Newcon Builders Pte Ltd *v* Sino New Steel Pte Ltd
[2015] SGHCR 13

Case Number : Originating Summons No 228 of 2015

Decision Date : 11 June 2015

Tribunal/Court : High Court

Coram : Chan Wei Sern Paul AR

Counsel Name(s) : Joseph Lee and Tang Jin Sheng (Rodyk & Davidson LLP) for the plaintiff; Wee Qianliang (Central Chambers Law Corporation) for the defendant.

Parties : Newcon Builders Pte Ltd — Sino New Steel Pte Ltd

Building and Construction Law – Statutes and regulations

11 June 2015 Judgment reserved.

Chan Wei Sern Paul AR:

1 The plaintiff and the defendant were, respectively, the main contractor and sub-contractor engaged to erect a house. A dispute arose between them as regards a progress payment that the defendant claimed from the plaintiff and this issue was resolved by adjudication pursuant to the regime provided under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("the Act"). Dissatisfied with the award made by the adjudicator, the plaintiff sought to set aside the determination.

2 Two distinct grounds were proffered in support of the present application: (i) the adjudication application was made prematurely; and (ii) the adjudicator had acted beyond his powers in allowing the defendant to lower its claim during the adjudication. The central question to be addressed in these grounds of decision is whether the two grounds fell within the purview of the High Court's supervisory jurisdiction in an application to set aside an adjudication determination.

3 This past April marks a decade since the Act came into operation. Since its enactment, many setting aside applications have been brought on the basis that timelines stipulated under the Act had not been complied with. Of these, a fair proportion involved adjudication applications that were allegedly submitted late; it is less common, although not altogether unprecedented, to find an application grounded in a premature adjudication application. This is the first case to examine such an application through the lens of the Court of Appeal's seminal decision in *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Chua Say Eng*").

The factual background

The construction project

4 The plaintiff was the main contractor for a construction project properly described as the "Proposed Erection of A 2 Storey Detached Dwelling House with an Attic and a Swimming Pool on Lot 99188K NK 15 at 14 Cassia Drive". In December 2008, two months after its own appointment, the plaintiff awarded a sub-contract for the defendant to provide materials and perform works relating to certain steel installations. Specifically, the defendant was responsible for "the design, supply,

installation and testing of structural steel, roof purlins, steel cladding & steel windows…" The letter of engagement stated in no uncertain terms that the sub-contract works were to be executed in accordance with the conditions of the main contract (*i.e.*, the contract between the plaintiff and the owner of the house).

5 After substantially completing its obligations under the sub-contract, the defendant served the plaintiff with the latest in a series of payment claims tendered throughout the engagement. Dated 31 December 2014, this payment claim was known as 'Payment Claim No. 14'. The claim was for work done during the period 15 April 2009 to 20 December 2010 and was for the amount of S$208,783.96. In the usual course of events, payment would either be forthcoming or the recipient of a payment claim would submit a payment response, stating how and why it disagreed with the claim. In the instant case, however, the plaintiff sought further clarification of the claim and the provision of further supporting documents from the defendant.

6 Instead of obliging the request, the defendant served a Notice of Intention to Apply for Adjudication on the plaintiff whereupon the plaintiff immediately submitted its payment response. Had the plaintiff not done so, the adjudicator may well be entitled under the Act not to consider any reason for the plaintiff withholding payment on the claim. The payment response was submitted on 20 January 2015. On the very next day, the defendant lodged an application for adjudication to the Singapore Mediation Centre pursuant to the Act.

The adjudication proceedings

7 Events developed fairly rapidly thereafter. On 22 January 2015, the adjudication application was served on the plaintiff, the adjudicator was appointed and parties were informed of the same. The plaintiff filed its adjudication response, as required under the Act, on 29 January 2015 whereupon an adjudication conference was held over three days. A site inspection was also carried out to allow the adjudicator to come to a determination, which he did in short order.

8 The adjudication determination was issued on 13 February 2015 with the following determination:

(a) The plaintiff shall pay the defendant a sum of S$86,961.88 (including GST);

(b) The adjudicated amount is to be paid within 7 days of the service of the determination;

(c) The rate of interest payable shall be 5.33% per annum compounded on an annual basis from 21 February 2015 up to the date of payment; and

(d) The costs of the adjudication shall be borne 70% by the plaintiff and 30% by the defendant.

9 Pertinently, the adjudicator recorded that during the adjudication, an issue arose in connection with the rates payable for certain materials. As originally agreed, the plaintiff was to pay $300 and $550 per square metre for corten steel cladding and steel windows and doors, respectively, that the defendant was supposed to procure and install. However, it turned out that part of these materials was instead provided by the plaintiff itself, whereupon parties agreed to reduce the corresponding rates to $250 and $350 per square metre instead. This revelation was disclosed by the defendant, seemingly against its own interests, but its intentions were not altogether altruistic – it was made in response to a back charge by the plaintiff for the provision of the said materials. Given the circumstances, the adjudicator chose not to give credit for the back charge but instead applied the

lower rates instead. The plaintiff took issue with this decision.

