claim or any part thereof which has been validly brought to adjudication and dismissed on its merits cannot be the subject of a subsequent payment claim or subsequent adjudication.
>
> 53 I accept that the Court of Appeal in *Terence Lee* did not expressly say that claimants could incorporate an unpaid payment claim into a subsequent payment claim which is *empty* in content (*ie*, with no claim for new work done). However, I think it follows from the foregoing that there is no prohibition against a "repeat" claim unless it falls within [52(d)]: see also the extra judicial comments by Chan Sek Keong, former Chief Justice who delivered the judgment in *Terence Lee*, in the Foreword to *Security of Payments and Construction Adjudication* ([43] *supra*). In principle this must be correct, *viz*, that any payment claim or claims, even if "repeated" in more than one payment claim, can only be the subject, on the merits, of one adjudication.
>
> [emphasis in original]

44 It appears that *Terence Lee* has been understood to stand for the proposition that the Act only prohibits a repeat claim that has been adjudicated and dismissed on its merits. In this respect, it is pertinent to note that Chan Sek Keong CJ, writing extra-judicially in the Foreword to *Security of Payments and Construction Adjudication* (at pp viii–ix) stated that:

> 11 In [*Terence Lee*], the Court of Appeal also considered the position of so-called 'repeat' claims under the Act. The Act does not use the expression 'repeat claims'. It is a judicial invention that has led to confusion as to its import. The Court stated, *obiter*, that the Act does not prohibit 'repeat' applications for payment claims which have not been adjudicated on the

merits (eg where on the first occasion a claim was made prematurely, or out of time, or where the employer has paid part of the response amount and the time taken by the contractor to chase for the remainder of the payment slips into the following month). The Court commented that the decision of the Assistant Registrar in [*Doo Ree*] (that the Act barred 'repeat' claims), had failed to distinguish between a payment claim which has been adjudicated by an adjudicator or one which has not been so adjudicated, and that there was no reason why a claimant should be barred from 'repeating' a claim which had not been adjudicated on its merits. In [*JFC Builders*] the High Court, after rejecting the defendant's Progress Claim No 8 in an oral judgment, stated in its subsequent written grounds that *it did so because the claim was a 'repeat' claim as it was for exactly the same work claimed under Progress Claim No 7 and for the same amount (after giving credit for $125,000 paid by the Plaintiff under the previous claim).* The High Court sought to distinguish the holding of the Court of Appeal in [*Terence Lee*] on 'repeat' claims on two grounds: (a) it was not clear whether the nature of the repeat claim in that case was the same as that in *JFC Builders* and (b) no reasons were given for its view.

12 In fact, the Court of Appeal did explain its holding (ie, the Act does not bar a claim that has not been adjudicated on the merits, eg, where it has been rejected on the technical ground of prematurity). Moreover, as noted by the Assistant Registrar in JFC Builders, *Progress Claim No 7 was never adjudicated on the merits. Hence, the type of case discussed by the Court of Appeal was the same type of case dealt with in JFC Builders*. ...

[emphasis added]

45 The split in judicial opinions was noted in *Associate Dynamic Builder Pte Ltd v Tactic Foundation Pte Ltd* [2013] SGHCR 16. The assistant registrar observed at [36] that:

I have reservations as to whether the decision of *JFC Builders* on the validity of a repeat claim is compatible with the reasoning in *Terence Lee*. The same view was expressed by Loh J in *[Admin Construction]* after considering the Court of Appeal judgment. This is especially so where one of the reasons for rejecting repeat claims in *JFC Builders* is that it is an abuse to allow a claimant to circumvent the deadlines for service of payment claims found in the legislation: see *JFC Builders* at [68]. This is in direct conflict with the Court of Appeal observations that the legislation does not impose such a deadline for the submission of payment claims. To hold that a repeat claim is prohibited under the Act would also be contrary to the Court of Appeal's observation that s 10(4) of the Act was intended to widen the scope of s 10(1) of the Act by providing an added option of including in a payment claim unpaid amounts made in earlier claims: see *Terence Lee* at [91]. As long as a previous payment claim has not been paid or partially paid and has not been the subject of an adjudication determination, it is an unpaid claim and can be rolled up pursuant to s 10(4) in subsequent payment claims.