Issue

10 As intimated earlier, the plaintiff put forward two reasons for setting aside the adjudication determination. Firstly, it contended that the adjudication application filed on 21 January 2015 was submitted too early. Secondly, the plaintiff reckoned that the adjudicator had acted beyond his remit in applying a lower rate to the payment for works relating to corten steel cladding and steel windows and doors. Ordinarily, both these issues had two separate facets to be considered, one factual and the other legal. In the present case, however, the determination of the legal aspects of these issues was sufficient to dispose of the application. Hence, the overarching question for this court may be stated thus: whether the bases provided for setting aside the adjudication determination fell within the court's supervisory jurisdiction.

The High Court's Supervisory Function

Starting premise

11 It has long been held that, under the common law, superior courts possess an inherent jurisdiction to control any inferior dispute settlement tribunal or body. This control is exercised via the court's supervisory jurisdiction. As declared in *R v Northumberland Compensation Appeal Tribunal* [1952] 1 KB 338 (at 346-347), when the court "exercises its control over tribunals this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had." For that reason, the High Court in *Haron bin Mundir v Singapore Amateur Athletic Association* [1991] 2 SLR(R) 494 (at [19]), held that "[t]he expression 'supervisory jurisdiction' is a term of act. It is the inherent power of the superior courts to review the proceedings and decisions of inferior courts and tribunals or other public bodies discharging public functions."

12 That this supervisory function extends to the adjudication regime under the Act may be inferred from section 27(5) of the Act which states:

> Where any party to an adjudication commences proceedings to set aside the adjudication determination or the judgment obtained pursuant to this section, he shall pay into the court as security the unpaid portion of the adjudicated amount that he is required to pay, in such manner as the court directs or as provided in the Rules of Court (Cap 322, R 5), pending the final determination of those proceedings.

This section is supplemented by O. 95 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC") which sets out the procedural requirements for the filing of an application to set aside an adjudication determination. While the Act does not expressly set out the power of the High Court to set aside an adjudication determination, it cannot be gainsaid that both the Act and the ROC presumes the existence thereof. Perchance it is unnecessary to provide for such a power precisely because it is inherent. Be that as it may, it is now settled law that "the court, in hearing an application to set aside an [adjudication determination]…, is exercising its supervisory jurisdiction": *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 (at [51]).

13 However, the Act is silent about the circumstances under which this supervisory function may be invoked. This is significant because it is trite that the High Court's supervisory jurisdiction is highly circumscribed. This is so in at least two respects. First, the restricted nature of the Court's supervisory jurisdiction is one of the main distinguishing features that set it apart from the Court's revisionary jurisdiction: see *Re Mohamed Saleem Ismail* [1987] SLR(R) 380 (at [7]). A leading

academic has opined that "supervision generally is confined to questions not touching the merits of the case but revision will lie on errors of law and fact: see Tan Yock Lin, "Appellate, Supervisory and Revisionary Jurisdiction" in ch 7 of *The Singapore Legal System*, (Walter Woon ed) (Longman, 1989) (at pp 233-234).

14 Secondly, and specific to the regime under the Act, adjudication was never intended to be the final determination of a party's rights. As is well-known, the scheme establishes an adjudication procedure to allow any party to construction works or a construction contract to claim and enforce payment. This scheme requires the contractor seeking payment to put in a payment claim whereupon the paying party should respond with a payment response. Thereafter, a period is imposed for parties to attempt to settle their dispute failing which the contractor seeking payment would be entitled to commence adjudication. Significantly, the adjudication determination is only binding in an interim fashion. Section 21 of the Act contemplates the possibility of the dispute being finally determined by litigation or any other dispute resolution mechanism.

15 Given that the nature of an inquiry at the setting aside stage must necessarily be different from that conducted pursuant to both the High Court's revisionary as well as adjudicatory functions, it is fairly unfortunate that the Act does not outline the scope of the High Court's supervisory function under the scheme. The only surety is that the function is a narrow one but to what extent and in what manner it is circumscribed is entirely uncertain. Needless to say, strict observance of common law principles would not suffice; after all, the supervisory power is being exercised within the context of a statutory regime. It is then left to the court to feel out the shape of this strange new animal.

Two judicial approaches

16 The contours of when a Court would be justified in setting aside adjudication determinations proved tricky to outline. Almost from the moment the Act came into force in 2005, challenges were made on the basis of 'jurisdictional' or 'breach of natural justice' grounds. Many objections, both major and minor, were cast as fundamental challenges precisely because parties were anxious that their applications should fall within the limited but hitherto undefined scope for the court to exercise its supervisory jurisdiction. The difficulty was with separating the wheat from the chaff. Eventually, two different judicial approaches developed. One was that taken by Judith Prakash J while Lee Seiu Kin J adopted the other.

17 In the decisions of *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2010] 1 SLR 658, *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 ("*SEF Construction*") and *AM Associates (Singapore) Pte Ltd v Laguna National Golf and Country Club Ltd* [2009] SGHC 260, Prakash J developed what was essentially a relatively constricted interpretation of the Court's role in setting aside applications. In *SEF Construction*, Prakash J had to consider a setting aside application on the basis that the adjudicator failed to apply his mind to two relevant issues. She held (at [42]) that:

> …instead of reviewing the merits (in any direct or indirect fashion), it is my view that the court's role must be limited to supervising the appointment and conduct of the adjudicator to ensure that the statutory provisions governing such appointment and conduct are adhered to and that the process of the adjudication, rather than the substance, is proper.

She went on (at [45]) to enumerate the (only) issues that the court should be concerned:

> Thus, I consider that an application to the court under s 27(5) must concern itself with, and the court's role must be limited to, determining the existence of the following basic requirements:

(a) the existence of a contract between the claimant and the respondent, to which the SOP Act applies (s 4);

(b) the service by the claimant on the respondent of a payment claim (s 10);

(c) the making of an adjudication application by the claimant to an authorised nominating body (s 13);

(d) the reference of the application to an eligible adjudicator who agrees to determine the adjudication application (s 14);

(e) the determination by the adjudicator of the application within the specified period by determining the adjudicated amount (if any) to be paid by the respondent to the claimant; the date on which the adjudicated amount is payable; the interest payable on the adjudicated amount and the proportion of the costs payable by each party to the adjudication (ss 17(1) and (2));

(f) whether the adjudicator acted independently and impartially and in a timely manner and complied with the principles of natural justice in accordance with s 16(3); and

(g) in the case where a review adjudicator or panel of adjudicators has been appointed, whether the same conditions existed, *mutandis mutandi*, as under (a) to (f) above.

For Prakash J, therefore, there was a closed and defined list of issues that the court should examine.

18 By contrast, Lee J appeared to apply a more generous interpretation of the court's role in *Sungdo Engineering & Construction (S) Pte Ltd v Italcor Pte Ltd* [2010] 3 SLR 459. In that case, Lee J dealt with the issue of whether a purported payment claim was actually a payment claim, an issue which did not seemingly fall within Prakash J's closed list. Lee J argued that:

> 32 … I am, with respect, unable to agree that jurisdiction is not affected by an invalid Payment Claim or service thereof. The power of the ANB to appoint an adjudicator arises from the receipt of an adjudication application from a claimant, and that is predicated by a whole chain of events initiated by the service of a Payment Claim by the claimant on the respondent under s 10 of the Act. It must follow that if the claimant had failed to serve a Payment Claim, or to serve something that constitutes a Payment Claim, the power to appoint an adjudicator for that particular claim has not arisen.
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> …
>
> 34 … In principle, if the validity of a Payment Claim goes to jurisdiction, I do not see how a court is precluded from examining this issue on judicial review and I would, with respect, disagree with this.

It thus appeared that Lee J was prepared to scrutinise all issues that may possibly go to the jurisdiction of the adjudicator and, in this regard, let the law develop on a case-by-case basis. In any case, he did not agree that there should be a closed list of such issues.

Chua Say Eng

19 Matters came to a head in *Chua Say Eng* and the Court of Appeal took the opportunity to

revisit both jurisdictional approaches. The Court decided that the decisions of Prakash J and Lee J were not incompatible as the challenges were made on different grounds. As regards the former, the chief issues were compliance with the applicable requirements of the Act and therefore "whether the adjudicator had exercised his powers correctly" (*Chua Say Eng* (at [37])). Insofar as the latter was concerned, Lee J dealt with the issue of whether a purported payment claim even constituted a payment claim and therefore "whether an adjudicator has been validly appointed to the office of adjudicator" (*Chua Say Eng* (at [37])).

20 The Court of Appeal in *Chua Say* Eng also categorically pronounced upon the role of the court in an application to set aside an adjudication determination. I can do no better than to reproduce the words of the Court in full:

> 66 Turning now to the court's role in a setting-aside action, we agree with the holding in *SEF Construction*… that the court should not review the merits of an adjudicator's decision. The court does, however, have the power to decide whether the adjudicator was validly appointed. If there is no payment claim or service of a payment claim, the appointment of an adjudicator will be invalid, and the resulting adjudication determination would be null and void.
>
> 67 Even if there is a payment claim and service of that payment claim, the court may still set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, has not complied with one (or more) of the provisions under the Act which is so important that *it is the legislative purpose that an act done in breach of the provision should be invalid*, whether it is labelled as an essential condition or a mandatory condition. A breach of such a provision would result in the adjudication determination being invalid.
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> [Italics in original.]

It is against the foregoing passage that all subsequent applications to set aside an adjudication determination, including the present, should be measured.