46 In my view, s 10 of the Act is equivocal as to whether a repeat claim is permitted and it is a matter of judicial policy in interpreting the Act so as to achieve its objectives. On the one hand, as Woo J pointed out in [68] of *JFC Builders*, permitting repeat claims opens the Act to abuse by rendering the deadline nugatory as a claimant could merely issue and serve a repeat claim. On my part, I do not think this is a real problem in view of the holding in *Terence Lee* at [94] that a payment claim served just after the deadline for that month could be construed as a payment claim within the deadline for the following month. In my view, the more serious concern is that this paves the way for a claimant to ambush the respondent by repeatedly serving the same payment claim month after month. The present case is a good example of sustained repeat claims. The first payment claim was served on 22 June 2013 and this was repeated four times over the next five months. The danger for a respondent is that the moment he slips up and fails to serve a payment response within the deadline,

the claimant could file an adjudication application (although that is not a feature in the present case). Because s 15(3)(*a*) of the Act forbids consideration of a late payment response, the claimant would be virtually certain of obtaining an adjudication determination in his favour. *JFC Builders* is an example of such an ambush: a payment claim was submitted on 15 December 2010 for about $360,000 and the respondent made payment of $125,000. The following month, on 24 January 2011, the claimant submitted a payment claim for the balance of about $235,000 in respect of the same period in the December payment claim. The respondent failed to provide a payment response in time and the claimant successfully obtained an adjudication determination in its favour. *Doo Ree* is yet another example. The claimant had submitted a payment claim on 29 November 2008 for the sum of about $254,000. The respondent did not provide a payment response in time and an adjudication application was made. However, the adjudicator held that the claim was premature under s 13(3)(*a*) and dismissed it pursuant to s 16(2)(*a*) of the Act. On 30 January 2009, the claimant submitted a second payment claim for the reduced sum of $202,349.41 but in relation to the same works as the earlier claim. The respondent provided a payment response in which the claim was refuted on the basis that this was a repeat of the earlier payment claim. The claimant did not make an adjudication application in this instance, but two months later, on 31 March 2009, filed a payment claim for the same sum of $202,349.41. The respondent did not provide a payment response to this claim and the claimant filed an adjudication application.

47 In the converse situation, there are also disadvantages in disallowing repeat claims. In this situation, when a payment claim is rejected in part or in full by a payment response, a claimant would be pressured to apply for adjudication or forever forgo recourse to adjudication in respect of the works under that payment claim. This would lead to many more applications for adjudications in cases where the payment response rejects a substantial portion of the payment claim. By permitting repeat claims, there is a cooling off period during which the claimant can assess his options or monitor developments and still have the option of resurrecting his right to adjudication by submitting a repeat claim.

48 The benefits and pitfalls in the two approaches are finely balanced and it turns on which is more capable of being ameliorated by industry practice and judicial policy. In my view, permitting repeat claims is the lesser evil as, from the cases that have come before the courts, the industry appears to have developed the practice of volleying back zero payment responses to repeat payment claims. This would be preferable to prohibiting repeat claims which would induce more adjudication applications to be made. In any event, I believe that the observations in *Terence Lee*, notwithstanding that it is *obiter dicta*, is too deeply entrenched to be changed. On my part, therefore, I would prefer the approach in the manner set out in *Terence Lee* which permits repeat claims that have not been dismissed by an adjudicator on its merits.

49 I should add that the conclusion I have reached is the result of a balancing exercise between two unsatisfactory situations. It is the consequence of the Act which, from the rich case law it has spawned in the decade of its existence, is sorely in need of review, not only in respect of this aspect, but also in relation to a number of other areas. In a piece of legislation that has such dire consequences for breaching short timelines, it is amazingly complicated and vague at the same time. For example, it has mysteriously omitted the requirement found in the New South Wales Building and Construction Industry Security of Payment Act 1999 (Act 46 of 1999) (upon which the Act was largely modelled) for a payment claim to contain a statement that it is a payment claim. This has resulted in the confusion that is described in [18]–[19] of *Sungdo Engineering*. It makes sense that where timelines are short and consequences severe, documents required of parties should be clearly defined, preferably in prescribed forms, in order to enable the respondents to focus on the substantive issues instead of wasting precious time prising through layers of ambiguity to decide on matters that could have been expressly stated at the outset. In *Admin Construction* at [63]–[65],

Loh J had also called for a review of the Act and identified several areas for consideration. I wholeheartedly support his call.