21 The decision in *Chua Say Eng* did not resolve all issues relating to setting aside applications under the Act but it did make clear a few things. First, the court's role is not to examine the merits of an arbitrator's decision. Secondly, an issue the court is empowered to look into is whether the adjudicator was validly appointed. Thirdly, the absence of a payment claim or service of a payment claim would be a matter that goes to the validity of the adjudicator's appointment. Finally, even if an act (which breaches a provision of the Act) does not affect the validity of the adjudicator's appointment, it may still be invalid if it goes against legislative intent to allow that act to be valid. It is this last holding upon which counsel for the plaintiff relied.

Whether the grounds provided fell within the High Court's supervisory function

22 To restate, the plaintiff put forward two distinct bases in support of the present application. First, it is argued that the adjudication application in the present case was made prematurely. Secondly, it was also contended that the adjudicator had acted beyond his powers in allowing the defendant to lower one of its claim during the adjudication. Each will be considered in turn.

Premature application

23 There was no dispute between parties that the adjudication application was made by the defendant on 21 January 2015. However, the plaintiff contended that this was a day too early – the defendant was only entitled to make the application from 22 January 2015. The fulcrum of the dispute

really rested upon the time the plaintiff had to file its payment response rather than the period for the submission of the adjudication application.

Parties' arguments

24 The plaintiff's case was as follows. The sub-contract stated that progress payment claims were to be made monthly and were "to be submitted to [the plaintiff's] head office on the last day of each calendar month". The defendant complied with this by submitting Payment Claim No. 14 on 31 December 2014. The sub-contract did not provide for the period or deadline by which the payment response ought to be submitted. However, it did provide for the incorporation of the main contract. Accordingly, one must have reference to the main contract to ascertain the period for the submission of the payment response. Clause 2.2 of the main contract allowed the employer 14 days to submit a payment response in answer to the plaintiff's payment claims. The plaintiff contended that the same period ought to apply *vis-à-vis* the plaintiff and the defendant by virtue of the incorporation of the main contract into the sub-contract.

25 If this was so, the plaintiff reasoned that the period for the submission of an adjudication application fell between 22 January 2015 and 28 January 2015 after taking into account the period mandated for the dispute settlement period under the Act. The relevant time periods, by the plaintiff's reckoning, would be as follows:

Event	**Stipulated Date**
Service of payment claim	On (or before) the last day of each calendar month (submitted on 31 December 2014)
Service of payment response	Within 14 days after 31 December 2014 (*i.e.*, 1 January 2015 to 14 January 2105)
Dispute settlement period	The period of seven days after 14 January 2015 (*i.e.*, 15 January 2015 to 21 January 2015)
Submission of adjudication application	Within seven days after 21 January 2015 (*i.e.*, 22 January 2015 to 28 January 2015)

26 The defendant had a different view of the relevant timelines. In essence, the defendant was not of the opinion that clause 2.2 of the main contract was incorporated into the sub-contract. This was because there was a slight discrepancy between the two contracts in the deadline provided for the service of a payment claim. It was also argued that the main contract was not provided to the defendant so the main contract could not have been incorporated into the sub-contract. Since the sub-contract did not provide a deadline for the submission of the payment response, the default period in the Act applied. This was seven days: see section 11(1)(b) of the Act. If so, the relevant time periods for the different parts of the regime were as such:

Event	**Stipulated Date**
Service of payment claim	On the last day of each calendar month (submitted on 31 December 2014)
Service of payment response	Within 7 days after 31 December 2014 (*i.e.*, 1 January 2015 to 7 January 2015)

Dispute settlement period	The period of seven days after 7 January 2015 (*i.e.*, 8 January 2015 to 14 January 2015)
Submission of adjudication application	Within seven days after 14 January 2015 (*i.e.*, 15 January 2015 to 21 January 2015)

Hence, far from being premature, the adjudication application was by the defendant's reckoning in fact made on the very last day allowed under the Act.

27 It must be noted that this issue of whether the adjudication application was submitted prematurely was canvassed before and considered by the adjudicator. In his adjudication determination dated 13 February 2015, under the heading "Validity of Adjudication Application", the adjudicator recorded:

> The [plaintiff] also raised the issue that the Adjudication Application is premature.
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> [Goes through the arguments raised by the plaintiff.]
>
> I found that the legislative intent of the SOP Act is to ease especially the cashflow situation downstream in the construction industry where the timeline in the SOPA has to be closely observed. If the [plaintiff] requires a longer timeline over the prescribed period of the SOPA, it is the responsibility of the [plaintiff] to simply make it clear in the [sub-contract]. It would be an unduly onerous burden if the obligation for obtaining the Main Contract rested on the [defendant] or his Counsel within the short timeline of adjudication process.

He thus agreed with the defendant that the period for submitting the payment response was seven days and that, accordingly, the period for making the adjudication application was between 15 January 2015 and 21 January 2015. The application was not, by that reasoning, premature.

28 The plaintiff, of course, took the view that the adjudicator was wrong in this conclusion. More fundamentally, counsel sought to persuade that this issue - whether the adjudication application was submitted prematurely – was one that would attract the court's supervisory jurisdiction. In support thereof, many cases were cited, some by way of further arguments. These cases may, for the present purposes, be usefully classified into two categories: those that dealt with a *late* adjudication application and those that had to consider a *premature* adjudication application. It is necessary to run through these cases before providing the court's decision in this regard.

Cases that dealt with late adjudication application

29 *YTL Construction (S) Pte Ltd v Balanced Engineering & Construction Pte Ltd* [2014] SGHC 142 ("*YTL Construction*") was a case that involved an allegation that the adjudication application was lodged late and therefore out of time. It was contended that there was a breach of section 13(3)(a) of the Act which reads:

> 13(3) An adjudication application –
>
> (a) shall be made within 7 days after the entitlement of the claimant to make an adjudication application first arises under section 12;
>
> (b) …

Counsel also referred to section 16(2)(a) of the Act which mandates that any adjudication application that offends the above provision shall be rejected:

> 16(2) An adjudicator shall reject –
>
> (a) any adjudication application that is not made in accordance with section 13(3)(a), (b) or (c); and
>
> (b) …

30 Tan Siong Thye J agreed with counsel and reasoned thusly:

> 46 I agree with the above two decisions in relation to s 16(2)(a) of the SOP Act which makes it mandatory for an adjudicator to reject an adjudication application that does not comply with ss 13(3)(a), (b) or (c). This is especially the case for s 13(3)(a) of the SOP Act which deals with timelines, an essential factor in ensuring a fast and fluid cash flow within the building and construction industry.
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> …
>
> 48 Hence, the legislative intent was for the 7-day timeline in s 13(3)(a) to be observed strictly such that the adjudicator must, without any room for discretion, reject an adjudication application lodged out of time. This would also mean that there is no room for waiver of the formal requirements by the parties to the adjudication…
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> 49 Therefore the adjudicator should have rejected the adjudication application as required by s 16(2) which circumscribes the adjudicator's jurisdiction. There is no exception to this obligation.

Hence, Tan J held that section 13(3)(a) of the Act was so important that it is the legislative purpose that an act done in breach of the provision should be invalid. He arrived at this conclusion for two reasons: (i) section 16(2) prescribes that any adjudication application made in breach of section 13(3)(a) "shall" be rejected; and (ii) strict observance of 7-day timeline stipulated in section 13(3)(a) would aid the ultimate legislative purpose of ensuring a fast and fluid cash flow within the industry.

3 1 *YTL Construction* approved of the decision in *Shin Khai Construction Pte Ltd v FL Wong Construction Pte Ltd* [2013] SGHCR 4 ("*Shin Khai*"), a case which the plaintiff also urged me to consider. Like *YTL* Construction, *Shin Khai* was a case which had to consider an adjudication application that was lodged later than the period of entitlement stipulated under section 13(3)(a) of the Act. The Assistant Registrar who decided that case held that a breach of section 13(3)(a), however slight, is a ground for setting aside a determination: *Shin Khai* (at [28]). He, again, relied on the clear language of section 16(2) but also added that having a "bright line test", as opposed to allowing the adjudicator to ascertain whether a breach should or should not be forgiven, "is more consistent with and emblematic of the regime": *Shin Khai* (at [27]).

32 Counsel for the plaintiff further cited the case of *RN & Associates Pte Ltd v TPX Builders Pte Ltd* [2013] 1 SLR 848 as authority for the proposition that a breach of section 13(3) would attract the court's supervisory jurisdiction. However, reliance upon that case was misplaced as it had to do with a late *payment claim* rather than a late adjudication application. There was therefore no question of not complying with section 13(3).

Cases that dealt with premature adjudication application

33 As mentioned, cases dealing with a premature adjudication application are less common than those considering a late adjudication application. Nevertheless, they are not unprecedented and counsel for the plaintiff cited two as authority. The more recent case is that of *LH Aluminium Industries Pte Ltd v Newcon Builders Pte Ltd* [2015] 1 SLR 648 ("*LH Aluminium*"). Unfortunately, this case did not assist the plaintiff as the Judge found that the adjudication application was in fact not premature. In the circumstances, he did not consider whether a premature application would be a ground that would attract the court's supervisory jurisdiction.

34 More on point was the case of *Taisei Corp v Doo Ree Engineering & Trading Pte Ltd* [2009] SGHC 156 ("*Taisei*"). The facts of *Taisei* are not dissimilar to the present. A challenge was brought on the basis that the adjudication application was made prematurely. That issue turned on whether a certain clause relating to the period for service of the payment response was binding on parties. The AR in that case held (at [37]) as follows:

> 37 … the appropriate question that should be asked is whether our legislature decided, when enacting the SOP Act, that the timelines for making an adjudication application should be essential to the existence of an adjudication determination… If an adjudication application is a nullity because of non-compliance with a mandatory time limit prescribed in the statute, it is difficult to see why identical non-compliance would not make an adjudication determination, reached because an adjudicator erroneously thought there was compliance, a nullity as well… it would be open to a court to review an adjudication determination to determine if there was compliance with these timelines and set aside the adjudication determination as being void in the event of non-compliance.
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> …
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> 39 … This strict approach is in line with the decision in *Kell & Rigby* as well as local practice… Among other things, requiring parties to adhere strictly to the timelines prescribed in the SOP Act facilitates the settlement of disputes and ensures that parties have ample time to prepare for the adjudication within the limits of the statutory framework.