50 Returning to the issue at hand, for the reasons above, I find that the Final Payment Claim was not made in breach of s 10(1) of the Act. Hence, the Final Payment Claim is a valid claim for the purpose of the Act and the Adjudication Determination which was based on the Final Payment Claim is a valid determination.

51 I will now consider the defendant's third submission.

Whether there was a settlement agreement between the parties

52 The defendant claims that there was a settlement reached between the parties on or around 4 November 2013 in respect of the backcharges totalling $513,917.47 inclusive of GST ("Backcharges") which formed part of the Final Payment Claim. As a result, the Backcharges should not have been included as part of the Adjudication Application. This gives rise to the question: was there a settlement agreement between the parties in respect of the Backcharges?

53 According to the defendant, the settlement agreement between the parties is evidenced by a series of correspondence exchanged between the parties, and in particular, the letters dated 10 October 2013 and 4 November 2013.

54 On 10 October 2013, the defendant wrote to the plaintiff and offered to settle the Backcharges for the amount of $250,000. [note: 14] The defendant also stated that it will engage a third party contractor to carry out the defect rectification works and "backcharge all the cost to [the plaintiff]" if it fails to complete the works on time. [note: 15] On 4 November 2013, the plaintiff stated that it accepted the offer of $250,000 but "on condition that there are no further backcharges relating to and/or arising from the matters/issues set out in the Backcharges". [note: 16] I do not agree with the defendant that these two letters show that the plaintiff had accepted the defendant's offer; it was a counter-offer made by the plaintiff.

55 This conclusion is supported by the subsequent correspondence between the parties. On 7 November 2013, the defendant replied and said, in relation to the counter-offer, that "it [was] acceptable but subject to FEO's release of Maintenance Certificate and 2nd half of retention" and that "[a]ny cost incurred from above including the cost back-charged from FEO shall be borne by [the plaintiff]." [note: 17] This was rejected by the plaintiff on the same day, stating that it was looking towards the release of the $250,000 "after the existing defects have been rectified, not upon the release of the Maint Cert and retention fund". [note: 18] The defendant did not reply thereafter. It is clear from the correspondence that there was no consensus *ad idem* between the parties at any point in time. The defendant argues that the mere fact that negotiations continued after 4 November 2013 did not itself affect the existence of the settlement agreement that was already concluded, citing *Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 at [53]. However, the argument is premised upon a finding that there was a settlement agreement that was concluded by the parties on 4 November 2013. As I have stated earlier ([54] above), I do not think that such a finding is justified on the present facts.

56 It appears to me that the defendant is also arguing, in the alternative, that the parties must have reached agreement by 7 November 2013 since the defendant did not object to the position outlined in the plaintiff's email and there was no further correspondence on the issue. [note: 19] In this

regard, the defendant cites *Midlink Development Pte Ltd v The Stansfield Group Pte Ltd* [2004] 4 SLR(R) 258 at [51]–[52] for the proposition that silence can constitute acceptance. I do not think that there is any merit in the argument. In my view, the facts clearly indicate that this is a case of inconclusive negotiations.

57 Accordingly, I find that there is no settlement agreement concluded between the parties in respect of the Backcharges.

Conclusion

58 For the reasons set out above, I would dismiss the appeal.

59 I will hear parties on the issue of costs.

[note: 1] defendant's submissions ("DWS") at para 10.

[note: 2] DWS at para 14.

[note: 3] DWS at para 19.

[note: 4] DWS at paras 21–23.

[note: 5] DWS at para 27.

[note: 6] DWS at para 28.

[note: 7] DWS at para 30.

[note: 8] DWS at para 50.

[note: 9] DWS at para 51.

[note: 10] PWS at para 12.

[note: 11] PWS at para 14.

[note: 12] DWS at para 51.

[note: 13] DWS at para 51.

[note: 14] Cao Wei Min's 1st affidavit ("CWM's 1st affidavit") at p 471.

[note: 15] CWM's 1st affidavit at p 471.

[note: 16] CWM's 1st affidavit at p 474.

[note: 17] CWM's 1st affidavit at p 475.

[note: 18] CWM's 1st affidavit at p 478.

[note: 19] DWS at para 91.

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