It is not insignificant that *Taisei* was decided well in advance of the decision in *Chua Say Eng*. It is also notable that the AR framed the question as whether "…our legislature decided, when enacting the SOP Act, that timelines for making an adjudication application should be essential to the existence of an adjudication determination." This formulation, to my mind, was too broad. But, be that as it may, one of the main driving reasons for the decision was the view that the timelines facilitate the settlement of disputes. Counsel for the plaintiff would go on to echo this argument.

The decision of the court

35 In my view, the position adopted by the plaintiff rested upon a mistaken premise. While I had differentiated the cases that dealt with a late adjudication application and cases that had to consider adjudication applications that were made too early, counsel did not think it necessary to do so. He referred to cases belonging to the two categories interchangeably and appeared to be of the opinion that all breaches of timelines ought to be treated alike. For that reason, he relied heavily on *YTL Construction*, a case which had to do with a late adjudication application, and submitted that that decision was binding on this court.

36 I did not agree with the position taken by the plaintiff. It is well-known that the *raison d'etre* of the regime provided under the Act is to provide for "a fast and low cost adjudication system to resolve payment disputes": see *Singapore Parliamentary Debates, Official Report* (16 November 2004)

vol 78 at col 1112 (Cedric Foo Chee Keng, Minister of State for National Development). Stipulating a mandatory deadline by which an adjudication application must be submitted is integral to the achievement of this aim. Were it otherwise, any adjudication system provided for may not be as quick as desired. However, providing for a timeline before which an adjudication application ought not be submitted does not further that ultimate objective. In fact, it almost detracts from it. That such a timeline is provided under the Act is, of course, a nod to a secondary objective. As was stated in *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering & Construction Co Ltd* [2008] SGHC 159 (at [57]), the Act "recognises that the fastest and most efficient means of disposing of the dispute is through settlement". The latter timeline therefore endeavours to balance between allowing enough time for settlement and moving the adjudication process along. The former deadline, however, was designed solely to secure a quick adjudication. Given the different impetuses for the two, they ought to be examined independently.

37 This leads me to the next point. In my opinion, counsel for the plaintiff, as well as the AR in *Taisei*, was wrong to assume that the provision breached where there was a premature adjudication application was section 13(3)(a) of the Act. Section 13(3)(a) provides that an adjudication application shall be made within seven days after the entitlement to make it first arises. This sets the *latest* date by which an adjudication application must be made. It says nothing of the time before which an adjudication application ought not be made. Instead, the provision not complied with when there is a premature adjudication application is section 12(2):

> 12(2) Where, in relation to a construction contract –
>
> (a) the claimant disputes a payment response provided by the respondent; or
>
> (b) the respondent fails to provide a payment response to the claimant by the date or within the period referred to in section 11(1),
>
> the claimant is entitled to make an adjudication application under section 13 in relation to the relevant payment claim if, by the end of the dispute settlement period, the dispute is not settled or the respondent does not provide the payment response, as the case may be.

This provision states that a claimant is entitled to lodge an adjudication application after the end of the dispute settlement period, which, itself, is a period of seven days after the date on which or the period within which the payment response is required to be provided. Indeed, that was how the argument was framed in *LH Aluminium* and how it should have proceeded in the present case.

38 This is significant for the purpose of ascertaining the legislative intent behind the provision of the time before which an adjudication application ought not be lodged. *TYL Construction* and *Shin Khai* made reference to the mandatory language of the Act. This is accurate but only insofar as section 13(3) is concerned. The use of "shall" is found in section 13(3)(a) but not in section 12(2). Section 12(2) uses the phrase "is entitled" which is more permissory than mandatory. Further, section 16(2) only requires the rejection of any adjudication application not made in accordance with section 13(3)(a), (b) or (c); it does not require the rejection of any application made in breach of section 12(2). Hence, one of the key reasons for determining that a late adjudication application would fall within the purview of the court's supervisory jurisdiction is not present in the case of a premature adjudication application – the Act does not use mandatory language in respect of the latter. In my view, the court in *Taisei* was wrong to assume that a premature adjudication application resulted in the breach of a mandatory time limit.

39 This, of course, is not the end of the analysis. After all, '[r]egardless of whether the word

"shall" is used, the court must always ask itself whether it was Parliament's intent to have adjudication determinations that are made in violation of certain requirements set aside': *TYL Construction* (at [18]). That statement was made in reference to the holding in *Chua Say Eng* (at [67]) that "the court may still set aside the adjudication determination on the ground that the claimant, in the course of making an adjudication application, has not complied with one (or more) of the provisions under the Act which is so important that *it is the legislative purpose that an act done in breach of the provision should be invalid*." Thus, the legislative intent is paramount. The use or absence of mandatory language is but one clue, albeit a significant one, as to the legislative purpose.

40 As I intimated earlier, the provision stipulating the time before which an adjudication application ought not be made - section 12(2) of the Act – balances two competing interests. On the one hand, it almost encourages adjudication applications to be filed if certain events have come to past. This of course is in furtherance of the aim of establishing a fast adjudication system to deal with construction disputes. On the other hand, it also provides that entitlement to lodge an adjudication application only arises after the end of the dispute settlement period. This is to allow sufficient time - seven days - for parties to attempt to amicably resolve the dispute privately. In a case when an adjudication application is filed prematurely, the period allowed for settlement is truncated but parties proceed to adjudication sooner. The question to be asked is then this: is it the legislative intent for a breach of section 12(2) to be *ipso facto* invalid?

41 By my reckoning, the question ought to be answered in the negative. In my view, the objective of providing for a fast, timeline-driven adjudication system is paramount. In this regard, I need only cite the decision in *WY Steel Construction Pte Ltd v OSko Pte Ltd* [2013] 3 SLR 380 as follows:

> 18 …It has often been said that cash flow is the life blood of those in the building and construction industry. If contractors and sub-contractors are not paid timeously for work done or materials supplied, the progress of construction work will almost inevitably be disrupted. Moreover, there is a not insignificant risk of financial distress and insolvency arising as a result… The Act achieves its stated purpose of facilitating cash flow in the building and construction industry in two principled ways. First, it establishes that parties who have done work or supplied goods are entitled to payment as of right: see s 5 of the Act. Second, it creates an intervening, provisional process of adjudication which, although provisional in nature, is final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined or resolved: see s 21 of the Act. This is what is referred to a temporary finality.

If the plaintiff's position is correct, and all adjudication applications lodged before the expiry of the dispute settlement period are *ipso facto* invalid, this would run counter to the overriding objective of creating an expedited adjudication process to facilitate cash flow. The plaintiff's position would mean that even in a situation where both parties are happy to continue with the adjudication despite the premature application (perhaps because they would not in any case settle), the adjudicator cannot proceed with the adjudication.

42 This is not to say that claimants should be allowed to breach section 12(2) with impunity. The court in *Taisei* quite correctly observed that requiring parties to adhere to the timelines prescribed in the SOP Act facilitates the settlement of disputes. Undoubtedly, settlement is an important aspect of the regime and the Act provides space for it by imposing a period for dispute settlement. This, however, does not mean that any adjudication application in breach section 12(2) of the Act must inevitably result in the invalidation of the application. This is particularly so since the overriding concern of the Act is with cash flow. Moreover, parties are not precluded from coming to a settlement during the process of adjudication in a situation where the dispute settlement period is truncated.

43 Instead of rendering premature adjudication applications *ipso facto* invalid, it seemed to me that the correct position should be that a premature adjudication application is something that the adjudicator can consider in his determination of the costs payable for the adjudication. After all, the main prejudice suffered by a respondent in such a scenario would be a loss of a chance to settle the dispute. If it was determined that settlement during the dispute settlement period would have been likely had the adjudication application not been made prematurely, an appropriate costs order may be made to reflect that finding.

44 Counsel for the plaintiff postulated a different type of prejudice. He pointed out that section 12(4) of the Act provided the respondent with the opportunity to provide payment response during the dispute settlement period if one was not already provided:

> 12(4) During the dispute settlement period, in addition to any other action that the claimant or the respondent may take to settle the dispute –
>
> …
>
> (b) the respondent may provide the claimant with a payment response where he has failed to do so under section 11(1), or vary the payment response provided under that section.

To him, therefore, there is the loss of a very real chance of providing a payment response. This is critical because of the operation of section 15(3) which precludes the adjudicator from considering any reason for not paying on the payment claim if such grounds were not included in the payment response. Counsel further argued that this may lead to a breach of natural justice.

45 To this argument, I have three points to make. First, this concern was overstated. One must recall that before an adjudication application can be lodged, the claimant has to notify the respondent of his intention to apply for adjudication: see section 13(2) of the Act. Upon being served with that notice, the respondent can immediately provide a payment response. Indeed, that was what took place in the present case. Secondly, it is the respondent's duty and right to respond to a payment claim within the time stipulated under section 11. In relation to a construction contract, the period for putting in a payment response is seven days after the service of the payment claim, if such a period is not otherwise specified in the contract. Parties should not game the system by deliberately not complying with section 11 in anticipation that they may still rely on section 12(4). If a respondent fails to comply with section 11, he runs the risk that he may not be able to put in a payment response. Following on from that point, if there is any loss of a chance to put in a payment response in a situation where an adjudication application was filed prematurely, that loss of chance is due as much to the fact that the respondent did not comply with section 11 as it is to the prematurity of the adjudication application. It does not behove the respondent to then run to the court to complain of the claimant's actions. There is no breach of natural justice as the respondent was not precluded from defending the claim – he just did not do so within the time provided under section 11 of the Act.

46 In sum therefore, I was of the view that the issue of whether an adjudication application was filed prematurely was not one that fell to be considered by the High Court in a setting aside application. Considering the operation and language of the Act holistically, section 12(2), important as it is, is not "so important that it is the legislative purpose that an act done in breach of the provision should be invalid". To render a premature adjudication application *ipso facto* invalid would be to run counter to the objective of providing for an expedited adjudication process. Instead, the fact of a premature adjudication application is one that the adjudicator may consider in his determination of costs. To the extent that the AR in *Taisei* conflated premature and late adjudication applications and held that the former breached section 13(3)(a) of the Act, I must respectfully disagree.

Adjudicator acted beyond powers

47 The other ground relied upon for invoking the court's supervisory jurisdiction was that the adjudicator had gone beyond his remit in accepting lower rates for payment relating to corten steel cladding and steel windows and doors. As explained previously, the payment claim made out that $300 and $550 per square metre were due for corten steel cladding and steel windows and doors, respectively. However, during the adjudication, the defendant admitted that the correct rates should be $250 and $350 per square metre instead.

48 The argument by the plaintiff was couched cleverly. It was not so much the accepting of the lower rates that it took issue with. Rather, the argument was that the plaintiff was deprived of an opportunity to settle the claim because the payment claim was overstated. For that reason, so the reasoning went, section 17(3) of the Act mandated that the adjudicator should have reference to and only to certain stated items, including the payment claim and the payment response:

> 17(3) Subject to subsection (4), in determining an adjudication application, an adjudicator shall only have regard to the following matters:
>
> …
>
> (c) the payment claim to which the adjudication application relates, the adjudication application, and the accompanying documents thereto;
>
> (d) the payment response to which the adjudication application relates (if any), the adjudication response (if any), and the accompanying documents thereto;
>
> …

The plaintiff argued that "the payment claim is akin to the statement of claim" and "[p]arties are not permitted to stray beyond their pleadings."

49 The flaw in this carefully constructed argument was that the Act does indeed allow the adjudicator to take into account the fact that parties in fact agreed to a different set of rates other than the one initially settled upon. One of the other items that an adjudicator may have regard to under section 17(3) of the Act is "any other matter that the adjudicator reasonably considers to be relevant to the adjudication". It cannot be reasonably argued that a variation in the agreement between parties as to price is not a relevant consideration for the adjudicator. Indeed, one would be hard-pressed to conceive of a more material consideration.

50 The plaintiff relied on the case of *Quanta Industries Pte Ltd v Strategic Construction Pte Ltd* [2015] 2 SLR 70 ("*Quanta Industries*") in support of his claim that the adjudicator acted *ultra vires*. However, that case does not support the plaintiff's argument. *Quanta Industries* involved a situation in which the adjudicator determined that the claimant should pay the respondent. This was clearly in breach of section 17(2) of the Act which provided that the adjudicator should determine the adjudicated amount "to be paid by the respondent to the claimant". The case at hand was far different. The act of the adjudicator in taking into consideration the fact that lower rates had been agreed upon was not against the provisions of the Act. It was not as if the adjudicator did not have regard to the payment claim and the payment response. Rather, the adjudicator merely also had regard to other relevant matters which is clearly permissible under section 17(3)(h) of the Act.

51 In fact, what the plaintiff was doing was exactly what was warned against in many cases:

asking the courts to examine the merits of an arbitrator's decision. In the recent decision of *JRP & Associates Pte Ltd v Kindly Construction & Services Pte Ltd* [2015] SGHC 86, Chan Seng Onn J added his voice to the litany of judicial pronouncements on this point (at [36]):

> The Court thus has a limited role when it comes to setting aside an adjudication determination made under the Act given the speedy and economical nature of the adjudication procedure. The court's role is not to look into the parties' arguments before the adjudicator and determine for itself whether the adjudicator arrived at the correct decision…

Even though the plaintiff painted his argument as a loss of a chance to settle, at the heart of the dispute was the price payable for materials purchased and work performed. Nothing could have more to do with the merits of an adjudicator's decision.

Conclusion

52 For the reasons expressed, the application to set aside the adjudication determination was dismissed. The grounds provided by the plaintiff did not justify the exercise of the court's supervisory jurisdiction. Having heard parties, I ordered the plaintiff to pay costs of $7,000, plus reasonable disbursements to the defendant. After the hearing, counsel for the plaintiff requested to put in further arguments. I declined this request as it was apparent even from the outline of his further arguments that he was still labouring under the mistaken premise that there was no material distinction between an adjudication application that was filed too early and one that was filed too late. I have, however, addressed some of his arguments in this judgment.

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